FACT SHEET: PARENTING ORDERS

FAMILY & RELATIONSHIP LAW

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The reality of separation and divorce is that one family must become two, and time with your child must be shared. If you reach agreement with your former partner as to the future living arrangements for your child, this can be documented in one of two ways:

- a parenting plan, which is a written agreement signed by both parents, setting out the agreement reached as to the time spent with the child, or
- parenting orders, which are usually drafted by a lawyer, and which become a legally enforceable agreement, made by a Court.

The difference between a parenting plan and parenting orders is simply that orders are enforceable by a Court whereas a parenting plan is not.

WHAT IF MY FORMER PARTNER & I CANNOT AGREE ON PARENTING ARRANGEMENTS?

If you cannot reach agreement with your former partner, the next step is to seek the assistance of a mediator, Family Dispute Resolution Practitioner or a lawyer to help you to negotiate an agreement.

REQUIREMENT TO ATTEND/ATTEMPT DISPUTE RESOLUTION (MEDIATION)

The *Family Law Act 1975* (Cth) (**Family Law Act**) requires parents to have attempted mediation or family dispute resolution before issuing Court proceedings, and to provide a certificate to confirm that an attempt has been made (often referred to as a Section 60I Certificate), unless:

- there are circumstances of urgency
- an application has been made previously in the past 12 months
- one or more of the parties is unable to participate effectively in mediation (because of incapacity), or
- there is abuse, family violence, or a risk of abuse or family violence occurring.

If you would like to attempt mediation, further information can be found at www.familyrelationships.gov.au.

If parenting arrangements cannot be resolved through mediation, you can then issue proceedings in the Federal Circuit and Family Court of Australia. We strongly recommend obtaining legal advice before doing so.

LEGISLATIVE APPROACH IN PARENTING MATTERS

Recent changes to the Family Law Act came into effect on 6 May 2024, which have changed the legal framework in terms of how parenting matters will be dealt with by the Courts when an application is made by either parent. The amendments have been aimed at simplifying the Court pathway and to provide for a greater consideration of family violence. A significant part of the change is to focus on the new term “safety”. In determining the best interests of the child, the must court consider the ”need to protect” a child from physical or psychological harm as a result of being subjected to, or exposed to, abuse, neglect or family violence. Previously there were 16 factors that the Court had to consider when determining whether parenting arrangements were in the best interests of the children involved. That has been reduced to a manageable six factors. These factors are:

- promoting the safety of children and their carers
- views expressed by the child
- the developmental needs of the child
- the capacity of carers responsible for the child to provide for those needs
- the benefit of the child being able to have a relationship with significant persons to the child, and
- anything else relevant to the child.

Whilst any simplification is welcome, there are a number of matters that will also continue to be relevant to children's orders, such as the practicalities of each parent spending time with the child given geographic or work factors and making orders which are less likely to lead to further court proceedings. However, the intention of the amendment is to allow greater focus on the best interests of a child when determining parenting arrangements.

WHAT IS PARENTAL RESPONSIBILITY?

Parental responsibility refers to long term aspects of a child's care and welfare such as education, health, religion and change of name. Previously, the starting point for a court had to be that both parents shared in this responsibility unless there was evidence to rebut it. That presumption has now been removed, and the consequence of this may be that there will be greater claims of sole parental decision making, where circumstances justify this. Prior to the amendments, the Court had to consider whether an equal time arrangement was inappropriate. This is no longer the case. Whilst it was only ever 'consider', this framework led to much conjecture that both parents were entitled to equal time no matter what. The removal of this structure may free up courts to contemplate arrangements which are not focused on each parent spending significant time with the child. This may become apparent in high conflict cases, where both parents want to be the primary carer, but struggle to cooperate in any meaningful way with each other, or where there are significant allegations around family violence or other risk issues impacting the safety of the child/ren.

CHILD IMPACT REPORT, FAMILY REPORT & INDEPENDENT CHILDREN'S LAWYER

As part of the proceedings your family may be asked to meet with a specialist family psychologist, who will meet with you, your former partner and your child/ren, and then prepare a report (known as a Child Impact Report or Family Report) which sets out recommendations to the Court for future parenting orders. The Court may also appoint an Independent Children's Lawyer (**ICL**) to act on behalf of the child/ren. This normally occurs in very complex cases, or where there are allegations of abuse or family violence. The ICL is a party to the proceedings, and under the recent amendments is required to meet with the child/rem in any dispute, and provide the child with an opportunity to express any views.

FINALISING PARENTING PROCEEDINGS

You will have an opportunity to resolve your matter throughout the Court process by negotiation and, if you do, parenting orders can then be made by the Judge by consent. However, if you cannot reach agreement, your case will be listed for a final hearing, and a Judge will make final orders taking into account the recommendations of any family report and the evidence provided by you, your former partner and any ICL. We recommend that any agreed parenting arrangement should be documented in writing to ensure that you can enforce compliance. The form of the written agreement we recommend will depend on the level of trust you share with the other parent and whether you require formal order for enforcement purposes, or prefer a flexible agreement, which can be amended as the children grow older.

WHAT CAN I DO IF MY FORMER PARTNER TAKES MY CHILD FROM ME?

If, following separation, your child is removed from your care without your consent, you can seek a Recovery Order from the Court to have your child returned to you. If you have concerns that your child may be taken out of the country, then you can seek an Airport Watch List Order, which will create an alert visible at all international airports throughout Australia and will stop your child leaving Australia. Both applications can be made on an urgent ex parte basis (within 24 hours and without the other party being notified in certain circumstances).

WHAT DO I DO IF I AM CONCERNED I AM NOT THE BIOLOGICAL PARENT OF THE CHILD?

In the event that you have concerns about the paternity of a child, an application can be made to the Court to have paternity testing undertaken to resolve any dispute. The Court can order the child, the mother or any other person attend for such testing, including submitting to a medical procedure to determine parentage. The Court can then make parenting orders once the results are known.

I AM A GRANDPARENT/STEP-PARENT/CLOSE FAMILY MEMBER OF THE CHILD – DO I HAVE RIGHTS?

Yes. Under the Family Law Act a significant person to the child can seek orders to spend time or communicate with a child.

CONTACT US

Our Family & Relationship Law team can provide you with expert advice regarding your family law matter. Please contact us on (03) 9663 9877 or adminfamily@khq.com.au for a complimentary 30-minute discussion.