

Disputes About Children

How The Family Court of Australia Decides



This fact sheet is intended to help you understand why the Family Courts of Australia make certain decisions about children, and to help you understand the advice given by family lawyers.

Parents and children

The *Family Law Act* (1975) provides direction to the Family Courts of Australia, and to lawyers and their clients, about how to make decisions about children after separation and divorce. Those decisions include major long-term decisions, and also arrangements about who a child should live with, spend time with, and the way that time is spent with a child.

Parents have legal obligations to support their children from the day they are born until their 18th birthday, and sometimes after that birthday. The responsibility of parents includes financial and emotional support, encouragement and guidance so that children can reach their full potential. These responsibilities do not end just because the parents separate, and responsibilities do not end if parents marry again.

The authority of parents over their children decreases with time. As children grow up they gain maturity and the ability to make reasonable decisions. So generally we say that **children have rights and parents have responsibilities**.

- Children have a right to know and be cared for by both their parents.

- Children have a right to spend time on a regular basis with, and communicate with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives).
- Children have a right to enjoy their culture (including the right to enjoy that right with other people who share that culture).

Parental responsibility

Generally, the term “parental responsibility” means the responsibility to make major long-term decisions about the care, welfare and development of a child. These decisions are made by the persons with parental responsibility. Examples of long-term issues are health, education, religious and cultural upbringing, and a child’s name.

Sometimes separated parents have equal shared parental responsibility, and sometimes they agree between themselves to take responsibility for certain decisions but not others.

A person can have parental responsibility and not live with the child. By contrast, the day-to-day decisions about a child’s life are made by the person who is living with the child.

It is important to remember that equal shared parental **responsibility** does not mean that both the parents spend an equal amount of **time** with the child.

Spending time with a child

Time spent with a child can be equal shared time, or substantial and significant time, or any amount of time that is agreed. “Equal shared time” means exactly half of the days of the year are spent with the child. “Substantial and significant time” means that the time spent with the child includes days on weekdays as well as weekends and days on holidays. “Substantial and significant time” allows the parent to be involved in the child’s daily routine and be together on significant occasions.

When you are deciding where a child should live and how much time a child should spend with a person, you should consider two important things:

1. what arrangement is in the **best interests** of the child?; and
2. what arrangement is “practicable”?



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What are the best interests of the child?

The *Family Law Act* (1975) directs the Family Court of Australia, (and all of us) to consider that the “**best interests of the child**” should be the most important consideration when making decisions about children. You will hear this expression many times. What does it mean?

It means that when making decisions about children the courts must give utmost importance to whatever arrangements are best for the safety, care, welfare and development of the children. This is known in English as “arrangements in the **best interests of the child**”.

The *Family Law Act* (1975) also provides guidance about **how** to decide what is in a child’s **best interests** by setting down two primary considerations and thirteen additional considerations. These considerations should be applied when you are evaluating proposed arrangements for children. You should think about the children’s needs both now and in the future.

The two primary considerations are:

- The benefit of children having a meaningful relationship with both of their parents.
- The need to protect children from physical or psychological harm.

Some of these thirteen additional considerations are:

- The children’s views.
- The kind of relationships that children have with their parents and other significant people, including siblings, grandparents and relatives.
- The likely effect of change in where the children are living, including the effect of separation from parents, siblings, grandparents and other relatives or people important to their welfare.

- How much each parent, and any other person, including grandparents can provide for the children’s physical, emotional and intellectual needs.
- Each parent’s attitude to the children, and to their responsibilities of being a parent.

If you would like more information about the **best interests** of the child you can read section 60CC of the *Family Law Act* or you can find it on the internet at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cc.html

What does “practicable” mean?

Ask yourself how easily your proposed arrangement can be put into practice. This is what “practicable” means. Consider things like: how far apart the parents live, how well they can resolve disagreements as they arise, and the effect the proposed arrangements will have on the children.

Your focus should not be on the amount of time that is spent with children but on how it is spent and whether it fosters a close and meaningful relationship between parent and child.

How does the Family Court apply these considerations when assessing proposed arrangements for children?

It is very hard to predict how the court will view a proposal by looking at previous cases as people don’t argue about just one issue. We cannot tell how much importance was placed on a particular aspect of a case when a decision is made. One case offers limited guidance to another case. Here are some aspects the courts have discussed.

Children’s wishes

The children’s view is one of the considerations to take into account when considering what is in the child’s best interests. The amount of weight given to a consideration of the children’s views depends upon the children’s age and maturity. Their wishes are important, but even so, they can be overridden by other factors that relate to their best interests.

Separating siblings

The effect upon the children of separation from each other is one of the considerations to take into account when considering what is in the child’s best interests. It is argued that it is important to children’s future to maintain a close relationship between children as they grow up. While the court has stated that siblings can be separated, in practice it does not happen very often.

Conduct of the parties

The attitude of the parents towards their responsibilities, and the ability of the parents to meet the emotional needs of children are two more of the considerations to take into account when considering what is in the child’s best interests.

You should think about how much each parent has taken the opportunity to spend time and communicate with the child. You should think about how much the parents have shown co-operation in allowing the other parent to spend time with the child.

The issue as to which parent leaves the family home is not relevant, except as it affects the child’s welfare, including future welfare.

Lifestyle

Adults are free to choose their lifestyle. When the Family Court has to judge the proposed lifestyle it uses objective contemporary social standards, and not the social standards that the parents have been raised to follow. The court will evaluate the

proposed mode of living only if it might seriously jeopardise the future welfare of the child.

Religion

The Family Court won't choose one religion over another. The court won't show preference for a religious upbringing over a non-religious upbringing. The court will only involve itself in religious matters where the beliefs and practices impact upon the welfare of the child.

