

Legal Answers for Permanent Care Families

Fact Sheet 2: Rights of the Child in Permanent Care

What are the governing principles in relation to the child?

Every decision relating to the child is to be made consistently with the objects, provisions and principles provided for in the *Children Youth and Families Act 2005 (Vic)* (CYFA), and where appropriate, the *United Nations Convention on the Rights of the Child 1989* (CROC). Australia is a signatory to CROC and many of the principles within the Convention are embedded within child protection legislation.

The principle of the ‘best interests of the child’ is one of the fundamental principles of the CYFA and CROC.

As such, the Permanent Care Order (PCO) may include conditions that the Court considers to be in the best interests of the child concerning contact with the child's parents, siblings and other persons significant to the child unless this is contrary to the child's best interests.

In summary the objects and principles of the above legislation are as follows:

- Children have a right and a need to know their background so ongoing contact with one or both parents and extended family is important.
- If the child is an Indigenous child, arrangements should, where possible, be made to ensure that the child remains connected with their cultural family and backgrounds.
- The child's safety, welfare and wellbeing is the paramount consideration, this means that it is the most important thing the Court must consider.
- Where appropriate, assistance should be given to the carers to promote a safe and nurturing environment for the child.
- Consideration to be given to the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances and according to the level of the child's maturity.
- The child must be given the opportunity, information and assistance necessary to help them participate in decisions that would affect their lives taking into account their level of maturity.
- The child's culture, language, religion, disability and sexuality must be taken into account in any proceedings.
- The child is at all times entitled to have an environment free of violence and exploitation, one which fosters their health, development needs, spirituality, dignity, self respect and self esteem.
- If action is necessary to protect the child from harm or risk, the course taken must be appropriate with options that are the least intrusive interventions to the child's life and the carer family.
- The child's name, identity, language, culture and religion should be maintained as far as possible.

Can the child apply to change the Court Order?

Yes, the child, carer, birth parent, or the Secretary of the Department of Human Services (DHS) can apply to the Children's Court to vary (change) or revoke (cancel) the PCO.

From the age of 10, a child will usually have separate legal representation in the Children's Court. This is also recognised as the age at which the child can instruct a lawyer, unless they lack the maturity to do so (in which case the lawyer must act in the child's best interests). In exceptional circumstances, the Court may decide that it is in the best interests of a child under the age of 10 to be legally represented.

As regards variation, the Court may, if satisfied that it is in the best interests of the child to do so, vary any of the conditions included in the order or add or substitute a condition but must not make any change in who has the custody or guardianship of the child.

If the application is for the revocation of the order, the Court may revoke the order in whole or in part.

What are the inheritance rights of a child in permanent care?

Children who are subject to a PCO do not have the same inheritance rights as natural or adopted children in relation to the estate of a carer. [See Fact Sheet 5.](#)

It is possible for the child to inherit from a carer, but a carer would need to ensure this happens by including the child in their Will.

If the carer has not made provision for the child in his or her Will, the child may have the right to claim for provision under the family provision legislation in Victoria in terms of which the Court may order that provision be made out of the estate of a carer for the proper maintenance and support of the child who was financially dependant on the carer and who was part of the carer's household.

What are the child's rights to access their records?

A person having guardianship of the child may apply for documents from DHS on behalf of the child.

Once the child reaches the age of 16 years, the child can make his or her own application. [See Fact Sheet 1.](#)

Can the child see his or her extended family?

Yes, if it is the best interests of the child, the carer is expected to facilitate contact with extended family. This may also be a condition set out in the PCO. [See Fact Sheet 3.](#)

If the child is an Aboriginal child and has a placement with a non-Aboriginal family, the child is entitled to a detailed Cultural Plan (as a part of the current case plan and/or placement plan) containing information around ensuring that the child maintains and strengthens his or her links with their Aboriginal family, extended family and community.

Family Law proceedings - What are the child's rights if the permanent carers separate?

A PCO can be suspended on the making of an application to a Family Law Court by a carer seeking parenting orders on terms which the parties to the proceeding have agreed, *provided* the prior consent of the Secretary of DHS has been obtained. The PCO then ceases to be in force on the making of that parenting order by a Family Law Court.

The child has no standing to bring an application in a Family Law Court.



About these fact sheets

This fact sheet was produced as part of Legal Answers For Permanent Care Families, a joint project of Peninsula Community Legal Centre Inc. and Permanent Care and Adoptive Families Inc. Project Worker – Saskia Rijfkoegel. April 2014.

Disclaimer

The material in this fact sheet has been prepared for information purposes only. The contents of this fact sheet should not be relied upon as legal advice. Peninsula Community Legal Centre and Permanent Care and Adoptive Families expressly disclaim any liability howsoever caused to any person in respect of any legal advice given or any action taken in reliance on the contents of the fact sheet.