



Australian Government
Attorney-General's Department

Parenting orders – what you need to know



ISBN: 978-1-925290-67-7 (online)
ISBN: 978-1-925290-66-0 (print)

© Commonwealth of Australia 2020

All material presented in this publication is provided under a Creative Commons Attribution 4.0 International licence (www.creativecommons.org/licenses).

For the avoidance of doubt, this means this licence only applies to material as set out in this document.

The details of the relevant licence conditions are available on the Creative Commons website as is the full legal code for the CC BY 4.0 licence (www.creativecommons.org/licenses).

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are detailed on the It's an Honour website (www.itsanhonour.gov.au).

Contact us

Enquiries regarding the licence and any use of this document are welcome at:

Attorney-General's Department
3-5 National Cct
BARTON ACT 2600
Email: copyright@ag.gov.au

Foreword



The Turnbull Government is committed to a family law system that supports the needs of contemporary Australian families.

In 2006, the Coalition Government led by Prime Minister the Hon John Howard MP introduced the landmark shared parenting laws. These reforms amended the *Family Law Act 1975* to prioritise the rights of children, focus on the responsibility that each parent has towards their children, and support each child's right to a meaningful relationship with both parents where this is safe.

The 2006 reforms also recognised that, with support, many separated parents can – and, indeed, prefer to – agree on arrangements for their children without going to court. By resolving their differences in this way, parents can reduce stress for themselves and their children, as well as saving time and money.

This Handbook will help separated parents to agree on arrangements for their children, and support them to develop workable parenting orders. It has been designed to assist parents to understand the key legal principles that need to be considered when developing parenting orders. But every family is different, and so the Handbook also provides examples and tips to guide parents on deciding what orders are best for their children.

I am delighted to introduce this practical resource to support Australian families in making parenting arrangements that work for them and their children.

Senator the Hon George Brandis QC
Attorney-General

Parenting orders – what you need to know

INTRODUCTION	2
CHAPTER 1. Making arrangements for children after separation	5
CHAPTER 2. Advice on writing parenting orders	13
CHAPTER 3. Examples of parenting orders	19
APPENDIX 1. The legal background	40
APPENDIX 2. Obtaining consent orders	53
GLOSSARY of legal terms	57



Introduction

EXAMPLE SCENARIO

Karen and John are separating after 12 years together. They have two children, Paul (9) and Michelle (7). They have had arguments about what arrangements should be made for the children and how much time the children should spend with each of them. Karen is concerned that John has been drinking too much and might not look after the children properly. She knows that the children love John and should spend time with him, but thinks it would be best if they lived mainly with her, whereas John wants the children to live with each of them on alternate weeks. Also, Karen wants the children to go to a public school, whereas John wants to send them to private schools.

At one stage it looked as if they might have to have their dispute resolved by a court. With the help of lawyers and counsellors though, Karen and John eventually reach agreement on these matters. What happens next?

They might simply do what they have agreed and take no legal steps at all. They might set out their agreement in a 'parenting plan'. Or they might arrange for their agreement to be set out in orders made by a court – these are called 'parenting orders' and might look something like this

1. *The mother and father are to have shared parental responsibility for their children Paul, born [date] and Michelle, born [date] ... except that the father may enrol one or both of the children in a non-government school provided that he gives the mother one month's prior notice of his intention to do so.*
2. *The children are to live with the mother except at times they are to live with the father as provided in order 3.*
3. *The children are to live with the father as the parties agree, and in the absence of agreement at the following times*
 - (a) *during school term, on each alternate week (commencing [date]) from after school on Thursday until after school on Monday, and on each other week from after school on Wednesday until after school on Thursday*
 - (b) *during school holiday periods, in each even-numbered year for the first half of each school holiday period and in each odd-numbered year for the second half of each school holiday period.*

The parenting orders might go on to deal with other matters, such as arrangements for the children at Christmas, children's birthdays and each parent's birthday.

The orders might also be made more specific – eg they might define precisely what is meant by 'after school', and they might specify how the children are to be transferred from one parent to the other.

They might include an order that neither party will consume more than two standard drinks on any day while the children are with them. It is up to Karen and John to decide how much detail they want in the orders.

Note that there is nothing unusual or 'legal' about the language used – the orders are written in plain language. Note also that order 1 deals with decision-making, and orders 2 and 3 deal with arrangements for the children, in this case expressed in terms of their 'living with' each parent at specified times.

An important alternative for separating parents is to have a 'parenting plan'. Chapter 1 looks at the choice between parenting orders and a parenting plan. The focus of this handbook is to help parents and those who advise them to work out if they need parenting orders, and what those orders should be.

We hope this handbook will also be helpful to parents even when the case needs to be resolved by a court, by making it easier for them to understand what orders the court might make. We will often speak of parents, but sometimes others will be involved – eg grandparents or other relatives.

While we hope this handbook will be helpful for many families, it does not deal with child support. It is also important to note that this handbook does not attempt to deal with some of the very serious issues that affect some families – violence, or child abuse, or mental illness, or alcohol or drug dependence. If you are in a situation where you feel that you or your children are unsafe, you will need to get expert help and perhaps make urgent arrangements to ensure that you and your children are safe.

WHAT IS IN THIS HANDBOOK

Chapter 1 looks at making arrangements for children after separation. Everyone has views about what is good for children. This handbook does not set out to advise parents on what arrangements are likely to be best for their children but rather provides information and suggestions.

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

- what parenting orders are and why they 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.

Chapter 2 provides general guidance on drafting parenting orders. It addresses questions such as 'what sort of language should be used?', 'how detailed do parenting orders need to be?' and 'what topics should parenting orders cover?'

Chapter 3 sets out and discusses examples of parenting orders dealing with a wide range of topics. While it is impossible to deal with every situation, the examples aim to help parents decide what sort of orders would be best for their children.

Appendix 1 contains background information and further detail about the law.

Appendix 2 contains details about the process of applying for parenting orders by consent.

The Glossary explains some legal terms used in this handbook.

BACKGROUND TO THIS HANDBOOK

This handbook has been prepared by the Attorney-General's Department with the assistance of Professor Richard Chisholm AM. Together, we would like to express our deep gratitude to the many people who assisted with this project by providing precedents, suggestions and ideas, as well as reviewing drafts.

While too numerous to mention by name, they include judges and other personnel of the family courts, the Family Law Section of the Law Council of Australia, the Family Law Council, expert and experienced practising and academic family lawyers, as well as expert and experienced professionals from a range of organisations providing mediation, legal aid, family counselling, and government departments. Their time and generosity has added enormous value to this handbook.

It is intended to be a practical resource to assist parents with drafting parenting orders. The need for such a publication was recognised in the Family Law Council report *Improving Post-Parenting Order Processes* (2007).

This handbook is available online at www.ag.gov.au. Any questions about it can be directed to the Family Law Branch at familylawunit@ag.gov.au

We hope this handbook will also be helpful to people assisting parents, including legal practitioners, counsellors, and mediators. Most of all, we hope that it will help people produce clearly written parenting orders that are made with the best interests of the child at heart.



CHAPTER 1.

Making arrangements for children after separation

Chapter 1

Making arrangements for children after separation

This chapter helps explain parenting orders and the best way to approach them. It does not deal with any immediate problems of safety. Any reader who has safety concerns is advised to contact the appropriate authorities or emergency services.

Parenting, responsibility and the law

The law does not tell parents how to care for their children. Instead, it says that each parent has *parental responsibility* to care for their children and make decisions about them. Neither parent is more important in law than the other. Whether a family is intact or separating, it is the parents' responsibility to make arrangements that are in the best interests of the child.

Following separation, parents may need assistance in sorting things out. They have the option of coming to an informal arrangement, or making what is called a 'parenting plan', or applying to a court for an enforceable arrangement.

If parents cannot agree, the *Family Law Act 1975* provides guidelines for the courts to follow in determining disputes. The guidelines do not restrict what parents might work out between themselves following separation.

This is sometimes misunderstood and parents are sometimes misinformed. For example, parents may be told they have a right to spend equal time with the child, or that they are entitled to a certain time with the child if they have paid child support. This is misleading and does not apply when parents are considering what arrangements to agree on.

