

Information Guide

Parenting Issues

Provided by milburn guttridge lawyers

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The Family Law Act 1975 deals with all issues involving children living with a Parent and spending time with the other.

Part A: Purpose of the Act

The underlying philosophy of the Family Law Act is to encourage the parties to resolve their disputes without the intervention of the court through use of mediation services. Old terms, such as guardianship, custody and access have been replaced with modern terms such as 'parental responsibility', 'carer' and 'spend time and communicate with'. The changes that have been made go beyond simple changes in terminology. There is a real difference at law.

A residence order is simply an order that sets out the person or persons with whom a child is to live. This is one part of the old definition of custody. This order however does not give to any person any rights or responsibilities concerning children unless specifically stated as part of a specific issues order.

Residence orders may be drawn in favour of one parent or party with whom the child or children live for the majority of the time. Alternatively, it may be drawn in favour of both parties setting out the times of residence in different households. This would be an alternate order to a contact order.

The parent with whom the child does not reside is able to spend time and communicate with the child. The form of the Contact Order will vary according to the circumstances of the parents, the age, school commitments and social activities of the child and the relationship between the parents after separation. A common Order is for alternate weekends from Friday evening until Sunday evening with the 'contact parent' collecting and returning the child.

A Specific Issues Order is an order that deals with any other aspect of parental responsibility apart from where the child should live and when and on what basis the child should be able to spend time and communicate with the other parent. The types of matters that may be addressed in these orders include daily care, welfare and development, long term care, and more specifically, issues about schooling, health and religion. An example of a Specifics Issues Order is:-

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"The wife shall have sole responsibility to determine questions relating to the child's schooling."

Part B: Relevant Criteria to be considered in disputes

Before Court action is taken

Applicants wishing to apply for an order involving children¹ are **required** to provide a certificate from a registered family dispute resolution practitioner, unless there is an exception to this requirement².

Note:

If the requirements set out in the Practice Direction are not met, the Court may not be able to deal with the application, may take the failure to meet the requirements into account in deciding costs and/or you may be ordered to attend family dispute resolution.

Factors to be considered by a Court

It is not possible to provide an exhaustive list of factors that a Court will consider when determining a parenting dispute. However, the *Family Law Act* directs the Court to be guided by the following considerations:-

1. The best interests of the child are paramount.
2. The expressed wishes of the child must be considered and are to be given such weight as the circumstances of the case dictate.
3. The Court must make orders which are the most likely to resolve matters. The Court does not wish to see the parties constantly returning to Court.
4. Apart from these major issues the Court must take into account the following:
 - The child's relationship with his or her parents or other relevant people.
 - The effect on the child of separation from a parent, sibling or other person with whom he or she is living.
 - The practical difficulty and expense of a child spending time and communicating with a parent and whether that difficulty or expense will affect the child's right to maintain spend time and communicate with both parents on a regular basis.
 - The capacity of the parents and other relevant people to provide for the needs of the child.
 - The child's maturity, sex and background.
 - The need to protect the child from physical or psychological harm.
 - The attitude of the parents to the child and responsibilities of parenthood.
 - Any family violence involving the child.
 - Any family violence order applying to the child or a family member.
 - The needs to protect the rights of children and to promote their welfare.
 - The need to ensure safety from family violence and means available for assisting parties to consider the improvement of their relationship to each other and to their children.

¹ Under Part VII of the *Family Law Act 1975*

² Under section 60I(5) or (9) of the *Family Law Act 1975*. Practice Direction No 2 of 2007 'Family Dispute Resolution - applications for orders under Part VII *Family Law Act 1975*' outlines the procedural requirements for applications who seek to file an application for an order under Part VII of the *Family Law Act 1975* in the Federal Magistrates Court of Australia.

Part C: Children's Rights

Children's rights are enshrined as part of the *Family Law Act*. The objective of the Family Law Act is:-

"To ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities concerning the care, welfare and development of their children."

In essence children have a right to:-

1. Know and be cared for by both parents, and
2. Spend time and communicate with both parents and with other people significant to their care welfare and development on a regular basis.

Part D: Children's Representatives

In any proceedings in which the welfare of a child is relevant, the Court may appoint a Children's Representative to act for the child on its own initiative, or on the application of the child, a welfare organisation or any other person. The role of the Children's Representative is normally to cross-examine the parties and their witnesses at the hearing, present evidence to the Court about the child and matters relating to his or her welfare and where appropriate present evidence of the child's wishes.

