

Children - How the Court Decides Parenting Orders

In the making of any Parenting Orders, including Orders which prescribe who a child lives with, spends time with, and communicates with; the Court must regard the best interests of the child as the paramount consideration.

The overriding factors set out in the *Family Law Act* which demonstrate the purpose of the legislation as to arrangements for children upon separation of their parents are as follows:

- Children get the benefit of both parents having a meaningful involvement in their lives, to the maximum extent, consistent with the best interests of the child;
- Children are protected from physical or psychological harm such as being subjected to, or exposed to, abuse, neglect, or family violence;
- Children must receive adequate and proper parenting to help them achieve their full potential;
- Parents must fulfil their duties and meet responsibilities concerning the care, welfare, and development of their children;
- Children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;
- Children have a right to spend time on a regular basis with, and communicate on a regular basis with both their parents and other people significant to their care, welfare, and development (such as grandparents and other relatives);
- Parents jointly share duties and responsibilities concerning the care, welfare and development of their children;
- Parents should agree about the future parenting of their children; and
- Children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

These are the fundamental principles that the Court will consider when determining the best interests of the child.

Since 1 July 2006, the *Family Law Act* has been amended to provide that there is a presumption of equal shared parental responsibility. This presumption can only be displaced in limited circumstances including where there are instances of family violence or child abuse.

Provided that the presumption is not displaced, the Court must consider an Order where the children spend equal time with each parent or alternatively an Order where the children spend “significant or substantial” time with each parent. A number of factors are set out in the *Family Law Act 1975* which helps the Court determine what is in a child's best interest these include:

Primary considerations

- The benefit to the child of having a meaningful relationship with each of their parents; and
- The need to protect the child from physical or psychological harm such as being subjected or exposed to abuse, neglect, or family violence.

Additional considerations

- Any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the Court considers relevant;
- The nature of the child's relationship with each parent and other significant people (including grandparents or other relatives);
- The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent;
- The likely effect of any other changes in the child's circumstances including the anxiety of separation from either parent, siblings, or other person (including grandparents or other relatives) with whom the child has been living with;
- The practical difficulty and expense of a child spending time and communicating with a parent and whether that difficulty of expense will substantially effect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- The capacity of each parent and any other person (including grandparents or other relatives) to provide for the needs of the child, including emotional and intellectual needs;
- The maturity, gender, background (including culture and traditions), and any other characteristics of the child or parents that the Court deems to be relevant;
- Cultural considerations if the child is an Aboriginal or Torres Strait Islander;
- The extent to which each parent has fulfilled or failed to fulfil his or her responsibilities as a parent, in particular the extent to which each parent has taken, or failed to:
 - Participate in making decisions about major long-term issues in relation to the child;
 - Spend time and communicate with the child;
 - Facilitate, or failed to facilitate the other parent;
 - Fulfil the parent's obligation to maintain the child in events that have happened, and in circumstances that have existed since the separation occurred.

The Court must also consider whether an Order providing that the children spend equal time with each parent or significant and substantial time with each parent is "reasonably practicable". The Court will consider the following factors in determining the reasonable practicality of a proposed Order:

- How far apart the parents live from each other;
- The parents' current and future capacity to implement and arrangement for the child to spend equal or substantial and significant time with each parent;
- The parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement; and
- The impact that any arrangement would have on the child.

In many disputes concerning children some of the above factors are more relevant than others depending upon the particular facts of the case. It is important to always remember that the Court has a wide discretion to make the order that they think is the most proper and that is in the best interests of the child.

Parenting Orders are never final, but if you or your partner wish to change the Orders, then you can do so by agreement but if you don't agree then you must satisfy the Court that a change in circumstances has occurred (since the Parenting Orders were made) that warrants the Court changing the Orders.

If you have any concerns or queries regarding Parenting Orders and wish to understand what is best for your children in your particular situation, contact us for professional Family Law advice.

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