

January 2009

## Children and Relationship Breakdown

The issue of children's on-going living arrangements and their general welfare require serious consideration when their parents' relationship comes to an end.

It is clearly desirable, and encouraged, for the separated parents of children to reach their own agreement with respect to issues such as where the children should live, how much time they should spend with each parent, what school they should attend and other important issues such as religious instruction etc. Reaching an agreement with your former spouse not only avoids the stress, unpleasantness and expense of litigation, it generally augurs well for a co-operative relationship with your former spouse as your children grow up.

### ***Primary Dispute Resolution***

Alternatives to litigation such as mediation and the collaborative law process can assist you in reaching an agreement with your former spouse. We are happy to provide you with advice as to the most suitable resolution options available to you and provide you with a referral to a Family Dispute Resolution Centre or Agency.

However when it is not possible to reach an agreement with your former spouse, the matter may need to be resolved by the bringing of an application in the Family Court or the Federal Magistrates Court, which will be determined by a Judge or Federal Magistrate.

### ***Who gets the children?***

On 1 July 2006 the *Family Law Amendment (Shared Parental Responsibility) Act* came into effect into Australia.

As a result of this legislation, there is now a rebuttable presumption of shared parental responsibility when Parenting Orders are being made by a Family Law Court.

If the presumption of shared parental responsibility is **not** rebutted, then the court must consider whether equal time, or "shared and significant time", is reasonably practicable when making a parenting order.

### ***The Child's Best Interests are Paramount:***

The *Family Law Act* provides that in deciding whether to make a particular Parenting Order, the court must regard the best interests of the child as the "paramount consideration".

### ***How does the Court determine what is in a child's best interests?***

When determining what is in a child's best interests, the court must consider a range of matters including:

- a) The benefit to the child of having a **meaningful relationship** with both of his or her parents;
- b) The need to protect the child from physical or psychological harm and from being exposed to abuse, neglect or family violence;
- c) Any views expressed by the child (e.g. as to where the child may want to live), subject also to consideration being given to factors relevant to the weight that should be attached to the child's views, such as the child's maturity or level of understanding.

**There is no fixed age that determines when a child can choose which parent he or she wants to live with. Whether a child's views are taken into account will depend upon the child's maturity and the circumstances in which the child's views are expressed. For example, does your child fully appreciate the impact and significance of the views he or she has expressed?**

- d) The nature of the relationship the child has with each of his or her parents and other persons (e.g. Grandparents or other relatives);
- e) The capacity of each parent and any other relevant persons ( e.g. Grandparents or other relatives) to provide for the material, emotional and intellectual needs of the child;
- f) The attitude to the child, and to the responsibility of parenthood, demonstrated by each of the child's parents; and
- g) Any family violence involving the child or a member of the child's family.

### ***Compulsory Family Dispute Resolution***

Before applying to a Family Law Court for an order in relation to parenting matters, both parents must make a genuine effort to resolve their dispute by participating in Family Dispute Resolution, with a qualified Family Resolution Provider.

Upon participating in Family Dispute Resolution with your former spouse, the Family Dispute Resolution provider will issue you with a certificate pursuant to section 60 I of the *Family Law Act* indicating that you have attended family dispute resolution and made a genuine effort to resolve the issues.

Once a certificate is issued, if no agreement has been reached, it is open to a separated parent to commence proceedings in a Family Law Court regarding parenting issues.

### ***Can I issue Court proceedings without a Family Dispute Resolution Certificate?***

It is not possible to commence proceedings in a Family Law Court **without** a Family Dispute Resolution Certificate, except in certain limited circumstances, for example;

1. Where orders are being made with the consent of all parties;
2. Where the court is satisfied that there are reasonable grounds to believe that the child has been abused or is at risk of abuse;
3. There has been family violence or a risk of family violence by one of the parties to the proceedings;
4. The matter is urgent;
5. One or more of the parties to the proceeding is unable to participate effectively in Family Dispute Resolution.

These are limited exceptions and the requirement for the issue of a Family Dispute Resolution Certificate is, generally speaking, interpreted strictly by the Family Law Courts.

For further information regarding Family Dispute Resolution, or for a list of Family Dispute Resolution providers in your region, please contact Damian Harriss or John Mazzotta.

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