

FACT SHEET - PARENTING ORDERS

MATTERS TO BE CONSIDERED BY THE COURT

Section 61DA Family Law Act 1975 Court must apply a presumption that it is in the best interests of the child for the parents to have equal Shared Parental Responsibility

Grounds for challenging presumption

61DA(2) and (4)

Reasonable Grounds to believe that there has been abuse or violence or evidence satisfies the Court that it is not in the best interests of the child

To determine best interests

60CA – Best Interests of the child are paramount

60CC – Primary considerations and additional considerations

If Court believes presumption should apply

65DAA – Court must consider whether equal time with each parent would be in the child's best interests and is reasonably practicable

If equal time is not reasonably practical

Court must consider whether substantial and significant time would be in the child's best interests and is reasonable practicable

Basis of Consideration

60CA – Child's interests are the paramount consideration

60B – Objects

60CC – Primary and additional considerations used to determine what is in the child's best interests



If Court doesn't believe presumption should apply

60CA – Bests interests of the child are paramount

60B – Objects

60CC – Primary Considerations and additional considerations

Matters to be taken into account by the Court in relation to child related matters

(Extract from Part 7 Family Law Act)

SECTION 61DA PRESUMPTION OF EQUAL SHARED PARENTAL RESPONSIBILITY WHEN MAKING PARENTING ORDERS

- 1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

- 2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
 - a) Abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
 - b) Family violence.
- 3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.
- 4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

If the court believes that it is in the best interests of the child for the parents to have equal shared parental responsibility – then Section 65DAA applies.

SECTION 65DAA COURT TO CONSIDER CHILD SPENDING EQUAL TIME OR SUBSTANTIAL AND SIGNIFICANT TIME WITH EACH PARENT IN CERTAIN CIRCUMSTANCES

Equal time

- 1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:
 - a) Consider whether the child spending equal time with each of the parents would be in the best interests of the child;

- b) Consider whether the child spending equal time with each of the parents is reasonably practicable; and
- c) If it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

Substantial and significant time

2) If:

- a) A parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and
- b) The court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and

The court must:

- c) Consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
- d) Consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
- e) If it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

- 3) For the purposes of subsection (2), a child will be taken to spend **substantial and significant time** with a parent only if:
 - a) The time the child spends with the parent includes both:
 - i. Days that fall on weekends and holidays; and
 - ii. Days that do not fall on weekends or holidays; and
 - b) The time the child spends with the parent allows the parent to be involved in:
 - i. The child's daily routine; and
 - ii. Occasions and events that are of particular significance to the child; and

- c) The time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.
- 4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

- 5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:
 - a) How far apart the parents live from each other; and
 - b) The parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
 - c) The parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
 - d) The impact that an arrangement of that kind would have on the child; and
 - e) Such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

- a. 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 (paragraph 60CC(3)(c));
- b. the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity--the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

If the Court does not believe that it is in the best interests of the child for the parents to have equal shared parental responsibility then the court must determine how much time each parent spends with the children taking into account sections 60CA, 60B and 60CC

SECTION 60CA CHILD'S BEST INTERESTS PARAMOUNT CONSIDERATION IN MAKING A PARENTING ORDER

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

SECTION 60CC HOW A COURT DETERMINES WHAT IS IN A CHILD'S BEST INTERESTS

Determining child's best interests

- 1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

- 2) The 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.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

- 3) Additional considerations are:
 - a) 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;
 - b) The nature of the relationship of the child with:
 - i. Each of the child's parents; and
 - ii. Other persons (including any grandparent or other relative of the child);
 - c) 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;
 - d) The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - i. Either of his or her parents; or
 - ii. Any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

- e) 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;
 - f) The capacity of:
 - i. Each of the child's parents; and
 - ii. 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;
 - g) 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;
 - h) If the child is an Aboriginal child or a Torres Strait Islander child:
 - i. 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); and
 - ii. The likely impact any proposed parenting order under this Part will have on that right;
 - i) The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
 - j) Any family violence involving the child or a member of the child's family;
 - k) Any family violence order that applies to the child or a member of the child's family, if:
 - i. The order is a final order; or
 - ii. The making of the order was contested by a person;
 - l) 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;
 - m) Any other fact or circumstance that the court thinks is relevant.
- 4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, 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 fulfil, the parent's obligation to maintain the child.

4A) If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

Consent orders

- 5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

- 6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
 - a) To maintain a connection with that culture; and
 - b) To have the support, opportunity and encouragement necessary:
 - i. To explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - ii. To develop a positive appreciation of that culture.

SECTION 60B OBJECTS OF PART AND PRINCIPLES UNDERLYING IT

- 1) The objects of this Part are to ensure that the best interests of children are met by:
 - a) Ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
 - b) Protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - c) Ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

- d) Ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- 2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
- a) 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; and
 - b) 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); and
 - c) Parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
 - d) Parents should agree about the future parenting of their children; and
 - e) Children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).
- 3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
- a) To maintain a connection with that culture; and
 - b) To have the support, opportunity and encouragement necessary:
 - i. To explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - ii. To develop a positive appreciation of that culture.

Other matters to consider

SECTION 65DAC EFFECT OF PARENTING ORDER THAT PROVIDES FOR SHARED PARENTAL RESPONSIBILITY

- 1) This section applies if, under a parenting order:
- a) 2 or more persons are to share parental responsibility for a child; and
 - b) The exercise of that parental responsibility involves making a decision about a major long-term issue in relation to the child.
- 2) The order is taken to require the decision to be made jointly by those persons.

Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).

- 3) The order is taken to require each of those persons:
 - (a) To consult the other person in relation to the decision to be made about that issue; and
 - (b) To make a genuine effort to come to a joint decision about that issue.
- 4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

SECTION 65DAE NO NEED TO CONSULT ON ISSUES THAT ARE NOT MAJOR LONG-TERM ISSUES

- 1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who:
 - a) Has parental responsibility for the child; or
 - b) Shares parental responsibility for the child with another person;

about decisions that are made in relation to the child during that time on issues that are not major-long term issues.

Note: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long-term issues.

- 2) Subsection (1) applies subject to any provision to the contrary made by a parenting order.

Definitions

Major long-term issues, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

- a) The child's education (both current and future); and
- b) The child's religious and cultural upbringing; and
- c) The child's health; and
- d) The child's name; and
- e) Changes to the child's living arrangements that make it significantly more difficult for the child to spend more time with a parent.

To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a major long-term issue in relation to the child. However, the decision will involve a major long-term issue if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent.

Family Violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of a person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

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