



# FAMILY DISPUTE RESOLUTION, CHILDREN AND THE FAMILY LAW ACT 1975 (CTH)

## Abstract

Family Dispute Resolution (hereinafter 'FDR') is a form of mediation that is facilitated by an independent practitioner, who is registered to assist parents to negotiate issues relating to the future care arrangements of their child/ren, after separation. FDR is a cost effective tool to achieve this. It can minimise legal costs and reduce the stress that is often associated with separation.

FDR is required before proceedings can be commenced in the Federal Circuit & Family Court of Australia unless a party comes within one of the exceptions.

Matthews Lawyers recommends FDR as a tool to resolve the future care arrangements of the child/ren of the relationship.

# FAMILY DISPUTE RESOLUTION & FAMILY LAW INFORMATION BOOKLET

**NB: Family violence is briefly discussed in this booklet. Please download our Family Violence & the Family Law Act 1975(Cth) Information Booklet for more detailed information and guidance if family violence is a feature for you.**

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### Introduction:

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.

If the parties choose not to have any orders but rely on an informal agreement about where the children will live, what and how decisions about them are made and contact with the non-custodial parent.

**Informal arrangements are risky.** The parties risk that the other parent may not return the children to them at the conclusion of contact time. Formal orders are best. If one party contravenes an order, the Federal Circuit & Family Court of Australia (hereinafter 'Family Court') can enforce the Orders.

There are procedures in place to assist parties to reach agreement about how the needs of the children of their relationship will be met. **Family Dispute Resolution** (hereinafter 'FDR'), is one such mechanism.

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.**

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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,

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- 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. **FDR IS AN IMPORTANT TOOL** TO RESOLVE CHILDREN'S ISSUES. **FDR CAN ALSO REDUCE LEGAL COSTS** TO THE PARTIES. **MATTHEWS LAWYERS HIGHLY RECOMMENDS FDR.**

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

#### Parenting orders Family Law Act 1975

- 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 61B – meaning of parental responsibility
- Section 61C – each parent has parental responsibility
- Section 61D – parenting orders and parental responsibility

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- Section 61DA – presumption of equal shared parental responsibility when making parenting orders.
- Section 64B – meaning of parenting order and related terms.
- Section 65DAA – court to consider child spending equal time or substantial and significant time with each parent in certain circumstances.
- Section 65DAB – court to have regard to parenting plans
- Section 65DA – parenting orders
- Section 65F – general requirement for counselling before parenting order can be made
- 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.
- Section 68L – appointment of an Independent Children’s Lawyer
- Section 68LA – the role of the Independent Children’s Lawyer

### 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.

### Equal Shared Parental Responsibility:

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

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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.

### What is Family Dispute Resolution?

The Family Law Act 1975 (Cth) requires you to attempt Family Dispute Resolution (hereinafter 'FDR') unless your circumstances fall into one of the exceptions permitted by the FLA. Family Dispute Resolution (hereinafter 'FDR') is a form of mediation that is facilitated by an independent practitioner, who is registered to assist parents to negotiate issues relating to the care of their children, after separation. By having an independent mediator assist you to resolve the future care of the children, you can minimise your legal



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costs. Participation in FDR, can also minimise the stress that is often associated with separation.

The agreement can be reduced to writing, in the form of a parenting plan, which can form the basis of Consent Orders. It is a practical way for parents to resolve disagreements and to make arrangements, for the future care of their children, without the need for protracted litigation. By negotiating with the other party for the future care of the children of the relationship, the parties are able to determine what those arrangements will be. If the parties cannot agree, the Family Court will make orders, that one party, or more likely both parties, will not be satisfied with. The parties during FDR have complete control.

Litigation is expensive. Accordingly, the parties should do all things possible to minimise legal costs. Matthews Lawyers recommends parties participate in FDR for this reason. To use the vernacular, *you make your legal representative rich by disagreeing about the future care of the children – sometimes just because you're hurting and you want the other party to suffer* - or you can be sensible and negotiate a resolution, minimising your legal costs. The choice is yours. If you seek assistance from Matthews Lawyers, we will recommend that you attempt FDR first. If parents cannot agree on the future care of their children, the Family Court, may on its own initiative or at the request of a party, order that the parties attend FDR.

Except in limited circumstances, Part VII of the Family Law Act 1975 (Cth) (hereinafter 'FLA') requires parties to obtain a certificate from a registered Family Dispute Resolution Provider (hereinafter 'FDRP') before proceedings can be filed in the Family Court, regarding children. A section 60I Certificate will be provided to the parties if FDR has not been successful.

**FDR & the Role of the Independent Children's Lawyer ('ICL'):**

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If the Family Court thinks it is necessary, an ICL can be appointed to act in the best interests of the child/ren of the relationship between the parties. If an ICL is appointed, he or she will also be present at the FDR. The appointment of the ICL is set out in section 68L of the FLA.

The role of the ICL is set out in section 68LA of the FLA. He or she must:

- act impartially in dealings with the parties to the proceedings; and
- ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and
- if a report or other document that relates to the child is to be used in the proceedings:
  - (i) analyse the report or other document to identify those matters in the report or other document that he or she considers to be the most significant ones for determining what is in the best interests of the child; and
  - (ii) ensure that those matters are properly drawn to the court's attention; and
- endeavour to minimise the trauma to the child associated with the proceedings; and
- facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.

The ICL is not the child's legal representative. The ICL assists the Family Court to understand the views of the child. The ICL forms an independent view based upon evidence that comes to his or her hand, regarding the best interests of the child. He or she is not obliged to carry out the child's instructions.

Once the views of the child are ascertained, the court is required to consider them in concert with the primary considerations and such of the other additional considerations relevant to the child's welfare. *This process of ascertaining the wishes of the child, is described by the Full Court in R v R<sup>1</sup> as follows:-*

“ ... the court will attach varying degrees of weight to a child's stated wishes depending upon, amongst other factors, the strength and duration of their wishes, their basis, and the

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<sup>1</sup> [2000] FamCA 43 at paragraph 42.

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maturity of the child, including the degree of appreciation by the child of the factors involved in the issue before the court and their longer term implications. Ultimately the overall welfare of the child is the determinant. That is so because the legislation says so and also because long before specific legislation the practice of the Court in its *parens patriae* jurisdiction established that view.”

The court also stated in *R v R*<sup>2</sup>

that “ ... [t]here are many factors that may go to the weight that should be given to the wishes of children and these will vary from case to case and it is undesirable and indeed impossible to catalogue or confine them in the manner suggested. Ultimately it is a process of intuitive synthesis on the part of the trial judge weighing up all the evidence relevant to the wishes of the children and applying it in a commonsense way as one of the factors in the overall assessment of the children's best interests.

The court may inform itself of views expressed by children by having regard to anything contained in a report given to the Court by a family consultant<sup>3</sup> or other expert or appropriately qualified person retained by the parties or through the independent children's lawyer<sup>4</sup>

### When can FDR Occur?

The Family Law Act 1975 (Cth) requires the parties to have attended FDR prior to commencing proceedings. There must be a genuine effort by the parties to resolve issues relating to the future care arrangements for the children of the relationship, unless they meet one of the criteria for exemption from participation in FDR – this is discussed later in this booklet. The parties must file a *Genuine Steps Certificate* with the Family Court,

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<sup>2</sup> [2000] FamCA 43 at paragraph 54.