The circumstances in which a Children's Representative may be appointed are diverse. Some incidences are:-

1. When the parties dispute a child's wishes, e.g. one parent might allege that the other is influencing the child.
2. When a child has expressed views about his or her relationship with one or both parents.
3. Where there is an allegation of physical or sexual abuse.
4. When special circumstances are allegedly affecting the child's welfare and the parents hold strong views about their circumstances e.g. difference of opinion in religious belief or adherence to unconventional lifestyles.
5. When the bitterness between the parties is of such magnitude that it threatens to obscure objective evidence concerning the child's welfare.
6. When the Court is concerned that none of the parties to the proceedings may be a fit and proper custodian.

Part E: Variation of Parenting Orders

Residence, Contact and Specific Issues orders can be varied at any time if such variation is shown to be in the best interests of the child. The Court will not entertain lightly, an application to alter a Residence Order with a Specific Issues Order for the day to day care, welfare and development of the child. The procedure for making an application for variation of existing orders is substantially the same as that used in making original applications.

Part F: Mediation

We would recommend that you strongly consider mediation as an early option. As stated earlier, the use of the mediation process as a means of resolving issues is encouraged by the Courts.

We make the following comments in relation to mediation: -

1. Attendance at and participation in mediation sessions are voluntary;
2. A party to a mediation session may withdraw from the mediation session at any time;
3. Any agreement reached at or drawn up pursuant to, a mediation session is not enforceable in any court, tribunal or body, unless the parties agree in writing that the agreement is to be enforceable;

4. Nothing in the mediation legislation affects any rights or remedies that a party to a dispute has;
5. The Director of a Dispute Resolutions Centre may decline to consent to accepting any dispute for mediation at the Centre;
6. A mediation session, if started, may be terminated at any time by the mediator;
7. A party to a mediation session is not entitled to be represented by an agent unless it appears that:-
 - 7.1. An agent should be permitted in order to facilitate mediation; and
 - 7.2. The agent proposed to be appointed has sufficient knowledge of the matter in dispute to enable the agent to represent the party effectively.

With limited exceptions, anything which is said or done or any document that is prepared for or as a result of the mediation taking place cannot be used in court unless both parties agree.

Part G: Legal Aid and Funding

We would be happy to discuss the possibility of obtaining Legal Aid (in full or part) to assist you with legal fees. Please contact us if you wish to make a Legal Aid Application.

Part H: Means of Documenting an Agreement

The most common way to document an agreement is by way of consent order.

Consent Orders

Where an agreement can be reached, the arrangements between yourself and your former partner can be embodied in the terms of a Consent Order under the Act. This is a relatively cost effective method of formalising proceedings. Once formally made, consent orders have the same legal force as if they had been made after a court hearing.

Normally, you will not be required to attend Court in order to obtain a Consent Order. However, if the orders you seek are inconsistent with a family violence order between you and your partner or any of your children, then your application must be heard in open court.

Part I: Property Matters

Under the Family Law Act you must institute proceedings for a determination by the court of property and financial matters within one year of your divorce if you intend to do so. If you do not apply within that time limit then you may be prohibited from applying to the Court for relief. You should diarise that time limit, and a date at least one month before the time limit, to ensure that you comply with the rules of the Court and do not risk losing your opportunity to bring an application to the Court. It is important to bear this time limit in mind during the course of your negotiations.

Waiver:

The information contained in this *milburn guttridge lawyers Information Guide* is intended only as a guide and does not constitute legal, financial, tax or duty advice. You should obtain your own advice on the subject of the *Information Guide*. *milburn guttridge lawyers* cannot, and does not, guarantee the accuracy of the contents of the *Information Guide*. Nor does the firm attempt to provide information specific to your individual circumstances.

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Your Will and Power of Attorney

It may be an appropriate time for you to consider the contents of your Will (if you have one or if not, to have one prepared).

We believe that it is also an appropriate time for you to consider having an Enduring Power of Attorney prepared. An Enduring Power of Attorney appoints someone to act on your behalf (i.e. as Attorney) should you suffer any disability rendering you mentally incapable of looking after your own affairs.

*milburn guttridge lawyers has had a long standing relationship with **Cancer Council Queensland** regarding the making of Wills and many clients have left bequests to the Cancer Council in their Wills. If you are thinking of doing so please let us know as you may be eligible for a **free Will**. Please ask for details.*

If you have any questions at all regarding the above please do not hesitate to contact our office.

What if my Power of Attorney was signed before 1998?

The enduring power of attorney introduced in 1990 was limited to dealing with a person's financial affairs and did not empower the attorney to deal with other aspects of the principal's life such as personal and health care decisions. Since 1998, the law allows us to draft the power of attorney much wider to cater for a much greater range of contingencies.

If you have an 'old' power of attorney, we suggest you update it.