



Parenting Orders and the Family Law Act 1975 (Cth)

Abstract

The law is complex and confusing to many. This information booklet has been prepared by Eugenia Matthews of Matthews Lawyers. Its purpose is to provide information to parents about the Family Law Act 1975 (Cth) and the Federal Circuit Family Court of Australia. It is hoped that the parties will make a genuine attempt to resolve all issues, without the need for expensive litigation.

Disclaimer: It is of a general nature only and not a substitute for legal advice.

3/10 Gawler Street Mount Barker SA 5251

admin@matthewslawyers.com.au

Contents

Overview:.....	3
Family Law Act 1975 (Cth): Legislation Guiding the Family Court.....	4
Marriage; De Facto Relationships & Same Sex Relationships:	4
Grandparents and Others	4
Does the child have a say?	4
Equal Shared Parenting Responsibility is the Starting Point:	5
Parenting Agreement – What is it?.....	5
Parenting Plan – What is it?:.....	6
Parenting Orders: What are they?.....	6
Parenting Orders: Limitations.....	6
What can be included in the Parenting Agreement/Plan/Orders?	7
Parenting Orders and Other Orders:.....	9
What happens if a Parenting Order is breached?	9
How is an order contravened?	10
What is a reasonable attempt to comply?	10
The other party has not complied: What can I do? If you allege that another person has contravened an order without a reasonable excuse, you can:.....	10
What is the standard of proof in contravention proceedings?.....	11
Who bears the burden of proof?.....	11
Penalties for failing to comply with a parenting order	11
Independent Children’s Lawyers (ICL):	12
Child Protection and Family Law.....	12
Family Dispute Resolution Everyone applying to the Family Law Court for a parenting order must attend, or attempt to participate in, family dispute resolution — unless their situation fits one of the exceptions set out in the Family Law Act 1975 (Cth).	13
Who can provide a Family Dispute Resolution certificate?.....	14
What happens if we agree about the children?	14
When is family dispute resolution inappropriate? Family dispute resolution may not be right for every situation. Examples of instances in which family dispute resolution is not recommended are:.....	14
Is family dispute resolution confidential?	14
Parenting Orders by Consent: The Rule in Rice v Asplund.....	15
The Rule	15
What Is A Significant Change Of Circumstances?	15
What Does This Mean For Parties Seeking A Variation To Final Parenting Orders?	16
Negotiation has Failed: The Parties go to Court:.....	16
Costs:.....	17
APPENDIX 1: THE FAMILY LAW ACT 1975 (CTH).....	18

APPENDIX 2: FAMILY LAW RULES: RULE 6.06 DUTY OF DISCLOSURE21
APPENDIX 3: FAMILY VIOLENCE & THE FAMILY LAW ACT 1975 (CTH)22

Parenting Orders and the *Family Law Act 1975 (Cth)*

Overview:

There are no legal rules about what arrangements should be made for the children when parents separate. Parents are able to make whatever arrangements they choose. They can choose not to have any orders made, or to have a parenting plan, or to have consent orders made.

The *Family Law Act 1975 (Cth)* states that a child SHOULD HAVE a MEANINGFUL RELATIONSHIP with both of their parents, UNLESS there is a risk of family violence, abuse or neglect. Parents MUST promote a meaningful relationship between the child and the other parent. Although there may be animosity between the parents, they have obligations to their children. Parents must do **what is best for the child/ren**.

Parents find it easier to make arrangements for children after separation if they have some knowledge of the law and how it works. Some of the key things parents will probably need to know include:

- What a parenting plan is and why it might be useful,
- how parenting orders are different from parenting plans,
- how to obtain parenting orders by consent without going to court,
- how to change parenting orders, and
- other orders, such as injunctions that are often made with parenting orders.

Some of the things parents will have to consider are:

- where the children will live,
- who will have primary responsibility for them,
- what contact will the other parent have with the children – how often and where will handover – pick-up and delivery of the children.
- what will happen on special occasions such as Xmas, Easter, Mother's/Father's Day, school holidays and so on
- what arrangements will be made regarding school – which school will the children go to, parent/teacher interviews, report cards, school parts and other school events and so on
- what arrangements will be made for medical and allied health care – what treatment, who will pay for it,
- will the children participate in extra-curricular after school activities – music, gym, sport – will both parents share the cost and attend events and so on.

The list is endless because each family is different and has different needs. If it is important to you, then you will consider it.

IT IS IMPORTANT THAT THE PARENTS TRY TO REACH AGREEMENT REGARDING THE CHILDREN. **IF AGREEMENT IS REACHED** THE PARTIES CAN APPLY FOR **CONSENT ORDERS**. REACHING AGREEMENT CAN BE MADE INTO CONSENT ORDERS WHICH IS **ALWAYS CHEAPER THAN** HAVING LENGTHY ACRIMONIOUS **COURT** PROCEEDINGS. **IF THIS DOES NOT HAPPEN** THE COURT WILL MAKE ORDERS THAT ONE OR BOTH PARENTS ARE NOT HAPPY WITH.

Family Law Act 1975 (Cth): Legislation Guiding the Family Court

Parenting orders Family Law Act 1975

- Section 64B – meaning of parenting order and related terms.
- Section 60B – object of Part VII of the Act and principles underlying it.
- Section 60CA – child's best interests are the paramount consideration in making a parenting order.
- Section 60CC – how a Court determines what is in a child's best interests.
- Section 61DA – presumption of equal shared parental responsibility when making parenting orders.
- Section 65DAA – Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances.
- Section 67Z – the Court's obligation if you make an allegation of child abuse.
- Section 67ZBA – the Court's obligation if you make an allegation of family violence.