<sup>3</sup> *Family Law Act 1975* (Cth) [ss 60CD\(2\)\(a\)](#), [62G\(2\)](#) and [62G\(3A\)](#), the last provision of which generally requires the person giving the report to ascertain the child's views and include them in the report

<sup>4</sup> *Family Law Act 1975* (Cth) [ss 60CD\(2\)\(b\)](#), [62G\(2\)](#) and [68LA\(5\)\(b\)](#), the last provision of which requires an independent children's lawyer to ensure that the child's views are put before the court.

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wherein they formally attest that they have made all reasonable endeavours, to make arrangements for the future care of their children.

Where the parties have participated in FDR, prior to filing initiating procedures, the Family Court may still refer the parties to FDR, if it considers that it will assist the parties, to resolve the issues, regarding the future care of their children.

### Information about FDR to the Parties:

Pursuant to the Regulation 28 of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth) each party is given information about FDR. The parties must be advised:

1. That it is not the role of the FDR Practitioner to give legal advice, unless the Practitioner is a Solicitor.
2. The confidentiality and disclosure obligations of the FDR Practitioner.
3. That generally communications made in FDR are inadmissible.
4. The qualifications of the FDR Practitioner.
5. The fees charged by the FDR Practitioner for the FDR.
6. That the parties must attend FDR before seeking orders from the Family Court, regarding the child/ren of the relationship, unless an exception applies.
7. That the Family Court may take into consideration any Section 60I Certificate made under the FLA, when determining whether the parties should be referred to FDR or to award costs against a party.
8. Information about the complaints mechanism that a party can use, if they want to complain about the FDR service.

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### Advice to Facilitate Reconciliation: Section 12G Family Law Act 1975 (Cth):

Parties must be given information about family counselling and FDR services to assist with reconciliation. It does not need to be given, if there is sufficient information before the FDR Practitioner or where the FDR Practitioner believes there is no reasonable possibility of reconciliation.

### FDR & Family Violence or Child Abuse: Section 60J of the Family Law Act 1975 (Cth):

The parties do not need to attend FDR if family violence or child abuse, is a feature in their relationship.

Matthews Lawyers has directs you to our separate Information Booklet – Family Violence & the Family Law Act 1975 (Cth) for further advice if violence or abuse is a feature of the relationship. There are special provisions in the Family Law Act 1975 (Cth) to manage proceedings where family violence or abuse has arisen.

The Family Court recognises that family violence is not homogeneous or uniform, in its qualities. It accepts and acknowledges that family violence can arise in a variety of contexts; that it is widespread and can occur in all socioeconomic and ethnic groups.

The effects that the exposure to violence may have upon a child were commented upon in the matter of T & N<sup>5</sup> :

“There is an abundance of research from social scientists about the highly detrimental effect upon young children of exposure to violence and the serious consequences such

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<sup>5</sup> [2003] FamCA 1129 per Judge Moore at paragraph 36.

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experiences have for their personality formation. They are terrified and simultaneously come to accept it as an expected part of life; they may learn that violence is acceptable behaviour and an integral part of intimate relationships; or that violence and fear can be used to exert control over family members; they may suffer significant emotional trauma from fear, anxiety, confusion, anger, helplessness and disruption in their lives; they may have higher levels of aggression than children who do not have that exposure; and they may suffer from higher anxiety, more behaviour problems and lower self-esteem than children not exposed to violence.”

The definition of family violence in the Family Law Act 1975 (Cth) (hereinafter ‘FLA’) is expressed in gender neutral terms. In the matter of *Amador & Amador*<sup>6</sup> said:

*“Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission.*

*The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.”*

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

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<sup>6</sup> (2009) 43 FAM LR 268.

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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.

**Where family violence is a feature of the relationship of the parties, FDR will be deemed not appropriate.** The party raising the issue bears the burden of satisfying the Family Court that family violence is a factor of the relationship. However, once raised, the Family Court will act on the side of caution, at all times acting within the principles established in the Family Law Act 1975 (Cth) that its role is to facilitate and optimise the best interests of the child/ren and that it is a paramount consideration.

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### FDR: Best Interests of the Child and Parenting Plans: Family Law Act 1975 (SA)

The FDR Practitioner must inform the parties that the paramount consideration in the FDR process is the *best interests of the child/ren* and that it is also the paramount consideration of the Family Court, when making decisions about Parenting Orders. Accordingly, the parties will be advised that pursuant to the FLA, the best interests of the child/ren are met by:

1. The child/ren having a meaningful relationship with both parents, and
2. Ensuring that the child is protected from physical emotional or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence.

Considerations to determine what the best interests of the child/ren are, include but are not limited to:

1. The views of the child/ren. The older the child or the more mature the child, the more weight will be given to his/her or their views.
2. The existing relationship the child has with each parent and the extended family.
3. The effect of the separation of the parents on the child/ren – will the child/ren have to change schools or where they live.
4. The capacity for each of the parents to provide for the needs of the child/ren.
5. The ability for each of the parents to support the need of the child/ren to enjoy and maintain a connection with the cultural background.



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### FDR: Confidentiality and Inadmissibility

The negotiations between the parties regarding the future care arrangements for the children of the relationship are confidential and not admissible in proceedings in the Family Court pursuant to section 10H of the FLA and section 10J respectively.

Confidential communications in the FDR may be disclosed if the FDRP, reasonably believes that the disclosure is necessary for the purpose of:

1. Protecting a child from risk of physical or psychological harm.
2. Preventing or lessening a serious and imminent threat to the life or health of a person.
3. Reporting the commission, or preventing the likely commission, of an offence that involves violence or a threat of violence to a party.
4. Preventing or lessening a serious and imminent threat to the property of a party.
5. Reporting the commission, to prevent the likely commission, of an offence involving intentional property damage of a person or the threat of damage to property of a party.
6. To assist an independent children's lawyer to properly represent the best interests of a child.

Notwithstanding the above, confidential information may be disclosed to the other party, if consent is given for this to occur.

Inadmissible communications are not admissible in any court or proceedings, unless they relate to concerns of child abuse.

### Admissibility of FDR Intake & Assessment:

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Rastall and Ball [2010] FMCA 1290 provides that intake and assessment information is admissible, as the FDR has not occurred. It is only information that comes to hand during the FDR process that comes within the purview of sections 10H & 10J of the FLA.

### What happens in the FDR Intake & Assessment?

Pursuant to the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth) (hereinafter 'FDR Regulations'), an assessment of the parties must be undertaken prior to FDR. The purpose of the assessment is to determine whether FDR is appropriate.

The FDRP must be satisfied that the parties are able to participate in the FDR process freely and effectively. The FDRP will consider:

1. Whether violence is a factor in the relationship of the parties.
2. The safety of the parties.
3. The risk that a child of the relationship may suffer child abuse.
4. The emotional, psychological and physical health of the parties, or
5. Any other matter considered relevant for FDR to proceed.

