
CHILDREN – A GUIDE FOR SEPARATED PARENTS

Following separation, parties can reach agreement in relation to the living arrangements of the children informally, by a Parenting Plan or a Consent Order.

Whether the parties are amicable or not, it is in your interests to reduce that agreement to writing either by way of a Parenting Plan or a Consent Order as it provides certainty for both of the parties and reduces the likelihood of disputes arising with respect to the living arrangements of the children in the future.

Parenting plan vs Consent Orders?

A Parenting Plan is a written agreement between the parties which sets out the future living arrangements for the children. A Parenting Plan is not required to be registered and is not enforceable by a Court. However, if Court proceedings are instituted at a later time, a recent Parenting Plan is evidence of the intentions of the parties as to the living arrangements they believe are in the children's best interests. Therefore, a Parenting Plan may be given weight by a Court in determining the living arrangements that are in the best interests of the children.

A Consent Order is an Order providing for the future living arrangements of the children that both parties have agreed to and that is made following an Application to the Court by both parties. A Consent Order proposed to be made by two parties is analysed by the Court and will only be made if it is considered to be in the children's best interests. If the Order is not in the children's best interests it will not be approved by the Court. You do not have to go to Court to get a Consent Order.

The main difference between a Parenting Plan and a Consent Order is that a Parenting Plan is not enforceable whereas a Consent Order is enforceable.

Therefore, in most circumstances, a Consent Order is the preferable option for a party wanting to ensure certainty and enforceability of the agreement with respect to the living arrangements of the children. As it is enforceable, if one party breaches it, there are remedies the other party can use to remedy the breach.

A Parenting Plan is most efficient where either the parties have an amicable post separation relationship, it is unlikely that the agreement will need to be enforced (i.e. each party is likely to abide by it) or where circumstances of the parties and/or the children are changing or are likely to change in the near future and so it is likely that the living arrangements of the children documented in the Parenting Plan will need to be reviewed at a later stage.

However, even where parties are amicable post separation, circumstances can change in the future, especially if either parent re-partners or seeks to relocate which can place strain on the relationship between the parents and cause parental conflict.

The primary disadvantage of a Consent Order is that it is not very changeable. It is generally in force permanently until the children are eighteen subject to an alternate agreement between the parties or a significant change in circumstances occurring

If a Consent Order is in place and you wish to change it without the consent of the other party, you need to seek permission from the Court and you need to satisfy the Court that there has been a significant change in circumstances. You should seek legal advice from one of our experienced family law specialists as to what constitutes a significant change in circumstances and whether you would be entitled to apply to have a Court Order changed on this basis.

What happens if the parties are unable to reach an agreement?

The process where you are not able to reach an agreement with your former partner in relation to the children's future living arrangements is firstly Mediation, and secondly, if an agreement cannot be reached through mediation, you may make an application for parenting orders to the Federal Circuit Court.

Mediation is a compulsory step that you must take prior to making an application to the Court for parenting orders.

Whilst there are certain exceptions where mediation may not be required, for example circumstances of urgency and/or risk, in the large majority of cases, you must participate in mediation first.

How does a Court determine the living arrangements of my children?

The paramount consideration of a Court in determining what parenting order it is to make, is the child's best interests.

It is important to understand that in the eyes of the law, you as a parent do not have any rights with respect to you children, only responsibilities.

When considering what orders are in your children's best interests, the primary considerations of the Court are:

1. The children's right to have a meaningful relationship with both of their parents;
2. The right of the children to be protected from harm.

Where there is a conflict between these two fundamental rights of the child, the child's right to be protected from harm is given greater weight by the Court.

There is no presumption that a child should spend equal time with each of the parents.

There are additional considerations the Court is also required to consider in determining what orders are in the child's best interests. These include:

- a. Views (or wishes) expressed by a child;
- b. The nature of the child's relationship with both parents and other important persons;
- c. The extent the child's parents have taken opportunities to spend time with/communicate with the child and participate in long term decisions regarding the child;
- d. The extent the child's parents have fulfilled their obligation to maintain the child (child support);
- e. The likely effect of any change in circumstances on the child;
- f. The practical difficulty and expense of each parent spending time with the child;
- g. The capacity of the parents to provide for the needs of the child;
- h. The maturity, sex, lifestyle and background of the child and the child's parents and any special characteristics of the child that are relevant;
- i. If the child is Aboriginal/Torres Strait islander;
- j. The attitude demonstrated by the parents to the child and responsibilities of parenthood;
- k. Any family violence involving the child or a member of the child's family;
- l. Any family violence orders that apply;
- m. The order that would least likely lead to the institution of further court proceedings (if court proceedings are on foot);
- n. Any other fact or circumstance the court thinks is appropriate, including for example, the ability of the parents to facilitate and encourage the child's relationship with the other parent.

A Court may make an Order for a child to spend equal time, or substantial and significant time, with both of the child's parents.

Before making an Order for equal time or substantial and significant time, a Court must find that the arrangements are 'reasonably practicable'. This is determined by:

- a. How far the parents live from each other;
- b. The parents' current and future capacity to implement an arrangement for the child spending equal (substantial or significant) time with both parents;

- c. The parent's capacity to communicate;
- d. The impact such an arrangement would have on the child.

There is *no presumption* that a child should spend equal time with each of the parents.