When making an agreement, parents should focus on what is best for the child and try to work out arrangements that will best meet the child's needs. Most separating couples do manage to come to an amicable agreement. Only a small proportion of cases, less than five per cent, need to be resolved by a court. This is because many couples are able to use the resources available, to agree on suitable arrangements.

Where to get help

The Australian Government funds a range of services to help separating or separated couples manage disputes and avoid attending court. These can include issues about property and finances, as well as issues relating to children.

Family Relationship Centres

Family Relationship Centres (FRCs) are a source of information and confidential assistance. Although FRCs have a focus on enabling families to come to workable parenting arrangements outside the courts, they offer services that can also help strengthen relationships and deal with relationship difficulties.

www.familyrelationships.gov.au/talk-someone/centres

Family Relationship Advice Line

The Family Relationship Advice Line (FRAL) (1800 050 321) is a national telephone service available to help families affected by relationship issues. It also provides information and advice on parenting arrangements after separation. Callers can be referred to local services, such as FRCs, for further assistance. The FRAL is available from 8am to 8pm, Monday to Friday, and 10am to 4pm on Saturday (local time), except national public holidays.

www.familyrelationships.gov.au/talk-someone/advice-line

Family Relationships Online

Information about services can be found at Family Relationships Online

www.familyrelationships.gov.au

This website provides information about relationships, including separation, and information about the services designed to help Australian families. A list of services can be found here

www.familyrelationships.gov.au/legal-advice#a4

Considering the options

Every family is different. For some couples, separation is reasonably amicable and they are able to work out arrangements between themselves.

Other families may have difficulty reaching an agreement and will require more formal action. If so, there are basically two options

- parenting plans, or
- parenting orders.

Although parenting plans and parenting orders both set out arrangements for children, parenting orders create obligations that are legally enforceable, while parenting plans are not legally enforceable.

Parents will usually benefit from obtaining advice from experienced family lawyers or qualified counsellors.

Parenting plans

If the relationship is amicable, a parenting plan may be the best option. Many people find them useful as a record of the agreement that has been reached and their plans for the future. Community-based counselling or support services may help with tailoring a parenting plan to suit the particular family circumstances.

Parenting plans can also be made more cheaply and with less formality than parenting orders.

In simple terms

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

Parenting orders

If parents require a legally enforceable arrangement, a parenting order is needed.

Parenting orders generally address specific behaviours – eg the times when a parent will pick up a child from school, or whether a parent may take a child overseas for a holiday. A parenting order could also prohibit a parent from a specific behaviour, such as denigrating or criticising the other parent when talking to the child, or, in situations where there is a history of violence, from going to the other parent's home without an invitation.

Note – 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 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) – '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.

Parenting orders can also cover minor incidental financial aspects of arrangements for children – for more detail, see **Appendix 1**.

What topics should parenting orders cover?

Parenting orders can cover one or two topics, or an extensive list – there is no requirement to deal with any particular matters.

When choosing the topics to be covered, parents may find it helpful to consider

- the problems that are likely to arise following family separation
- which of those problems should be addressed in the parenting orders.

Some of the topics that could be covered in parenting orders are outlined below.

For example parenting orders, see Chapter 3.

Parental responsibility

Parental responsibility means all of the duties, powers, responsibilities and authority that parents have in relation to their child.

If there are no court orders about parental responsibility, each parent ordinarily has parental responsibility for the child. This means that the parents can make decisions about the child independently from each other.

If parents would like to create a legal obligation to make joint decisions about major long-term issues, they should make an order for equal shared parental responsibility.

If parents don't want to create that obligation but would like each parent to have equal parental responsibility, they could either make no order about parental responsibility, or make an order for each parent to retain parental responsibility.

Alternatively, if parents want to transfer parental responsibility to one parent alone, or allocate some aspect of parental responsibility to one parent, they should make orders in those terms.

If parents want to specifically deal with an issue by order, such as what name the child is to have, the order can be written so it deals with that issue.

Living arrangements

Living arrangements will 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 set out 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.

Changeovers

It is recommended that parenting orders deal with changeover 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 - see Glossary.

Taking care of the child

Sometimes, issues arise between parents about matters relating to the care of the child. 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. Such 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 and discuss the arrangements that are best for the child at that particular time. Or the orders might specify that each parent is to give the other at least 24 hours' notice if they are going to be unavailable to care for the child, or that the child can be cared for by a relative.

Communication with the child

Parenting orders can deal with the way the child is to 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 child'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.

Parents' behaviour with the child

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.

It is important to consider whether there is a need to have such legally enforceable orders and whether issues like this are better resolved by negotiation, counselling or a parenting plan.

Interstate and international travel

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

www.passports.gov.au/pages/brochure-children-and-parental-consent.aspx

To avoid delays or failure to obtain child passports, parenting orders could deal specifically with passport arrangements. 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.

It is important to note that 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

In many cases, issues 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.

Different arrangements for different children

Where there are two or more children in the family, it is often appropriate to keep them together. In some circumstances though, it is best to make different arrangements for each child. While loving both parents, sometimes children form a particular attachment to one or the other. For these and other reasons, parenting orders sometimes make different arrangements for each child.

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 to be addressed could include

- whether school reports are to be sent to one or both parents
- who will attend parent teacher evenings and school events – and any arrangements that need to be made to prevent both parents being there at the same time

- which parent the school should contact in the event of an emergency
- any extra-curricular activities the child will attend, and whether one or both parents will be involved.

Communicating about the child

Parenting orders may have to be reconsidered from time to time, especially as the child grows and their needs change. While it can sometimes be uncomfortable for parents to communicate, they will often need to do so for the sake of the child. This could be included in the parenting orders by setting up a regime for future discussions and an agreed way of handling disputes, such as consulting a counsellor or mediator (family dispute resolution practitioner).

How to change existing parenting orders

The simplest and cheapest way to change parenting orders is by making a parenting plan. That will normally modify the operation of any parenting order.

For example, if a parenting order said that a child should spend time with a parent on Sundays, and a later parenting plan said that the child should not spend time with that parent on Sundays, the legal obligation for the child to spend time with the parent on Sundays would end. This modification would take effect, even though the parties made no application to the court to change the parenting order.

The family courts have the power to

- remove (discharge) existing parenting orders
- make new parenting orders, or
- modify (amend) existing orders.

When changing a parenting order, the court must determine on the basis of the available evidence, what orders will best serve the interests of the child.

After a court has made a parenting order, a party can request the court change an order if the party can demonstrate some change of circumstances that makes it appropriate for the court to re-examine the matter.

Parenting orders and other related orders

In practice, parenting orders are often combined with other orders. Some examples are outlined below and further detail is at **Appendix 1**.

Injunctions

Injunctions are typically orders that restrain people from certain behaviour. Parenting orders are often accompanied by injunctions dealing with aspects of behaviour that have caused problems, or seem likely to cause problems.

Location orders and recovery orders

Occasionally, a parent or other person has taken the child away and cannot be found. Before the court can consider what parenting orders to make, it is imperative that the child be located – this is likely to require the assistance of the police or other government agencies.

For this reason, the court has powers to make location orders and recovery orders

- **location orders** require certain people to provide information about the whereabouts of the child, and authorise police and other agencies to take certain actions to locate the child

- **recovery orders** are often used in combination with orders requiring a parent or other person to return the child. If the parent fails to do so, the police are authorised to recover the child, if necessary by force.

Passport delivery orders

If a court considers there is a possibility or threat that a child may be removed from Australia, it may order that the child's passport be delivered to the court.

Family violence orders

It is quite common for children's proceedings under the Family Law Act to involve allegations of violence. Sometimes a state or territory court has made family violence orders in earlier proceedings, by the time a case gets to a family court. This allows magistrates courts to make orders for the protection of family members (and others) against threatened violence, intimidation, and other such behaviour.

When the case is brought to a family court, the parties must tell the court of the existence of any such family violence order.

Parenting orders and child support

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

www.servicesaustralia.gov.au

Advice on writing parenting orders

Chapter 2

Advice on writing parenting orders

Court orders do not need to use complicated language, in fact the simpler the better. This chapter provides general advice and guidance on writing parenting orders, while chapter 3 provides a range of examples.