If a determination has been made that FDR is not appropriate because there is an unacceptable risk to the safety and well-being of one of the parties or a child of the relationship, FDR will not proceed.

### The FDR Conference:

The Intake and Assessment has occurred. The parties have been provided with Information about FDR, the role of the FDR Practitioner, confidentiality and inadmissibility of the communications in the FDR and have considered the future care arrangements of

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the child/ren. The FDR Practitioner has facilitated the FDR together with the legal representatives of the parties which has been reduced to writing.

Generally, the FDR Conferences are held by way of a shuttle process. The FDR Practitioner moves between each party, who are in separate rooms during the FDR. The parties can self-represent (attend on their own) or can be legally represented. The role of the FDR Practitioner is not to tell the parties what future arrangements should be made for the care of the child/ren, it is to assist the parties to come to agreement on what those arrangements will be. It is always best for the parties to reach agreement for the future care of the child/ren. If they cannot, the Family Court will make orders that one or more likely both parties will not be completely with.

If necessary a follow up FDR may be required.

### Parenting Agreement – What is it?

**FDR is an important tool in assisting the parties** to determine the future care arrangements for their children. Their negotiations will be reduced to a Parenting Agreement. It focuses on the needs and best interests of the children pursuant to the principles and legislative requirements of the FLA. Parenting agreements can be;

- an oral agreement – **Matthews Lawyers does not recommend this**. It is too easy for one party to misinterpret what the other party has agreed to resulting in conflict. It becomes a he said/she said dispute which is usually expensive.
- a written parenting plan – **Matthews Lawyers recommends** have a written plan. A parenting plan reduced to writing, becomes objective evidence of the intention of the parents regarding the future care arrangements for their children. However, beware, a parenting plan, **cannot be enforced** by the Family Court, if one of the parties does not

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comply with it or breaches/contravenes its terms, **unless it forms the basis of ‘consent orders’** or

- used as the basis for formal **‘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.

Matthews Lawyers can **assist to expedite the FDR negotiation** process by **preparing a draft Parenting Plan** which the parties can take with them to FDR, to facilitate, maximise and optimise the effectiveness of the negotiations between the parties, with respect to the future care of the children of the relationship. This approach **minimises** legal costs.

The document prepared by Matthews Lawyers will be in the correct format and will address the requirements of the legislation. Often Parenting Plans prepared by FDRPs, omit some requirement(s) of the legislation. When this occurs, further negotiation becomes necessary, which of course, adds to the cost. If the FDRP is legally qualified, it is likely the Parenting Plan drafted to reflect the agreement between the parties regarding the future care of the children, will address all legislative requirements. It is reiterated that if the FDRP is not legally qualified, there is a risk, even if it is a small risk that the Parenting Plan will omit, to address an issue that should have been considered and documented in the Parenting Plan.

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### 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 – e.g. 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 and Finality – Rice & Asplund Rule

Parenting orders are what the Family Court makes, on the basis of the agreement the parents have reached. They are known as Consent Orders. Their strength, is that they have finality. In addition, another strength of Consent Orders, is that they cannot easily be overturned or set aside. They are subject to the rule stated 'In the Marriage of Rice & Asplund' (1978) 6 Fam LR 570 – known as the Rule in Rice v Asplund. In this matter His Honour Chief Justice Evatt

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*stated at 572: should not lightly entertain an application to reverse an earlier custody order. To do so would be to invite endless litigation.*

Rice v Asplund held:

1. The court should not lightly entertain an application to reverse an earlier custody order. It would need to be satisfied by the applicant that there was some changed circumstance which would justify such a serious step, some new factor arising, or, at any rate, some factor which was not disclosed at the previous hearing which would have been material. These are not necessarily matters for preliminary submission, but they are matters which the judge should consider in his reasons for decision.
2. These principles apply whether the original order was made by consent or after a contested hearing.
3. Once the court is satisfied that there is a new factor or a change in circumstance, then the issue of custody should be determined in the ordinary way, applying the principles enunciated in s 64.
4. While the court should give weight to any earlier decision and to any findings of fact, the judge is not bound by the earlier court's assessment of the parties or views as to the best interests of the child.
5. The fresh evidence sought to be tendered by counsel for the husband was of such a nature that if it were admitted the respondent wife would seek an opportunity to cross-examine the deponent husband and an opportunity to present evidence in reply. Such an exercise should not be conducted by the Full Court as a general rule, but should be heard by a single judge.

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### 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.

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### 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



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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

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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,

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- 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.

### **Conclusion:**

Matthews Lawyers strongly recommends that the parties participate in FDR. Participation can help to resolve differences, minimise legal costs, which is always a good thing and reduce the stress that is often accompanied with the ending of a marriage or relationship.

The Family Law Act of Australia 1975 (Cth) states that children have the right to have a meaningful relationship with both of their parents and extended family. Parents have responsibilities to ensure that the needs of the child/ren are facilitated, promulgated and optimised.

Failure to act in the best interests of the child/ren may have cost consequences. The Federal Circuit & Family Court of Australia may order costs against the party who does not act in the best interests of the child/ren.

Should you require further information, please do not hesitate to contact our office, to speak to one of our experienced Solicitors, who will guide you through this difficult time with care and support.

Family Dispute Resolution is a mechanism whereby the parties can resolve any differences they have regarding the child/ren of their relationship and make arrangements for the future care of the child/ren. FDR is mandatory before proceedings can be filed in the Federal Circuit & Family Court of Australia, unless one of the exceptions applies and the parties are exempted from participation in FDR.

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APPENDIX A: Section 60B, 60CA, 60CC, 61B, 61C, 61D, 61DA, 64B, 65DAA, 65DAB, 65DA, 65F, 67Z & 67BA , 68L & 68LA FAMILY LAW ACT 1975 (CTH)  
FAMILY LAW ACT 1975 - SECT 60B

### Objects of Part and principles underlying it

(1) The objects of this Part are to ensure that the best [interests](#) of [children](#) are met by:

(a) 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 [interests](#) of the [child](#); and

(b) protecting [children](#) from physical or psychological harm from being subjected to, or [exposed](#) to, [abuse](#), neglect or [family violence](#); and

(c) ensuring that [children](#) receive adequate and proper [parenting](#) to help them achieve their full potential; and

(d) ensuring that [parents](#) fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their [children](#).

(2) The principles underlying these objects are that (except when it is or would be contrary to a [child's](#) best [interests](#)):

(a) [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; and

(b) [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](#)); and

(c) [parents](#) jointly share duties and responsibilities concerning the care, welfare and development of their [children](#); and

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(d) [parents](#) should agree about the future [parenting](#) of their [children](#); and

(e) [children](#) have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(3) For the purposes of subparagraph (2)(e), 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:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the [child's](#) age and developmental level and the [child's](#) views; and

(ii) to develop a positive appreciation of that culture.

(4) An additional object of this Part is to give effect to the Convention on the Rights of the [Child](#) done at New York on 20 November 1989.