Marriage; De Facto Relationships & Same Sex Relationships:

Children have the same rights whether their parents are married or not. They are entitled to be cared for and to be supported. Both parents are able to ask the Federal Circuit Family Court of Australia (FCFCOA) for orders in relation to the child/ren, as would married parents.

Grandparents and Others:

The law recognises the importance of a child (or children) having a relationship with grandparents, including after the child's parents have separated. Section 60B(2)(b) of the Family Law Act 1975 recognises that, as long as it is in their best interests, a child has the right to spend time with and to communicate with their parents, and other people important to them, such as grandparents, relatives and members of extended families. A grandparent is able to make an application to the Federal Circuit Family Court of Australia for orders regarding contact with the grandchild/ren and if necessary that the grandchild/ren live with them and the authority to make decisions for the health, welfare and education and other important issues, to facilitate and optimise their well-being, safety and security.

Does the child have a say?

The Court will take into account any views expressed by the child, however, the weight that the Court will give to the child's views will depend on any factors the Court thinks is relevant, such as the child's maturity and level of understanding. There is no rule that says that children of a particular age can make independent decisions about where they may live. There are a number of reasons for this, including the fact that age does not necessarily always match maturity. Generally, the older the child, the more weight will be given to his/her wishes.

Equal Shared Parenting Responsibility is the Starting Point:

Equal shared parental responsibility means that both parents share the right to make major long-term decisions about the children of their relationship. Parents should talk to each other and make a genuine effort to make major long-term decisions regarding the children themselves. Shared parental responsibility does not include day to day decisions about children such as what they wear and what they will have for lunch/recess. If the Family Court does not think that the best interests of the children will be met by both parents have equal responsibility for the children, they may order that one parent has sole parental responsibility. Alternatively, a parent can surrender their right to have equal say in making decisions for the children to the other parent.

When the court makes orders concerning children it must always consider the ‘best interests of the child’ – section 60CA of the *Family Law Act 1975 (Cth)*. The Family Court must presume that it is in the best interests of the child for the parents to have ‘equal shared parental responsibility’ – section 61DA of the *Family Law Act 1975 (Cth)*. This is a starting point for the court’s decision-making process and the court may determine, in the circumstances of an individual case, that shared parental responsibility – section 61B of the *Family Law Act 1975 (Cth)* - is not appropriate. Section 61B of the *Family Law Act 1975 (Cth)* includes all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.

Parenting Agreement – What is it?

This is an agreement made between the parents of the children of the relationship. It focuses on the needs and best interests of the children. Parenting agreements can be;

- an oral agreement – Matthews Lawyers does not recommend this. It is too easy for one party to say they did not agree. It becomes a he said/she said dispute.
- a written parenting plan – Matthews Lawyers recommends have a written plan because it becomes objective evidence of the intention of the parents regarding the care arrangements for their children, **but** it cannot be enforced by the Family Court, if there is no compliance with it. or
- a Parenting Agreement that is put into a formal court order, called ‘consent orders’. This requires an application to the court. Matthews Lawyers recommends this. It provides certainty to the parents and can be enforced by the Family Court, if there is non-compliance with Consent Orders - Contravention Proceedings. Also, pursuant to the rule in *Rice v Asplund* – we have a separate brochure for this topic – Consent Orders cannot be overturned or set aside easily.

Parenting Plan – What is it?:

Please note that **unless** a Parenting Plan has been filed in the Federal Circuit Family Court of Australia (hereinafter 'Family Court'), as **consent orders**, parenting plans have **no legal force**. They **can be considered** by the Court when making Parenting Orders.

Simply a Parenting plan is:

- a parenting plan is the agreement reached between the parents, reduced to writing and is signed and dated. Like the agreement, it deals with matters such as parental responsibility and arrangements for the children of their relationship,
- a parenting plan must be free from any threat, duress or coercion
- other people can also be involved in a parenting plan – eg where children are living with or spending time with grandparents
- although a parenting plan cannot create new legal obligations, it can relieve a party from obligations under an existing parenting order
- if it is in the best interest of the child, the court will consider the parenting plan when looking to make parenting orders.

Parenting Orders: What are they?

Parenting orders are what the Family Court makes, on the basis of the agreement the parents have reached. They have certainty and cannot easily be overturned or set aside.

Parenting Orders: Limitations

There are limits to what a parenting order can include. For example, a court cannot make an order for someone to be tactful or generous. The *Family Law Act 1975 (Cth)* says that parenting orders can deal with any of the following topics:

- who the child can live with – 'live with' orders
- the time the child can spend with each parent (and sometimes others) – 'time with' orders
- decision-making powers between the parents (and sometimes others) about the child – 'parental responsibility' orders
- the communication the child is to have with each parent (and sometimes others such as extended family members) – 'communication orders'
- other parenting orders deal with – the form of consultation between the parents: how they are going to make decisions together, either verbally or in writing – the steps to be taken before applying for an order that varies the existing parenting orders – the process to be used for resolving disputes about the terms or operation of parenting

orders, and – any aspect of the care, welfare or development of the child, or any other aspect of parental responsibility for a child.

- Financial assistance for the children - child support - but Matthews Lawyers recommends that an application is made to the Child Support Agency for financial orders regarding the support of the children.

What can be included in the Parenting Agreement/Plan/Orders?

The topics covered in the Parenting Order are always unique to the parents making them. There is no *one size fits all* Parenting Orders and no requirement to deal with any particular issues.

Living arrangements

Living arrangements normally specify when the child is to be with one parent or the other. Often it will be convenient to set out arrangements for each week, or each fortnight. In practice, the parent with whom the child is living or spending time will normally be the one who looks after the child for that period.

Special occasions

It is common for parenting orders to make arrangements for special occasions, such as Christmas, religious holidays and birthdays. Typically, the orders will make some provision for the child to spend time with each parent on the child's birthday, and with each parent on the parent's birthday.