Referring to children and family members

It is best to avoid repeating the full names of individuals in each order. A convenient way of doing this is to use the terms 'father' 'mother' and 'child', after first defining them. For example

*[full name], born 22 May 2010 and
[full name], born 22 May 2011 ('the children')
are to live with [full name] ('the mother') ...
The children are to spend time with [full name]
('the father') ...*

It is a good idea to initially use the full name of the child. This makes it easier for law enforcement, medical officers and similar parties not to confuse the parenting orders with any other orders. For privacy reasons, a judge may refer to the month the child was born, not the specific day.

Legal obligations should be clear

Parenting orders generally give a person who has parental responsibility powers relating to that child. Parenting orders can also set out the arrangements for the care of the child, creating certain obligations. Therefore, it is essential that orders are written in a way so it is clear who is required to do what.

There is no need to use any special legal terms – the orders should be in everyday language. The following examples are all fine and mean the same thing

*The mother shall deliver the child to the father
each Saturday ...*

*The mother is to deliver the child to the father
each Saturday ...*

*The court orders ... that the mother deliver the
child to the father each Saturday ...*

Each of the above examples sets out the mother's obligations under the order.

The following order does not actually specify what the mother is obliged to do, or what the father is obliged to do. It only indicates what the outcome is to be

The child is to spend time with the father each Saturday ...

In practice, such orders are common and don't usually cause any problems. The reason they work as orders is that they *imply* obligations on the parents. In the previous example, the order obviously required the mother to do what was reasonable so that the child could spend time with the father on Saturdays. However, if the mother deliberately took the child away to live somewhere else, or refused to respond to all requests by the father to deliver the child on alternate weekends, she would be in breach of the order (for more detail, see Appendix 1).

There is a problem, though. What if the *father* doesn't make himself available on alternate weekends? Would he be in breach of the order? There is no clear answer as the wording of the order does not spell out the obligations of each parent.

This kind of uncertainty can be avoided by making sure the orders spell out exactly what each party needs to do, for example

Each of the parties shall take all reasonable steps to ensure that the children spend time with the father as follows [...]

The terms of this order make it clear that it creates obligations on both parents. The father would be in breach of the order if he failed to turn up, just as the mother would be in breach of the order if she failed to provide the child.

Parents may wish to seek legal advice if they are unsure as to whether a drafted order will achieve its intended purpose.

How detailed should orders be?

This is an important question. The answer is it *depends*.

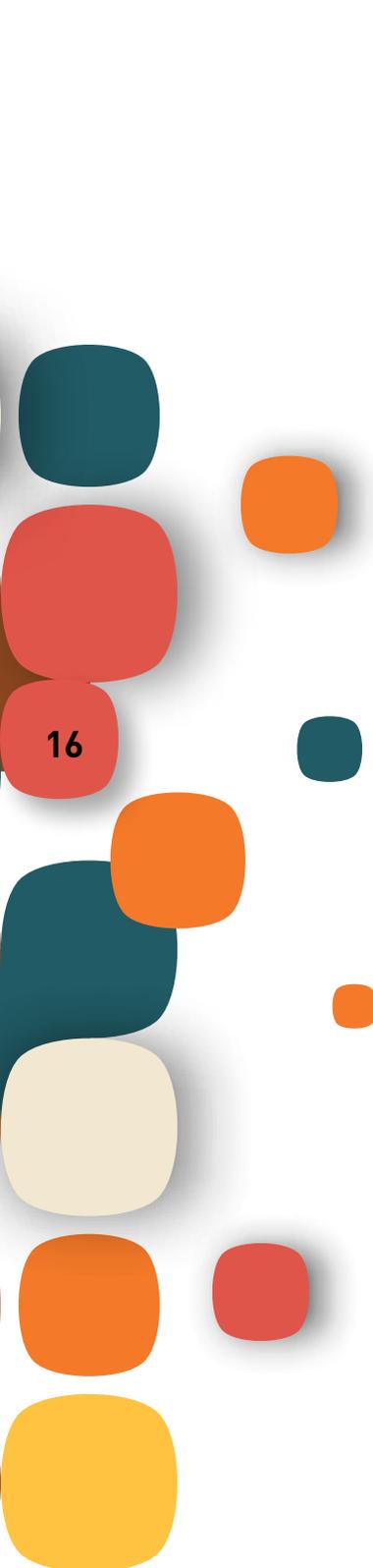
Every family's situation is different. Some parents can be confident that they don't need to spell out orders covering matters such as school pickups, as they will be able to agree on sensible arrangements between themselves. In these cases it may be enough to have orders that contain fairly general terms.

However this may not suit every family. In some situations, if the parenting orders are to be effective, they will need to spell things out in great detail. This may be necessary in cases where both parents are not able to come to amicable agreements.

No orders can solve all future problems

No matter how detailed the orders may be, they will not always prevent difficulties from arising in the future. There are two reasons for this.

Firstly, even the most detailed orders will not cover every situation. This is best illustrated by the following example. Let's assume that the orders state that a child has to spend every alternate Saturday with Parent B. However on that particular Saturday, the child's favourite uncle is about to move overseas indefinitely and Parent A would like to take the child to visit him. The orders could not possibly cover the detail of a situation as unexpected as that.



The second reason is that people's circumstances constantly change. A parent's employment location or work roster could change; a parent may enter a new relationship; a parent may become seriously ill. Rigidly sticking to a particular arrangement regardless of such changes might be impractical, or unsuitable for the child, even if the arrangement had seemed ideal at the time the orders were made.

When circumstances change, it would normally be in the child's best interests if the parents can get together and make new arrangements to fit the new situation. If the relationship is good, parents may not need new orders – a parenting plan might be a better and cheaper option. However if parents can't agree, one or both of them can apply to the court for new orders.

Each family is different but as a general rule

- if the parents can communicate well and focus on the child's best interests, the orders can establish some basic arrangements but leave many details open to negotiation
- if the parents are not able to communicate in a civilised way, it might be desirable for the parenting orders to be precise and detailed. At least for the immediate future, there will then be a clear regime, providing a possible basis for the parties to settle down and reach a state where they are better able to negotiate as circumstances change.

The courts often build some flexibility into parenting orders. This often allows the parties to agree on something that is different from the measures set out in the orders. An example of this would be if the parenting order stated that a child would be handed over to Parent B at a specific location like the local library, but added the words '*or such other place as the parties might agree*'.

This flexibility works best for parents in situations where they are able to make reasonable compromises and adapt to different situations. It may not be appropriate when the parties are not in an amicable relationship or when one party is frightened of the other.

Avoiding confusion

Sometimes, when multiple orders deal with the same topic, it is important to explicitly state which one is more important. An example of this would be if a set of parenting orders said that the child was to be with one parent during the Easter holidays, and with the other parent on that parent's birthday. What if one year the second parent's birthday fell on Easter Sunday? Avoiding clashes between orders will reduce the chance of arguments in the future.

This can be done by using words, such as

Despite any other order, on the child's birthday ...

Except as otherwise provided in these orders, during school terms ...

Subject to orders 4, 5 and 6 dealing with special days, the child is to live with ...

The same approach works with other topics

***Order 1:** Subject to order 2, the parents are to have shared parental responsibility for the child.*

***Order 2 :** Parent A is to have parental responsibility in relation to the child's schooling ...*

Another way of putting this would be

The parents are to have shared parental responsibility for the child, except that Parent A is to have parental responsibility in relation to the child's schooling ...

Keep it simple

It is important to keep parenting orders as short and simple as possible, and to avoid adding unnecessary words. Suppose you added the words underlined below to the standard order for equal shared parental responsibility

The parents are to have equal shared parental responsibility for decisions relating to the children.

This would not be a good idea. The extra words are unnecessary and may cause issues in the future. Without the underlined words in the example, the order would create an obligation for both parties to consult each other on *major long-term issues*. With the underlined words, the order would require the parties to consult each other on every single decision relating to the child, including what they were allowed for breakfast.

