



This brochure gives you basic information about appeal procedures in the Family Court from decisions of Federal Magistrates. It deals only with appeals from a decision made by a Federal Magistrate when the jurisdiction of the Family Court is to be exercised by a single Judge. For appeals from a decision of a Family Court Judge or a Federal Magistrate when the jurisdiction of the Family Court is to be exercised by the Full Court, see the brochure *Appeal Procedures – Full Court*.

If you need information regarding the correct procedure for appeals from decisions made by Family Court judicial registrars, registrars or local court magistrates, call 1300 352 000.

Legal terms

Appeal – a procedure which enables a person (usually a party to legal proceedings) to challenge the decision made by a court. Chapter 22 of the *Family Law Rules 2004* sets out the procedure for an appeal from a decision of a federal magistrate or a Family Court judge.

Appeal books – a bound or fastened and indexed collection of all documents relevant to the appeal (see page 6 for more information).

Appellant – a person who files an appeal.

Cross-appellant – a person who files a cross-appeal.

Draft index to the appeal books – a list of the documents which were before the federal magistrate at the hearing or trial.

Federal magistrate – the federal magistrate who heard the proceedings and made the orders that are being appealed.

Full Court – three judges hearing an appeal together. Appeals from a decision of a Family Court judge are heard by a Full Court. A Full Court may also hear an appeal from a federal magistrate (if your appeal is to be heard by the Full Court, see the brochure *Appeal Procedures – Full Court*). Judges who regularly sit on the Full Court are called judges of the Appeal Division.

List of authorities – the names of, and citations for, reported cases which will be referred to in support of the case.

Leave to appeal – in certain cases you need the Court's permission before you can file an appeal (see page 3 for more information).

Reasons for judgment – the reasons given by the federal magistrate for the orders that were made.

Respondent – the other party or parties to the proceedings.

Regional appeal registry –

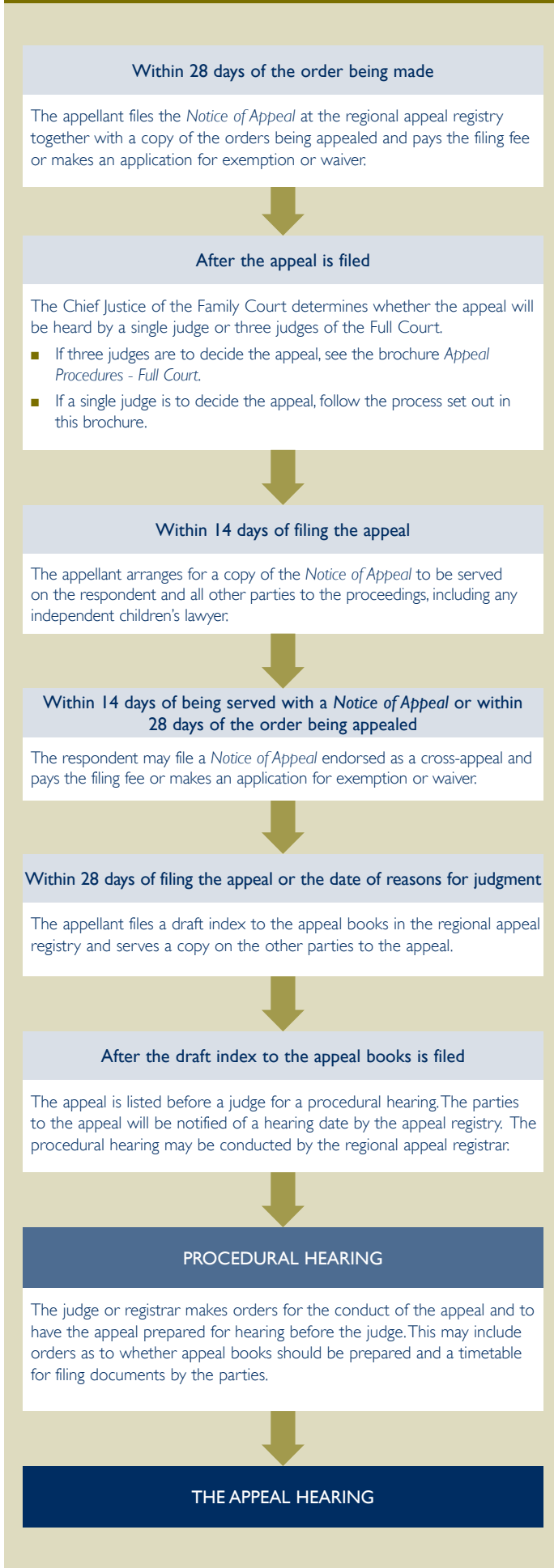
- BRISBANE Registry of the Family Court for appeals from matters heard in Queensland, the Northern Territory and Lismore.
- SYDNEY Registry of the Family Court for appeals from matters heard in New South Wales (except Lismore) and the Australian Capital Territory.
- MELBOURNE Registry of the Family Court for appeals from matters heard in Victoria, Tasmania and South Australia.
- PERTH Registry of the Family Court for appeals from matters heard in the Family Court of Western Australia.

