

# FAMILY LAW MATTERS

## RELOCATION – GENERAL ADVICE



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## RELOCATION CASES

After separation, 1 Parent may wish to relocate with the Children. This can be for a number of reasons, for example for better financial security, to be closer to family or to pursue a new relationship. The move can often be intrastate, interstate or overseas. These types of cases are termed “relocation cases”.

This presents a difficult situation where both the Mother and Father wish to be actively involved in the Children’s day to day lives and spend an equal amount of time with the Children. Often parties turn to the Court to decide what arrangements should be made and how much time each Parent should spend with the Children.

The *Family Law Act 1975* (the Act) confers the power on the Family Court and Federal Magistrates Court to make Parenting Orders and dictates the process by which any decision made.

There are 2 clear intentions of the Act in this area. Firstly, it is intended that both Parents should have an ongoing role in the parenting of the Children. Secondly, it is the best interests which is fundamental to the decision making process.

### Best Interests

In determining what is in a Child’s best interests the Court refers to section 60CC of the Act. Section 60CC is **attached**. In deciding whether to make a particular Parenting Order, the Court must regard the best interests of the Child as the paramount consideration. (section 60CA).

When making an Order the Court must also consider the objects and principles underlying the part of the Act, as set out in section 60B. This section is **attached**.

### Equal Shared Parental Responsibility

When making a Parenting Order, 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 (section 61DA). This presumption does not apply if there are reasonable grounds to believe that the Parent of the Child has engaged in abuse of the Child or family violence.

When parents have equal shared parental responsibility it means that they are jointly responsible for making important/major decisions in the child’s life. Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. These important decisions can be in relation to things like:

- which school the child attends (Education);
- health and medical treatment;
- religious and cultural upbringing;
- name; and
- living arrangements.

The presumption of equal shared parental responsibility 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).

## **Equal Time with Each Parent or Substantial and Significant Time?**

Where the Court determines that it is appropriate for parents to have joint parental responsibility for a child, they must then consider whether it is appropriate for the children to spend equal or substantial and significant time with each parent.

In determining whether a Child should spend equal time or substantial and significant time with each Parent, the Court refers to section 65DAA. This section is **attached**.

### *Equal Time*

Again the Court will consider whether spending equal time with each parent would be in the best interests of the child. Equal time usually means a week about arrangement (i.e. with one parent for one week and with the other for the following week).

The Court will also consider whether equal time with each parent is practicable. This means the Court will take into account things like:

- how far apart the parents live from each other
- the parents capacity to implement an equal time arrangement
- the parents capacity to communicate with each other and resolve difficulties that might arise in this type of arrangement
- the impact that would have on the child
- any other matters the Court would consider relevant.

### *Substantial and Significant Time*

If the Court determines that it is not appropriate for the child to spend equal time with each parent, they will consider whether it is appropriate for the child to spend substantial and significant time with each parent. Substantial and Significant time means the time the child spends with the parent includes both:

- days that fall on weekends and holidays; and
- days that do not fall on weekends and holidays.

This allows the parents to be involved in the child's daily routine and occasions that are of particular significance to the child.

## **Recent Decisions**

### *Lay & Winter [2008] FamCA 400 (6 June 2008)*

The Mother and Father had separated and were both living in Sydney. The Mother wanted to relocate to live on the Gold Coast in Queensland and take the 2 boys, aged 7 and 4 years old respectively with her. She submitted that the Children should spend time with the Father in Sydney. The Father proposed that both Parents reside in Sydney with the Children to spend equal time with each Parent. During the Trial it was established that the Mother clearly wanted and supported the Children having an ongoing relationship with the Father regardless of where they lived. Both parties managed to effectively communicate with one another and generally shield the Children from the adult issues and the ongoing litigation.

The Judge in that case, Justice O'Ryan, determined that equal shared parental responsibility was entirely suitable.

Justice O’Ryan was concerned that if the Children were to move to Queensland the Father’s opportunities to be involved in their daily routine and other everyday activities would be limited and he may lose touch with details of their daily development that help maintain the close parent/child relationship.

The Wife believed that her emotional and economic interests would be best served by relocating to Queensland however taking into account that the Children would experience a sense of loss and sadness in the absence of a regular involvement of the Father, any change that would entail the absence of a Parent would not be in their best interests.

Justice O’Ryan also took into account the wishes expressed by the Children and the degree to which each Child had bonded with either Parent. He determined that both of the boys were significantly bonded with both Parents however given their young age both boys were bonded more closely with their Mother.

It was determined that the Children should reside with the Mother on the Gold Coast and the Father would continue to reside in Sydney.

Justice O’Ryan then had to determine whether it would be reasonably practicable for the Children to spend equal time with each Parent. He pointed out that if both Parents were living in Sydney then it would be reasonably practicable for each Child to spend equal time with each Parent, likewise if both Parents resided on the Gold Coast. However it would not be appropriate if the Father resided in Sydney and the Mother resided on the Gold Coast. Regardless, Justice O’Ryan determined that it would not be in the best interests of the Children to spend equal time with each Parent because of the young age of the Children, the need for stability and the professional commitments of the Father (the Father was a Partner in a large firm in Sydney and it was questionable as to whether he would be able to spend time with the Children given these work commitments).