### FAMILY LAW ACT 1975 - SECT 60CA

#### Child's best interests paramount consideration in making a parenting order

In deciding whether to make a particular [parenting order](#) in relation to a [child](#), a [court](#) must regard the best [interests](#) of the [child](#) as the paramount consideration.

### FAMILY LAW ACT 1975 - SECT 60CC

#### How a court determines what is in a child's best interests

Determining [child's](#) best [interests](#)

(1) Subject to [subsection](#) (5), in determining what is in the [child's](#) best [interests](#), the [court](#) must consider the matters set out in [subsections](#) (2) and (3).

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Note: [Section 68P](#) also limits the effect of this section on a [court](#) making decisions under that section about limiting, or not providing, an explanation to a [child](#) of an order or injunction that is inconsistent with a [family violence order](#).

Primary considerations

(2) The primary considerations are:

(a) the benefit to the [child](#) of having a meaningful relationship with both of the [child's](#) [parents](#); and

(b) the need to protect the [child](#) from physical or psychological harm from being subjected to, or [exposed](#) to, [abuse](#), neglect or [family violence](#).

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in [paragraphs](#) 60B(1)(a) and (b).

(2A) In applying the considerations set out in [subsection](#) (2), the [court](#) is to give greater weight to the consideration set out in [paragraph](#) (2)(b).

Additional considerations

(3) Additional considerations are:

(a) any views expressed by the [child](#) and any factors (such as the [child's](#) maturity or level of understanding) that the [court](#) thinks are relevant to the weight it should give to the [child's](#) views;

(b) the nature of the relationship of the [child](#) with:

(i) each of the [child's](#) [parents](#); and

(ii) other persons (including any grandparent or other [relative](#) of the [child](#));

(c) the extent to which each of the [child's](#) [parents](#) has taken, or failed to take, the opportunity:

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(i) to participate in making decisions about [major long-term issues](#) in relation to the [child](#); and

(ii) to spend time with the [child](#); and

(iii) to communicate with the [child](#);

(ca) the extent to which each of the [child's parents](#) has fulfilled, or failed to fulfil, the [parent's](#) obligations to maintain the [child](#);

(d) the likely effect of any changes in the [child's](#) circumstances, including the likely effect on the [child](#) of any separation from:

(i) either of his or her [parents](#); or

(ii) any other [child](#), or other person (including any grandparent or other [relative](#) of the [child](#)), with whom he or she has been living;

(e) the practical difficulty and expense of a [child](#) spending time with and communicating with a [parent](#) and whether that difficulty or expense will substantially affect the [child's](#) right to maintain personal relations and direct contact with both [parents](#) on a regular basis;

(f) the capacity of:

(i) each of the [child's parents](#); and

(ii) any other person (including any grandparent or other [relative](#) of the [child](#));

to provide for the needs of the [child](#), including emotional and intellectual needs;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the [child](#) and of either of the [child's parents](#), and any other characteristics of the [child](#) that the [court](#) thinks are relevant;

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(h) if the [child](#) is an [Aboriginal child](#) or a [Torres Strait Islander child](#):

(i) the [child](#)'s right to enjoy his or her [Aboriginal or Torres Strait Islander culture](#) (including the right to enjoy that culture with other people who share that culture); and

(ii) the likely impact any proposed [parenting order](#) under this Part will have on that right;

(i) the attitude to the [child](#), and to the responsibilities of [parenthood](#), demonstrated by each of the [child](#)'s [parents](#);

(j) any [family violence](#) involving the [child](#) or a [member](#) of the [child](#)'s family;

(k) if a [family violence order](#) applies, or has applied, to the [child](#) or a [member](#) of the [child](#)'s family--any relevant inferences that can be drawn from the order, taking into account the following:

(i) the nature of the order;

(ii) the circumstances in which the order was [made](#);

(iii) any evidence admitted in [proceedings](#) for the order;

(iv) any findings [made](#) by the [court](#) in, or in [proceedings](#) for, the order;

(v) any other relevant matter;

(l) 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](#);

(m) any other fact or circumstance that the [court](#) thinks is relevant.

### Consent orders

(5) If the [court](#) is considering whether to make an order with the consent of all the parties to the [proceedings](#), the [court](#) may, but is not required to, have regard to all or any of the matters set out in [subsection](#) (2) or (3).



## FAMILY DISPUTE RESOLUTION & FAMILY LAW INFORMATION BOOKLET

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Right to enjoy [Aboriginal or Torres Strait Islander culture](#)

(6) For the purposes of [paragraph](#) (3)(h), an [Aboriginal child](#)'s or a [Torres Strait Islander child](#)'s right to enjoy his or her [Aboriginal or Torres Strait Islander culture](#) includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the [child](#)'s age and developmental level and the [child](#)'s views; and

(ii) to develop a positive appreciation of that culture.

### FAMILY LAW ACT 1975 - SECT 61B

#### Meaning of parental responsibility

In this Part, [parental responsibility](#), in relation to a [child](#), means all the duties, powers, responsibilities and authority which, by law, [parents](#) have in relation to [children](#).

### FAMILY LAW ACT 1975 - SECT 61C

#### Each parent has parental responsibility (subject to court orders)

(1) Each of the [parents](#) of a [child](#) who is not 18 has [parental responsibility](#) for the [child](#).

Note 1: This section [states](#) the legal position that prevails in relation to [parental responsibility](#) to the extent to which it is not displaced by a [parenting order made](#) by the [court](#). See [subsection](#) (3) of this section and [subsection](#) 61D(2) for the effect of a [parenting order](#).

Note 2: This section does not establish a presumption to be applied by the [court](#) when making a [parenting order](#). See [section 61DA](#) for the presumption that the [court](#) does apply when making a [parenting order](#).

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Note 3: Under [section 63C](#), the [parents](#) of a [child](#) may make a [parenting plan](#) that deals with the allocation of [parental responsibility](#) for the [child](#).

(2) [Subsection](#) (1) has effect despite any changes in the nature of the relationships of the [child's](#) [parents](#). It is not affected, for example, by the [parents](#) becoming separated or by either or both of them marrying or re-marrying.

(3) [Subsection](#) (1) has effect subject to any order of a [court](#) for the time being [in force](#) (whether or not [made](#) under [this Act](#) and whether [made](#) before or after the commencement of this section).

### FAMILY LAW ACT 1975 - SECT 61D

#### Parenting orders and parental responsibility

(1) A [parenting order](#) confers [parental responsibility](#) for a [child](#) on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the [child](#).

(2) A [parenting order](#) in relation to a [child](#) does not take away or diminish any aspect of the [parental responsibility](#) of any person for the [child](#) except to the extent (if any):

- (a) expressly provided for in the order; or
- (b) necessary to give effect to the order.

### FAMILY LAW ACT 1975 - SECT 61DA

#### Presumption of equal shared parental responsibility when making parenting orders

(1) When making a [parenting order](#) in relation to a [child](#), 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](#).