Handovers

It is recommended that parenting orders deal with handover arrangements – ie how the child is to get from one parent to another. When relationships between the parents are difficult, it is often a good idea to make arrangements that do not involve the parents meeting each other. There are services available to help with changeovers, such as Child Contact Centres.

Caring for the children

Sometimes, issues arise between parents about matters relating to the care of the children. For example, parents may disagree about whether a young child should be allowed to catch public transport on their own, or one parent may be concerned about the other's behaviour, particularly in relation to drugs or alcohol. These matters can be included in parenting orders.

When a parent is unavailable

Parents may wish to include provisions for what should happen if a parent is unexpectedly unable to look after the child. The most sensible response would often be to contact the other parent to make alternate care arrangements if unavailability arises. Or the orders might specify that each parent is to give the other at least 24 hours' notice if they are going to be unavailable to care for the child, or that the child can be cared for by a relative.

Communication with the children

Parenting orders can deal with the way the children communicate with parents, or other people. For example, when the child is with one parent, arrangements could be made

for the child to speak with the other parent at a particular time of day by telephone or other means.

The child and other people

Parenting orders can deal with aspects of the children's relationship with other people. For example, the child could spend time with a grandparent on the child's birthday or the grandparent's birthday, or the child could go on holidays with cousins or other family members. Parenting orders could also provide that the child is not to be left alone with a particular person because of criminal proceedings or other serious allegations. The parent who raises the issue of concern to prevent the child spending time with a particular person, bears the burden of proof to the Family Court.

Parents' behaviour with the children

Sometimes parents are concerned about how the other parent might behave with the child. Parenting orders can set out the sort of behaviour that should be avoided by the parent having the child. An example of this is when a parent may say adverse things to the child about the other parent – such 'non-denigration' orders are quite common. Other common orders are that a parent will not consume or have alcohol or illicit drugs or have them in the premises or allow others to consume or have them whilst in the presence of the children.

Interstate and international travel

Parenting orders can also be used in relation to the child being taken out of the home state or territory, or out of Australia. Importantly, it is only in limited special circumstances that child passports can be issued without full parental consent. Seek legal advice if this is an issue.

The parenting orders could deal with who needs to consent to a child's passport, or who should hold the child's passport. They can also provide that a parent must give the other parent a period of notice before taking the child overseas or interstate. Alternatively, the orders could provide that neither parent will take the child overseas without the consent of the other parent and if not agreed upon by the consent of the Family Court.

Even if there is no specific parenting order dealing with international travel, when parenting orders are in place or parenting proceedings are pending, it is an offence for a parent to take the child out of Australia without the other parent's consent or the court's permission.

In cases where one parent fears that a child will be taken out of the country, urgent legal advice should be obtained. One of the options available might be to have the child's name placed on the Family Law Watchlist for international departures, both air and sea.

Medical care

Concerns about health care can be handled by the parents without the need for parenting orders. However, there may be instances in which parenting orders could be useful. Examples of this include when parents take different approaches to health issues, how one parent will communicate with the other if the child is sick, and issues relating to immunisation. Covering this topic may also be worth considering if a child has a special medical condition.

Education and extra-curricular activities

Parenting orders can deal with issues relating to a child's education, such as which school the child should attend. Other issues could include:

- whether school reports are to be sent to one or both parents,
- who will attend parent teacher evenings and school events – and any arrangements that need to be made to prevent both parents being there at the same time,
- which parent the school should contact in the event of an emergency and
- any extra-curricular activities the child will attend, and whether one or both parents will be involved.

Parenting Orders and Other Orders:

Child support

Under Australian law, parenting orders are completely separate from child support, which is dealt with under different legislation. It is not possible to ask the court to make a child support order as part of parenting orders. Information about child support is available on the Department of Human Services website at www.humanservices.gov.au

Family violence orders

It is common for children's proceedings under the *Family Law Act 1975 (Cth)* to involve allegations of violence. Sometimes a state or territory court has made family violence orders – Interim Intervention Order or Final Intervention Order - in earlier proceedings in the Magistrates Court of South Australia, by the time a case gets to a family court. This allows magistrates courts to make orders for the protection of family members (and others) against threatened violence, intimidation, and other such behaviour. When the case is brought to a family court, the parties must tell the court of the existence of any such family violence order. Also where the Family Court makes orders that differ from those made by the Magistrate, the orders of the Family Court take precedence, if there is an inconsistency. Usually, the Family Court will make orders that are consistent with those made by a Magistrate. If this applies to you, you should keep with you both orders, so that if Police involvement arises, you will have evidence that you are not in breach of a court order. Breaching a court order is serious and can result in a custodial sentence being imposed.

What happens if a Parenting Order is breached?

When a parenting order is made by the Court, each person affected by the order must comply with (follow) the order. The parent must do everything a parenting order says. This includes taking all reasonable steps to ensure that the terms of the order take effect.

The parent must also positively encourage his/her child/ren to comply with the orders. For example, where the order states your child is to spend time with another party, you must not only ensure that the child is available, but must also positively encourage them to do so, even if the child says they do not wish to.

The parenting order remains on foot, unless it is formally changed by the FCFCOA. If you want to change the parenting order, an application must be made to the Court asking that the parenting order is varied/amended.

NB: A parenting plan is different from a parenting order. A parenting order is made by a court. A parenting plan is a written agreement that sets out parenting arrangements for children. It is not legally enforceable, although its contents can override part of a court order, so that part of the court order is no longer enforceable. Before entering into a parenting plan, you should seek legal advice.

How is an order contravened?

A person contravenes (breaches) an order, if they:

- intentionally fail to comply with the order
- make no reasonable attempt to comply with the order
- intentionally prevent compliance with the order by a person who is bound by it, or
- aid (help) or abet (assist) a contravention of the order by a person who is bound by it.