Single judge – the judge who hears the appeal. When an appeal is filed from a decision of a federal magistrate, the Chief Justice of the Family Court will decide whether the jurisdiction of the appeal court is to be exercised by a single judge or three judges of the Full Court. There is no right to appeal against this decision.

Transcript – the written record of the evidence in court proceedings.

This brochure provides general information only and is not provided as legal advice. If you have a legal issue, you should contact a lawyer before making a decision about what to do or applying to the Court. The Family Law Courts cannot provide legal advice.

Main stages in an appeal



Appeals

What is an appeal?

An appeal is not a rehearing of the original dispute. For your appeal to be successful, you must convince the judge that the federal magistrate made an error.

The judge:

- does not consider any evidence or information that was not before the federal magistrate, except in special circumstances
- does not hear witnesses giving oral evidence
- reads all the relevant documents that were filed by the parties for the original hearing before the federal magistrate and the relevant parts of the transcript of the proceedings
- takes into account the written summaries of argument, and
- listens to legal argument from both sides.

As the appellant, you need to convince the judge that the federal magistrate made an error such that the decision should be set aside.

In order to do this you must persuade the judge that the federal magistrate:

- applied a wrong principle of law, or
- made a finding of fact or facts on an important issue which could not be supported by the evidence, or
- exercised his or her discretion to arrive at a decision which was clearly wrong.

A finding of fact is, for example:

- a finding that a certain event did or did not occur
- that something was said or not said, or
- that something has a certain value (for example, your house).

A federal magistrate exercises a discretion when the result of the case does not depend on a fixed rule, but where the federal magistrate has to weigh up a number of different factors, all of which are of some relevance to his or her decision. To succeed on appeal, it is not enough for you to show that another federal magistrate might have formed a different view on the facts or decided the case differently.

For example:

- In a financial case, there is a margin within which the Court has a range of decisions open to it; all of which will be legally valid or acceptable.
- In a parenting case, matters may be so finely balanced between the parties that the federal magistrate could decide in favour of either party, without being in error in a legal sense.

If the federal magistrate accepted the evidence of one party in preference to that of the other party, the judge will be reluctant to take a different view because, unlike the federal magistrate, he or she does not see and hear the parties or their witnesses giving evidence.

Leave to appeal

You must apply for leave to appeal against a federal magistrate's decision in the following circumstances:

- Where you want to challenge an interim or procedural order which does not relate to a parenting order and which is not final; for example, an order stopping you from accessing money in a bank account until further order.
- Where you want to challenge an order made under the *Child Support (Assessment) Act 1989* or the *Child Support (Registration and Collection) Act 1988*.

Leave to appeal is sought using the same document that you file for an appeal.

Outcome of appeal

If your appeal is successful the judge may:

- make a different order to the one made by the federal magistrate, or
- order a retrial (that is, another hearing) by a federal magistrate.

It is also possible for the judge to find that, although the federal magistrate made some errors, he or she came to the correct conclusion and the appeal should be dismissed.

Cost

Before deciding whether to appeal against the federal magistrate's decision, it is important to be aware of the costs involved. They include:

- a filing fee (you may be exempt from paying the filing fee in certain circumstances or you may apply for a fee waiver due to financial hardship).

To find out the current filing fee or for an exemption or waiver form:

- ~ go to www.familylawcourts.gov.au
- ~ call 1300 352 000, or
- ~ visit your nearest family law registry

- the cost of a transcript of the proceedings before the judicial officer. Each appellant buys transcripts at their own cost. There is no exemption or waiver.

In addition, if your appeal is unsuccessful, it is likely that the Court will order you to pay some or all of the other costs of all other parties to the appeal.

