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FACT SHEET

How the Court approaches issues involving children

On 1 July 2006, significant amendments were made to the Family Law Act to change the terminology of Court Orders involving children and there is now a presumption that equal shared parental responsibility by both parents is in the best interests of the child. In those circumstances, Courts deciding on these matters now have an obligation to consider ordering that the child spend equal time with both parents or, at the very least, “substantial and significant time” with each parent. When parents share parental responsibility for their child, they have an obligation to consult on long term issues which affect the child, including his or her current and future education, their religious and cultural upbringing, health issues, their name and any changes to the living arrangements of the child that make it significantly more difficult for them to spend time with either parent.

Terms such as “residence” and “contact” no longer apply. Instead, parenting Orders now include reference to who a child is to “live with” and who a child is to “spend time with” or “communicate with by telephone”.

Section 60A of the Family Law Act makes it very clear that, in all matters involving children, the best interests of the child must be paramount.

Determining the Best Interests of the Child

- When considering arrangements in relation to children, you should always put their best interests first.
- Section 60CC sets out certain factors that a Court must consider in determining the best interests of the child. They are divided into “primary” and “additional” considerations and include:-
 - The benefit to the child of having a meaningful relationship with both parents
 - The need to protect the child from harm, abuse, neglect or family violence
 - Any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) the Court thinks relevant to the weight it should give to the child's wishes
 - The nature of the relationship of the child with each parent and other people, including grandparents or relatives
 - The willingness and ability of each parent to encourage a close and continuing relationship between the child and the other parent
 - The likely effect of any changes in the child's circumstances, such as separation from either parent, any other child or other person whom the child has been living with
 - The practical difficulty and expense of a child having contact with a parent, and whether that difficulty or expense would substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis
 - The capacity of each parent to provide for the needs of the child, including emotional and intellectual needs
 - The maturity, sex, lifestyle and background (including any need to maintain a connection with a lifestyle, culture and traditions) of the child or of either parent

- The attitude to the child and to the responsibilities of parenthood demonstrated by each parent
- Any family violence involving the child or a member of the child's family
- Any other fact or circumstance that the Court thinks relevant.

How Should Parenting be Managed Following Separation? The Role of Court Orders

In most circumstances, it is better for parties to come to their own agreement in relation to parenting of their children than to have a Court impose a set of rules.

However, a small percentage of parties ultimately require a Court to determine these arrangements.

If you reach your own agreement it is prudent to have that agreement formally reflected through a consent order obtained through the Court. The procedure for obtaining consent orders in this way is simple and does not involve attendance at Court. It also does not involve the payment of any filing fee to a Court.

Time and time again, agreements between parents - which have worked for months and sometimes years following separation - are disrupted and fall apart when one of the parents re-partners. This occurs for many reasons including:

- natural emotional reaction created when the other party re-partners
- resentment that the new partner seems to enjoy a good relationship with the child
- resentment that the new partner may be taking on some parenting responsibilities for the child.

In the absence of a consent order, the aggrieved party often withdraws from the informal arrangement and seeks to impose conditions relating to the presence or otherwise of the new partner - for example, "the children can't stay with you overnight if she/he is going to be there".

Rights of Parents in the Absence of Court Orders

By virtue of being the parents of a child, each parent has the same rights and responsibilities in relation to a child if there are no Court Orders in place – no more, no less.

This means, for example, that the parent who does not live with the child is not able to enforce any informal arrangements which have previously existed allowing them to spend time with the child. Similarly, without any Court Orders in place, the person spending time with the child is not bound to return the child to the other parent at any specific time. The parent the child lives with is at risk because the other parent may seek to alter the informal arrangement and have the child live with him/her. They may refuse to return the child to the other parent when this occurs. Such an action is not against the law because there are no Court Orders in place and the Police cannot assist in those circumstances.

Both parents are entitled to collect the child from school. The school does not have the power to refuse a parent unless it is provided with evidence of a Court Order granting the day to day care and control of the child to one parent only.

Without a Court Order there is no certainty for the parties or the child relating to arrangements. Each parent is at the mercy of the other.

Benefits of Court Orders

Court Orders provide certainty so that parties and the child can plan their lives in advance without being at risk of last minute changes to those arrangements.

If a parent refuses to return a child to the parent the child lives with, the “lives with” parent can take action to enforce the Orders and retrieve the child.

Likewise, if the “lives with” parent denies the other parent time with the child, the other parent can ask a Court to deal with that parent for breaching the Orders.

Unless the Orders otherwise provide, neither party will be entitled to remove the child from Australia. In addition, Orders can clarify the obligations on each parent regarding transport arrangements and other specific issues, including extra-curricular activities which take place on weekends and provision of information relating to things like schooling, school reports and parent-teacher interviews.

Having Court Orders in place which set out the arrangements for the child protect everyone involved against the consequences of a further breakdown in the parental relationship.

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