

What is family law?

Family law is the main law relating to divorce, separation, children, parenting arrangements, property and financial matters. It is the law that applies under the Commonwealth *Family Law Act 1975*.

The Family Law Act (FLA) sets out law that the courts must apply when determining family law disputes including parenting disputes about where children will live, who they will spend time with and who holds parental responsibility for them.

Who hears Family Law disputes?

There are two Commonwealth Courts which deal with matters under the FLA. These are the Family Court of Australia (FCA) and the Federal Circuit Court of Australia (FCC). These courts are often collectively referred to as the family law courts. The FCC deals with the majority of family law disputes.

NSW Local Courts also have jurisdiction to hear and determine some family law matters including power to make certain parenting orders and to deal with certain property settlements.

The FCA only handles disputes that are of a particularly complex nature or which involve allegations of child sexual abuse or significant physical abuse.

What are the principles and objectives of the Family Law Act?

Part VII (7) of the FLA relates to children. It deals with the concept of parental responsibility and contains provisions concerning parenting orders.

Part VII also details other types of orders and injunctions relating to children including the enforcement of orders affecting children.

Section 60CA of the FLA provides that in making decisions about parenting orders, the Court's paramount consideration must be the best interests of the child.

Section 60B(1) sets out the objectives for how the best interests of children are met. They include:

- 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 interest of the child, and

- Protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence, and
- Ensuring that children receive adequate and proper parenting to help them achieve their full potential, and
- Ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

Section 60B(2) sets out the principles underlying these objects. These principles apply except where it would be contrary to a child's best interests. They are that:

- 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
- 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)
- Parents jointly share duties and responsibilities concerning the care, welfare and development of their children
- Parents should agree about the future parenting of their children, and
- Children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

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:

- To maintain a connection with that culture, and
- To have the support, opportunity and encouragement necessary:
 - To explore the full extent of that culture, consistent with the child's age and developmental level and the child's views, and
 - To develop a positive appreciation of that culture.

What are parenting orders?

The FLA starts with the presumption that each of a child's parents will jointly exercise parental responsibility for them (section 61C(1)).

Parenting orders confer parental responsibility for a child on a person or persons (see section 61AD(1)).

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

- Who the child will live with

- How much time the child will spend with each parent and with other people, such as grandparents
- The allocation of parental responsibility
- If two 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
- How the child will communicate with a parent they do not live with, or other people
- The process to be used for resolving disputes about the terms or operation of the order, and
- Any other aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

Who can apply for parenting orders?

A parenting order may be applied for by:

- Either or both of the child's parents
- The child
- A grandparent of a child, or
- Any other person concerned with the care, welfare and development of the child, which would include the Secretary, DCJ.

When can parenting orders be sought?

Both the FCA and the FCC require parties seeking parenting orders to participate in family dispute resolution (FDR) before commencing court proceedings,

There are circumstances in which FDR would not be appropriate. These matters include where there are reasonable grounds to believe there has been, or there is a risk of child abuse or family violence or the matter is otherwise urgent (s 60I(9)(b)). In those matters an application can be made to dispense with FDR.

In FDR, an independent FDR practitioner assists the parties to resolve parenting disputes, through mediation, conciliation or other means. Parties who participate in FDR obtain a s 60I certificate, which must be attached to their initiating application. Information disclosed in FDR is admissible in court proceedings only in very limited circumstances.

What factors does the court consider in making parenting orders?

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

In determining what is in the child's best interests, the court must have regard to primary considerations and secondary considerations.

Primary considerations:

- The benefit to the child of having a meaningful relationship with both parents; and
- The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

In considering both of these, the court is to give greater weight to the second point above.

Secondary considerations:

- Any views expressed by the child
- The nature of the relationship between the child and their parents and relevant persons (such as grandparents or other relatives or kin)
- The extent to which each of the parents have taken or failed to take the opportunity to participate in making decisions about the child, to spend time with the child and communicate with the child
- The extent to which each of the child's parents have fulfilled or failed to fulfil obligations to maintain the child
- The likely effect of any changes in the child's circumstances
- The practical difficulty and expense of a child spending time or communicating with a parent
- The capacity of the child's parents and any other person (such as a grandparent or other relative) to provide for the needs of the child, including emotional and intellectual needs
- The maturity, sex, lifestyle, background and any other relevant characteristic of the child and his or her parents
- If the child is Indigenous, the child's right to enjoy his or her Indigenous culture
- Any family violence involving the child or a member of his or her family
- If a family violence order has been made, any relevant inferences that can be drawn from the order, and

- 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.

When making a parenting order, 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 (s 61DA(1)). This relates solely to the allocation of parental responsibility and does not provide a presumption about the amount of time the child spends with each of the parents.

This presumption does not apply if there are reasonable grounds to believe that a parent has engaged in (s 61DA(2)) :

- Abuse of the child or another child, who at the time, was a member of the parent's family, or
- Family violence.

The presumption may also 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 (s 61DA(4)).

Relationship with care orders

In 1986, many of the States, including NSW, referred powers to the Commonwealth concerning children and young persons. The States, however, kept the power to deal with the safety, welfare and wellbeing of children and young persons under certain laws, which became known as child welfare laws.

The Commonwealth then amended the 1975 Act in 1988 to allow family law courts to deal with all children and young persons (not just children and young persons of a married couple) except for where the child or young person was subject to one of those child welfare laws. Section 69ZK places this limit on family law courts.

Section 69ZK prevents a family court from making any parenting order under the FLA (other than a child maintenance order) about a child or young person who is under the care of a person under a 'child welfare law' unless:

- The order is expressed to come into effect when the child ceases to be under that care, or
- The nominated child welfare officer of the relevant State gives written consent to the court dealing with the child or young person.

Section 69ZK operates in NSW. Schedule 5, *Family Law Regulations 1984* (Cth) sets out the child welfare laws in NSW that will prevent a family law court from making orders about the child or young person and includes:

- Care Act
- *Adoption Act 2000* (NSW)
- *Guardianship Act 1987* (NSW)
- *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW)

In NSW the nominated child welfare officer is the Minister. The Minister has delegated power to give written consent to family law proceedings to a manager grade 10/11 and 11/12 and a legal officer grade 6 (that is, category 5 delegated officers).