

A guide to subpoenas in family law

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E&A Lawyers has made the decision to no longer provide family law services. While we no longer take on any new family law matters, we are happy to assist by referring you to lawyers specialising in this area. Please don't hesitate to contact us if you would like a referral.

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When a matter has proceeded to Court, subpoenas can be a very useful tool, but what exactly are they, when are they used and why are they useful? In the context of family law, subpoenas can be invaluable to provide evidence for the parties in proceedings and can assist the Court in making findings in a matter.

Different courts have different requirements, timings and expectations. This blog will cover what you need to know regarding subpoenas in the Federal Circuit and Family Court of Australia ('the Court') family law matters.

What is a subpoena?

A subpoena is a legal document issued by a court at the request of a party in family law proceedings.

There are three types of subpoenas:

1. A subpoena for production;
2. A subpoena to give evidence; and
3. A subpoena for production and to give evidence.

Commonly in family law, a "subpoena for production" will involve a request for documents and information relevant to the proceedings (e.g. financial records, bank statements, medical records, school records, reports etc).

A “subpoena to give evidence” can be issued to compel a party to appear in person and testify in the court proceedings where necessary.

Once a party has completed the subpoena, the party must file it with the Court. Filing a subpoena incurs a filing fee which can be found at the Court’s website. Once you have filed the subpoena, the Court will complete the details and add a court seal before sending it back to the party seeking to issue it.

When can I issue a subpoena?

In family law, a subpoena is issued by the Court, which means they are only used when legal proceedings have commenced (as opposed to your dispute being settled, for example, through mediation without the need for litigation).

Before issuing a subpoena, the Court encourages parties to make all attempts to obtain the documents or evidence they intend to request. For example, this may involve requesting the documents directly from the person or preparing an affidavit in support of your case.

A party can request up to five subpoenas to produce documents for the hearing of any application seeking interim orders. However, in a final hearing or trial of an application seeking final orders or in an appeal, subpoenas will not be issued unless a judge or registrar gives permission.

Why would I need a subpoena?

Subpoenas can play a critical role in family law proceedings, particularly at the final hearing stage. Subpoenas assist in gathering evidence and information to support your position, especially in circumstances when one party may not produce the documents willingly (against their duty of disclosure), or they do not have access to the said documents.

Compliance obligations if subpoenaed in family law proceedings

A person or entity who has been issued a subpoena must comply with a subpoena unless:

1. the subpoena was not served on the person in the manner required by the *Family Law Rules 2021*; or
2. conduct money was not provided.

If a person does not comply with a subpoena, a Court may issue a warrant for the person’s arrest, and/or order them to pay any costs caused by the non-compliance. A Court may also find the person guilty of contempt of Court.

There are grounds to object to a subpoena in family law. The most common grounds include:

- that the documents or testimony are not relevant to issues in the proceeding;
- that the documents requested are protected by privilege;

- that the scope of the subpoena is too wide.

The Court will consider your objection before deciding whether or not the subpoena should be set aside. If you are considering objecting to a subpoena, you should seek legal advice to ensure your objections are fair and valid.

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How do I serve a subpoena?

There are special rules relating to the service of subpoenas. You cannot serve a subpoena until it has been issued and sealed by the Court.

Once issued by the Court, the subpoena must be served on each other party, any interested person and any independent children's lawyer in the proceeding.

If the subpoena requires the person subpoenaed to produce documents to the Court, the subpoena must be served at least 10 days before the date for production.

If the subpoena requires the person subpoenaed to attend to give evidence, you must arrange to have the subpoena personally served by hand (personal service) to the person subpoenaed. The person subpoenaed must be served not less than seven days before they are required to attend Court to give evidence.

At the time of service, conduct money must also be served. Conduct money is an amount paid to the person subpoenaed, to meet reasonable expenses associated with complying with the subpoena. For example, if the person is required to produce documents, conduct money will cover time to collate those documents and copy them for the Court.

Will I be able to see everything that has been produced under subpoena?

Whether or not you are able to see everything that has been subpoenaed will be specified by the Court.

If the subpoena is for production only and the issuing party has served the subpoena in compliance with the Rules, and there is no objection made to the production of the documents, the issuing party may, on or after the production day, file a Notice of Request to Inspect.

Each party to the proceedings may then make an appointment with the Court to inspect the documents produced and take copies of documents. There are some exceptions related to photocopying of documents, which includes child welfare records, a criminal record, medical record or police record.

Get help from a family lawyer

If you have queries regarding subpoenas and family law, our family law team can assist you to ensure you receive a fair and just result.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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