What is a reasonable attempt to comply?

When a parenting order is made, each person affected by the order must comply with the order. This includes taking all reasonable steps to comply with the order.

What is a reasonable excuse?

If the Court makes a finding that a person has failed to comply with an order, it will consider whether the person had a reasonable excuse for contravening the order. Some examples of reasonable excuses that may satisfy a court include:

- the person did not understand the obligations imposed by the order – this will be difficult to prove, if the person was represented by a Lawyer, or
- both:
 1. the person reasonably believed that the actions which gave rise to the contravention were necessary to protect the health and safety of a person, including the person who contravened the order or the child, and
 2. the contravention did not last longer than was necessary to protect the health and safety of the person who contravened the order or the child.

The other party has not complied: What can I do?

If you allege that another person has contravened an order without a reasonable excuse, you can:

- seek legal advice

- attend Family Dispute Resolution (FDR) counselling, and/or
- apply to the Court by filing an Application – Contravention, and supporting evidence.?

What is the standard of proof in contravention proceedings?

'Standard of proof' means how certain the Court needs to be to find that an alleged fact is true. The standard of proof which applies to a contravention depends on the order the Court is being asked to make. In most cases, the standard of proof is the 'balance of probabilities'. This means that the Court can find a fact proved if the fact is more likely to exist than not.

The Court may only impose the most serious penalties – a prison sentence, a community service order, or a fine – if the allegations are established 'beyond reasonable doubt'. This is the same standard of proof required in criminal matters.

Who bears the burden of proof?

The party who alleges there has been a contravention of a parenting order bears the burden of proving each alleged contravention.

If the respondent alleges that they had a reasonable excuse for a contravention, the respondent bears the burden of proving the existence of that reasonable excuse.

Penalties for failing to comply with a parenting order

A court can only penalise someone for failing to comply with a parenting order, which has not been altered by a parenting plan, if another person files an application alleging the person did not comply with the order.

After considering all the facts of the case and applying the law, the Court may decide:

1. the alleged contravention was not established
2. the contravention was established but there was a reasonable excuse
3. there was a less serious contravention without reasonable excuse, or
4. there was a more serious contravention without reasonable excuse.

If a court finds that you have failed to comply with a parenting order without reasonable excuse, it may impose a penalty. Depending on the particulars of the case and the type of contravention, a court may:

- vary the primary order
- order you to attend a post separation parenting program
- compensate for time lost with a child as a result of the contravention
- require you to enter into a bond
- order you to pay all or some of the legal costs of the other parties
- order you to pay compensation for reasonable expenses lost as a result of the contravention
- require you to participate in community service

- order you to pay a fine
- order you to a sentence of imprisonment.

The penalties are listed in Division 13A of Part VII of the *Family Law Act 1975*.

Independent Children's Lawyers (ICL):

Section 68L of the Act relates to the appointment of an ICL. If the parents cannot agree about anything or there is conflict the Family Court will appoint an Independent Children's Lawyer.

They are funded through the legal aid system. Their role is to act independently and help the court make orders that will be best for the child. Section 68LA of the *Family Law Act 1975 (Cth)* states the role of the ICL. The role of the ICL is to advance the interests of the children. Recommendations from the ICL usually prevail in family court proceedings as the recommendations are independent, based on objective evidence – the ICL may have ordered independent expert assessments and reports – to determine the best interests of the children.

Independent children's lawyers have a duty to ensure that the court learns what the child's views are, and they will often interview the child in preparing for the case. They can also play a valuable role in helping the court to determine the orders that are most likely to benefit the child. Although they are not parties to the proceedings, independent children's lawyers can call witnesses, make submissions and appeal. Costs orders can be made in favour of or against independent children's lawyers.

In the case of ***Re K (1994) FLC 92-461*** the Full Court of the Family Court laid down an extensive list of guidelines for cases in which an independent children's lawyer should be appointed. These stipulate that a lawyer may be appointed where:

- there are allegations of abuse of the child
- there is intractable conflict between the parties
- the child is alienated from one or both parties
- there are cultural and religious differences between the parents
- there are concerns about the mental or physical illness or personality disorder of either parent
- neither party seems to be a suitable residential parent for the child
- a child of mature years indicates that they do not wish to have contact with one parent
- there is a threat of removal of the child from the jurisdiction
- the determination of the case may involve separation of siblings, or
- neither party is represented

Child Protection and Family Law

The family law system and the child protections system are different. However, where a child is at risk, the two systems connect. An example of this, is where the Department for Child Protection (DCP) is involved because of abuse and or neglect concerns, regarding the child/ren. When this occurs the Family Circuit and Family Court of

Australia (FCFCOA) will liaise with DCP regarding its involvement and determinations and the basis for them. The FCFCOA will make orders that support facilitate and optimise the interests of the child/ren, pursuant to section 69Z. of the Family Law Act 1975 (Cth).

Family Dispute Resolution

Everyone applying to the Family Law Court for a parenting order must attend, or attempt to participate in, family dispute resolution — unless their situation fits one of the exceptions set out in the Family Law Act 1975 (Cth).