When drafting orders, keep it simple and bear in mind that the purpose of orders is to create legal obligations.

Setting out orders

When writing parenting orders, be logical and practical. What topics should be covered? What should the orders achieve? How should they be arranged?

A useful approach is to start with parental responsibility, then move on to 'live with' and 'spend time with' orders, and then other topics such as 'changeover' orders. It is often a good idea to have headings for each of the main categories. These days, it is common for the courts to make orders grouped under headings, as it makes them much easier to read.

Here are some examples

- parental responsibility
- when the children are to live and spend time with each parent
- changeover arrangements
- communication between the child and each parent
- school and extra-curricular activities
- other matters.

The most difficult orders to organise will probably be the 'live with' and 'spend time with' orders. They will have to cover different periods, including term time and school holidays, weekends and weekdays, and special days such as Christmas and birthdays.

If there are to be different arrangements for each child, separate headings could be used in relation to those matters.

An example of setting out parenting orders

Here is an example of mapping out parenting orders. This hypothetical family has a baby, twins aged 7 and an older child, aged 15.

Parental responsibility

One order might be sufficient here – eg that the parents have equal shared parental responsibility in relation to all the children.

Times for [the baby] to live and spend time with each parent

These orders will deal only with the baby. They may not need to take account of school terms and school holidays for the immediate future. The parties may also want to provide for different arrangements as the baby grows older.

Time for [the 15 year old] to live and spend time with each parent

These orders will deal with the 15 year old spending time with each parent – taking into account the teenager's views as well as their schooling, employment and extracurricular activities.

Times for [the school-aged twins] to live and spend time with each parent

These orders will probably be a little more complicated. They will deal separately with school periods and school holiday periods. They might also have to deal with after-school or before-school activities. It will be a lot easier to write these orders after having dealt with the baby and the 15 year old.

Special days

It may be that the parents want the children to be together on special days – if so, one set of orders might apply to all the children. If there is a reasonable working relationship between the parents, these orders might make good use of flexibility formulas such as 'unless otherwise agreed'.



CHAPTER 3.

Examples of parenting orders

Examples of parenting orders

This chapter provides some examples of parenting orders, covering a range of topics. These are intended to help parents draft the orders that best fit their situation and look out for the best interests of the child.

The example orders come from various sources, including orders made in reported family law judgments and others kindly supplied by the Family Law Section of the Law Council of Australia.

PARENTAL RESPONSIBILITY ORDERS

Parental responsibility refers to decision-making about a child. Subject to any court orders, each parent usually has parental responsibility, with identical duties and responsibilities. For example, each (and either) parent would be able to authorise medical treatment for the child.

Parents are encouraged to work out what arrangements will be best for the child in their particular situation.

This may involve deciding on shared parental responsibility. For example, parents may want to create an obligation to consult with each other about a major long-term decision in relation to their child. This can be decided without a court order, or an order can be created that makes it a legal obligation.

There is a legal presumption that it is in the child's best interests for parents to have equal shared parental responsibility. However, if this is not in the best interests of the child, the courts have the power to make parenting orders that change this responsibility. When parents ask for consent orders, they can decide whether the order they want the court to make is one that creates an obligation on them to share decision-making. Note – equal parental responsibility does not necessarily mean parents sharing equal time with a child.

Parenting order – example 1

That the father and mother have equal shared parental responsibility for the child.

This example is the standard way of making an order for equal shared parental responsibility. Even though it does not say so, this order creates an obligation on those sharing parental responsibility to consult on decisions about major long-term issues relating to the child (see Appendix 1).

Such major long-term issues include the child's

- name
- health
- education (current and future)
- religious and cultural upbringing, and
- changes to living arrangements that make it significantly more difficult for the child to spend time with a parent.

Ordinary day to day matters, such as a child attending a friend's house for a birthday party, would typically not be a major long-term issue. However, if one parent wanted to restrict the child to interacting only with people of a particular religion or ethnicity, this could involve a major long-term issue relating to the development of the child.

Parents may not want to create a legal obligation to consult about major long-term decisions. If so, the order can say that both parents continue to have parental responsibility but not that it is shared. Or, there could be no order made about parental responsibility at all.

Parenting order – example 2

That the maternal grandparents have equal shared parental responsibility for the child.

This example shows how parenting orders are not limited to parents.

As this order is for shared parental responsibility, it creates an obligation on the maternal grandparents to consult about major long-term decisions, just as a similar order does for parents.

Parenting order – example 3

That the mother and father retain parental responsibility for the child as provided in the Family Law Act s 61C.

This example results in each parent having parental responsibility. As they do not have shared parental responsibility, there is no legal obligation for them to consult about major long-term decisions.

Note – there is a presumption in the courts that it is in the child's best interests for parents to have equal shared parental responsibility. The court might require parents to provide reasons why this presumption does not apply (refer to Appendix 2).



Parenting order – example 4

Parent A shall have sole parental responsibility in relation to the child's education, but in other respects each parent shall retain parental responsibility.

This order results in one parent having responsibility for making decisions about one area of the child's life – education.

This might be useful if one parent has a particular understanding of a child with serious special needs, for example.

Parenting order – example 5

That Parent A have sole parental responsibility for the child.

This example results in one parent having sole parental responsibility – so Parent A would have full decision-making powers for the child and the other parent would have none.

There may be circumstances where this is in the best interests of the child.

Parenting order – example 6

It is possible to have different orders relating to different children in the same family. In one case, a court made orders like this

1. *Parent A shall have sole parental responsibility for decisions about major long-term issues relating to the child X...*

2. *Parent B shall have sole parental responsibility for decisions about major long-term issues relating to the child Y...*

3. *Each parent shall advise the other in writing of any significant decision made in the exercise of that parent's sole parental responsibility.*

This example illustrates the important point that orders can include the communication parents must have in relation to parental responsibility.

Orders that divide parental responsibility

Parenting orders can re-allocate parental responsibility in various ways

Parenting order – example 7

Parent A has sole parental responsibility for the children except for any decision to relocate the children to live more than [a number] kilometres from [a place].

Parenting order – example 8

Parent A shall be solely responsible for determining the children's winter sporting activities, and Parent B solely responsible for determining their summer sporting activities.

Parenting order – example 9

1. Parent A shall have sole parental responsibility for all major long-term issues for the child other than as specifically provided in (2) and (3).
2. Parent B may enrol the child in a private school after giving Parent A three months written notice of any such enrolment.
3. Parent A shall not permit the child to receive medical treatment from Dr X without the written consent of Parent B.

Orders imposing requirements on sole parental responsibility

As illustrated by the second order in example 9 above, it is possible to give one parent sole parental responsibility but have requirements about how that power is to be exercised. Here is an example, requiring a process of involving the other parent

Parenting order – example 10

Parent A is to have sole parental responsibility, but when making a decision about major long-term issues, Parent A must

(a) inform Parent B in writing of the decision to be made

(b) invite written comments from Parent B

(c) take such comments into account when making the decision, and

(d) inform Parent B in writing of the decision.

Orders stating the legal consequences of parental responsibility

Parenting orders are sometimes made in a form that states the legal obligations they create

Parenting order – example 11

Parent A and Parent B are to have equal shared parental responsibility for the children. This order requires decisions about major long-term issues in relation to the children to be made jointly, and requires the parents to consult each other, and to make a genuine effort to come to a joint decision about such issues ...

Writing orders in this way does not change the actual effect of the orders. In this example, the second sentence simply re-states the provisions of s 65DAC of the Family Law Act.



Here is another example

Parenting order – example 12

1. *[Parent A] shall have sole parental responsibility for the major long-term issues for the child [...] such issues to include but not be limited to*
 - (a) the child's education*
 - (b) the child's religious and cultural upbringing,*
and
 - (c) the child's health.*
2. *Each parent shall have responsibility for daily decisions about the care, welfare and development of the child while they are in that parent's care.*

Paragraphs (a), (b) and (c) in order 1 of this example are copied from section 4 of the Family Law Act, which defines major long-term issues. So these issues would be included without stating them.

While order 2 in this example states the ordinary legal situation, it is not expressly stated in the Family Law Act. So although it does not actually have any significant legal effect, some parents may think it is useful to avoid the risk that anyone may think each parent had to consult with the other about day to day matters.

