

Children and Family Law

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When parents separate they may not be able to reach an agreement about who the children live with and/or how much time the children spend with each parent. They may also disagree about other issues such as the children's schooling, for example.

If the parents are unable to reach an agreement between themselves, they may need the help of Family Dispute Resolutions (FDR) services, a lawyer, and/or the Court.

The Legal Language

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

The new terms or phrases used are:

- "Live with" is where a child will live and who they will live with.
- "Spend time with" is who the child will physically be with at certain times.
- "Communicate with" is who the child will be in contact with via telephone, letter, email, video and SMS communication.

The term "Child Representative" has also been replaced with "Independent Children's Lawyer."

Family Dispute Resolution (FDR)

FDR refers to a variety of dispute resolution processes – most commonly Mediation. Some of these processes can involve lawyers, and others involve the parents (called 'parties') and the Family Dispute Resolution Practitioner (FDRP).

FDR involves the parties identifying and discussing issues and trying to negotiate an agreement. The

FDRP makes sure the session runs effectively and helps with the process, but they cannot give legal advice.

If the parties cannot reach an agreement, and they want to make an application to the Court, they need to have tried FDR before making the application. The parties may be exempt from participating in FDR if there is any family violence (see our fact sheet 'Family Violence and Family Violence Orders'), child abuse or risk of abuse, or it involves a matter of urgency. But even if a Court is satisfied that an exemption applies, those parties can still be ordered to participate in FDR.

The FDRP is responsible for providing parties with a Counselling Certificate if FDR has been unsuccessful, in situations where 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 that details arrangements for the children if parents have separated. 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; and
- 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, and dated and signed by the parties. A parenting plan can be changed at any time by a new parenting plan, which is agreed by both parties.

Unlike a parenting order, a parenting plan is not legally binding. This means that if one party does not follow the parenting plan, the other party cannot seek a remedy from the Court to have the parent punished, or to make them comply.

If your parenting plan needs to be changed and you cannot reach an agreement, you will need to make an application in Court for a parenting order (see below). 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, but only if it is in the best interests of the child.

Consent Orders

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

Consent order kits are available free of charge from the Family Law Courts or through their website at www.familylawcourts.gov.au. There is a fee for filing an Application for Consent Orders in the Court. The fee is regularly updated, and is listed on the Family Court Website. You may be exempt from these fees in some circumstances, such as if you have a Health Care Card, if you have been granted Legal Aid, or if you would suffer financial hardship from paying the fee.

Consent orders for parenting can be changed at any time if both parties agree. If parties cannot agree, then one party may be able to make an application to the Court to change the order. However, the Court will only allow an application to vary orders if there has been a 'significant change in circumstances' since the original order was made.

If you think that the other party may not follow the parenting plan or agreement that you make with them then a consent order or parenting order may

be the best option for you as it can be enforced, unlike a parenting plan.

Court Orders

If the parties cannot agree on consent orders, then an application can be made to the Family Court or the Federal Circuit Court for a judge to make orders that will be legally binding and enforceable. Information about applying for court orders can be found on the family Court website (www.familycourt.gov.au/) or the Federal Circuit Court website (www.federalcircuitcourt.gov.au).

An Independent Children's Lawyer may be appointed if there are concerns about the welfare of a child. This lawyer will represent the child's best interests, provide any necessary evidence about the wellbeing of the child, and can help the child participate in the matter where appropriate.

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 such as the child's education, religion, culture, health and the child's name.

The presumption of equal shared parental responsibility will not apply if there is enough evidence to show that it is not in the best interests of the child. This happens 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 when making parenting orders

The most important consideration when making a Parenting Order 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 is required to consider:

- (a) The benefit to the child of having a meaningful relationship with both parents; and
- (b) The need to protect the child from physical and psychological harm.

The Court gives priority to the need to protect the child from harm.

Other considerations the Court might make include:

- (a) Any views expressed by child;
- (b) The nature of the relationships with each of the parents and any other person;
- (c) The willingness and ability of each of the child's parents to facilitate, and encourage, a close relationship between the child and the other parent;
- (d) The likely effect of any changes in the child's circumstances;
- (e) The practical difficulty and expense of a child spending time with, and communicating with, a parent, and whether that will substantially affect the child's right to maintain personal relations and direct contact with both parents;
- (f) The capacity of each parent and any other person to provide for the needs of the child;
- (g) The maturity, sex, lifestyle and background of the child and either parent;
- (h) Whether the child or child's parents are of Aboriginal or Torres Strait Islander culture;
- (i) Each parent's attitude to the child and to the responsibilities of parenthood;
- (j) Any family violence;
- (k) Any family violence order;
- (l) Whether an order is the least likely to lead to further proceedings;
- (m) Any other fact or circumstance that the Court thinks is relevant.

In addition to this, the Court must consider the extent to which each parent has fulfilled, or failed to fulfill, their responsibilities as a parent. In particular, the extent to which they:

- (a) Have taken, or failed to take, the opportunity:
 - (i) To participate in making decisions about major long-term issues in relation to the child;
 - (ii) To spend time with the child; and

- (iii) To communicate with the child, and

- (b) Have facilitated, or failed to facilitate, the other parent:

- (i) Participating in making decisions about major long-term issues in relation to the child;
- (ii) Spending time with the child; and
- (iii) Communicating with the child; and

- (c) Have fulfilled, or failed to fulfill, the parent's obligation to maintain the child (provide financial support).

Shared responsibility and equal (or substantial and significant) time

Where both parents agree on shared parental responsibility or if the Court intends to make that order, the Court must consider:

- (i) Whether the child spending equal time with each parent would be in the best interests of the child; and
- (ii) Whether this is reasonably practical in the circumstances of the case.

Where a Court does not make an order for equal time, the Court must consider whether the child is spending "substantial and significant time" with each of the parents. The same considerations as to whether it is in the best interests of the child and whether it is reasonably practical will be applied.

Breaches of Orders

Court Orders (including Consent Orders) are legally binding. This means that if one party breaches the Order, then the other party can start contravention proceedings in Court. Contravention proceedings involve telling the Court that the other parent has not complied with the Order. There may be consequences for breaching an order, such as the child needing to spend extra time with a parent to make up for time lost during a breach.

Breaches can include one parent intentionally failing to do something, or making no reasonable attempt to do something. When breaches come to the attention of the Courts, they consider whether there was a reasonable excuse for breaching the order.

Breaches of orders are not enforceable by Tasmania Police. If the other parent is refusing to return a child as required under a Court Order, the Police will not force them to unless the child has been or is at risk of being harmed. An application will need to be made to the Court for a Recovery Order.

Contacts

- **Women's Legal Service Tasmania:**
1800 682 468
- **Relationships Australia:** 1300 364 277
- **Legal Aid Commission of Tasmania:**
1300 366 611

“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 document 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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