

Preparing for a trial in a protection and care case 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, ('the Department', 'Child Protection') for a protection order and you are preparing to represent yourself in a trial (sometimes called a 'final order hearing').

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

Applying for legal aid

If you want to apply for legal aid to have a lawyer for the trial you must do this as soon as the trial 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.

How does a case get to a trial?

Your case may go through several types of court hearings before it gets to a trial. It goes through these different stages to a trial when one or more respondents, or the child representative, opposes the Department's application.

Before you take your case to a trial you should be clear about exactly what you are opposing.

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 trial 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 makes those decisions.

Before you take your case to a trial 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 they are 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 about the care arrangements for your child, for example, where your child is to live, or your contact arrangements?

Steps to a trial

If there is no agreement about the Department's application, one of the steps your case may go

through if each party to the case agrees, is a child protection mediation conference.

Going to the conference with your lawyer gives you the best chance to be clear on what Child Protection is looking for from you to make it safe for your child, to say what you think is best for your child, to maybe narrow the issues that are in dispute or even come to an agreement about your case.

After this conference your case will usually go back to court for a status conference. A status conference is a hearing where the court will check if an agreement has been reached. If an agreement has been reached the court will usually make the agreed orders and the case will be finished.

If no agreement has been reached the court may:

- make directions about what needs to happen next
- refer the case to the Case Management List in certain cases listed at Perth Children's Court, and/or
- set a date for a pre-hearing conference (a date should be set within 4 weeks).

After the status conference you need to lodge your response with the court (if you have not already done so) and give everyone a copy within 7 days (unless the court orders something different to this).

What is a response?

A response is a court document which can be completed and lodged with the Children's Court. It is called a response because it is lodged when responding to an application made by the Department for a protection order or another party's application.

Your response is an affidavit that sets out your evidence in writing for the hearing. It must be true.

Completing and lodging a response can help your case as you can tell your side of the story. You can also tell the court, Child Protection, the child

representative and other respondents what you think is best for your child.

With a response you can tell your side of the story at an early stage rather than waiting until the end of the court case to give your evidence in the witness box at a trial.

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 <https://www.childrenscourt.wa.gov.au/> or any Children's Court registry to get a copy of the kit or a blank response form.

Pre-hearing conference

A pre-hearing conference is a meeting attended by a registrar or magistrate, parents, their lawyers, Child Protection's case worker and team leader (and their lawyers) and the child's lawyer, if one has been appointed. The meeting is usually run by a registrar or sometimes a magistrate.

When everyone does not agree with the reasons Child Protection brought your case to court and the final order Child Protection is asking for, a pre-hearing conference can be arranged by the court. This meeting is an opportunity for everyone to have a say about what they think is best for the child and to try and reach an agreement.

If everyone reaches an agreement at the meeting the case can finish.

If no agreement is reached, the case will usually then be listed for a hearing in the Trial Allocation List.

Trial Allocation Hearing

At this hearing the court will look at whether the case is ready to be given trial dates.

The court may also make directions. These tell everyone about when important paperwork for the trial has to be filed at the court.

The court will want to hear from everyone involved in the case about:

- what everyone agrees on and what is in dispute

- whether an agreement may be able to be reached, for example, by going to another pre-hearing conference or a mediation conference
- whether the parties have lodged and served the affidavits and other paperwork they need for the trial.

‘Served’ means give the court papers to Child Protection, other respondents and if one has been appointed, the child representative.

To help the court find out this information, each party needs to lodge a court paper called a ‘Trial Listing Callover Certificate’ no later than 3 working days before this hearing.

The court may make different arrangements for you to put in your certificate if you do not have a lawyer.

If no other steps can be taken to try to reach an agreement, the information in the certificate will help the court work out how long your case will take and then a date can be set for the final hearing.

Unless the court orders something different:

- the applicant, usually Child Protection, must lodge and serve the affidavits and other documents they want to use as evidence 21 days before the usual next step which is a readiness hearing (or the trial if no readiness hearing is ordered)
- you, the child representative, if one has been appointed, and any other respondents must lodge and serve your affidavits and other documents you want to use as evidence 14 days before the readiness hearing (or the trial if no readiness hearing is ordered).

You might need to file another affidavit to cover anything you did not respond to in the Department’s affidavits and any others filed by the Department since you put in your response, or to cover positive new developments for you since you put in your response.

What happens at the readiness hearing?

A readiness hearing is a short court hearing held before the final order hearing. It is a hearing to

check your case is ready for trial – for example, who has a lawyer and who will represent themselves; has everyone received the right court papers. Not every case has a readiness hearing.

At this hearing the court can make any directions needed to make sure the case is ready to go ahead on the final order hearing date.

There is a court paper called a ‘case outline’ that must be lodged and served no later than 7 days before the readiness hearing or 7 days before the final order hearing if no readiness hearing is held. The court may make a different arrangement for you about this outline if you do not have a lawyer.

The case outline should have:

- a list of all the affidavits and other documents you want to use as evidence at the hearing;
- a list of all documents you have asked for by a summons that you want to use as evidence;
- a statement of issues which are still in dispute; and
- say which witnesses for the Department and other parties you want to be able to ask questions of.

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 right 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.

What happens at the trial?

