

Children’s passports in family law matters

Author: Ben Smith
Email: ben@smithfamilylaw.com.au
Date: **Monday July 26, 2021**

Obtaining a child’s passport in intact families is straightforward. However, disputes can arise after separation or divorce about whether the child can travel overseas, have an Australian passport or which parent holds the child’s passport. There may also be a risk of a parent unlawfully removing a child from Australia.

This blog explores how separated families can obtain a passport for a child and what steps can be taken to prevent a party from obtaining a passport for a child without your consent.

The *Australian Passports Act 2005* (Cth) regulates how Australian citizens can apply for a passport with the Department of Foreign Affairs and Trade (**“the Department**”). For children under the age of 18, a passport cannot be issued unless:

- both parents, or each party with parental responsibility for the child, consent to the child’s passport being issued; or
- there is a Court Order in place allowing the child to travel internationally or have an Australian passport. This includes Family Law Orders and Orders made by a State or Territory in relation to a child’s welfare.

Who is a parent and what is parental responsibility?

The law presumes that the person/s named on the child’s birth certificate is the child’s parent/s. A parent has parental responsibility for the child.

Parental responsibility is generally the power a person has to make decisions about a child’s long-term care, welfare and development (for example, education, health and medical needs, the child’s name and cultural and religious upbringing). Parental responsibility can involve joint decision-making, where both parents are required to consult each other and make a genuine effort to

come to a joint decision, or sole responsibility, where one parent has the power to make the long-term decision.

Only the Family Law Courts have the power to make orders allocating parental responsibility for making long-term decisions regarding a child. Orders may provide for joint decision-making or sole decision-making or a combination of both. For example, the Court can order a parent to have sole decision-making for a specific issue and joint decision-making for the remaining major long-term issues.

Where there are Court orders providing for joint decision-making, consent will be required from both parents on any application for an Australian passport for the child. If the Court makes orders for a person to have sole responsibility, then that person does not need the consent of the other parent to obtain a child's passport.

The Family Law Courts also have the power to grant parental responsibility to a person not named on the child's birth certificate and the power to take away parental responsibility from a person named on the child's birth certificate.

In short, consent is generally required from both parties named on the child's birth certificate unless there are Court Orders in place to the contrary.

What if there is only one parent named on the birth certificate?

If there is only one parent on the child's birth certificate and there is no Court Order that grants parental responsibility or guardianship of the child to another person or relates to the child's ability to travel or get a passport, then the parent named on the birth certificate can apply to the Department for the child's passport to be issued.

A special form needs to be filed with the Department.

How to stop a parent from applying for a child's passport without your consent

If you are a parent not named on the child's birth certificate (for example, a guardian) or you are a person concerned about the welfare, care and development of the child, and are concerned the other parent or person with parental responsibility will obtain a child's passport or travel overseas without your consent, then these steps can be taken:

- You can call the Consular Section of the Department and lodge an objection to the issuing of the child's passport. 24-hour consular emergency contact: 1300 555 135 (within Australia) or +61 2 6261 3305 (outside Australia).
- You can make an application to the Family Law Courts to have the child's name placed on the Family Law Watchlist. This means the Australian Federal Police may be able to prevent your child from travelling overseas.
- You can submit a Child Alert Request with the Australian Passport Office to issue a warning to the Department before a passport is issued to the child.

Family Law Orders about a child's passport and travel

The Family Law Courts not only deal with the issue of parental responsibility about who can apply for a child's passport, but they also have the power to make Orders:

- ordering a party to consent to the child's passport;
- removing the need to obtain the other parent's consent regarding the passport; or
- preventing a child from being taken overseas.

You should seek expert legal advice about the prospects of success and how to apply in the Family Law Courts for an order for joint decision-making or to have sole responsibility, even if you are not a child's parent (being a person concerned with the care, welfare or development of the child).

Call us for a free initial consult: 03 8625 8957

Overseas Orders

If there are overseas Court Orders relating to parental responsibility or issues around a child's passport, they will only have legal effect if they are registered with the Australian Family Law Courts.

What if the other parent refuses or fails to agree to the child's passport being issued?

Court Orders about parental responsibility or the child's passport that require both parties consent to the passport are legally binding. If a parent or person refuses to comply with the Court Orders, then you should consider applying to the Family Law Courts for an Enforcement Order or filing a Contravention Application. For more information, you can read our blog "Compliance with Parenting Orders".

If there are no Court Orders in place and the other parent refuses or fails to effectively sign the child's passport application, there are a few steps you can take:

1. You can engage in mediation or Family Dispute Resolution (**"FDR"**) with the other parent to try to reach a mutual agreement about the child's passport. You and the other parent meet with an impartial third party (the mediator or Family Dispute Resolution Practitioner) to work through the issues with a view to coming to a mutual agreement.
2. If mediation is unsuccessful, you can negotiate with the other parent through lawyers to try to reach an agreement.
3. If the matter is urgent or if negotiations through lawyers are unsuccessful, you should consider applying to the Family Law Courts for Orders in relation to the child's passport or travel as outlined above.
4. You can also make an application directly with the Department to issue the child's passport without the other parent's consent. This can only be done at the discretion of the Minister for Foreign Affairs if there are special circumstances.

What special circumstances will the Department consider in issuing a child's passport without the consent of the other parent?

The Minister for Foreign Affairs has the discretion to issue a passport to a child without the need for the other parent's consent or a Court Order if the Minister is satisfied that:

- the case is exceptional (which may include that there has been no contact with the non-consenting parent for a substantial period of time or there is significant family violence); or
- not allowing the child to travel internationally would adversely affect their welfare (physical or psychological); or
- the child needs to travel urgently due to a family crisis, and the other parent or person with parental responsibility cannot be contacted within a reasonable period.

However, the Minister may still refuse to issue the passport if it is preferable for the matter to be dealt with by a court or tribunal and may even still require the other parent's consent. It is usually better to apply to the Family Law Courts given the discretionary nature of applying to the Department and consent may still be required.

How a family lawyer can help

Smith Family Law can advise you on the best course of action when it comes to obtaining a child's passport or stopping the other parent from obtaining a child's passport without your consent.

Our approach is to try and negotiate a mutual outcome where possible and only litigate the matter in the Courts where it becomes necessary for the child's safety.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.