Note: The presumption provided for in this [subsection](#) is a presumption that relates solely to the allocation of [parental responsibility](#) for a [child](#) as defined in [section 61B](#). It

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does not provide for a presumption about the amount of time the [child](#) spends with each of the [parents](#) (this issue is [dealt with](#) in [section 65DAA](#)).

(2) The presumption does not apply if there are reasonable grounds to believe that a [parent](#) of the [child](#) (or a person who lives with a [parent](#) of the [child](#)) has engaged in:

(a) [abuse](#) of the [child](#) or another [child](#) who, at the time, was a [member](#) of the [parent](#)'s family (or that other person's family); or

(b) [family violence](#).

(3) When the [court](#) is making an interim order, the presumption applies unless the [court](#) considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

(4) The presumption may 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](#).

### FAMILY LAW ACT 1975 - SECT 64B

#### Meaning of parenting order and related terms

(1) A [parenting order](#) is:

(a) an order under this Part (including an order until further order) dealing with a matter mentioned in [subsection](#) (2); or

(b) an order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in [paragraph](#) (a).

However, a declaration or order under Subdivision E of Division 12 is not a [parenting order](#).

(2) A [parenting order](#) may deal with one or more of the following:

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- (a) the person or persons with whom a [child](#) is to live;
- (b) the time a [child](#) is to spend with another person or other persons;
- (c) the allocation of [parental responsibility](#) for a [child](#);
- (d) if 2 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;
- (e) the communication a [child](#) is to have with another person or other persons;
- (f) maintenance of a [child](#);
- (g) the steps to be taken before an application is [made](#) to a [court](#) for a variation of the order to take account of the changing needs or circumstances of:
  - (i) a [child](#) to whom the order relates; or
  - (ii) the parties to the [proceedings](#) in which the order is [made](#);
- (h) the process to be used for resolving disputes about the terms or operation of the order;
- (i) any aspect of the care, welfare or development of the [child](#) or any other aspect of [parental responsibility](#) for a [child](#).

The person referred to in this [subsection](#) may be, or the persons referred to in this [subsection](#) may include, either a [parent](#) of the [child](#) or a person other than the [parent](#) of the [child](#) (including a grandparent or other [relative](#) of the [child](#)).

Note: [Paragraph](#) (f)--a [parenting order](#) cannot deal with the maintenance of a [child](#) if the [Child Support \(Assessment\) Act 1989](#) applies.

(3) Without limiting [paragraph](#) (2)(c), the order may deal with the allocation of responsibility for making decisions about [major long-term issues](#) in relation to the [child](#).

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(4) The communication referred to in [paragraph](#) (2)(e) includes (but is not limited to) communication by:

- (a) letter; and
- (b) telephone, email or any other electronic means.

(4A) Without limiting [paragraphs](#) (2)(g) and (h), the [parenting order](#) may provide that the parties to the [proceedings](#) must consult with a [family dispute resolution practitioner](#) to assist with:

- (a) resolving any dispute about the terms or operation of the order; or
- (b) reaching agreement about changes to be [made](#) to the order.

(5) To the extent (if at all) that a [parenting order](#) deals with the matter mentioned in [paragraph](#) (2)(f), the order is a [child maintenance order](#).

(6) For the purposes of [this Act](#):

- (a) a [parenting order](#) that provides that a [child](#) is to live with a person is [made in favour](#) of that person; and
- (b) a [parenting order](#) that provides that a [child](#) is to spend time with a person is [made in favour](#) of that person; and
- (c) a [parenting order](#) that provides that a [child](#) is to have communication with a person is [made in favour](#) of that person; and
- (d) a [parenting order](#) that:
  - (i) allocates [parental responsibility](#) for a [child](#) to a person; or
  - (ii) provides that a person is to share [parental responsibility](#) for a [child](#) with another person;is [made in favour](#) of that person.

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(9) In this section:

"*this Act*" includes the [applicable Rules of Court](#).

### FAMILY LAW ACT 1975 - SECT 65DAA

**Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances**

Equal time

(1) Subject to [subsection](#) (6), if a [parenting order](#) provides (or is to provide) that a [child's](#) [parents](#) are to have equal shared [parental responsibility](#) for the [child](#), the [court](#) must:

(a) consider whether the [child](#) spending equal time with each of the [parents](#) would be in the best [interests](#) of the [child](#); and

(b) consider whether the [child](#) spending equal time with each of the [parents](#) is reasonably practicable; and

(c) if it is, consider making an order to provide (or including a provision in the order) for the [child](#) to spend equal time with each of the [parents](#).

Note 1: The effect of [section 60CA](#) is that in deciding whether to go on to make a [parenting order](#) for the [child](#) to spend equal time with each of the [parents](#), the [court](#) will regard the best [interests](#) of the [child](#) as the paramount consideration.

Note 2: See [subsection](#) (5) for the factors the [court](#) takes into account in determining what is reasonably practicable.

Substantial and significant time

(2) Subject to [subsection](#) (6), if:

(a) a [parenting order](#) provides (or is to provide) that a [child's](#) [parents](#) are to have equal shared [parental responsibility](#) for the [child](#); and

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(b) the [court](#) does not make an order (or include a provision in the order) for the [child](#) to spend equal time with each of the [parents](#);

the [court](#) must:

(c) consider whether the [child](#) spending substantial and significant time with each of the [parents](#) would be in the best [interests](#) of the [child](#); and

(d) consider whether the [child](#) spending substantial and significant time with each of the [parents](#) is reasonably practicable; and

(e) if it is, consider making an order to provide (or including a provision in the order) for the [child](#) to spend substantial and significant time with each of the [parents](#).

Note 1: The effect of [section 60CA](#) is that in deciding whether to go on to make a [parenting order](#) for the [child](#) to spend substantial time with each of the [parents](#), the [court](#) will regard the best [interests](#) of the [child](#) as the paramount consideration.

Note 2: See [subsection](#) (5) for the factors the [court](#) takes into account in determining what is reasonably practicable.

(3) For the purposes of [subsection](#) (2), a [child](#) will be taken to spend *substantial and significant time* with a [parent](#) only if:

(a) the time the [child](#) spends with the [parent](#) includes both:

(i) days that fall on weekends and holidays; and

(ii) days that do not fall on weekends or holidays; and

(b) the time the [child](#) spends with the [parent](#) allows the [parent](#) to be involved

in:

(i) the [child](#)'s daily routine; and

(ii) occasions and events that are of particular significance to the [child](#);

and

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(c) the time the [child](#) spends with the [parent](#) allows the [child](#) to be involved in occasions and events that are of special significance to the [parent](#).

(4) [Subsection](#) (3) does not limit the other matters to which a [court](#) can have regard in determining whether the time a [child](#) spends with a [parent](#) would be substantial and significant.

Reasonable practicality

(5) In determining for the purposes of [subsections](#) (1) and (2) whether it is reasonably practicable for a [child](#) to spend equal time, or substantial and significant time, with each of the [child's](#) [parents](#), the [court](#) must have regard to:

(a) how far apart the [parents](#) live from each other; and

(b) the [parents'](#) current and future capacity to implement an arrangement for the [child](#) spending equal time, or substantial and significant time, with each of the [parents](#); and

(c) the [parents'](#) current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

(d) the impact that an arrangement of that kind would have on the [child](#); and

(e) such other matters as the [court](#) considers relevant.