Another way of achieving the result of order 2 in example 12 would be

Parenting order – example 13

While the child is spending time with a parent under these orders, that parent is not obliged to consult with the other about decisions that are not about major long-term issues relating to the child.

When writing orders that spell out the legal consequences, it is important to make sure they do so correctly. The meaning of the order would be uncertain if there were any significant difference between the language of the relevant section of the Family Law Act and the wording of the order.

An alternative to spelling out the obligations of the parties, is to have a notation to the order. Notations are usually written at the end of the parenting orders.

Parenting order – example 14

Parent A and Parent B are to have equal shared parental responsibility for the children.

Notations

(1) This order requires decisions about major long-term issues in relation to the children to be made jointly, and requires the parents to consult each other, and to make a genuine effort to come to a joint decision about such issues.

(2) Major long-term issues for the child include but are not be limited to

(a) the child's education

(b) the child's religious and cultural upbringing, and

(c) the child's health.

(3) Each parent will have responsibility for daily decisions about the care, welfare and development of the child while they are in that parent's care.

Notations such as this do not affect the legal obligations created by the order, and remind the parties of what the orders mean. If there were later proceedings for breach of the orders, the notation might make it difficult for a party to say, for example, that he or she did not realise the order created an obligation to consult.

Orders about particular aspects of parental responsibility

As well as allocating or re-allocating parental responsibility, orders can deal with any aspect of parental responsibility. For example in relation to health issues, a parenting order could be

Parenting order – example 15

Each parent shall notify the other of any medical emergency, illness or injury the children suffer while in that parent's care that the parent considers serious enough to require treatment by a health professional, and shall authorise any treating health professionals to communicate with the other parent about the condition and treatment of the children.

Parenting orders don't have to apply equally to both parents. Take a case where Parent A (who happens to be a medical practitioner) believes that Parent B had been taking the child to hospital unnecessarily. Parent B might agree on the following

Parenting order – example 16

- 1. Parent B shall not take the child to a hospital or medical practitioner without first consulting Parent A, except in an emergency.*
- 2. If Parent B takes the child to a hospital or medical practitioner in an emergency, Parent B shall advise Parent A of the circumstances as soon as possible.*



Here's an example relating to education

Parenting order – example 17

The parents are to continue to have the child attend [a specified school] unless they agree in writing to enrol the child in a different school.

Or the child's name

Parenting order – example 18

The parents are to take all reasonable measures to ensure that the child continues to be known by the surname [surname specified].

Here are some examples on other topics

Parenting order – example 19

Neither parent shall permit the child to attend an M-rated movie without the prior consent of the other parent.

Parenting order – example 20

Neither parent shall permit the child to travel outside Australia without the prior written consent of the other parent.

Parenting order – example 21

Neither parent shall permit the child to be in the care of [a specified person].

Parenting order – example 22

Both parents shall take all reasonable measures to ensure that the child continues swimming lessons.

Parenting order – example 23

Neither parent shall permit the child to use electronic devices for more than two hours a day while they are in that parent's care.

As with many parenting orders, another approach to such topics would be to use an order in the form of an injunction, using wording such as 'Each parent is restrained from ...' (see example orders under the heading 'The parties' behaviour').

'LIVE WITH' ORDERS

Here are some general examples of 'live with' orders

Parenting order – example 24

That the children live with Parent A.

This would be a suitable form of words where no other orders are needed providing for the children to live with or spend time with anyone else.

Parenting order – example 25

That the children live with Parent A, except at the times they are to live with or spend time with Parent B.

This would be a suitable order where the children are to live mainly with one person, Parent A, and spend limited time with Parent B. With this order in place, it is only necessary to spell out when the children are to be with Parent B (see example orders under the heading 'Spend time with orders').

Examples 24 and 25 both use the words 'that the children live with'. Although many orders use this sort of language (also 'the children shall live with'), parents may prefer to set out the obligations of the parties, as in the next example

Parenting order – example 26

The parties shall take appropriate steps to ensure that the child lives with ...

Some 'live with' orders set out a fortnightly cycle

Parenting order – example 27

In this order, 'Week 1' means the week commencing on the first Sunday after the date of these orders, and each alternate week thereafter. 'Week 2' means the week commencing on the second Sunday after the date of these orders, and each alternate week thereafter.

Except as otherwise provided by these orders, unless they agree otherwise the parties shall take appropriate measures to ensure that the child lives with each parent as follows

in Week 1, with Parent A from [time] on [day of week] to [time] on [day of week] and with Parent B from [time] on [day of week] to [time] on [day of week]

in Week 2, with Parent B from [time] on [day of week] to [time] on [day of week] and with Parent A from [time] on [day of week] to [time] on [day of week].

A few points can be noted about example 27

- it identifies a starting time (the first Sunday after the date of the orders)
- it uses the technique of separately defining a convenient term (Week 1, Week 2) that can then be used in the orders, helping to make them reasonably short and easy to read
- depending on what days and times are inserted, it can result in the child spending similar or different times with each parent
- the opening words '*except as otherwise provided by these orders*' mean that any other orders that deal with where a child is spending their time (such as birthdays, school holidays or public holidays), will override these orders
- the words '*unless the parties agree otherwise*' add flexibility to the order, allowing for a change of circumstances
- the order uses the words '*the parties shall take appropriate measures to ensure that the child lives with*' rather than '*the child is to live with*'. This means it explicitly states the obligations of the parties.

This form of order could also be adapted to other time cycles.

Setting out a weekly cycle is simpler than a fortnightly cycle. One example would be

Parenting order – example 28

Commencing on [date], except as otherwise provided by these orders, unless they agree otherwise the parties shall take appropriate measures to ensure that the child lives with Parent A from [time] on [day of week] to [time] on [day of week] and with Parent B from [time] on [day of week] to [time] on [day of week].

'SPEND TIME WITH' ORDERS

'Spend time with' orders are similar to 'live with' orders.

Parenting order – example 29

The child shall spend time with [Parent A] as follows ...

This order creates an obligation on Parent B to provide the child, but not necessarily an obligation on Parent A to exercise it.

To create an obligation on Parent A to spend time with the child (as well as an obligation on Parent B to provide the child), the following would be more suitable

Parenting order – example 30

The parties shall take all reasonable steps to ensure that the child spends time with [Parent A] as follows ...

Occasionally, courts are asked to make orders in the form that Parent A spend time with the child. This form of words is not recommended. It suggests that Parent A is the only one who has obligations under the order. Since it is hard to imagine that anyone would want to create an obligation on Parent A to spend time with the child, but no obligation on Parent B to provide the child, it is best to avoid orders written this way.

Orders that a parent is to spend no time with a child

In rare and sad circumstances, perhaps involving violence or abuse, the court may order that a parent is not to spend any time with a child.

Parenting order – example 31

Parent A shall not spend time with the child.

If Parent A is not prevented from spending time with the child, some appropriate words would be

Parenting order – example 32

That there be no order for the child to spend time with Parent A.

Under this order, if Parent A and the child happen to meet by chance, Parent A would not be in breach of the orders by spending time with the child. This highlights how important it is for parents to think through exactly what they want to achieve and write the orders accordingly.

Arrangements during school holidays

Once the child is of school age, 'time with' and 'live with' orders will usually distinguish between arrangements for term time and those for holiday periods.

In relation to school holidays, it will usually be necessary to deal with how and when the child is to be transferred from one parent to the other and to set out what parts of the holidays are to be spent with each parent.

Where state schools are involved, it is usually best to refer to public school holiday periods and school terms, since these dates are published on government websites. Sometimes, the parties may wish to make different arrangements for different school holidays, especially between the shorter holidays and the long holiday period after the last week of term for the year ('the Christmas holidays').

Where the children attend schools in different states or territories, or if some of the children are at private schools, it may be necessary to specify the exact periods of holidays and term times.

As with other topics, it is a matter of judgment how precise the orders need to be. For example, it will usually be enough for the orders to refer to the first half and the second half of school holiday periods. In some cases it might help to reduce arguments if the orders specified exactly where the mid-point occurs.



