

Parenting orders

Family Law Act 1975

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Section 64B – meaning of parenting order and related terms

FAMILY LAW ACT 1975 - SECT 64B

Meaning of parenting order and related terms

(1) A ***parenting order*** is:

(a) an order under this Part (including an order until further order) dealing with a matter mentioned in subsection (2); or

(b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a).

(2) A parenting order may deal with one or more of the following:

(a) the person or persons with whom a child is to live;

(b) the time a child is to spend with another person or other persons;

(c) the allocation of parental responsibility for a child;

(d) if 2 or more persons are to share parental responsibility for a child--the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;

(e) the communication a child is to have with another person or other persons;

(f) maintenance of a child;

(g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:

(i) a child to whom the order relates; or

(ii) the parties to the proceedings in which the order is made;

(h) the process to be used for resolving disputes about the terms or operation of the order;

(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

Note: Paragraph (f) – parenting order cannot deal with the maintenance of a child if the *Child Support (Assessment) Act 1989* applies.

- (3) Without limiting paragraph (2)(c), the order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.
- (4) The communication referred to in paragraph (2)(e) includes (but is not limited to) communication by:
- (a) letter; and
 - (b) telephone, email or any other electronic means.
- (4A) Without limiting paragraphs (2)(g) and (h), the parenting order may provide that the parties to the proceedings must consult with a family dispute resolution practitioner to assist with:
- (a) resolving any dispute about the terms or operation of the order; or
 - (b) reaching agreement about changes to be made to the order.
- (5) To the extent (if at all) that a parenting order deals with the matter mentioned in paragraph (2)(f), the order is a **child maintenance order**.
- (6) For the purposes of this Act:
- (a) a parenting order that provides that a child is to live with a person is **made in favour** of that person; and
 - (b) a parenting order that provides that a child is to spend time with a person is **made in favour** of that person; and
 - (c) a parenting order that provides that a child is to have communication with a person is **made in favour** of that person; and
 - (d) a parenting order that:
 - (i) allocates parental responsibility for a child to a person; or
 - (ii) provides that a person is to share parental responsibility for a child with another person;is **made in favour** of that person.
- (9) In this section:
"this Act" includes:
- (a) the standard Rules of Court; and
 - (b) the related Federal Magistrates Rules.

Section 60B – objects of Part VII of the Act and principles underlying it

FAMILY LAW ACT 1975 - SECT 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.
- 4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

Note: The text of the Convention is set out in Australian Treaty Series 1991 No. 4 ([1991] ATS 4). In 2011, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Section 60CA – child's best interests paramount consideration in making a parenting order

FAMILY LAW ACT 1975 - SECT 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

FAMILY LAW ACT 1975 - SECT 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).

- (2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph 2(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 extent to which each of the child's parents 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.
- (ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child.
- (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) if a family violence order applies, or has applied, to the child or a member of the child's family – any relevant inferences that can be drawn from the order, taking into account the following:
 - (i) the nature of the order;
 - (ii) the circumstances in which the order was made;
 - (iii) any evidence admitted in proceedings for the order;
 - (iv) any findings made by the court in, or in proceedings for, the order;
 - (v) any other relevant matter.
- (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.

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 61DA – presumption of equal shared parental responsibility when making parenting orders

FAMILY LAW ACT 1975 - SECT 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.

Section 65DAA – Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances

FAMILY LAW ACT 1975 - SECT 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; and
 - (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)).
- (c) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child.

Subsection 4(1) – interpretation of terms

FAMILY LAW ACT 1975 - SECT 4 Interpretation

s4(1) [Interpretation]

“Aboriginal“ or “Torres Strait Islander” culture - in relation to a child:

(a) means the culture of the Aboriginal or Torres Strait Islander community or communities to which the child belongs; and

(b) includes Aboriginal or Torres Strait Islander lifestyle and traditions of that community or communities.

“Family Violence” has the meaning given by subsection 4AB(1).

“Abuse”, in relation to a child, means:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

(1AB) For the purposes of:

(a) the definitions of *family violence*, member of the family and *step-parent* in subsection (1) and s4AB; and

(b) paragraphs 60CC(3)(j) and (k); and

(c) section 60CF, 60CH and 60CI;

a person (the *first person*) is a *member of the family* of another person (the *second person*) if:

(d) the first person is or has been married to, or in a de facto relationship with, the second person; or

(e) the first person is or has been a relative of the second person (as defined in subsection (1AC)); or

(f) an order under this Act described in subparagraph (i) or (ii) is or was (at any time) in force:

(i) a parenting order (other than a child maintenance order) that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;

(ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons;
or

or (g) an order under a law of a State or Territory described in subparagraph (i) or (ii) is was (at any time) in force:

(i) an order determining that the first person or the second person is or was to live with the other of those persons, or is or was to have custody or guardianship of the other of those persons;

(ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or

(h) the first person ordinarily or regularly resides or resided with the second person, or with another member of the family of the second person; or

(i) the first person is or has been a member of the family of a child of the second person.

(1AC) For the purposes of subsection (1AB), a *relative* of a person is:

(a) a father, mother, grandfather, grandmother, step-father or step-mother of the person; or

(b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or

or (c) a brother, sister, half-brother, half-sister, step-brother or step-sister of the person;

(d) an uncle or aunt of the person; or

(e) a nephew or niece of the person; or

(f) a cousin of the person; or

(g) if the person is or was married—in addition to paragraphs (a) to (f), a person who is or was a relative, of the kind described in any of those paragraphs, of the person's spouse; or

(h) if the person is or was in a de facto relationship with another person—in addition to paragraphs (a) to

(f), a person who would be a relative of a kind described in any of those paragraphs if the persons in that de facto relationship were or had been married to each other.

4AB Definition of family violence etc.

- (1) For the purposes of this Act, **family violence** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
 - (a) an assault; or
 - (b) a sexual assault or other sexually abusive behaviour; or
 - (c) stalking; or
 - (d) repeated derogatory taunts; or
 - (e) intentionally damaging or destroying property; or
 - (f) intentionally causing death or injury to an animal; or
 - (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
 - (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
 - (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
 - (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.
- (3) For the purposes of this Act, a child is **exposed** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
- (4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
 - (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
 - (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
 - (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
 - (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
 - (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.