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. Court staff can help you with questions about court forms and the court process, but cannot give you legal advice.

You can get legal advice from a:

- legal aid office
- community legal centre, or
- private law firm.

Before seeking legal advice, you should have a copy of the orders from which you want to appeal and the judicial officer's reasons for judgment. You can get these from the family law registry where your case was originally heard. You can get procedural information from the regional appeal registrar (see the back page for contacts).

What to do and when

1 Preparing your appeal

You prepare your appeal by completing a *Notice of Appeal* and attaching a copy of the orders you seek to appeal. The notice must be typed or printed clearly and must state:

- If you are applying for leave to appeal, the facts relied on in support of the application for leave.
- Whether the appeal is against all or only part of the orders. If it is against part of the orders, state which part.
- The grounds on which you claim that the decision is wrong. You should point out specifically which principles of law the federal magistrate applied wrongly, and/or which of his or her findings of fact are wrong, and why you say the decision is wrong. It is important that the grounds of appeal are prepared carefully as they govern the matters the judge will consider in deciding the appeal.
- What order you want the judge to make in place of the order made by the federal magistrate or whether you want a new trial.

2 Time limits on appealing

The *Notice of Appeal* must be filed in the regional appeal registry no later than 28 days after the day on which the order being appealed was made.

You may apply for an extension of time by filing an *Application in an Appeal* and an affidavit in support of the application. These documents must be filed in the regional appeal registry and served on the other parties or their lawyers (including any independent children's lawyer).

The application will be heard by a judge. The Court has discretion whether or not to extend the time. Matters that will be taken into account when deciding whether to allow you the extension of time to file the appeal will include:

- the length of the delay
- the reasons for the delay
- any disadvantage it has caused the other party
- the merits of the proposed appeal, and
- the overall justice of the case.

If a judge refuses to grant an extension of time you can apply to the High Court for special leave to appeal. See 'Appeals to the High Court' on page 8 for more information.

3 Filing the appeal

The *Notice of Appeal* and orders you seek to appeal (the original plus one copy for each party to the appeal) must be filed in the regional appeal registry. Filing can be done by post, by delivering the documents to a family law registry or by electronic communication (that is, fax or email).

At filing, you must pay a filing fee. If you are filing the *Notice of Appeal* by electronic communication, you may pay the filing fee at your nearest family law registry and fax or email a copy of your receipt (or an application for exemption or waiver of the fee) with your *Notice of Appeal*. You must also send or deliver the original *Notice of Appeal* plus copies so that they reach the regional appeal registry within seven days of filing.

Note: the filing fee cannot be returned if you withdraw or abandon your appeal.

4 Serving the *Notice of Appeal* on the other party

You must arrange for a copy of the *Notice of Appeal* to be served on each other party to the appeal or their lawyers, including any independent children's lawyer within 14 days of filing. Service may be conducted by:

- **post** (by you or someone acting for you)
- **hand** (personal delivery – you cannot serve the papers yourself).

The Court's *Service Kit* provides information on service and includes the *Affidavit of Service* that will be given to you when you file the *Notice of Appeal*. You can follow the instructions in the kit or arrange for service to be conducted by a process server for a fee.

5 Draft Index to the Appeal Books

Within 28 days of filing the *Notice of Appeal* (or the date of any reasons for judgment), you must file a draft index to the appeal books with the Court and serve it on the respondent and all other parties to the appeal. The draft index lists the documents which were in evidence before the federal magistrate and that will be included in the appeal books or that must be before the judge hearing the appeal. If you fail to file and serve a draft index within 28 days of filing, the appeal will be taken to be abandoned (see 'Prosecution of the appeal' on page 6).

Cross-appeals

The respondent to the appeal may also appeal if he or she considers that the federal magistrate was in error. This is done by filing an original (and one copy for service on each other party) of a *Notice of Appeal* endorsed as a cross-appeal in the regional appeal registry. The respondent must file any *Notice of Appeal* endorsed as a cross-appeal no later than 14 days after service of the original *Notice of Appeal* or within 28 days of the order being made, whichever is the later.

The time for filing a cross-appeal may also be extended by order of the Court.

A fee must be paid when filing a cross-appeal and this fee cannot be returned if you withdraw the cross-appeal.

