

Children and Family Law

Terminology

When talking about children during separation, most people are familiar with terms such as “custody”, “residence”, “contact” and “specific issues” orders. These terms are no longer used.

The terms or phrases now used are:

- who a child is to “live with” relates to where a child will live and with whom.
- who a child is to “spend time with” relates to the child physically being with that person at certain times.
- who a child is to “communicate with” relates to the child being in contact with a person via telephone, letter, email and SMS communication.

The term “Child Representative” has also been replaced with “Independent Children’s Lawyer”.

Presumption of equal shared parental responsibility:

When making a parenting order, the Court presumes that each parent has equal shared parental responsibility. “Equal shared parental responsibility” means that both parents have a duty to consult with each other and make a genuine effort to reach agreement on all major issues including education, religion, culture, health and the child’s name.

The presumption will not apply if there is sufficient evidence to show that it is not in the best interests of the child, if there has been family violence, or if there has been child abuse by one of the parents or by a person who lives with the parent.

Considerations in making parenting orders

The paramount consideration is the child’s best interests. Section 60CC of the Family Law Act sets out how the Court determines what is in the child’s best interest.

The court **MUST** be notified of any family violence or child protection matters, notifications or investigations.

Section 60CC requires the Court to primarily consider:

- (a) the benefit to the child having a meaningful relationship with both parents; and
- (b) the need to protect the child from physical and psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The court has to give greater weight to part (b) – protecting the child from harm.

The court also takes into account the following “additional considerations”:

- (a) the views of the child;

- (b) the relationship that the child has with each of its parents and other people such as grandparents or other relatives;
- (c) whether the parents participate in decision making for the child, spend time with the child or communicate with the child;
- (ca) whether the parents are fulfilling their obligations to provide for and look after the child;
- (d) the likely effect of any changes in the child's circumstances including what effect separation from a parent, sibling or other family members may have;
- (e) the practical difficulty and expense of a child spending time with and communicating with a parent;
- (f) the capacity of the parents or guardian to provide for the needs of the child including their emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and culture of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
- (h) if the child is an Aboriginal child or a Torres Strait Islander child the court will consider the child's right to enjoy their culture;
- (i) the attitude to the responsibilities of parenthood that has been demonstrated by the parents;
- (j) any family violence involving the child or a member of the child's family;
- (k) any relevant matters relating to a family violence order;
- (l) whether the proposed order will lead to further proceedings in relation to the child;
- (m) the court also has the power to consider any other fact or circumstance that may be relevant.

Definition of Family Violence

Family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful. This can include:

- (a) assault; or
- (b) sexual assault or other sexually abusive behaviour; or
- (c) stalking; or
- (d) repeated derogatory taunts; or
- (e) intentionally damaging or destroying property; or
- (f) intentionally causing death or injury to an animal; or
- (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- (h) unreasonably withholding financial support at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

A child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

Parenting Order proposing shared time

Where both parents agree on shared parental responsibility or if the Court intends to make that order, the Court must consider whether spending equal time with each parent is in the best interests of the child and if it is practicable in the circumstances of the case.

Where the Court does not make an order for equal time, the Court must consider the

child spending “substantial and significant time” with each of the parents. The same considerations of whether it is in the best interests of the child and whether it is reasonably practicable will be applied.

Family Dispute Resolution (FDR)

All new parties to Court proceedings will need to participate in FDR, prior to making an application in Court. If there is any family violence, any child abuse or risk of abuse or the case is a matter of urgency, then those parties will be exempt from participating in FDR. However, even if a Court is satisfied that an exemption applies, those parties can still be ordered to participate in FDR.

FDR is an alternative dispute resolution method. It involves parties identifying and discussing issues and attempting to negotiate an agreement. FDR is conducted in the presence of an independent third party who is called the Family Dispute Resolution Practitioner (FDRP). The FDRP ensures the session runs effectively and assists with the process but cannot provide legal advice.

The FDRP is responsible for providing parties with a Counselling Certificate if FDR has been unsuccessful, if one party will not participate in FDR or if the parties are exempt from FDR. This Certificate is to be filed in the Court when making a Court application to resolve the matter.

Parenting Plans

A parenting plan is a written agreement about arrangements for children of separated parents. This agreement may be developed through the parties’ own negotiations or after successful FDR.

A parenting plan can cover any issues relating to the arrangements of the children, for example:

- where the child will live;
- what time a child will spend with the other parent;
- how parental responsibility is allocated between the parents;
- how any future disputes will be resolved.

They can be as specific or general as the parties like but should reflect the agreed arrangements between the parties.

A parenting plan must be in writing, dated and signed by the parties. A parenting plan can be changed at any time by a new parenting plan, which is agreed to by both parties.

Unlike a parenting order, a parenting plan is not legally binding. This means that if one party breaches the parenting plan, the other party cannot initiate contravention or enforcement proceedings in Court.

If your parenting plan needs to be changed and you cannot reach an agreement, you will then need to make an application in Court for a parenting order. The Court will consider the most recent parenting plan when deciding what order to make. The Court may make an order that reflects the most recent parenting plan, if it is in the best interests of the child.

Consent Orders / Parenting Orders

A consent order is an agreement of the parties which is filed in the Court. Once the Court has approved the consent order, it becomes a court order.

Consent order kits are available free of charge directly from the Family Law Courts or through their website at www.familylawcourts.gov.au. An Application for Consent Orders, when lodged with the Court, currently costs \$145.

Consent orders for parenting can be changed at any time if both parties agree. If parties cannot agree, then one party will have to make an Application to the Court to change the order.

Consent orders are legally binding. This means that if one party breaches the order, then the other party can initiate contravention proceedings in Court.

If you think that the other party may not adhere to any parenting agreement, then a parenting order is possibly the best option for you. This is because it is enforceable by the court, in contrast a parenting plan is not.

Costs

Generally each party pays their own costs for Court proceedings however in certain circumstances a Court can order that a party pays for the other party's costs.

Contacts

*The Women's Legal Service can be contacted on **1800 682 468**.*

"Children and Family Law" is intended to give general information to people who have children and are going through or who are contemplating going through family law proceedings concerning their children. While we have made every effort to ensure the contents of this publication are accurate at the time of publication the law and services do change. Legal and service exactness is not possible in a publication of this nature. This publication should not be used as a substitute for legal advice.

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