Note: [Paragraph](#) (c) reference to future capacity--the [court](#) has power under [section 13C](#) to make orders for parties to attend [family counselling](#) or [family dispute resolution](#) or participate in courses, programs or services.

Consent orders

(6) If:

(a) the [court](#) is considering whether to make a [parenting order](#) with the consent of all the parties to the [proceedings](#); and



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(b) the order provides (or is to provide) that a [child's](#) [parents](#) are to have equal shared [parental responsibility](#) for the [child](#);

the [court](#) may, but is not required to, consider the matters referred to in [paragraphs](#) (1)(a) to (c) or (if applicable) the matters referred to in [paragraphs](#) (2)(c) to (e).

(7) To avoid doubt, [subsection](#) (6) does not affect the application of [section 60CA](#) in relation to a [parenting order](#).

Note: [Section 60CA](#) requires the best [interests](#) of the [child](#) to be the paramount consideration in a decision whether to make a particular [parenting order](#).

### FAMILY LAW ACT 1975 - SECT 65DAB

#### Court to have regard to parenting plans

When making a [parenting order](#) in relation to a [child](#), the [court](#) is to have regard to the terms of the most recent [parenting plan](#) (if any) that has been entered into between the [child's](#) [parents](#) (to the extent to which that plan relates to the [child](#)) if doing so would be in the best [interests](#) of the [child](#).

### FAMILY LAW ACT 1975 - SECT 65DA

#### Parenting orders

(1) This section applies when a [court](#) makes a [parenting order](#).

(2) It is the duty of the [court](#) to include in the order particulars of:

(a) the obligations that the order creates; and

(b) the consequences that may follow if a person contravenes the order.

(3) If any of the persons to whom the order is directed is not represented by a legal practitioner, it is also the duty of the [court](#) to explain to the person, or to each of the persons:

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(a) the availability of programs to help people to understand their responsibilities under [parenting orders](#); and

(b) the availability and use of location and [recovery orders](#) to ensure that [parenting orders](#) are complied with.

(4) The [court](#) may cause to be prepared, and given to persons to whom a [parenting order](#) is directed, a document setting out particulars of the matters mentioned in [paragraphs](#) (3)(a) and (b).

(5) If a person to whom the order is directed is represented by a legal practitioner, the [court](#) may request the practitioner:

(a) to assist in explaining to the person the matters mentioned in [paragraphs](#) (2)(a) and (b); and

(b) to explain to the person the matters mentioned in [paragraphs](#) (3)(a) and (b).

(6) If a request is [made](#) by the [court](#) to a legal practitioner under [paragraph](#) (5)(a) or (b), it is the duty of the practitioner to comply with the request.

(7) Failure to comply with a requirement of, or with a request [made](#) under, this section does not affect the validity of a [parenting order](#).

(8) Any matter that is required by this section to be included in a [parenting order](#) or any explanation that is required by this section to be given to a person is to be expressed in language that is likely to be readily understood by the person to whom the order is directed or the explanation is given.

### FAMILY LAW ACT 1975 - SECT 65F

#### General requirements for counselling before parenting order made

(2) Subject to [subsection](#) (3), a [court](#) must not make a [parenting order](#) in relation to a [child](#) unless:

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(a) the parties to the [proceedings](#) have attended [family counselling](#) to discuss the matter to which the [proceedings](#) relate; or

(b) the [court](#) is satisfied that there is an urgent need for the [parenting order](#), or there is some other special circumstance (such as [family violence](#)), that makes it appropriate to make the order even though the parties to the [proceedings](#) have not attended a conference as mentioned in [paragraph](#) (a); or

(c) the [court](#) is satisfied that it is not practicable to require the parties to the [proceedings](#) to attend a conference as mentioned in [paragraph](#) (a).

(3) [Subsection](#) (2) does not apply to the making of a [parenting order](#) if:

(a) it is [made](#) with the consent of all the parties to the [proceedings](#); or

(b) it is an order until further order.

### FAMILY LAW ACT 1975 - SECT 67Z

#### Where interested person makes allegation of child abuse

(1) This section applies if an [interested person](#) in [proceedings](#) under [this Act](#) alleges that a [child](#) to whom the [proceedings](#) relate has been [abused](#) or is at risk of being [abused](#).

(2) The [interested person](#) must file a notice in an [approved form](#) in the [court](#) hearing the [proceedings](#), and serve a true copy of the notice upon the person who is alleged to have [abused](#) the [child](#) or from whom the [child](#) is alleged to be at risk of [abuse](#).

(3) If a notice under [subsection](#) (2) is filed in a [court](#), the [Registry Manager](#) must, as soon as practicable, notify a [prescribed child welfare authority](#).

(4) In this section:

*"approved form"* means a form approved for the purposes of this section under the [applicable Rules of Court](#).

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*"interested person"* in [proceedings](#) under [this Act](#), means:

- (a) a [party](#) to the [proceedings](#); or
- (b) an independent [children's lawyer](#) who represents the [interests](#) of a [child](#) in the [proceedings](#); or
- (c) any other person prescribed by the regulations for the purposes of this [paragraph](#).

### FAMILY LAW ACT 1975 - SECT 67ZBA

#### Where interested person makes allegation of family violence

(1) This section applies if an [interested person](#) in [proceedings](#) for an order under this Part in relation to a [child](#) alleges, as a consideration that is relevant to whether the [court](#) should make or refuse to make the order, that:

- (a) there has been [family violence](#) by one of the parties to the [proceedings](#); or
- (b) there is a risk of [family violence](#) by one of the parties to the [proceedings](#).

(2) The [interested person](#) must file a notice in an [approved form](#) in the [court](#) hearing the [proceedings](#), and serve a true copy of the notice upon the [party](#) referred to in [paragraph](#) (1)(a) or (b).

(3) If the alleged [family violence](#) (or risk of [family violence](#)) is [abuse](#) of a [child](#) (or a risk of [abuse](#) of a [child](#)):

(a) the [interested person](#) making the allegation must either file and serve a notice under [subsection](#) (2) of this section or under [subsection](#) 67Z(2) (but does not have to file and serve a notice under both those [subsections](#)); and

(b) if the notice is filed under [subsection](#) (2) of this section, the [Registry Manager](#) must deal with the notice as if it had been filed under [subsection](#) 67Z(2).

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Note: If an allegation of [abuse](#) of a [child](#) (or a risk of [abuse](#) of a [child](#)) relates to a person who is not a [party](#) to the [proceedings](#), the notice must be filed in the [court](#) and served on the person in accordance with [subsection](#) 67Z(2).

(4) In this section:

*"approved form"* means a form approved for the purposes of this section under the [applicable Rules of Court](#).

*"interested person"* in [proceedings](#) for an order under this Part in relation to a [child](#), means:

- (a) a [party](#) to the [proceedings](#); or
- (b) an independent [children's lawyer](#) who represents the [interests](#) of the [child](#) in the [proceedings](#); or
- (c) any other person prescribed by the regulations for the purposes of this [paragraph](#).