Status quo

This is Latin, and means "the position in which you are standing". It refers to the current arrangements in place for children. The effect of change on children is one of the considerations to take into account when considering what is in the child's best interests.

This argument is that disruption to children's lives is harmful to their development. It is generally accepted that children benefit emotionally from the stability and familiarity of well settled arrangements, and are harmed by disruption to their established life, including family, schooling and friendships. There is still no reason to think that current arrangements for children should never change.

Acts of violence

Protection of children from harm is one of the primary considerations to take into account when considering what is in the child's best interests. Family violence is clearly relevant to the child's welfare. Exposure to family violence can result in physical or mental harm to the child. The court must consider any family violence that has occurred, when making decisions about the amount of time that is to be spent with a child, or the way that time is spent with a child.

This might result in special conditions being imposed on a parent of a child. For example, time with the child might be restricted to certain times of the day. There might be

a condition that time with a child can only be spent in the home of another person, or with another family member present.

The Family Court can order that a parent of a child must first undertake training in parenting, or to undertake counselling to control anger problems, or to control alcohol or other drug use, before any time is spent with a child.

The Family Court will also consider how well a person can protect a child from family violence by others. This might be relevant if a person is pretending that family violence is not happening, or that it is not important.

How can you resolve disputes about children?

You should start by thinking carefully about what arrangements are in the best interests of your grandchild. Then you should try to settle any disagreements by negotiation.

If you can settle your dispute by agreement you can make a **Parenting Plan**, or register a **Consent Order** with the court. If you cannot reach an agreement you can request that the court settle the dispute by making a **Parenting Order**.

A grandparent can make a Parenting Plan and a grandparent can apply to the court for a Consent Order and a Parenting Order.

A **Parenting Plan** is a written agreement between parents that deals with any aspect of parental responsibility and who a child should live with, spend time with or communicate with,

and the care of a child. It must be signed and dated by the parents or the person with parental responsibility.

The problem with Parenting Plans is that if one of the parents does not keep their agreement contained in the Parenting Plan it cannot be enforced in the Family Courts.

Parenting Orders are made by the court. A Parenting Order can deal with the issue of who a child is to live with, time and other communications that a child is to have with other persons, and the allocation of parental responsibility.

The problem with Parenting Orders is that they can be changed by a Parenting Plan that is agreed and signed after the Parenting Order is made.

Consent Orders are Parenting Orders that you have made by agreement, and you have asked the court to make its Orders in the same terms as your agreement.

In deciding whether to make a Parenting Order, even by consent, the Family Courts must consider the best interests of the child as the paramount consideration.

Independent Children's Lawyers

The court can order that the child be represented separately by an Independent Children's Lawyer. The Independent Children's Lawyer represents the child's interests, not the child. This means that the Independent Children's Lawyer does not act on the child's instructions. The lawyer must inform the court of the child's views and inform the court of what arrangements are believed to be in the child's best interests. The lawyer must try to help the parents resolve the dispute.

An Independent Children's Lawyer is not appointed in every case involving children. It is usually in the more difficult cases, for example, cases of child abuse, or where there is a high level of conflict between the parents, or when there is significant medical or psychiatric illness, or where there is a real issue of religious or cultural differences, or when the court is asked to separate siblings. These are just some of the reasons why an Independent Children's Lawyer would be involved.

Children's wishes

The children's views are one of the considerations to take into account when considering what is in the child's best interests. Courts do not usually expect children to be actively involved in expressing their wishes. Children cannot be forced to express a view, as it is considered to be upsetting for them to have to make a choice.

So the court can get this information through an expert or an Independent Children's Lawyer or, very rarely, by the child giving evidence or in a private interview with the judge.

Some other Orders the court can make

Location Orders

A Location Order is made to help you locate a child when you do not know where the child is.

It is an Order directed at government officials, who are required to check their records at least once every three months. It lasts for twelve months. Grandparents can apply for a Location Order.

Recovery Order

This is an Order to return the child to a person who is named in a Parenting Order as someone who has a residence for the child. Grandparents can apply for a Recovery Order. At the time of applying there must already be a Parenting Order in place.

Overseas travel alert

A person cannot take a child out of Australia without a court Order or written consent of the other person with parental responsibility. A child's name can be placed on a watch list, which means that the Australian Federal Police are alerted if someone tries to take a child

out of Australia via an airport or a sea port. To do this you must show the Australian Federal Police your Parenting Orders. You must have Parenting Orders which state that you have a residence for the child, or if there are no Orders, an application for Parenting Orders must have been started.

Some other issues that might arise

Changing a child's name

Sometimes parents change their child's name when they marry again. They do this unofficially, simply by calling the child by a different name. Occasionally it is done to escape from a violent ex-partner.

It is possible to apply for a court Order to stop a parent changing the child's name. The court will consider the long and short-term effects of any change in the child's name, any embarrassment or confusion about identity that might occur, the effect on the relationship between the child and the parent whose name the child previously used, and the level of animosity between the parents.

Relocation

Relocation means planning to move to a different location and taking the child with you, usually interstate or overseas. Sometimes the reason for the move is to move closer to family members, or to get a new job with more income.

The problem with relocation after parents have separated is that it becomes difficult and expensive to spend time with children and it can result in a reduction of the quality of the relationship between parent and children.

Remember that children have a right to spend time on a regular basis with and communicate with both parents

and with other people significant to their care, welfare and development, such as grandparents and other relatives.

Taking a child overseas

Australia has signed an international treaty called the "Hague Convention". This is an agreement between many countries to return children who are wrongfully removed from one of the countries that have signed the treaty. The purpose is to return a child to their home country, where the court can determine their parenting dispute. The overseas country is not interested in deciding which parent the child should live with, but only which court should hear the case.

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