You may be exempt from paying the filing fee in certain circumstances or you may apply for a fee waiver due to financial hardship. You can get the exemption or waiver forms:

- ~ from www.familylawcourts.gov.au
- ~ by calling 1300 352 000, or
- ~ or your nearest family law registry.

Effect of appeal – filing an appeal does not stop the order

Filing a *Notice of Appeal* does not automatically affect the orders made by the federal magistrate (except where the order is a divorce order). This means that, both you and the other party must obey the orders even if you have filed an appeal. If you want to stop the operation of the orders until your appeal is decided, you must file an application to stay the orders and an affidavit. That application can only be filed after the *Notice of Appeal* has been filed. You may request an early hearing so that the matter can be dealt with quickly.

The application will be decided by the federal magistrate from whom you are appealing if available. Your application to stay an appeal must be filed in the registry of the Federal Magistrates Court where the proceedings were heard originally, not the regional appeal registry.

If a stay is granted, the federal magistrate's orders have no effect until the appeal is decided or some other order is made in relation to the stay.

The procedural hearing and the appeal books

After the draft index to the appeal books has been filed, a date is allocated for a procedural hearing before a judge.

At the procedural hearing, the judge will make orders about the following:

- whether an appeal book is required for the hearing of the appeal and if so, the contents of the appeal book
- if an appeal book is not required, a timetable for the filing by each party of a list of documents to be relied on by the party
- a timetable for the filing by each party of a summary of argument and a list of authorities
- a timetable for the party responsible (usually the appellant) to obtain, file and serve the federal magistrate's reasons for judgment and those parts of the transcript of the hearing likely to be relevant to the appeal, and
- a date for the hearing of the appeal.

The appeal books or list of documents to be relied on will be before the judge hearing the appeal and unless otherwise ordered, must include the following:

- the *Notice of Appeal*
- the order being appealed
- reasons for judgment of the federal magistrate
- any relevant previous or subsequent order
- the application that was decided by the federal magistrate
- any response
- relevant affidavits relied on before the federal magistrate
- any family report received in evidence
- relevant exhibits tendered before the federal magistrate
- the relevant part or parts of the transcript of the hearing before the federal magistrate

The hearing date

The hearing date will be discussed at the procedural hearing and if possible, a date allocated for the hearing before the judge. Urgent appeals may be given priority so you should make a submission to the judge or regional appeal registrar if there is any particular urgency about your case. In some cases, you may be required to file an *Application in a Case* together with an affidavit in support of the application to request an urgent hearing.

Prosecution of the appeal

If you do not obey orders made by the Court or fail to appear in court or attend appointments, the judge may dismiss your appeal 'for want of prosecution' without hearing it. You will be given prior written notice of this and the opportunity to appear before the judge before this can occur. If your appeal is dismissed for want of prosecution, you may be liable to pay the other parties' costs relating to the appeal.

An appeal or cross-appeal may be taken to have been abandoned if the appellant or cross-appellant fails to file and serve all relevant documentation by the due dates and comply with all orders made concerning the conduct of the appeal. This will happen automatically under the Family Law Rules without the need for any further communication with you, if you fail to file the draft index to the appeal books or if required to do so, the appeal books. You may file an application to re-instate your appeal on an *Application in an Appeal* with a supporting affidavit.

Transcript

If you decide to appeal, it is your responsibility to order and pay for the relevant parts of the transcript of the hearing before the federal magistrate. Transcripts are available from an independent service provider. You can obtain an order form and a schedule of the local costs from a family law registry. Each appellant is responsible for purchasing transcripts at their own cost. The independent service provider provides these transcription services and the Court cannot exempt or waive the transcription fees.

Summaries of argument and lists of authorities

You must file with the Court and serve on the respondent and any other parties a summary of your argument and a list of authorities. Your summary of argument must set out, in relation to each ground of appeal, a statement of the arguments setting out the points of law or fact to be discussed, and the orders you seek. The document must not exceed 10 pages (unless the Court orders otherwise), each paragraph must be numbered consecutively and it must be signed. At the hearing of the appeal you will be expected to speak to your written summary of argument. If participating in the appeal, the respondent and any other parties may be required to file a summary of argument and a list of authorities.

The appeal hearing

As the appellant, you will put your case to the judge first. The respondent and any other parties will then be called on to answer your case. You will then be able to reply to anything raised by the respondent. In presenting your case, you are expected to be familiar with the material in the documents before the judge. You should be able to direct the attention of the judge to the documents which support your argument.