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 must 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 or judge 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 your child may:

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

You should 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 should give the court evidence that shows:

- your child is not in need of protection, or
- if they are in need of protection that the order the Department wants is not in your 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 your child's best interests rather than a protection order (until 18).

The magistrate or judge 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.

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 cases.

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

Read the top of page two of your child's protection 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 member of the child's family or other suitable adult can be found who is willing and able to care for the child
- aa) paragraph (a) applies and, on the parent or parents subsequently being found —
 - (i) there is no parent who is willing and able to care for the child; and
 - (ii) no suitable adult member of the child's family 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 member of the child's family 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 or unwilling to provide, or arrange for the provision of adequate care for the child; or
 - (ii) the child's parents being unable or unwilling to provide or arrange the provision of, effective medical, therapeutic or other remedial treatment for the child.

What does the court consider in working out the best interests of a 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 a 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 members of the child's family 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 member of the child's family; or
 - (iii) a carer or any other person (including a child) with whom the child is, or has recently been, living; or
 - (iv) other people who are significant in the child's life;
- h) the need for the child to develop and maintain contact with the child's parents, siblings and other members of the child's family and with 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 and religious identity (including the need for cultural support to develop and maintain a connection with the culture and traditions of of the child's family or community)
- 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 a 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 children 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 think is best, 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 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) to give more time to work towards reunification.

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 things safe enough for your child at home. Evidence could include, for example:

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

- satisfactory completion of counselling (for example, drug and alcohol, or personal or family violence) and how your behavior has changed as a result of the counselling
- 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 trial date?

Be clear about what you disagree with.

Apart from completing your response, the Trial Listing Callover Certificate and the case outline, as set out above you will also need to:

- 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, for example, it could be divided into Department documents, your court documents, child representative 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

- 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 (for example,, 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 person who wrote them 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). The court needs to give you permission to send a summons. You should:
 - lodge the application with the court at least 21 days before the commencement of the trial, and
 - include a covering letter about why you want the evidence you are asking for.
- 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 hearing before the final hearing you will need to early list your case to ask for permission.

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

Arrange to look at the Department's file or other documents before the trial

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.

- You can obtain information on the correct service guidelines and fees for money for Department witnesses by emailing releaseof.information@communities.wa.gov.au or phoning (08) 6277 5311.
- All summons issued to the Department of Communities should be sent by either of the following:
 - By post: Attention: The Proper Officer, Department of Communities, Locked Bag 5000, FREMANTLE WA 6959
 - In person to: The Proper Officer, Department of Communities 130 Stirling Street Perth WA 6001
- You will get a return of summons listing notice from the court when documents you have asked for by summons have arrived at court.
- You have to make sure other parties get a copy of the notice.
- There will be a hearing, usually before a registrar to sort out any objections to your

summons and to make directions about you inspecting any documents.

- 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 must follow any directions from the court about the documents and make arrangements with the court to look at the documents well in advance of the hearing date. The court usually wants to know no later than 7 days before the readiness hearing (or 7 days before the trial if there is no readiness hearing) which of these documents you want to be able to ask about at the trial.
- 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. If you want to make a copy of any documents you will need to get your case relisted to ask for permission.

What if I need an interpreter?

If you or one of your witnesses needs an interpreter you should mention this when your case is in the Trial Allocation List or at the readiness hearing. 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 trial?

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 trial to be adjourned?

If you want the trial to be adjourned (put off) you will need to apply to the court. You should firstly ask whether the Department, other respondents and the child representative, (if one has been appointed), 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 trial 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 infosheet.

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 trial your request is less likely to be granted unless you have a very good reason, for example, you have just been unexpectedly hospitalised.

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:

<https://www.childrenscourt.wa.gov.au/>.

Where can I get more information?

- Contact the Legal Aid WA Infoline or Legal Yarn (for First Nations callers) or go to any Legal Aid WA office to get copies of the infosheets: 'Representing yourself in a trial in a protection and care case 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: <http://www.childrencourt.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 WA government legislation website: 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’s 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 insert court event when the order was made, for example, at the Readiness Hearing] held on [insert the date....].

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 CONTACTS

 **Infoline:** 1300 650 579

 **Legal Yarn:** 1800 319 803 (for First Nations callers)

 **Website/InfoChat:** www.legalaid.wa.gov.au

Interpreting and relay services to help you contact us:

 **Translating & Interpreting Service:** 131 450

 **National Relay Service:** 133 677

Perth office

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

Goldfields Office

Suite 3, 120 Egan Street,
KALGOORLIE WA 6530
(08) 9025 1300

Midwest & Gascoyne Office

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

East Kimberley Office

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

West Kimberley Office

Upper Lvl, Woody's Arcade,
15 – 17 Dampier Terrace,
BROOME WA 6725
(08) 9195 5888

Southwest Office

7th Floor, Bunbury Tower,
61 Victoria Street,
BUNBURY WA 6230
(08) 9721 2277

Great Southern Office

Unit 3, 43 – 47 Duke Street,
ALBANY WA 6330
(08) 9892 9700

Pilbara Office

28 Throssell Road
SOUTH HEDLAND WA 6722
(08) 9172 3733

Indian Ocean Office

Administration Building,
20 Jalan Pantai,
Christmas Island,
INDIAN OCEAN WA 6798
(08) 9164 7529

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