An application to the Family Law Court for a parenting order must include a certificate issued by a family dispute resolution practitioner [s 60I(7)]. The certificate will say one or other of the following:

- that the applicant did not attend family dispute resolution but that their failure to do so was due to the refusal or failure of the other party to attend
- that the applicant did not attend family dispute resolution because, in the opinion of the practitioner, it would not be appropriate for them to do so
- that the applicant attended family dispute resolution and all attendees made a genuine effort to resolve the issues in dispute, or
- that the applicant attended family dispute resolution but that either they or the other party did not make a genuine effort to participate

A certificate from a family dispute resolution practitioner is not required where:

- any of the people involved applied *before* 1 July 2007 for a parenting order for that particular child or children
- the applicant is seeking a consent order (an order where both people have made an agreement)
- the application is in response to an application made by another person
- the situation is urgent, for example a child has not been returned or is missing
- one or more of the people involved cannot go to family dispute resolution because of 'incapacity' (which includes a person being unwell or living with a disability) or they live too far away from a family dispute resolution service
- there are reasonable grounds to believe that there has been (or there is a risk of) abuse of the child or family violence
- a court order made in the previous 12 months has been broken and the court finds that the person who broke it has shown a serious disregard for their obligations under the order

Dispute resolution is about the parents coming together to talk about their differences and trying to agree. This can happen with all the people involved talking in the same room, or it may be able to happen separately if people do not wish to see each other. Where children are involved, the aim of family dispute resolution is to reach an agreement about what is in the best interests of the children.

Who can provide a Family Dispute Resolution certificate?

Only registered Family Dispute Resolution Practitioners can provide certificates establishing whether or not dispute resolution has been attempted. Whilst there are many services that can provide family dispute resolution such as mediation and counselling, not all are registered practitioners. The main agencies which provide these services such as the Family Relationships Centres, Relationships Australia and Centacare are registered.

What happens if we agree about the children?

Where an agreement has been reached, we encourage parents to make an application to the Federal Circuit Family Court of Australia seeking Consent Orders to give finality and certainty regarding the arrangements for the child/ren. Unless there are court orders in place, there is no certainty for either parent that the agreement will be complied with and if not, the agreement cannot be enforced, because it is not a court order.

When is family dispute resolution inappropriate?

Family dispute resolution may not be right for every situation. Examples of instances in which family dispute resolution is not recommended are:

- where there is family violence or child abuse, or a risk that these will happen
- where one person cannot make decisions on an equal basis with the other because they feel intimidated or unsafe
- in urgent situations, for example, if children have not been returned from a visit, or if one party thinks that the other might take or damage property that they are entitled to
- where one person refuses to participate
- where the ability of one of the parties to participate is affected by a mental illness or a drug or alcohol abuse problem

If you cannot make decisions equally with your ex-partner because you feel intimidated or unsafe, or there has been family violence you or your Lawyer should inform the family dispute resolution practitioner.

Is family dispute resolution confidential?

What is said during family dispute resolution sessions is normally confidential and not admissible in court. However, a family dispute resolution practitioner may (but does not have to) give information to the court if they believe that to do so:

- is necessary to protect a child from harm (both physical and psychological)
- is necessary to protect someone's life or health or property
- may prevent a crime involving violence or threats of violence or report a crime involving threats or violence

- will assist a lawyer independently representing a child's interests.

Parenting Orders by Consent: The Rule in *Rice v Asplund*

Final Parenting Orders are family law orders that detail the parenting arrangements for a child, which are made on a final basis and intended to remain in force until the child turns 18. A party who wishes to vary existing final parenting orders must bring an initiating application before the court setting out the variation sought. The court will only consider varying final orders if it is satisfied that the test outlined in the 1979 decision of *Rice v Asplund* has been met.

Rice V Asplund (1979) FLC ¶90-725

This case dealt with the living arrangements for the parties' three-year-old daughter. Final Parenting Orders were in place. The mother brought an application to vary the order, seeking orders that the daughter live with her and spend time with the father. Ultimately, the mother's application was successful.

The mother's application was filed after there were significant changes in her circumstances. These changes meant that the orders that had been made the previous year no longer reflected the child's best interests. On that basis the Federal Circuit Family Court of Australia, granted the mother's application and varied the orders.

The Rule

In *Rice v Asplund*, the Full Court of the Family Court decided that before reviewing final orders in relation to parenting matters, it needed to be satisfied that there had been a significant change in circumstances since the making of the orders. This is now referred to as the rule in *Rice v Asplund*.

Chief Justice Evatt stated that the court: "...*should not lightly entertain an application ... To do so would be to invite endless litigation for **change** is an ever-present factor in human affairs ... there must be evidence of a significant change in circumstances.*"

The purpose of the rule in *Rice v Asplund* is to protect children from being exposed to the uncertainty of ongoing litigation.

What Is A Significant Change Of Circumstances?

In deciding whether there has been a significant change of circumstances, the court will consider the changes in circumstances together with the facts of the matter.

As highlighted by Chief Justice Evatt, change alone will not be enough for the court to accept such an application. The changes must be of a serious nature to warrant a

variation. Whilst there are no specific circumstantial changes that automatically satisfy the rule in *Rice v Asplund*, there are a number of situations where parties may have a higher chance of success in satisfying the rule.

Examples of these are as follows:

- A party is seeking to relocate with the children;
- The current orders were made without all the relevant information being before the court;
- The parties have since consented to new parenting arrangements (e.g. entered into a parenting plan) and therefore, the current orders are no longer reflective of the actual arrangements for the children;
- A substantial period of time has elapsed between the final orders being made and the application being brought;
- One or more of the parties has re-partnered;
- There has been abuse of the children;
- A party to the proceedings or the child is in ill-health.

What Does This Mean For Parties Seeking A Variation To Final Parenting Orders?

A person intending to apply for a variation to final Parenting Orders must first consider the rule in *Rice v Asplund*. They should also attempt to resolve the situation through Family Dispute Resolution Conferencing prior to filing an Initiating Application. The court requires parties to have attempted Family Dispute Resolution conferencing prior to accepting an Application, except where there are exceptional circumstances.

The court is reluctant to vary final Parenting Orders. Even if there has been a significant change in circumstances and the rule in *Rice v Asplund* is satisfied, the Federal Circuit Family Court of Australia, will not necessarily grant the variation sought. The court will first need to carefully consider what is in the child's best interests. It will then decide whether a variation is desirable.

