

## Parenting orders

In making a protection order where the parties have children the applicability of Part VII, Division 11 of the *Family Law Act 1975* (Cth) and Part 5, Division 10 of the *Family Court Act 1997* (WA) should (and in some jurisdictions, must) be considered. 'Family court' in this section includes the Family Court of Australia and the Federal Circuit Court of Australia. The term, 'family violence order', is used in this statement to reflect the relevant provisions of the family law legislation; the equivalent term, 'protection order', is used elsewhere in this chapter.

The stated purposes ([Section 68N FLA](#); [Section 173 FCA](#)) of part VII, Division 11 of the *Family Law Act 1975* (Cth) and Part 5, Division 10 of the *Family Court Act 1997* (WA) are: to resolve **inconsistencies** between family violence orders and orders that provide for a child to spend time with a person (here called parenting orders); to ensure that parenting orders do not expose people to domestic and family violence; and to ensure the best interests of the child. Family violence orders collectively describe orders generally made by state and territory courts of summary jurisdiction. Parenting orders are generally made by a family court, however it is important to note that proceedings for a parenting order can be instituted in a **state or territory court of summary jurisdiction** subject to the limitations set out in [Section 69N FLA](#) and [Section 43 FCA](#).

[Section 68R FLA](#) and [Section 176 FCA](#) permit a court of summary jurisdiction (on its own initiative or on application), when making or varying a family violence order, to revive, vary, discharge or suspend an existing parenting order (or family law injunction for personal protection, parenting plan, or recovery order) where the court has before it material that was not before a family court when the parenting order was made. These provisions are a mechanism for ensuring the safety of the victim and their children in domestic and family violence matters where there are parenting orders already in place that provide for contact between the children and the perpetrator [[FLC 2015](#)]. This mechanism is relevant in cases where domestic and family violence has commenced or escalated since the parenting orders were made. For example, where a parenting order is made by a family court in the absence of the victim of family violence and the other party (the perpetrator) has failed to disclose the violence to the court, or violence commences or escalates in the context of child changeover arrangements stipulated in the parenting order. If the provisions of [Section 68R FLA](#) or [Section 176 FCA](#) are used effectively, a victim in these circumstances, having obtained a final family violence order [[ALRC/NSWLRC 2010](#)], would not face potential contravention proceedings for breaching a parenting order, and would not be required to make application to a family court for a variation of the parenting order.

When a court of summary jurisdiction exercises its power to vary an existing parenting order in the context of making or varying a final family violence order, the judicial officer should be aware of the consequences of making variations to the parenting order that may not be sustainable or that the parties may not be capable of complying with in the longer term. For example, a variation that requires a party to have supervised contact with their children at a designated contact centre. It is unlikely that a contact centre would agree to a long term commitment of this nature; it is far more likely to be an interim measure only. The judicial officer should be satisfied that they have sufficient evidence and information about the particular matter, including any relevant details arising from the parenting proceedings, before varying the parenting order.

If the family violence order is made or varied on an interim basis, the court of summary jurisdiction must not discharge the parenting order. Any revival, variation or suspension of a parenting order made by a court of summary jurisdiction in Western Australia ceases to have effect either when the interim order ends or 21 days from the date of the interim order, whichever time is earlier ([Section 178 FCA](#)). It is important to note however that in any other state or territory, any revival, variation or suspension of a parenting order made in proceedings to make or vary an interim family violence order by a court of summary jurisdiction ceases to have effect at the earliest of: the time the interim family violence order stops being in force; the time specified in the interim family violence order as the time at which the revival, variation or suspension ceases to have effect; and the time the parenting order is affected by any another court order made after the revival, variation or suspension ([Section 68T FLA](#)).

It has been observed that the Part VII Division 11 *FLA*/Part 5 *FCA* provisions are rarely applied by courts of summary jurisdiction. Reasons in individual cases may include:

- > In some instances the judicial officer may determine that parenting orders are sufficient to protect children without naming the children on the family violence order [[FLC 2015](#)].
- > In interim family violence order proceedings, the judicial officer may be concerned that the period prescribed in [Section 178 FCA](#) (and previously in [Section 68T FLA](#)) does not allow the victim sufficient time to bring an application before a family court to have the allegations of violence considered, and if substantiated, the parenting order varied, so elects instead to preserve the parenting order and name only the victim in the family violence order [[FLC 2015](#)].
- > A party or parties to the family violence order proceedings may not have access to appropriate legal advice and other support before seeking to vary a parenting order [[ALRC/NSWLRC 2010](#)]. A judicial officer may be reluctant to disturb existing orders in these circumstances.
- > Judicial officers may also be concerned about disturbing a parenting order where they believe they may not be apprised of all of the information and evidence that supported the making of the parenting order [[FLC 2015](#)].

It is important to note that judicial officers can elect to suspend the parenting order for the prescribed period, and set repeating return dates at the expiration of each period until the parties are able to have their application heard by a family court. Judicial officers should also be aware that parties who are **self-represented** may not be equipped to establish the grounds required by [Section 68R FLA](#) or [Section 176 FCA](#) on which the court may revive, vary, discharge or suspend an existing parenting order.

Judicial officers considering a family violence order application may decide that it is appropriate in a particular case (and in some Australian jurisdictions, they are required) to name the children in the (interim or final) family violence order and to specify the conditions governing contact between the children and perpetrator. In this way, the victim and children have immediate protection that remains in effect if or until parenting orders are made by a family court. Given that there may be a considerable delay before parenting matters, including contact, can be dealt with by a family court, the new status quo established by the family violence order may impact on the outcome of any subsequent parenting **proceedings**.

In cases where the family violence order is made prior to parenting order proceedings, [Section 68P FLA](#) and [Section 174 FCA](#) permit a family court to make a parenting order (or make a recovery order or grant an injunction) that is inconsistent with the family violence order, however the court must ensure the parties fully understand the nature and effect of the parenting order. This may occur in cases where information or evidence comes before the court that was not available to the court of summary jurisdiction that made the family violence order. In circumstances of ongoing violence, where a protected person is having difficulty with enforcement of a family violence order as a result of the operation of a parenting order made by a family court, the protected person may need to return to the court of summary jurisdiction and make application under [Section 68R FLA](#) or [Section 176 FCA](#) to ensure consistency and enforceability of orders.