### FAMILY LAW ACT 1975 - SECT 68L

#### Court order for independent representation of child's interests

(1) This section applies to [proceedings](#) under [this Act](#) in which a [child's](#) best [interests](#) are, or a [child's](#) welfare is, the paramount, or a relevant, consideration.

(2) If it appears to the [court](#) that the [child's interests](#) in the [proceedings](#) ought to be independently represented by a [lawyer](#), the [court](#):

- (a) may order that the [child's interests](#) in the [proceedings](#) are to be independently represented by a [lawyer](#); and
- (b) may make such other orders as it considers necessary to secure that independent representation of the [child's interests](#).

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(3) However, if the [proceedings](#) arise under regulations [made](#) for the purposes of [section 111B](#), the [court](#):

(a) may order that the [child's interests](#) in the [proceedings](#) be independently represented by a [lawyer](#) only if the [court](#) considers there are exceptional circumstances that justify doing so; and

(b) must specify those circumstances in making the order.

Note: [Section 111B](#) is about the Convention on the Civil Aspects of International [Child](#) Abduction.

(4) A [court](#) may make an order for the independent representation of the [child's interests](#) in the [proceedings](#) by a [lawyer](#):

(a) on its own initiative; or

(b) on the application of:

(i) the [child](#); or

(ii) an organisation concerned with the welfare of [children](#); or

(iii) any other person.

(5) Without limiting [paragraph](#) (2)(b), the [court](#) may make an order under that [paragraph](#) for the purpose of allowing the [lawyer](#) who is to represent the [child's interests](#) to find out what the [child's](#) views are on the matters to which the [proceedings](#) relate.

Note: A person cannot require a [child](#) to express his or her views in relation to any matter, see [section 60CE](#).

(6) [Subsection](#) (5) does not apply if complying with that [subsection](#) would be inappropriate because of:

(a) the [child's](#) age or maturity; or

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(b) some other special circumstance.

### FAMILY LAW ACT 1975 - SECT 68LA

#### Role of independent children's lawyer

When section applies

(1) This section applies if an independent [children's lawyer](#) is appointed for a [child](#) in relation to [proceedings](#) under [this Act](#).

General nature of role of independent [children's lawyer](#)

(2) The independent [children's lawyer](#) must:

(a) form an independent view, based on the evidence available to the independent [children's lawyer](#), of what is in the best [interests](#) of the [child](#); and

(b) act in relation to the [proceedings](#) in what the independent [children's lawyer](#) believes to be the best [interests](#) of the [child](#).

(3) The independent [children's lawyer](#) must, if satisfied that the adoption of a particular course of action is in the best [interests](#) of the [child](#), make a submission to the [court](#) suggesting the adoption of that course of action.

(4) The independent [children's lawyer](#):

(a) is not the [child](#)'s legal representative; and

(b) is not obliged to act on the [child](#)'s instructions in relation to the [proceedings](#).

Specific duties of independent [children's lawyer](#)

(5) The independent [children's lawyer](#) must:

(a) act impartially in dealings with the parties to the [proceedings](#); and

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(b) ensure that any views expressed by the [child](#) in relation to the matters to which the [proceedings](#) relate are fully put before the [court](#); and

(c) if a report or other document that relates to the [child](#) is to be used in the [proceedings](#):

(i) analyse the report or other document to identify those matters in the report or other document that the independent [children's lawyer](#) considers to be the most significant ones for determining what is in the best [interests](#) of the [child](#); and

(ii) ensure that those matters are properly drawn to the [court's](#) attention; and

(d) endeavour to minimise the trauma to the [child](#) associated with the [proceedings](#); and

(e) facilitate an agreed resolution of matters at issue in the [proceedings](#) to the extent to which doing so is in the best [interests](#) of the [child](#).

Disclosure of [information](#)

(6) Subject to [subsection](#) (7), the independent [children's lawyer](#):

(a) is not under an obligation to disclose to the [court](#); and

(b) cannot be required to disclose to the [court](#);

any [information](#) that the [child](#) communicates to the independent [children's lawyer](#).

(7) The independent [children's lawyer](#) may disclose to the [court](#) any [information](#) that the [child](#) communicates to the independent [children's lawyer](#) if the independent [children's lawyer](#) considers the disclosure to be in the best [interests](#) of the [child](#).

(8) [Subsection](#) (7) applies even if the disclosure is [made](#) against the wishes of the [child](#).



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### APPENDIX B: FINALITY – RICE V ASPLUND RULE (1978) 6 FAM LR 570

This was an appeal from the decision of *Ross-Jones J.* given in the Family Court of Australia at Sydney on 5 May 1978 in a matter concerning custody, access and property. It is an appeal by the husband.

The parties were married on 18 November 1967. There is one child, J, a girl, born on 1 December 1971. The parties separated on 16 February 1975 when the wife left the matrimonial home with the child. She was for some period after the separation in company with Mr. Asplund.

On 25 February 1975 the husband took the child from the wife against her wishes. Proceedings were commenced shortly after in the Hornsby Court of Petty Sessions. On 13 March 1975 the wife applied to the Supreme Court of New South Wales for custody and access. On 1 October 1975 after a contested hearing, *Larkins J.* ordered that the husband have custody, that the wife have defined access.

On 18 May 1976 the husband applied for orders to reduce the period of access granted to the wife. On 23 June of that year the wife applied for custody. On 3 September 1976 a decree nisi was granted on the husband's application. The wife married Mr. Asplund in that same month, September 1976. The hearing of the matter commenced in August 1977 and was completed on 29 September. Judgment was given on 5 May 1978 when *Ross-Jones J.* ordered that the wife have custody of the child and that the husband have reasonable access. The child was handed over into the custody of the mother shortly after. It is against that order of *Ross-Jones J.* that the husband has now appealed.

The substantial point of law argued by counsel for the appellant was that in order to justify the review of an earlier custody order, the applicant must satisfy the court that there has been substantial change in the circumstances since that earlier order. It is not sufficient, in

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his submission, that the court takes a view different from that taken by the judge who first heard the matter. In this case it was submitted that there was no change in circumstances since the date of *Larkin J.*'s order of October 1975 to warrant a review and a change of custody and that insufficient weight was given to the view which *Larkins J.* formed of the parties and of the issues. Counsel for the appellant relied on the case of *McManus* (1969) 13 F.L.R. 449. In that case the father applied successfully to vary a consent custody order. The Full Court of the Supreme Court of New South Wales allowed the appeal, finding that the judge, *Selby J.*, had given insufficient weight to the earlier decree, and I quote:

“The decision to overturn such decree made with the consent of the father, consent given in the light of the then known circumstances, is one which requires most substantial grounds. A reversal of the decree would require the discharge of a particularly heavy onus on the husband, a criterion not found in the affirmative by his Honour. One would look for new facts and circumstances to be revealed before this onus would be discharged.”

