

# 5 things you should know about 'family law'

## Who Should Children Live With?

### Introduction

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* amended important areas of the *Family Law Act 1975* (Cth.) ('the Act') primarily in relation to children and with whom they should live when families separate. The amendments aim to bring about a cultural shift in attitudes and the management of family separation by moving away from litigation and towards less adversarial procedures of cooperation and co-parenting. This discussion focuses on the significant changes to the way in which a Court determines parenting issues and in particular with whom a child should live with (previously termed "residence") and spend time with (previously termed "contact"). Although the amendments also aim to assist families to resolve disputes outside the Courts and litigation, for example, by way of non-Court based family services such as the new Family Relationship Centres, this article does not address those issues.

### Objects of the Act

The Act now explicitly provides that the best interests of children are met by, among other factors, "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 "protecting the children from physical or psychological harm."

### Presumption of Equal Shared Parental Responsibility

The major change is that now, 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. Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. This presumption is new in Family Law. However, the presumption may be rebutted if there is evidence that this would not be in the best interests of the child, such as in cases of abuse or family violence.

### Child's Best Interests

In deciding what parenting Order to make, the Court must still regard the best interests of the child as the paramount consideration. However, the Court is now directed to consider a number of primary considerations, and then additional (or secondary) considerations.

#### *Primary Considerations*

The Court must consider two primary considerations: (i) "the benefit to the child of having a meaningful relationship with both of the child's parents"; and (ii) "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence."

## *Additional Considerations*

After considering the primary considerations, the Court must consider a list of 14 additional considerations. These include views expressed by the child, the nature of the relationship between the child and each parent, the practical difficulty and expense of a child spending time with and communicating with a parent, and the capacity of each parent to provide for the child's emotional and intellectual needs. The Court must also consider the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent. These considerations reinforce the legislative focus on equal shared parental responsibility and reflect the objects as described above.

The focus is not only on the willingness of parents to encourage relationships between the child and the other parent, but also on the relationship between the parents and the way in which they interact. In a significant change, the Court must consider if a parent has facilitated the other parent's participation in making decisions about the child. The Court must also consider the extent to which each parent has fulfilled their obligation to maintain the child.

## **Court to Consider Child Spending Equal Time or Substantial and Significant Time with Each Parent**

If a parenting Order provides that parents are to have equal shared parental responsibility for the child, the Court *must* consider whether the child spending *equal time* with each of the parents would be in the best interests of the child. The Court must also consider whether equal time with each parent is reasonably practicable.

If a parenting Order provides for equal shared parental responsibility, but not equal time with each parent, the Court *must* consider whether the child spending "substantial and significant time" with each parent would be in the best interests of the child and, if so, whether this is reasonably practicable.

"Substantial and significant time" means weekdays, weekends, holidays and occasions that allow the parent to be involved in the child's daily routine. Substantial and significant time also includes occasions and events that are of particular significance to the child or parent such as birthdays and special celebrations.

When determining what is reasonably practicable for a child, the Court considers things such as how far apart the parents live from each other, the parents' current and future capacity to implement the child spending equal or substantial and significant time with each parent, the parents' current and future capacity to communicate and resolve difficulties in implementing an arrangement of that kind, the impact that such an arrangement would have on the child and any other matter the Court deems relevant.

## **Conclusion**

The amendments have ushered in significant changes reflecting a push towards equal shared parental responsibility while ensuring that the best interests of the child remain the paramount consideration in making a parenting Order. The Court is required to consider the way in which parents interact with their children and, in a significant legislative change, with each other. It remains to be seen how these factors will be interpreted by the Court and if it will deter parents from making demands of their former spouse [some say "blackmail"] that had to be met before allowing children to see the other parent.

Contrary to popular opinion, the new legislative changes do **not** provide for children automatically spending equal time living with each of their parents. The Court must apply the presumption that there should be equal shared responsibility and, if there should, it must then consider whether spending equal time with both parents is in the child's best interests and reasonably practicable. Parents should always remember that what may be appropriate living arrangements for one family may be entirely inappropriate in another. In Family Law matters, even where, on the face of it, two cases have similarities the outcome in one case may be completely different to another. Obtaining early assistance and advice from professionals, such as counsellors and family lawyers, is advisable to assist parties in understanding what the appropriate legal position may be and then moving on with discussions or negotiations with the other party.

For queries about these or any other family matters please contact Wilsons' family law team on ph: (03) 9672 4000, email [wilsons@wilsonslawyers.com.au](mailto:wilsons@wilsonslawyers.com.au) or visit our website at [www.wilsonslawyers.com.au](http://www.wilsonslawyers.com.au)