For example:

- If you are claiming that the federal magistrate applied a wrong principle of law, you should draw to the attention of the judge the relevant grounds of appeal and the passage in the judgment and then refer to the section of the *Family Law Act 1975* or other relevant legislation and/or to the reported decisions of the Court published in the law reports which show that the federal magistrate was in error.
- If you are claiming that the federal magistrate made an error in the findings of fact, refer to or identify the finding from the judgment. You should direct the judge to all the evidence in the affidavits, transcript and/or exhibits relevant to that finding (including evidence supporting that finding).
- If you are claiming that the federal magistrate exercised his or her discretion wrongly, you should draw the judge's attention to those aspects of the case that you claim were not given proper consideration and which ought to have led the federal magistrate to reach a different decision, as well as to those aspects that you claim were given too much weight by the federal magistrate.

In each case you should be able to give the judge references to the document by page number, paragraph number and location on the page (this is usually done by dividing a page roughly into 10 so that a passage appearing half way down the page is described as being at 'point 5').

Further evidence

In all but exceptional circumstances, the only evidence that the judge will consider is that given at the hearing before the federal magistrate.

Usually, if the further evidence was available at the time of the trial, but you or your lawyer did not call that evidence, the further evidence will not be admitted at the hearing of the appeal.

If you wish to apply to the judge for permission to introduce additional evidence, you must file an:

- *Application in an Appeal*, and
- affidavit in support of the application.

The affidavit should set out the grounds on which you are making the application, any evidence necessary to establish those grounds and include or provide an outline of the further evidence you want the judge to receive.

The original and service copies of the application and affidavit must be filed in the regional appeal registry; and two copies served on each other party to the appeal no later than 14 days before the hearing date.

Legal costs

If your appeal is dismissed, it is likely that the other parties will apply to the judge for an order that you pay their costs associated with your appeal. It is common for a costs order to be made against the appellant in those circumstances. If your appeal is successful, you may seek an order that the respondent to the appeal pay your legal costs (if any) and expenses. Alternatively, if the appeal succeeds on a question of law, you may ask the judge to recommend to the Attorney-General that a contribution be made towards those costs from a special fund. The Court may do this by granting a 'costs certificate'. The most you can be paid from the fund is \$4000.

Stopping an appeal

You can stop your appeal at any time. You do so by filing a *Notice of Discontinuance* in the regional appeal registry and serving a stamped copy on the respondent and any other parties, including any independent children's lawyer. The Family Law Rules provide that if you withdraw your appeal you may be required to pay the costs of the respondent and any other parties, including any independent children's lawyer, relating to the appeal.

Appeals to the High Court

There is no right of appeal to the High Court of Australia from a decision of the Family Court. You may apply to the High Court for special leave to appeal, but this is granted only in special cases. If you make any application to the High Court you must also lodge a copy of that application in the regional appeal registry. You should check with the High Court registry regarding any time limits which may apply. There is no appeal to the Full Court from the decision of a judge hearing an appeal from a decision of a federal magistrate.

Family Court Regional Appeal Registries

The Family Court has four appeal registries.

BRISBANE

Cnr North Quay and Tank Street Brisbane QLD 4000

TEL (07) 3248 2322

FAX (07) 3248 2251

(Appeals from Queensland, the Northern Territory and Lismore)

SYDNEY

97-99 Goulburn Street Sydney NSW 2000

TEL (02) 9217 7206

FAX (02) 9217 7217

(Appeals from New South Wales (except Lismore) and the Australian Capital Territory)

MELBOURNE

305 William Street Melbourne VIC 3000

TEL (03) 8600 3777

FAX (03) 8600 3950

(Appeals from Victoria, Tasmania and South Australia)

PERTH

Family Court of Western Australia

150 Terrace Rd Perth WA 6000

TEL (08) 9224 8222

FAX (08) 9224 8360

(Appeals from the Family Court of Western Australia)

Personal Safety

If you have any concerns about your safety while attending court, please call **1300 352 000** before your court appointment or hearing. Options for your safety at court will be discussed and arrangements put in place. By law people must inform a court if there is an existing or pending family violence order involving themselves or their children. More detail is in the brochure *Do you have fears for your safety when attending court?*

More information

For more information about the Family Law Courts:

- Go to www.familylawcourts.gov.au
- Call **1300 352 000**, or
- Visit a family law registry near you.