Here are some examples

Parenting order – example 33

Each party shall take all reasonable steps to ensure that the children spend time with Parent A as follows

- 1. Commencing on [date], for one half of each school holiday period other than Christmas school holidays, namely (unless otherwise agreed) the first half in each even numbered year and the second half in each odd numbered year.*
- 2. Where the children are with Parent A for the second half of a school holiday period, Parent A shall ensure that the children are returned to the care of Parent B no later than 9.00am on the last Saturday of such school holiday period prior to the commencement of the next school term.*
- 3. For the purpose of these orders, each 'school holiday period' commences at 9am on the day after the last day of the school term and ends at 5pm on the Saturday prior to the commencement of the new school term.*

As in other matters, no particular form of words is required, as long as the meaning is clear. For example, the 'Christmas school holidays' could just as well have referred to 'the December/January school holidays', or 'the school holidays following the last school day of each year'.

Parenting order – example 34

The children are to live with Parent A during New South Wales school holidays other than the Christmas school holidays, for the first four days of such holidays, commencing at 5.00pm on the last day of school term and concluding at 5.00pm on the fourth day thereafter.

Parenting order – example 35

The children are to live with Parent A

- (a) during the school holidays after Terms 1, 2 and 3, from the first Tuesday of the school holiday period until the last Saturday of the holiday period*
- (b) during the December/January school holiday period for three weeks as follows*
 - (i) in odd-numbered years, commencing on the Saturday immediately after the last day of the school term, and*
 - (ii) in even-numbered years, commencing on 3 January.*

Note – the Easter long weekend does not always fall within school holiday periods, so a separate clause may be required – refer to ‘special days’ below.

Time with parents on special days

For many parents, it’s important they have some involvement with their child on special days, such as the child’s birthday, each parent’s birthday, Father’s Day, Mother’s Day, and religious or cultural days like Christmas. Writing such orders is quite straightforward. Keep in mind that some special days may occur at times when the child would normally be with the other parent. It would therefore be appropriate to use words like *despite any other orders ...* to indicate that these orders would override the more general orders.

Here are some examples

Parenting order – example 36

Birthdays, Mother’s Day and Father’s Day

1. *Despite other orders, unless the parents agree otherwise the children shall spend time with each parent as follows*
 - (a) *with the mother on Mother’s Day and with the father on Father’s Day each year from 6.00pm on the Saturday immediately preceding Mother’s Day or Father’s Day until before school on the following Monday (or 9am if not a school day)*

(b) *on each of the birthdays of the children, if they are otherwise living with or spending time with the one parent, then with the other parent from 5.00pm to 7.00pm*

(c) *on each parent’s birthday, with that parent from 5.00pm to 7.00pm if they would otherwise be living with or spending time with the other parent.*

Christmas

2. *Unless the parents agree otherwise*

(a) *in each odd-numbered year the children shall spend time with Parent B from 5.30pm on 24 December until 2.30pm on 25 December and with Parent A from 2.30pm on 25 December until 5.30pm on 26 December, and*

(b) *in each even-numbered year the children shall spend time with Parent A from 5.30pm on 24 December until 2.30pm on 25 December and with Parent B from 2.30pm on 25 December until 5.30pm on 26 December.*



Note that the use of headings makes it much easier to read these orders. Obviously some parents will want to make special orders for other times of religious or cultural significance, such as Ramadan, Chinese New Year, Passover, etc.

'COMMUNICATE WITH' ORDERS

These orders provide for the child to have communication with the parent they are not living with. Sometimes, they provide that the children 'may' communicate with the parent at particular times. While this would be enough in some situations, it is generally better to try to set out the obligations of each parent in the orders.

Here are some examples

Parenting order – example 37

Parent A may send the child letters, cards and gifts for the child's birthday and Christmas, and Parent B shall give them to the child unless she has reasonable cause to consider that any particular item would be inappropriate for the child or either of them to receive.

This example provides for the possibility that Parent A might send inappropriate messages – eg ones that criticise Parent B. If necessary, it is a good idea to spell out such matters. However, the qualification probably does not change the legal situation significantly, since under the ordinary law, Parent B would have a 'reasonable excuse' for not giving the child inappropriate messages from Parent A.

Parenting order – example 38

That during times when the child is in their care, each parent will encourage the child to communicate with the other parent by telephone or otherwise at times agreed between the parents, and in the absence of agreement every second day between 6.00pm and 6.30pm.

Depending on the situation, and any problems that have arisen or seem likely to arise, it may be best to write more detailed orders

Parenting order – example 39

The parent with whom the child is living shall provide a telephone [or, eg Skype] to enable the child to communicate with the other parent and shall provide a setting in which such communications can be private.

In a situation where the parents live in different countries, the orders might look something like this

Parenting order – example 40

1. *When the children are not otherwise with Parent A, the parents are to encourage and assist the children to communicate with Parent A at agreed times, and failing agreement as follows*

(a) by telephone at all reasonable times (but not more than once every two days) with Parent A to initiate the call

(b) by e-mail at all reasonable times

(c) by webcam or Skype at all reasonable times, including on each of the children's birthdays, Parent A's birthday, Easter Sunday and Christmas Day

(d) by post.

2. *When the children are communicating with the other parent each parent shall*

(a) ensure that the children are available to receive the telephone call

(b) ensure that the children have privacy during their communication with the other parent.

3. *Each parent shall inform the children that they are at liberty to call the other parent at all reasonable times and the parent with whom the children are at the time, shall assist the children to make any calls they request.*

This is an example of a fairly detailed order for communication. Such detail is usually considered useful when the parties find it difficult to maintain a flexible arrangement.

Orders may also provide for various means of communication

Parenting order – example 41

1. *Parent B is to give the children any birthday and Christmas cards sent to them by Parent A.*
2. *Each parent is to facilitate the children writing to the other parent at all reasonable times.*
3. *When the children are not with him/her, Parent A shall communicate with [the child] via Facetime or Skype or telephone each Sunday evening between 7.00pm and 7.30pm and Parent B shall provide any contact details for these services via the 'talking parents' website.*

Parenting order – example 42

1. *Each of the parties shall take all reasonable steps to ensure that the child is able to communicate with Parent A in the following manner*
 - (a) by Parent A being able to send letters, cards, and/or gifts to the child on or about dates proximate to Father's/Mother's Day, the child's birthday, and Christmas Day, and*
 - (b) by the child sending to Parent A any letters, cards, photographs, or other written communication the child wishes to convey to Parent A.*



2. *For the purposes of implementation*

- (a) *Parent B shall, within seven days of these orders, notify Parent A and thereafter keep Parent A informed in writing of the address to which mail for the child may be sent, and*
- (b) *Parent A shall thereafter keep Parent B informed in writing of the address to which mail may be sent by the child.*

This example makes good use of the formula *shall take all reasonable steps to ensure that ...* Also, note how the requirements for implementation are set out separately in order 2.

Parenting order – example 43

Parent A shall communicate with the children as follows

- (a) *during school term by Skype on three nights per week, being Tuesday, Thursday and Sunday and by telephone on each other night with Parent B to initiate the Skype call or telephone the children between 7.30pm and 8.00pm*
- (b) *during the school holidays Parent B will make reasonable efforts to make the children available to communicate with Parent A by Skype or telephone each night between 7.30pm and 8.00pm wherever practicable, and*

- (c) *for the purposes of this order, in the event that the children are not available, Parent B will notify Parent A as soon as is practicable.*

The wording *Parent A shall communicate* would be appropriate when the order is intended to create an obligation on the parent to do so, not merely to create an obligation on Parent B to assist.

CHANGEOVER ORDERS

When children are to move between one parent and the other – a changeover – it is usually good to specify how this is managed. Dealing with this in parenting orders is usually straightforward

Parenting order – example 44

During term time, any changeovers will occur at the children's school(s) (unless the parents otherwise agree). Otherwise the parent to whom the children are travelling will collect the children from the residence of the other parent.

Parenting order – example 45

Unless otherwise agreed, Parent A shall transport the child to Parent B's home at the commencement of the child's time with Parent B, and Parent B shall return the child to Parent A's home at the conclusion of the time with Parent B.