Negotiation has Failed: The Parties go to Court:

If you have made genuine efforts to resolve the children's issues, but no agreement has been reached, then the Federal Circuit Family Court of Australia, will resolve the dispute and make Parenting Orders. Orders made in these circumstances will also come within the *Rice v Asplund* rule.

The best interests of the child/ren is the Court's primary consideration when resolving or determining parenting disputes. At all stages during the pre-action negotiations and during any proceedings in the Court, you must keep in mind the following:

- the need to protect and safeguard the interests of the child
- the importance of a continuing safe relationship between the child and both parents and the benefits the child gains from the parents cooperating with one another

- the potential damage to a child involved in a dispute, particularly if the child is encouraged to take sides or take part in any dispute between the parents
- the importance of identifying issues early and exploring options for settlement
- the need to avoid protracted, unnecessary, hostile and inflammatory exchanges
- the impact of correspondence on the reader, particularly on the other party/ies
- the need to seek only those orders that are reasonably achievable on the evidence and that are consistent with current law, and
- the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute

Parties must not:

- use the pre-action procedure for an improper purpose; for example, to harass the other party or to cause unnecessary cost or delay, or
- in correspondence, raise irrelevant issues or issues that might cause the other party to adopt an entrenched, polarised or hostile position.

The Court expects parties to take a sensible and responsible approach to pre-action procedures.

Costs:

There is a principle that parties pay their own legal costs in Family Law proceedings. There are some exceptions to this, where the Court may order one party to pay the legal costs of the other party. You should be prepared to pay the full amount of your legal costs because it is uncommon for a party to recover their legal fees from the other party. If you require further information regarding costs, contact Matthews Lawyers to speak with one of our experienced Solicitors.

Recommendation:

Matthews Lawyers encourages all parties to genuinely try to resolve the issues regarding the child/ren of the marriage, without the need for court proceedings, which can, and usually are, very expensive. The Federal Circuit Family Court of Australia, requires that all parties will make a genuine attempt to do this also. This is a complex area of law and you should obtain, at least, initial legal advice.

Call our office to make an appointment with one of our experienced Solicitors to help you.

APPENDIX 1: THE FAMILY LAW ACT 1975 (CTH)

Part VII of the Family Law Act 1975 (Cth) (hereinafter 'the Act') gives the Court the power to make orders for the care and welfare about children in Australia (except Western Australia). Orders about children are commonly referred to **parenting orders**.

When determining any dispute about children (including about with whom a child should live and/or spend time, who should make decisions about a child, and matters like where child should go to school or whether a child should have a medical procedure), the Court must regard the **best interests of the child** as its paramount consideration. The *Family Law Act 1975*, provides guidance as to how the Court determines a child's best interests, but the Court has discretion to consider anything it thinks relevant in determining those best interests.

Section 60CA states that the paramount consideration in making a parenting order is 'the best interests' of the child/ren.

Section 60CC of the Act gives guidance to the Court as to what it must consider in determining what the best interests of the child/ren is/are. The 'primary considerations' for determining a child's best interests, to which the Court is required to give the greatest weight, are the benefit to the child of having a meaningful relationship with both of their 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 balancing those primary considerations, the Court must give greater consideration to protecting the child from harm (see section 60CC(2) and 60CC(2A) of the *Family Law Act 1975*).

Section 60CD guide the Court in how the views of the child/ren is/are considered.

Section 61DA states that there is a presumption of equal shared responsibility by the parents regarding the child/ren.

Division 4 of the Act relates to **parenting plans**.

- Section 63 states what a parenting plan is. It is a signed written agreement that is in writing and is made between the parents of a child, free from any threat, duress or coercion.
- Section 63(2) requires the parents to state with which parent the child/ren is/are to live and the time the child/ren will spend with the other parent. It will also state the communication the child/ren is/are to have with the other parent, his/her/their maintenance and the process to be used to resolve disputes if they arise. The parenting plan will also state the process to be used by the parents to change the parenting plan to take into account the changing needs or circumstances of the child, or any aspect of the care, welfare or development of the child/ren. Child Support can also be considered in the parenting plan, pursuant to Section 63CAA of the Act.

Division 6 of the Act relates to **parenting orders**. Section 65AA of the Act states that the paramount consideration is the best interests of the child. Section 65DAB requires the court to have regard to any parenting plan made by the parents. All parties are expected to comply with the parenting orders made by the Court under the Act.

Breach of Parenting Orders

When a parenting order is made by the Court, each person affected by the order must comply with (follow) the order. The parent must do everything a parenting order says. This includes taking all reasonable steps to ensure that the terms of the order take effect.

The parent must also positively encourage his/her child/ren to comply with the orders. For example, where the order states your child is to spend time with another party, you must not only ensure that the child is available, but must also positively encourage them to do so, even if the child says they do not wish to.

The parenting order remains on foot, unless it is formally changed by the FCFCOA. If you want to change the parenting order, an application must be made to the Court asking that the parenting order is varied/amended.

NB: A parenting plan is different from a parenting order. A parenting order is made by a court. A parenting plan is a written agreement that sets out parenting arrangements for children. It is not legally enforceable, although its contents can override part of a court order, so that part of the court order is no longer enforceable. Before entering into a parenting plan, you should seek legal advice.

How is an order contravened?

A person contravenes (breaches) an order, if they:

- intentionally fail to comply with the order
- make no reasonable attempt to comply with the order
- intentionally prevent compliance with the order by a person who is bound by it, or
- aid (help) or abet (assist) a contravention of the order by a person who is bound by it.

What is a reasonable attempt to comply?

When a parenting order is made, each person affected by the order must comply with the order. This includes taking all reasonable steps to comply with the order.

What is a reasonable excuse?

