

Children & Parenting

How does the Family Court make parenting decisions?

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PRINCIPAL



Guideline

For general information purposes only

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Parenting Arrangements

Knowing how the Family Court makes parenting decisions will give you an advantage both in negotiations and in court. You will be able to structure the support for the outcome you want to achieve in a much more methodical manner.

What are the outcomes most parents in parenting disputes want to achieve?

- To have a good quality relationship with their children
- To have a say in how their children are raised and what kind of care they receive
- To be able to parent their children on a day to day basis without interference

A good quality relationship with a child is established over time by the degree of involvement a parent has in a child's life. This includes regular time communicating and seeing each other (quantity) that involve positive, healthy interactions characterised by boundaries and reliable support (quality).

Parental Responsibility

Having a say in how your child is raised and what kind of care they receive is encompassed by the legal term: parental responsibility. Parental responsibility refers to all the duties, powers and obligations parents have in relation to their children by law. This used to be called “child custody” and “guardianship”. It includes the obligation of a parent when making:

1. Major long term decisions - such as where they go to school, what kind of medical, health or dental treatment they have, religion, the child’s name, any changes to the child’s living arrangements that make it more difficult for one parent to spend time with the child; and
2. Day-to-day decisions – such as what time they should go to bed, what they should wear and eat, what activities they should participate in, and who they should associate with.

The starting legal position is that each parent of a child under the age of 18 years has full parental responsibility. This obligation exists whether you are in a relationship with the other parent or not, and can only be changed by a court order specifically pertaining to parental responsibility or by agreement of parents. It also means that this obligation can be exercised by either parent solely, without consulting the other parent, because both have the same decision making power in respect of the children.

Parents who separate have an option to not make an order about parental responsibility and allow the default legal position to remain as is. However, in most cases of separation parents hold very valid concerns about the other party making a major life decision for a child without being consulted. Some extreme examples include when one parent decides to change a child’s name, school enrolment, move the child to a location that makes it difficult for the other parent to spend time with the child, or authorise a travel document to be issued. It is completely legal for one parent to make these decisions without consulting the other parent.

Parental Responsibility

How Can Parental Responsibility be Altered?

Only through court orders – whether by a judge or by consent of the parents, or in a parenting plan by agreement of the parents.

When parents separate, the law states that we start with the presumption that parents should have equal shared parental responsibility. This means that parents will make decisions about major long term issues by consulting with each other. This is not always beneficial to a child if parents are engaged in high levels of conflict.

Shared parental responsibility is an arrangement for separated parents that can work well when parents cooperate with each other and communicate well with each other. It means that you jointly have to discuss and come to an agreement when making the big, life decisions for your children. In this case, one parent cannot make a decision without conferring with the other parent.

The obligation with shared parental responsibility is that you must:

- Consult each other
- Make a genuine effort to come to a joint decision
- The decision must have been made jointly

This does not mean you have to speak to each other or see each other. Consultation can be through written communication. Where a decision can't be made after joint consultation, you can seek a court order as to this one issue. With an order for shared parenting in place, it is illegal for one parent to make a unilateral decision about the children without consulting the other parent.

This doesn't effect day-to-day decisions. Day-to-day decisions are typically made by the parent that the children are spending time with at the time of the decision. So there is no need to consult with each other on these matters.

Parental Responsibility

Equal Shared Parental Responsibility

The courts start from the position that where parents seek shared parental responsibility, then this should be allocated equally – “equal shared parental responsibility”. This presumption can be rebutted by evidence that it is not in the best interests of the child to make such an order. If a parent alleges there has been abuse of a child or family violence, the presumption does not apply.

“Equal shared parental responsibility” does not mean children spend an equal amount of time with each parent, it only relates to how decisions are made.

Other Arrangements for Parental Responsibility

Sole parental responsibility can be requested where one parent has shown either that they do not commit to their parental obligations consistently, where there is a high level of conflict between the parents making communication unworkable, or there is some unacceptable level of risk to the child. In most cases, this will still mean that the other parent can make day-to-day decisions for the child when the child is in their care.