Parenting order – example 46

Changeover for the purpose of the children moving from one party to the other shall take place at [location] or such other place as the parties agree.

School is often the ideal place to avoid the parties meeting at changeover. Here the children are already in the care of the school and are under supervision when one parent drops them off until the other parent picks them up.

Sometimes places such as public libraries are also suitable. Parents often choose a place that is easy to find and get to, has a child-friendly environment, and of importance in some cases has closed-circuit TV. Some parents choose police stations but many feel they are not suitable places for children, and try to think of some other venue.

Where there is a difficult relationship between the parents, sometimes relatives are able and willing to help in the changeover process. Obviously, if other people are to be involved, it is important to ensure in advance that they are willing and able to do what is required of them. If it is intended that the orders should create legal obligations on a third party (eg a person who will be responsible for supervising the child when one parent drops them off and the other parent collects them), legal advice should be obtained.

Parenting order – example 47

1. The changeover of care from Parent A to Parent B is to be as follows

(a) Parent A is to deliver the children to the supervisor at [location] (the changeover venue) at the time the children are due to commence time with Parent B. Parent B is not to approach the changeover venue or be within 1 kilometre of the venue until 15 minutes after the time appointed for the commencement of his/her time with the children.

2. The changeover of care from Parent A to Parent B is to be as follows

(a) at the conclusion of Parent B's time with the children he/she is to ensure their return to the changeover venue by the appointed time and is to depart from the venue and be no closer than 1 kilometre of it, by the time the changeover to Parent A is due.

Orders can be written in a way that specifies who is to deliver and collect the child. They can also include conditions about the behaviour of the persons involved.



Here are some examples

Parenting order – example 48

Parent A is to have the child delivered ...

Parenting order – example 49

Parent B is to arrange for the child to be collected ...

Parenting order – example 50

At the designated times, Parent A shall either deliver the child in person or arrange for the child to be delivered by [eg a grandparent or relative].

Parenting order – example 51

Parent A shall ensure that [name of person] does not attend at the time the child is delivered.

Parenting order – example 52

If Parent A delivers the child in person, he/she shall ensure that he/she has not consumed alcohol in the previous 12 hours.

Changeover at a Contact Centre

A parent's time with a child may occur at a Contact Centre, where the time may be supervised. In these situations, it is important that the orders take into account not only the parent's situation but what is workable for the Contact Centre. Before including any orders of this nature, please consult with the Contact Centre to discuss arrangements.

THE PARTIES' BEHAVIOUR

It is fairly common, especially in litigated cases, for parenting orders to be combined with orders that deal with the parties' behavior. Usually, these orders would be better regarded as injunctions than parenting orders. However it is useful to set out some examples, since this is something parties might want to consider when making parenting orders.

Parenting order – example 53

Parent A is restrained from

- (a) attending the venue where the child is to spend time with Parent B accompanied by [a named person]*
- (b) remaining at the venue after delivering the child.*

Parenting order – example 54

Parent A is restrained from

- (a) denigrating or criticising Parent B to the child or allowing any third party to denigrate or criticise Parent B within the presence or hearing of the child*
- (b) discussing these proceedings with the child*
- (c) other than as specifically provided in these orders, taking the child for counselling or psychological intervention or allowing others to do so unless recommended by the child's school or general medical practitioner and after Parent A has consulted with Parent B pursuant to paragraph 3 of these orders and has provided Parent B with the name, address and telephone number of the proposed counsellor or mental health professional.*

Parenting order – example 55

Each party is restrained from causing or permitting the child to be or remain in the physical presence of Ms X.

Parenting order – example 56

Each party is restrained from denigrating or criticising the other in the presence or hearing of the child and from permitting the child to remain in the presence or hearing of another person denigrating the other.

Another alternative is to make an annotation or parenting plan, recording the parties' agreement that certain kinds of behaviour should be avoided – it's important to note this would not be legally enforceable.

This is an example taken from a parenting plan

Mother and Father agree that they will not denigrate the other parent in the presence or hearing of the children. They also agree that they will not allow other people to denigrate the other parent in the hearing or presence of the children.



Father and Mother agree to be mindful of the conversations they have with the children so as to ensure that the children are not involved or burdened with adult issues or conflict.

Mother and Father agree that they will communicate with each other any concerns they may have regarding the children or any concerns that the children may raise with them.

Another parenting plan contained this

Mother and Father agree to give each other as much notice as possible if there is to be a change to the pick up or drop off arrangements. Father and Mother agree that they will endeavour to make changeover respectful and amicable for [the child].

The parties to these parenting plans thought it would be more useful to set out their agreements on these matters in a non-binding form, rather than in enforceable parenting orders.

PASSPORTS

In general, parenting orders (and injunctions) can deal with the parties' obligations, but cannot direct other people or agencies on what to do. This is important in relation to passports – a parenting order cannot direct the authorities to issue a passport, or not issue one, or take other actions, but can make clear whether the consent of both parties is required for a passport to be issued.

Here are some examples

Parenting order – example 57

Parent A shall hold the child's passport and make the passport available only for the purposes of the child's travel as authorised by these orders.

Parenting order – example 58

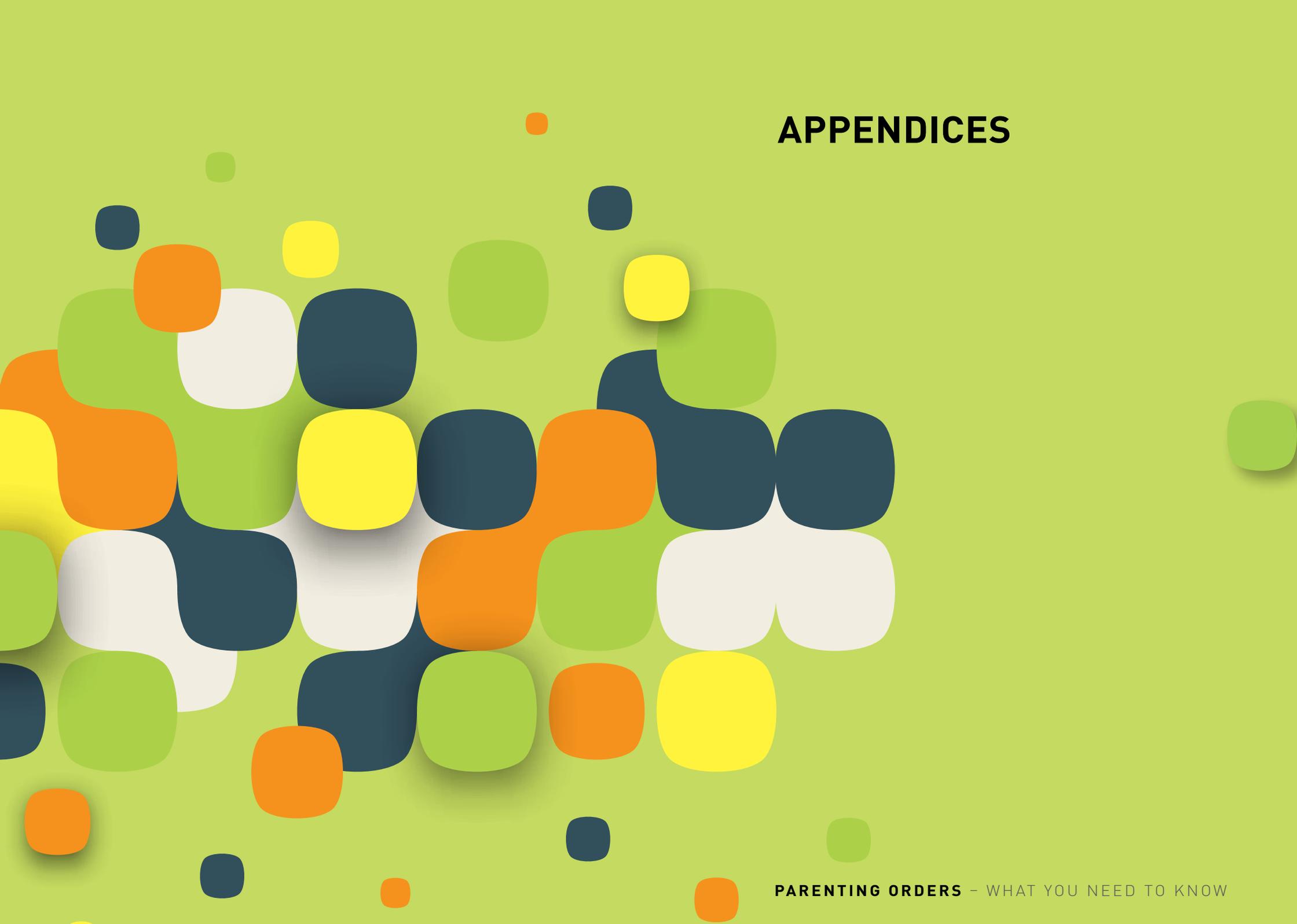
That both parties do all necessary acts and sign all necessary documents so as to cause

- (a) a passport to be issued for each of the children and to be held by the applicant, and*
- (b) an updated passport to be issued for each of the children at any time that a current passport expires or is due to expire.*

Where a party fails or refuses to do so, the requirement for that party's consent will be dispensed with.

