



## Disputes Involving Children

*Some of the most commonly asked questions about Disputes involving Children are discussed on this page.*

### **1. How will the Court determine with whom the children shall live after separation?**

The Court's only concern is what is in the best interests of the children. If you reach an agreement which the Court considers will be in the best interests of the children, you may make Consent Orders through the Family Court of Australia. If, however, no agreement is reached, a party may file an application either in the Family Court of Australia or the Federal Circuit Court to ask the Court to investigate the competing interests of the parties and to determine what will be in the children's best interests.

Note: In relation to Children's issues, if no agreement is reached between you and your ex-partner, in most cases, you will need to attend Mediation to attempt a settlement prior to filing an application in Court. There are certain exemptions.

### **2. Do custody and access still exist?**

No. The terms "custody/residency" and "access/contact" have now been replaced with the terms:-

The child/ren shall "live with" and the child/ren shall "spend time with" and may also include Orders for "communicating with" another party of the relationship.

### **3. Do we need Orders for children or can we come to our own private arrangement?**

Ultimately, this will be a matter for the parties. There is no requirement that there are Orders in place in relation to children's issues. Some people prefer to have Orders in place so everyone knows their respective rights and obligations in relation to the children. Also, you may register Parenting Plans with the Family Court.

### **4. If we seek Orders in relation to the children, what would those Orders cover?**

Orders may vary and take into account your particular circumstances, subject to the best interests of the children. For example, one parent may have the child live with them and the other parent may have the child spend time with them. Under the Amendments to the Family Law Act, there is now a presumption of shared parental responsibility.

Does this mean that the children shall live with the parents equally?

Not necessarily. Again, this will depend on the circumstances of each case. The Orders may include shared living arrangements in relation to the children – that is the children can live with one parent for one week and live with the other parent the alternate week; or it may include Orders that the children live with one parent and spend time with the other parent, for example, each alternate weekend and perhaps sometime during the week. There will also be



arrangements for school holidays, the Christmas period, the children's birthdays, Fathers' Day and Mothers' Day. It may also include Orders that one party will notify the children's school to provide the other parent with copies of school reports and newsletters.

## **5. Can we share the children?**

Yes. Under amendments to the Family Law Act, the Court is to consider the child spending equal time, or substantial and significant time, with each parent in certain circumstances. If a Parenting Order provides that the child/ren's parents are to have equal shared parental responsibility, then the Court must:-

- (a) Consider whether the child/ren spending equal time with each of the parents would be in the best interest of the child/ren.
- (b) Consider whether the child/ren spending equal time with each parent is reasonably practicable.
- (c) If it is, consider making an Order providing for a child to spend equal time with each of the parents. Equal time may be spending time "week-about", that is, spending one week with one parent and the alternate week with the other parent.

## **6. How old do children need to be before they can say where they wish to live?**

This is a delicate question and will depend upon the age and level of maturity of the child. The older the child, then the Court may consider the wishes of that child, however, the Court will again be guided only by what is in the best interests of the child. Although there is no specific age described by the Family Law Act, experience shows that the older the child, the more weight the Court will place on the wishes of the child. It may be that a fourteen year old and older child will decide, with its own feet, where he or she wishes to live and the time he or she will spend with a parent.

## **7. If I reach an agreement with my ex-spouse can we make orders by consent?**

Yes. To have orders made by the Court you will need to file an application which will include details about each of the parties, details of any previous orders and details about the children of the relationship. You will also need to file Terms of Settlement which will become the Courts Orders.

## **8. Who will make consent orders?**

You may file an Application for Consent Orders with the Family Court of Australia. Currently, there is no fee to file such an application. Both of the parties need to sign an Affidavit in support of the application and you will also need to file Terms of Settlement, which is signed by each of the parties.

The Application for Consent Orders and the Terms of Settlement are filed with the Family Court of Australia and determined by a Registrar of the Family Court of Australia in Chambers. There is no need for anyone to attend Court, other than for filing of the documents.

## **9. What if there is no agreement reached?**

Firstly, there is now a pre-action procedure, by which mediation should be used to attempt to resolve your differences, whether they be in relation to property or in relation to children's issues.

If there is an outstanding issue, you may need to file an Application for Final Orders, either in the Family Court of Australia or the Federal Circuit Court.



## 10. What will happen after I file an application?

This will depend upon in which Court you file the application.

Generally, if you file your application in the Family Court of Australia, you may be asked to attend an information session and also a Case Assessment Conference. The Case Assessment Conference will be the first opportunity to attempt to resolve the outstanding issues between you and your ex-spouse. If there is a dispute about property distribution, normally your Case Assessment Conference will be dealt with by a Registrar of the Family Court of Australia. If there is an issue about children, then you may be seen by a Court Counsellor of the Family Court of Australia. If there is an issue about both children and property, then you may be seen by both a Court Counsellor and Registrar of the Family Court of Australia.

If you reach an agreement at the case conference, then terms may be made on that day and filed in Court. If there is no agreement, you may then need to proceed to a Conciliation Conference (in relation to property issues) or counselling (in relation to children's issues).

Normally, in the Federal Circuit Court, an application is filed with the Affidavit in support of the application. You will be given a first return date at the Court and then an Order may be made for counselling in relation to children's issues or a Conciliation Conference in relation to property issues. Generally, before such counselling or Conciliation Conference is ordered, the Respondent to an application will need to file their Response and Affidavit in Support.

## 11. What if no settlement is reached?

Ultimately, if no agreement is reached, then a judicial officer, either a Federal Magistrate or a Justice of the Family Court of Australia, will determine your outstanding issues. This can involve much time and can be an expensive process as evidence under the Family Law Act is generally provided by way of Affidavits (that is, sworn written documents).

## 12. How can Bateman Battersby assist me in relation to Children's issues?

Oliver Hagen and his team have vast experience in handling matters relating to children's issues. We can provide initial advice to you. We can also negotiate on your behalf with your ex-partner or their legal representative and if no settlement is reached can appear on your behalf in Court.

***If you would like further information, or require assistance, please contact me on (02) 4731 5899 or send us an email by clicking on the 'Contact Us' page on our website.***