

THE LAW IN RELATION TO PARENTING DISPUTES

Should your matter require a decision to be made by a Family Law Court, the Court in making its decision must have the child's best interest as the paramount consideration.

When determining what is in the child's best interest, the Court must have regard to various objects and considerations which are prescribed in the Family Law Act 1975. Depending on the circumstances the Court must also apply certain presumptions.

CONSIDERATIONS

Section 60CC of the Family Law Act 1975, provides that in determining the child's best interest, the Court must have regard to two "primary considerations". Those primary considerations are:

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

Section 60CC also provides various "additional considerations" which the Court must have regard to. Attached is a list of these additional considerations. How much weight is given to each additional consideration depends on the particular facts and circumstances of each case.

As well as the above considerations, the Family Law Court is also required to take into account the terms of any Parenting Plan which you have made with the other parent as well. Parenting Plans are discussed below.

PRESUMPTIONS

In addition to having regard to the considerations, the Court is also required to apply certain presumptions.

Firstly, when making a Parenting Order the Court must apply a presumption that is in the best interest of the child for the child's parents to have equal shared parental responsibility for the child. Parental responsibility is defined as meaning "all the duties, powers, responsibilities and authority which, by law, parents have in relation to the child".

This presumption does not apply if there are reasonable grounds to believe that a parent of a child has engaged in "abuse of a child" or "family violence".

If the presumption does apply then the Family Law Court must consider whether equal time with each parent would be in the child's best interest.

If the Family Law Court decides that equal time is not appropriate, the Family Law Court must consider whether the child spending substantial and significant time with both parents would be in the child's best interest. Substantial and significant time means:

- (i) *Days that fall on weekends and holidays, and*
- (ii) *Days that do not fall on weekends and holidays, and*
- (iii) *Time that allows the parent to be involved in the child's daily routine and occasions and events of particular significance (ie. birthdays, Christmas etc).*

When the Family Law Court makes its decision, it makes what is known as a Parenting Order. This Order usually deals with:

- (a) *Where a child is to live*
- (b) *The time that the child is to spend with the other parent or person*

- (c) *The allocation of parental responsibility and if necessary the form of consultations each parent or person is to have*
- (d) *The communication the child is to have with the other parent or person (ie. telephone calls etc.)*
- (e) *The process for resolving disputes about terms or operation of the Order in the future.*

COMPULSORY FAMILY DISPUTE RESOLUTION BEFORE GOING TO COURT

Under the Family Law Act 1975, parties are required to make a genuine effort to resolve the dispute by “Family Dispute Resolution”. Family Dispute Resolution means the process in which a “Family Dispute Resolution Practitioner” helps people affected by separation to resolve their disputes with each other. This usually involves mediation with an Accredited Mediator or Counsellor.

Parties are required to attend Family Dispute Resolution and obtain a Certificate from the Family Dispute Resolution Practitioner before a Court can hear their Application unless one of the following exceptions apply:

- (a) *Where the Application is made with the consent of all parties*
- (b) *Where there has been family violence and/or child abuse*
- (c) *If the Application relates to a contravention of a Parenting Order made within the last 12 months and the Applicant can show that the other party has shown a serious disregard for their obligations.*

REACHING AN AGREEMENT WITHOUT GOING TO COURT

You may formalise any agreement about parenting arrangements by either entering into a Parenting Plan or making a joint Application to the Court for Consent Orders to be made.

Parenting Plans

A Parenting Plan is a written agreement which sets out the parenting arrangements for the children. The only legal requirements of a Parenting Plan are:

1. That it is made between parents.
2. That it is in writing.
3. That it deals with parenting matters.
4. That it is dated and signed by both parties.

A Parenting Plan need not be approved or registered by a Court.

Unless a Court otherwise Orders, parties may agree to change a Parenting Order by entering into a Parenting Plan.

Please note that unlike a Court Order, a Parenting Plan is not legally enforceable, although the Court is required to have regard to it when making a Parenting Order. Parenting Orders are however, quick and therefore less expensive.

Consent Orders

Consent Orders are Orders that the Court makes with the agreement of both parties. Consent Orders can cover parenting arrangements for the children as well as financial arrangements such as property.

Consent Orders have the same status as Orders made by a Court after a trial. They are legally enforceable.

ADDITIONAL CONSIDERATIONS

- 1** Any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the Court thinks are relevant to the weight it should give to the child’s views.
- 2** The nature of the relationship of the child with:
 - (a) each of the child’s parents, and
 - (b) other persons (including any grandparent or other relative of the child).
- 3** The willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent.
- 4** The likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:
 - (a) either of his or her parents, or
 - (b) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living.

- 5** The practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis.
- 6** The capacity of:
- (a) each of the child's parents, and
 - (b) any other person (including any grandparent or other relative of the child),
- to provide for the needs of the child, including emotional and intellectual needs.
- 7** The maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the Court thinks are relevant.
- 8** If the child is an Aboriginal child or a Torres Strait Islander child:
- (a) that the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture),
 - (b) the likely impact any proposed Parenting Order under this Part will have on that right.
- 9** The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents.
- 10** Any family violence involving the child or a member of the child's family.
- 11** Any family violence Order that applies to the child or a member of the child's family, if:
- (a) the Order is a Final Order, or
 - (b) the making of the Order was contested by a person.
- 12** Whether it would be preferable to make the Order that would be least likely to lead to the institution of further proceedings in relation to the child.
- 13** Any other fact or circumstance that the Court thinks is relevant.
- 14** Without limiting paragraphs 3 and 9, the Court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfill, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
- (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child, and
 - (ii) to spend time with the child, and
 - (iii) to communicate with the child, and
 - (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child, and
 - (ii) spending time with the child, and
 - (iii) communicating with the child, and
 - (c) has fulfilled, or failed to fulfill, the parent's obligation to maintain the child.
- 15** If the child's parents have separated, the Court must, in applying subsection 14, have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.