If the Court makes a finding that a person has failed to comply with an order, it will consider whether the person had a reasonable excuse for contravening the order. Some examples of reasonable excuses that may satisfy a court include:

- the person did not understand the obligations imposed by the order – this will be difficult to prove, if the person was represented by a Lawyer, or
- both:
 1. the person reasonably believed that the actions which gave rise to the contravention were necessary to protect the health and safety of a person, including the person who contravened the order or the child, and
 2. the contravention did not last longer than was necessary to protect the health and safety of the person who contravened the order or the child.

The other party has not complied

If you allege that another person has contravened an order without a reasonable excuse, you can:

- seek legal advice
- attend Family Dispute Resolution (FDR) counselling, and/or
- apply to the Court by filing an Application – Contravention and supporting evidence.

APPENDIX 2: FAMILY LAW RULES: RULE 6.06 DUTY OF DISCLOSURE

The duty of disclosure applies to all proceedings.

1. Each party to a proceeding has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the proceedings in a timely manner – Rule 6.01(1).
2. The duty of disclosure applies from the start of the proceeding and continues until the proceeding is finalised – Rule 6.01(2).
3. The rule does not apply to a respondent to an application alleging contravention or contempt – Rule 6.01(4).
4. A party (but not an independent children’s lawyer) must file a written notice:
 - Rule 6.02(1) stating that the party:–
 - a. Has read the rules regarding the duty of disclosure – Rule 6.02(1)(a)(i); and
 - b. Is aware of the party’s duty to the court and each other party (including any independent children’s lawyer) to give full and frank disclosure of all information relevant to the issues in the proceeding, in a timely manner; - Rule 6.02(1)(a)(ii); and
 - c. Gives an undertaking to the court, that to the best of his/her knowledge and ability, there has been compliance with, and there will be continued compliance with the duty of disclosure – Rule 6.02(1)(b); and
 - d. Acknowledges that a breach of the undertaking may be a contempt of court – Rule 6.02(1)(c).
5. A party commits an offence if he or she makes a statement or signs an undertaking that he or she knows, or should reasonably know, is false or misleading in a material (important) particular (issue) – Rule 6.02(2)
6. The duty of disclosure applies to each document – Rule 6.03 – that:
 - a. Is or has been in the possession, or under the control of the party disclosing the document – Rule 6.03(a); and
 - b. Is relevant to an issue in the proceeding – Rule 6.03(b).
7. The documents may only be used for the purpose of the proceeding and must not otherwise be disclosed to any other person without the court’s permission – Rule 6.04.
8. Documents that may contain relevant information to a parenting proceeding may include, among other documents:
 - a. Criminal records of a party – Rule 6.05(2)(a).
 - b. Documents filed in intervention order proceedings concerning a party – Rule 6.05(2)(b); and
 - c. Medical reports about a child or party – Rule 6.05(2)(c)
 - d. School reports – Rule 6.05(2)(d).

APPENDIX 3: FAMILY VIOLENCE & THE FAMILY LAW ACT 1975 (CTH)

The Family Court of Australia and the Federal Circuit Court of Australia (the Courts) take family violence very seriously.

Part 1: Legislation and Definition of Family Violence

Part 2: Principles Guiding Family Law Decisions

Part 3: Children and Family Violence

Part 4: Notifying the Family Court about Violence

Part 5: Parenting Orders and Intervention Orders – What are they?

PART 1

Legislation: Family Law Act 1975 (Cth) (hereinafter ‘the Act’)

Definition of Family Violence

Section 4AB of the Act, describes family violence as violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the *family member*), or cause the family member to be frightened.

Examples of behaviours that may constitute family violence include (but are not limited to):

- assault (including sexual assault or other sexually abusive behaviour), or
- stalking, or
- repeated derogatory taunts, or
- intentionally damaging or destroying property, or
- intentionally causing death or injury to an animal, or
- unlawfully depriving the family member, or any member of the family member’s family, of his or her liberty
- coercion – forcing someone to do something they do not want to do – this does not have to be accompanied by physical violence
- controlling a person’s activities, so that cannot make any decisions about what they do – this does not have to be accompanied by physical violence
- unreasonably denying the family member the financial autonomy that he or she would otherwise have had, or
- 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
- preventing the family member from making or keeping connections with his or her family, friends or culture.

Studies show the impact of living with family violence can cause short or long term physical and emotional trauma to children, young people and adults. Not only does family violence, or the threat of family violence, affect a person's safety, create fear and disrupt family units, it can also affect a person's:

- readiness to take action in a family law matter
- willingness to come to the Courts
- ability to participate in court events, and/or
- ability to achieve settlement of their dispute through negotiation.

PART 2

Principles Guiding Court Decisions: Best Interests of the Child – section 60CC

The Courts when dealing with family violence, is guided by what is in the best interests of the child.

When a court makes a parenting order, the Family Law Act requires it to regard the best interests of the child as the most important consideration. Parents are encouraged to use this principle when making parenting plans.

The *Family Law Act* focuses on the rights of children and the responsibilities that each parent has towards their children, rather than on parental rights. The Act aims to ensure that children can enjoy a meaningful relationship with each of their parents and are protected from harm.

The Family Law Act makes clear that:

- both parents are responsible for the care and welfare of their children until the children reach 18, and
- there is a presumption that arrangements which involve shared responsibilities and cooperation between the parents are in the best interests of the child.

The Court is also guided by the view that:

- Safety is a right and a priority for all who attend and work at the Courts.
- Family violence affects everyone in a family, including children.
- Family violence can occur before, during and after separation and it may affect the ability of people to make choices about their family law matter and to take part in court events.
- The Courts have a particular concern about the immediate and possible longer term adverse impacts on children who experience or witness family violence.
- Even if children do not directly witness the violence, they are often very aware of it.

