

Understanding family law

Information for people affected by cancer

Family law covers all areas of family relationships. If you are married, in a de facto relationship, separated or divorced, the Family Law Act will cover issues that may arise about your children or property. This fact sheet only covers family law issues specific to people who are unwell, including with cancer.

When a parent becomes ill

Separated or divorced parents may have court orders or informal arrangements that outline who cares for children. These arrangements can cover who the children will live with, how much time they will spend with each parent, and other matters.

If a parent is diagnosed with cancer, these arrangements may or may not need to be changed. Some people with cancer maintain their parenting arrangements, while others may need time without the children to recover.

If a parent is too ill to manage the usual arrangements for a period of time, the parents may want to think about appropriate people who can help

Even if everybody agrees to the new arrangement informally, the parents may wish to have a parenting plan written, or change an existing parenting plan to reflect the new arrangements.

If the parents can't agree on the new arrangements, either of them can apply to the Family Court of Australia or the Federal Circuit Court of Australia for a parenting order to determine who will care for the child. Usually the parties have to attend mediation before they can commence proceedings, but if there are circumstances of urgency, the Court may exempt the parties from having to attend mediation.

When making a parenting order, the Court's main concern is the best interests of the child. This includes:

- the need for the child to have a meaningful relationship with both parents
- the need to protect the child from harm or violence
- the capacity of each parent to provide for the child
- the practical difficulty and expense involved with a child spending time with each parent
- any views expressed by the child and any factors (such as the child's age and maturity) which the Court thinks are relevant to the weight it should give to the child's views.

When a parent is terminally ill

If a parent is terminally ill, they will need to make arrangements for their children after they have died. This person (the guardian) could be the other parent, a grandparent, other relatives or friends.

The guardian can be appointed:

- through a parenting plan (or Consent Order); or
- through a parenting order.

Although a person can express their wishes for who will care for the child in their will, this is not binding (see below).

Parenting plans and consent orders

Where a terminally ill parent would like someone other than the surviving parent to care for their children after they die, they may need formal Court



A parenting plan is a written, signed and dated agreement between both parents (or carers) setting out parenting arrangements. It is not legally binding. A Consent Order is a document that is signed and dated by both parties setting out the care arrangements between both parents (or carers). It is lodged in the Court and is legally binding.

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orders. The parents may want to have Consent Orders approved by the Court to formalise the agreed arrangements about who will look after the children.

Parenting order

If the parents and other relatives cannot agree on what contact they will have with the children, a *parenting order* from the Family Court of Australia or the Federal Circuit Court of Australia may be required.

The will

A terminally ill parent can write down their wishes for who will look after their children in their will. This person is known as the *testamentary guardian*. However, this is not binding.

Under the *Guardianship of Infants Act*, the surviving parent becomes the guardian, unless there are exceptional circumstances or orders in place (e.g. there were Court Orders in place that the child lives solely with the parent who has died).

If someone other than the surviving parent wants to look after the children, he or she can ask the Court for orders to override the surviving parent. The Court will then decide who should have parental responsibility - the other parent, the testamentary guardian, or someone else. If you have named a testamentary guardian in your will, the Court may take this into account when making orders. However, the Court has the power to appoint a different guardian if it thinks this is necessary.

If there were orders in place that the child lives with solely with the parent who has died, the surviving parent has no automatic rights to guardianship. In this situation, the Family Court will

make a decision on guardianship based on what is in the best interests of the child.

Rights of grandparents

Grandparents have the right to apply to the Court for a parenting order for the child to spend time or live with them. The Court will take the best interests of the child into account when making such a determination.

Grandparents who are primary carers may be eligible to receive financial assistance from Centrelink. Payments include the Double Orphan pension (if both parents have died, or one parent has died and the other is uncontactable), and Family Tax Benefit Part A and B. The child may also be added to a grandparent's Pensioner Concession Card, and receive prescription medicines at the pensioner rate. Grandparents may also receive a Statutory Care Allowance from the Department of Community Services.

Grandparents are also eligible to receive child support from the surviving parent. An application for a child support assessment can be made through the Child Support Agency.

Where to get help and information

- **Family Law Courts**
www.familylawcourts.gov.au
- **NSW: Legal Aid NSW**
www.legalaid.nsw.gov.au
- **Cancer Council Legal Referral Service 13 11 20**

Note to reader

This fact sheet provides general information relevant to NSW only and is not a substitute for legal advice. You should talk to a lawyer about your specific situation.

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For information and support on cancer-related issues, call Cancer Council **13 11 20**. This is a confidential service.