A court can also make orders that impose sole parental responsibility for some major life decisions but shared parental responsibility for other decisions. E.g. only the mother can make decisions about the children’s religious activities because the father holds risky or extreme religious views. However, the father is sensible with respect to other matters.

If a matter proceeds to litigation, the parents will then lose some of their autonomy in making decisions. A court will decide what is in the best interests of the child. Therefore, even if both parents agree on equal shared parental responsibility, if the court find a high level of conflict between parties and/or if there is serious risk to the child with one parent’s inability to make sensible decisions, the court can order sole parental responsibility in respect of just one parent.

Best Interests Test

The way in which the Family Court makes parenting decisions is to apply the best interests of the child test. Most countries across the world accept this test as the standard by which to make parenting orders.

Family law legislators in Australia have drafted and refined the law following decades of research and identified four key goals with respect to parenting of children. We believe that it is in the best interests of a child that:

1. They have the benefit of both of their parents having a meaningful involvement in their lives to the maximum extent that is consistent with what is in their best interests.
2. They should be protected from physical and psychological harm, or from being subjected to or exposed to abuse, neglect or family violence.
3. They should receive adequate and proper parenting to help them achieve their full potential.
4. The parents of the child fulfil their parental duties, and meet their responsibilities, concerning the care, welfare and development of the child.

So how do we know when these four goals are being achieved for a particular family? Is there a one ideal standard of life that all parents must provide? No, the reality is that the Judge is deciding what best can be done for a particular child in their unique circumstances. The Family Court looks at several factors that make up the best interests of the child test to get an impression of what parenting orders need to be made.

The Decision Maker

Who determines what is in the best interests of a child?

If you are in court and you cannot resolve the matter between you and the other parent, the Judge (one person) will make that decision. If you are not in court, you and any other legal guardian/parent are able to arrive at an agreement.

There are several distinct differences between arriving at an agreement between parents and what happens once the family enters into the court system. When you make an agreement prior to filing in court, you can enter into a parenting plan on any terms that you like. There is no requirement for any official ratification or for someone to look over them or tell you whether they are fair or not. You and your former spouse have complete control over the outcome of the family arrangement.

Once a family enters into the legal system, you lose some control over the outcome. If you arrive at an agreement during the case, then consent orders can be made and the Judge can decide he/she does not have to make sure the agreement meets the best interest test, or you can elect to dismiss the case mutually and enter into a parenting plan (in which case the judge won't know what the agreement is).

However if the Judge determines that a child is at risk of harm, they can reject the agreement and make an order for the child to be represented by an Independent Children's Lawyer (ICL), and if that occurs the ICL is like a third party who has to also agree to the orders. The court can also make an order to not permit a case to be dismissed if the parents arrive at an agreement outside of court, and continue the case with an ICL allocated.

Best Interest Test Formula

The Twin Pillars

The first two goals of the four keys goals of the family law legislation actually form the basis of the two primary considerations the Family Court always keeps in mind when making parenting decisions - known as the "Twin Pillars".

1. Every child is entitled to have a meaningful relationship with both of their parents.
2. However, a child must also be protected from any harm, including psychological, physical, exposure to violence and abuse.

The requirement to protect a child from harm is given greater consideration than the need for a child to have a meaningful relationship with their parents.

The Twin Pillars are goals that the Court strives to achieve in the circumstances and will ask:

"Is there a benefit to the child having a relationship with this parent if an order is made to try and support the relationship?"

Or is that benefit outweighed by the risk of harm to the child?"

Best Interest Test Formula

What does it mean to have a "meaningful relationship with a child?"

What it means to have a meaningful relationship with a child has not been defined in the legislation. However, there are cases that have looked at this consideration and it is well accepted that it means the relationship is important, significant and valuable to the child. Whether a relationship is meaningful depends on both how much time the parent spends with the child and the quality of those interactions. What if a parent has had little to no interaction with a child and suddenly wants to play a role in the child's life? Will this parent automatically be denied such a right? This is where most parents construct this question incorrectly - it's not the parent who has the right to play a role in the child's life. It is the child that has the right to have their parent play a role in their life. As a result, the Court would look at what benefit would such a relationship play in the child's life and ask the question is it in this child's best interest that a relationship now be introduced with this parent where no relationship existed previously?