PART 3

Children and Family Violence: Section 4(1) of the Act

The protection of children is the paramount consideration of the Act. It contains a range of provisions designed to protect parties and children from family violence. Section 4(1) of the Act states that abuse, in relation to a child, means:

- an assault, including a sexual assault, of the child, or
- 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 an unequal power in the relationship between the child and the first person, or
- 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
- serious neglect of the child.

Family violence between parents is traumatic for children and can have long lasting effects. A child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence

Examples of situations that may constitute a child being exposed to family violence include (but are not limited to):

- overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family, or
- seeing or hearing an assault of a member of the child's family by another member of the child's family, or
- 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
- 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
- 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.

Extensive research confirms the devastating impact family violence can have on children's lives and their physical and emotional development. Family violence can affect children in many ways.

How does Violence Affect Children? [26 Sep 2003 - pandora.nla.gov.au/pan/34659/20030410/issuespaper2.pdf](http://pandora.nla.gov.au/pan/34659/20030410/issuespaper2.pdf) - Trove

Research tells us that violence affects children and causes them to experience emotional and psychological trauma, as well as behavioural problems. It can affect their schooling and social lives and can lead to psychiatric illness – depression and anxiety. Children of different ages show their trauma in different ways.

PART 4

NOTIFYING THE COURT OF AUSTRALIA ABOUT FAMILY VIOLENCE

The *Notice of child abuse, family violence or risk* is a mandatory form for any person who files an Initiating Application or Response in the Family Court or Federal Circuit Court seeking parenting orders from 31 October 2020.

It is also the prescribed notice when allegations for the purposes of subsections 67Z(2) or 67ZBA(2) of the *Family Law Act 1975* are raised.

Sections 67ZBB and 67ZBA(2)-(3)

Under **section 67ZBB** prompt action by the Court is required in relation to allegations of child abuse or family violence. Considerations must be made to:

- determine what interim or procedural orders (if any) should be made to protect the child or any of the parties to the proceedings, and
- obtain evidence about the allegation as expeditiously as possible.

The Courts must take action as soon as practicable after the notice is filed, and within eight weeks if appropriate to the circumstances – **section 67ZAB(3)**.

If an interested party to the proceeding answered 'yes' to question 6 and/or 13e of the *Notice of child abuse, family violence or risk*, the prescribed child welfare authority must be provided a copy of the form by the Registry Manager who may provide such other court documents and information as is required to enable investigation of the contents of the Notice – **section 67Z(2)**.

If there are allegations of family violence, child abuse or risk of family violence, the Court may make orders to obtain documents or information from state and territory agencies in relation to the allegations (69ZW). This could include documents pertaining to notifications made to child protection/state or territory agencies regarding suspected child abuse or family violence affecting the child, or other investigations made by the agency following the notification.

Section 68 of the Act

Under section 68B, the Court can make orders or grant injunctions as it considers appropriate for the welfare of the child.

Section 60CF of the Act

Section 60CF states that if a party to the proceedings, or a person who is not a party to the proceeding, is aware that a family violence order applies to the child, or a member of the child's family, that party must inform the Court of the family violence order.

PART 5

Parenting Orders of the Family Court v Family Orders made by Magistrates Court of South Australia

The Family Court of Australia and the Federal Circuit Court of Australia have federal jurisdiction and are responsible for making parenting orders, whereas family violence orders are general made by the prescribed law of a state or territory.

What is a parenting order? [Parenting orders – what you need to know | Attorney-General's Department \(ag.gov.au\)](#)

A parenting order is a set of orders made by a court about parenting arrangements for a child. A court can make a parenting order based on an agreement between the parties (consent orders) or after a court hearing or trial. When a parenting order is made, each person affected by the order must follow it.

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
- how the child will communicate with a parent they do not live with, or other people
- any other aspect of the care, welfare or development of the child.

What is an Intervention Order?

An Intervention Order is a court Order against a person who makes you fear for your safety, to protect you from further violence, intimidation or harassment. The person you fear (known as the defendant) must obey the Order made by the court. An Intervention Order prohibits the defendant from assaulting, harassing, threatening, stalking, or intimidating you. An Order can be made against anyone you fear including a spouse, a relative, a neighbour or someone with whom you have had an intimate relationship. If you fear for your children's safety, you can include them in your application.

How to apply for an Intervention Order

If you have been assaulted, threatened or have had property damaged, call the Police or go to a Police station to make a report. The Police have the power to issue an interim (temporary) Intervention Order if the defendant is present or in custody. An Intervention Order starts once the Police hand it to the defendant.

Before you make a report, make a list of the things that have made you fear the person or feel unsafe. Try to include details of when and where these things happened and if there were any witnesses. It is helpful to have a written statement prepared beforehand. Your statement should include details about:

- Your relationship with the other person
- If you have children, their names and age

- If the children witnessed the abuse or have been abused themselves
- If there are any drug, alcohol or mental health issues
- If the other person has access to a weapon
- Details of physical violence, threats, intimidation, stalking, property damage or dangerous driving
- Any harassing phone calls, texts, Facebook posts or emails. Where possible, show these to the Police.
- Whether any other people close to you have also been threatened or have reason to be scared
- Copies of any Family Court Orders or Child Protection Orders

The Police may also decide to lay criminal charges against the defendant after hearing your story. Only the Police can do this – you cannot lay or withdraw charges.

All decisions of the Commonwealth override decisions made by states or territories.

Parenting orders that have been made by the Family Court or the Federal Circuit Court will supersede inconsistent obligations of a state or territory-based family violence order.

In South Australia a person who is the victim of family violence can obtain an Intervention Order – Restraining Order/Apprehended Violence Order – in the

Magistrates Court pursuant to the Intervention Orders (Prevention of Abuse) Act 2009.

SA Police can assist with this. **CHILDREN CAN ALSO BE INCLUDED IN**

INTERVENTION ORDERS.