Justice O’Ryan determined that it was in the best interest of the Children to reside with the Wife on the Gold Coast and spend significant and substantial time with the Husband.

This case is 1 demonstration of the numerous considerations that are taken into account in these types of matters.

*Hopler & Wardley [2007] Fam CA 676 (11 July 2007)*

In this case, the proceedings concerned the parties daughter who was 2 and a half years old. The Mother sought that the children live with her and spend time with the Father as agreed. She also sought that the parties be jointly responsible for the long term care, welfare and development of the child.

The Father sought that the child live with him and spend time with the Mother as agreed and failing agreement from 9-5 on each alternate Saturday and Sunday. He also sought that he be solely responsible for the long term decisions concerning the long term care, welfare and development of the child.

The Mother was a student and the Father was an accountant. Their relationship was brief and turbulent, lasting only a few years. The parties separated when the child was 8 weeks old after a disturbing incident, where the Mother was admitted to the Mental Health Unit. Since that time the Child was placed in the care of the Father. It

was alleged that during a fight between the Mother and Father, the Mother grabbed the child from the child seat in the car and dangled the child over the railing and threatened to jump off the railing into the water below. There were also other incidents where the Mother had previously attempted suicidal behaviour.

The Mother also alleged that the child had been sexually abused by the Father however these allegations were investigated and later dismissed.

The parties lived one and a half hours away from each other (North and South side of Brisbane). In this case it was unlikely that the parents could facilitate open communication in order to implement an equal time arrangement, given the turbulent nature of the relationship.

The Judge determined that it was not appropriate for the Child to spend equal time with each parent given the practical difficulties associated with change over and the relationship between the parties.

The Judge determined that the parents have equal shared responsibility for the Child. He also determined that the Child should live with the Father and spend substantial and significant time with the Mother (each alternate weekend from 3.00pm Friday till 5.00pm Sunday – to be supervised by the maternal grandparents, and 9.00am Tuesday until 4.00pm Wednesday each week – again supervised).

### **Summary**

Clearly there is a balancing of interests and a number of considerations to be taken into account when it comes to relocation cases

Each case has its own individual facts and thus each case must be determined on its merits. The Court is not bound by the parties' proposals. Where the evidence points to an alternative being in the best interests of the Children, Orders will be crafted by the Court accordingly.

The first step is to consider the Child's best interests (section 60CC) along with the objects and principals of the Act. The Court must then consider whether the presumption of equal shared parental responsibility does not apply or if it would not be appropriate for the presumption to be applied. If the presumption does apply and it is appropriate then the factors set out in section 65DAA will be considered to determine whether each Child is to spend equal time or substantial and significant time with each Parent.

While the Legislation has injected more direction into the process of making Orders about Children, the basic and overarching principle of the best interests of the Child prevails. Each case must be considered on its merits and all relevant evidence must be evaluated.

If you have an issue in relation to relocation or Children's matters generally, you should contact us for specific advice.

## **SECTION 60CC HOW A COURT DETERMINES WHAT IS IN A CHILD'S BEST INTERESTS**

### *Determining child's best interests*

**60CC(1) [Determining child's best interests]** 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).

### *Primary considerations*

**60CC(2) [Primary considerations]** 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.

### *Additional considerations*

**60CC(3) [Additional considerations]** 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 willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
- (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;
- (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) any family violence order that applies to the child or a member of the child's family, if:
  - (i) the order is a final order; or
  - (ii) the making of the order was contested by a person;
- (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.

**60CC(4) [Extent to which each parent has fulfilled or failed to fulfil responsibilities as a parent]** Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

- (a) has taken, or failed to take, the opportunity:
  - (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; and
- (b) has facilitated, or failed to facilitate, the other parent:
  - (i) participating in making decisions about major long-term issues in relation to the child; and
  - (ii) spending time with the child; and
  - (iii) communicating with the child; and
- (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

**60CC(4A) [Where child's parents have separated]** If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

#### *Consent Orders*

**60CC(5) [Where the court is considering making an order with consent of the parties]** 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).

#### *Right to enjoy Aboriginal or Torres Strait Islander culture*

**60CC(6) [Aboriginal child's or Torres Strait Islander child's right to enjoy their culture]** 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.

## **SECTION 60B OBJECTS OF PART AND PRINCIPLES UNDERLYING IT**

**60B(1) [Object of Part]** 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.

**60B(2) [Principles underlying object]** 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
- (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).

**60B(3) [Right of Aboriginal child or Torres Strait Islander child to enjoy their culture]** 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.

**SECTION 65DAA COURT TO CONSIDER CHILD SPENDING EQUAL TIME OR SUBSTANTIAL AND SIGNIFICANT TIME WITH EACH PARENT IN CERTAIN CIRCUMSTANCES**

*Equal time*

**65DAA(1) [Court must consider whether equal time in the best interests of the child]** 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.

*Substantial and significant time*

**65DAA(2) [Court to consider whether the child spending substantial and significant time with each parent is in best interests of the child] 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
- (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; and

the court must:

- (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interest 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.

**65DAA(3) [Substantial and significant time]** 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
- (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.

**65DAA(4) [Subsection (3) does not limit other matters to which court can have regard]** 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*

**65DAA(5) [Determining reasonable practicality]** 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.