It is very rare for a Court to find that there is no benefit to a child having a relationship with a parent. There have to be findings of an unacceptable risk of harm to the child through exposure to that parent. The more common approach is that the Court will look at how it can support the development and maintenance of a meaningful relationship between child and parent whilst mitigating any acceptable levels of risk (for example, if a parent is a drug addict, they may be required to provide periodic negative hair drug test results).

Best Interest Test Formula

Protecting a child from an unacceptable risk of harm

The need to protect a child from an unacceptable risk of harm will become an issue for consideration if allegations are raised that a child has been or is at risk of being exposed to harm. This allegation does not have to arise from the other parent and can arise from any person. Such allegations should be put to the police and child protective services in the first instance for investigation. Certain professionals who work with children have mandatory reporting obligations where they must call child protective services if a child communicates to the professional that they have been harmed. If there are allegations of harm of any form, the child should be taken to a medical practitioner immediately for assessment and referral.

Courts take allegations of harm to a child very seriously and it is very important to have objective medical and (if necessary) psychological evidence to support such allegations. Unfortunately, allegations are routinely made by parties with the knowledge that they are false or by parents with good intentions but which are based on erroneous assumptions. The Family Court is not an investigative body and is limited to making a determination based upon the evidence presented before the Court. Most allegations made simply are not backed up by objective evidence and, as a result, cannot lead to a positive finding of unacceptable risk of harm. Researchers analysed 380 Australian Family Court published judgements (from 2012 to 2019) where a party had made allegations of child sexual abuse (and the other party disputed these allegations) and found that of the 380 cases, a finding of risk of sexual harm by the judicial officer was found in 47 cases (12%).^[1]

[1] Webb, Moloney, Smyth, Murphy (2021) Allegations of child sexual abuse: An empirical analysis of published judgements from the Family Court of Australia 2012–2019. *Aust J Soc Issues*. 56:322–343.

Additional Considerations

Assessing the circumstances of your particular case

The further 25 factors make up a list known as the “Additional Considerations”. These Additional Considerations are used by the Court to assess the child’s circumstances to determine what is in the child’s best interests. The 25 factors can be summarised broadly into 10 factors as set out in the following list.

1. The child’s views, if any, have been expressed.
2. The nature of the relationship of the child with the parents and other persons.
3. The extent to which each parent has taken the opportunity to participate in making decisions relating to major long-term issues affecting the child, spends time with the child/communicates with the child, and has fulfilled their obligations to maintain the child.
4. The likely effect of any changes to the child’s circumstances.
5. The practical difficulty and expense of spending time with the child.
6. The capacity of the parents (and other persons) to provide for the child’s needs
7. The maturity, sex, lifestyle and background of the child and parents.
8. The attitude of the parent to the child and to parenthood.
9. If there is any family violence, and are there any family violence orders relating to the child or a member of the child’s family.
10. What order being made would be least likely to lead to further proceedings.
11. Anything else that the court thinks is relevant.

If the child is Aboriginal or Torres Strait Islander, certain additional considerations will also apply.

Agreements

How an agreement should be formalised if reached

Parenting arrangements can be:

- informal
- made into an agreed parenting plan that is signed and dated by both parents, or
- parenting orders can be sought by consent or following defended hearing.

Parenting arrangements can deal with any aspect of the care, welfare or development of a child or any aspects of parental responsibility for a child (i.e. how decisions about the long term welfare of a child are made).

Typically, arrangements will define the allocation of parental responsibility, who a child lives with and spends time with, communication with a child, processes for resolving disputes, and in some cases maintenance of a child.

Consent orders are legally binding and there are consequences (e.g. penalties) for a contravention of an order by a party that can be enforced in court by the non-defaulting party. They have the same level of force as though a judge had made the decision in court. There are no legal consequence if a party decides not to comply with a term in a parenting plan.

Consent orders can be varied by a subsequent parenting plan at a later stage.



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