The case of *McManus* was referred to by the Full Court of the Family Court in the case of *Hayman* (1976) FLC ¶90-140 at p. 75,680. That case, like the one before us, concerned a custody decision in which a Judge of the Family Court had reversed an earlier custody order made by the Supreme Court. One ground on which the appeal was allowed was that the Family Court Judge did not have regard to the prior decision of the Supreme Court, or to the reasons for that decision. In fact, the Family Court had neither the transcript nor the reasons for that decision before it.

The principles which, in my view, should apply in such cases are that the court should have regard to any earlier order and to the reasons for and the material on which that order was based. **It should not lightly entertain an application** to reverse an earlier custody order. **To do so would be to invite endless litigation** for change is an ever

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present factor in human affairs. Therefore, the court would need to be satisfied by the applicant that, to quote *Barber J.*, there is some changed circumstance which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material (passage quoted in *Hayman and Hayman (supra)*, at p. 75,680). These are not necessarily matters for a preliminary submission, but they are matters that the judge should consider in his reasons for decision. It is a question of finding that there are circumstances which require the court to consider afresh how the welfare of the child should best be served. These principles apply whether the original order is made by consent or after a contested hearing. The way they apply and the factors which will justify the court in reviewing a custody order will vary from case to case.

Once the court is satisfied that there is a new factor or a change in circumstances, then the issue of custody is to be determined in the ordinary way. The court must apply the principles of sec. 64 and weigh up the factors for and against the proposals of each party, having regard to the welfare of the child as the paramount consideration. One of these factors is the length of time the child has been in a particular situation. Another is any earlier decision of the court, and the reasons for that decision. The possible advantages or disadvantages of a change in custody need consideration along with all the other usual factors. While the court should give weight to any earlier decision and, in particular, to any findings of fact, the judge is not bound by the earlier court's assessment of the parties or views as to the best interests of the child. These are matters which cannot be determined by any fixed or absolute standard.

How did his Honour approach the case in regard to the principles that I have discussed?

His Honour said:

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“Custody applications cannot be allowed to be recommenced without some significant change occurring after the original hearing. In this case there are some significant changes, in that the wife has now stabilised her accommodation, has married Mr. Asplund and J was to commence schooling which made the previous access orders unworkable and unrealistic. Whether the wife was responding to the husband's prior application, or whether she believed such changes merited her application, I believe her application is justified on both counts.”

His Honour has approached the issue, in my view, on the basis of the need to establish a significant change. There is no error in this approach. His Honour, in the passage quoted, listed the factors which he considered relevant to that issue.

As regards the wife's remarriage, counsel submitted that this had been seen as a probability at the time of the hearing before *Larkins J.* It is true that *Larkins J.* did not accept the wife's evidence about her relationship with Mr. Asplund, believing it to have been of a closer nature than she would admit. This finding, his impression of her as a liar and as a naive being and foolish person, and the fact he had not seen and knew little of Mr. Asplund and took an unfavourable view of him, were significant factors in *Larkins J.*'s decision. Counsel for the appellant submitted the wife could not rely on her marriage to Mr. Asplund and on his present suitability as a stepfather when it had been her choice not to call him as a witness before *Larkins J.* As their relationship was a probability foreseen by *Larkins J.* it was not, he submitted, a change in circumstances which could be relied on. This submission seems to be very special pleading. The court cannot determine the welfare of the child by applying some sort of estoppel rule. The fact is the wife's future in late 1975 was fraught with uncertainties, most of which have now been resolved. The remarriage was, in the circumstances of this case, a sufficient reason for reopening the

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issue of custody, although not necessarily for changing custody. That decision has to depend on the future of all the relevant factors.

Another ground of appeal was that his Honour ought not to have been ready to substitute his view of the parties for that of the judge who had previously decided the question of custody without substantial reasons. *Larkins J.* extolled the virtues of the father, describing him as a model father, whereas the mother he considered to have a degree of instability, to be of poor morality and low intelligence. *Ross-Jones J.* adverted to *Larkins J.*'s judgment and stated that because of it he carefully observed the wife. He reached a more evenly balanced view of the parties, finding that J would be adequately and properly cared for by either parent. He accepted the wife as a person of truth, warmth and understanding. He accepted Mr. Asplund as a witness of truth. He made some comments critical of both parties. He found the husband to be inflexible and suspicious and that the wife had been highhanded on one occasion. He concluded:

“J has been and is being adequately physically cared for by the husband in the former matrimonial home and he has done a very good job with the help of his mother and sister and latterly more self reliant. However, I am concerned that his nature and outlook and relationship with the wife are such that they would inhibit the overall welfare of J. The wife, I believe, sees J's needs more realistically than the husband and in addition will be available on a full time basis to care for her as she has undertaken to give up her employment. The husband has the support of his mother which is not and will not always be available and in any event she has a rather restricted outlook as regards J's relationship with her mother. Mr. Asplund has satisfied me that he has and will maintain a good relationship with J and encourage her continued regular contact with her father.

The overall proposal of the wife and her second husband are to me the more meritorious

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of the competing proposals and I reach that decision with reluctance and after careful consideration, particularly as the husband has displayed a concerted and consistent devotion to J which he can continue during regular access periods."

In my opinion his Honour was entitled to form his own view of the parties once there were circumstances which justified a re-examination of the custody issue. He was not bound to follow *Larkins J.*'s view, even though he did not expressly state reasons for departing from that view.

There are surrounding circumstances which could account for a considerable change in the wife's demeanour. Her own position and her relationship with Mr. Asplund had been uncertain at the earlier hearing. The case before *Larkins J.* was heard before the commencement of the *Family Law Act*, which removed fault as a factor in matrimonial causes. She may well have felt at a considerable disadvantage in her situation under the earlier legislation. It is not, however, for us to speculate. His Honour's findings are supported by the evidence before him.

The order proposed then is that the appeal be dismissed.

**Pawley S.J.:** I agree. I have nothing to add.

**Fogarty J.:** I also agree and do not desire to add anything further.

*Appeal dismissed.*

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### APPENDIX B: SECTION 60I CERTIFICATE - FAMILY LAW ACT 1975 (CTH)

The link to the Certificate is attached here for you to access.

[Template s60I Certificate and general information sheet | Attorney-General's Department \(ag.gov.au\)](#)

#### **How long is a Section 60I certificate valid?**

A section 60I certificate can be issued within 12 months of the last attendance, or attempted attendance at FDR. Similarly, a certificate can only be filed with a Court if it has been issued within 12 months of the last FDR or attempted FDR. Over time, the issues in dispute and the people's attitudes usually change which may warrant a further attempt at FDR and these time frames recognise this.

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### APPENDIX C: GENUINE STEPS CERTIFICATE

This form is required to confirm each parties' compliance with the pre-action procedures, outlined at Schedule 1 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*.

An applicant seeking final and/or interlocutory orders must file this form with an *Initiating Application*.

A respondent seeking final and/or interlocutory orders must file this form with a *Response to Initiating Application*.

The link to the Genuine Steps Certificate is here for you to access

[Genuine Steps Certificate \(Family law\) | Federal Circuit and Family Court of Australia \(fcfcoa.gov.au\)](https://www.fcfcfa.gov.au/genuine-steps-certificate)