Parenting order – example 59

The child is permitted to have an Australian travel document.



APPENDICES

Appendix 1

The legal background

The law relating to children is complex and beyond the scope of this handbook. However, for those who are interested in learning more about the law, this appendix provides further information.

THE COURTS INVOLVED IN FAMILY LAW

There are three courts in Australia that are called 'family courts'.

The **Family Court of Australia** is a federal court and has registries throughout Australia. It was created in 1976 and exercises jurisdiction under the *Family Law Act 1975* (refer to Part IV).

The **Federal Circuit Court of Australia** is also a federal court and was established under the *Federal Circuit Court of Australia Act 1999*. The Federal Circuit Court has registries throughout Australia, in some cities sharing buildings with the Family Court of Australia. It came into operation in 1999 and has grown rapidly into a very large court. In practice it does the majority of family law in Australia, and many of its judges are family law specialists. Broadly speaking, in relation to children the Family Court and the Federal Circuit Court each exercise the same jurisdiction. To some extent,

the most difficult cases are dealt with by the Family Court of Australia. In practice though very few of the cases that have to be determined in court are simple, so both courts spend most of their time dealing with very difficult cases involving children.

The third family court is the **Family Court of Western Australia**, in which judges and family law magistrates exercise jurisdiction over family law in that state. Unlike the other two courts mentioned above, the Family Court of Western Australia is a state court, established under state law. The law it applies in relation to children is contained in Western Australia's *Family Court Act 1997*, which is essentially the same as the federal Family Law Act that is applied by the other two courts.

Magistrates courts of the states and territories sometimes deal with family law matters but this work is limited – apart from the family law magistrates in the Family Court of Western Australia. The Magistrates courts' power to make family violence orders has great relevance to family law.

COURT PERSONNEL

There are various court personnel who have a role in relation to parenting orders.

Judges and Magistrates have the power to determine disputes relating to children and make orders of all kinds, including orders by consent (refer to Part IV, Division 3).

Registrars are important officials of the court. In the Family Court of Australia, registrars have the power to make orders by consent on application by the parties. They play a major role as mediators in relation to financial matters (refer to Part IV, Division 4).

Family consultants are employed by the Family Court of Australia and have a special role in relation to children's matters. A family consultant will be assigned to a particular case by the court and will normally conduct a series of interviews and write a report to assist the court. The family consultant may also appear in court and provide advice and assistance during the course of the hearing. Family consultants may be cross-examined on the reports they write, just like other expert witnesses. Family consultants do not operate in a confidential way – the consultations they engage in and what they say to the court are made known to the parties.

PROFESSIONALS INVOLVED IN FAMILY LAW

There are other professionals outside the family court who are often involved in family proceedings.

Legal practitioners (lawyers) represent many of the parties in family law cases. Litigants in family law as in other areas of law are entitled to be represented by a legal practitioner if they choose. Those who can't afford the costs of legal representation may be eligible for legal aid – the legal aid commissions in the states and territories provide in-house lawyers in some cases and in others assist with the funding of lawyers in private practice. It is generally accepted that managing a family law case as an unrepresented litigant can be challenging.

Many lawyers specialise in family law, and provide expert assistance that helps parents work out an agreed solution to disputes about the child. The work of lawyers includes advising clients, referring them to mediation or other services, negotiating on their behalf, and in the minority of cases that are not settled, representing them in court. In some states and territories, lawyers are divided into solicitors and barristers (barristers specialise in court room advocacy), while in others places many lawyers do the work of both solicitors and barristers.

Family counsellors have a different role from family consultants. They are employed by community-based not-for-profit organisations, and provide confidential counselling and advice. They provide a valuable service in assisting the parties to address their personal and interpersonal issues and issues relating to the care of their children (refer to Part II, Division 2).

Family dispute resolution practitioners are mediators. Like family counsellors, they operate in a confidential setting. Some are private practitioners and some are employed by community-based organisations (or both). Some are legally qualified. They



provide expert assistance in helping the parties work out an agreed outcome with focus on the best interests of the child. Family dispute resolution practitioners are employed in a range of organisations including Family Relationships Centres, legal aid commissions and in private practice.

Independent children's lawyers are appointed by the courts in some cases. They are funded through the legal aid system. Their role is to act independently and help the court make orders that will be best for the child. The Family Law Act spells out their role – refer to s 68LA.

Although their task is to advance the child's interests, independent children's lawyers do not act on instructions from the child in the way lawyers act on the instructions of an adult client. They must make up their own minds about what will be best for the child. In some situations, they might ask the court to make orders that are not what the child wants. The work they do usually includes providing evidence to the court (eg by obtaining an independent expert report relating to the child's best interests), and cross-examining witnesses. They are independent in the sense they do not represent either of the adult parties, although in exercising their judgment they might ask the court to make some or all of the orders sought by one party.

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

to make an order for parents to pay a contribution towards the costs of the independent children's lawyer, to reduce the demands on the legal aid system.

PARENTING ORDERS

There are no legal rules about what arrangements should be made for the child when parents separate – parents can 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.

Parental responsibility

The Family Law Act provides '*each of the parents of a child who is not 18 has parental responsibility for the child*' (s 61C). Because of this provision, subject to any court orders, each parent has a role in deciding what is reasonable in looking after a child – eg to authorise medical treatment. Although parents will normally want to cooperate in caring for their child, unless a court has made an order requiring them to cooperate, there appears to be no legal obligation to do so. Each parent can exercise parental responsibility – eg if one parent is overseas the other parent can consent to medical treatment for the child.

Parental responsibility means that in the course of caring for their child, parents are entitled to do some things that other people are not allowed to do – eg making a child stay in a room for a short time by way of punishment. Many of the acts reasonably involved in the care of the child are lawful when done by parents, but unlawful if done by other people. Of course, there are limits to what parents can do, but broadly speaking it can be said that the law gives parents the authority to do the things that are ordinarily done in raising children.

The law also imposes certain responsibilities on parents – eg providing financially and otherwise for their child and sending them to school. Generally speaking, parents can delegate their parental responsibilities – eg when they leave their child in the temporary care of a baby sitter. In such circumstances, that person may legally do what is necessary to care for the child during that period. Although grandparents and other relatives often play a large part in the care of children, there are no separate rules that give them any parental responsibilities because of their status as relatives.

Who has parental responsibility

The Family Law Act gives each parent ‘parental responsibility’ (s 61C). They do not have defined rights in relation to the care of their child. The Act gives these responsibilities to people who come within the legal definition of ‘parent’ – usually, the biological parents and adoptive parents (s 4). The definition of ‘parent’ does not include grandparents, stepparents, or foster parents. In some cases, notably where the child is born by artificial conception, defining the parents can be complicated – see ‘parent’ in the Glossary.

Changing or removing parental responsibility

Each parent has parental responsibility whether or not they are married to each other, living together or separated – or even if a parent has gone to prison, travelled overseas, or become mentally ill. In fact no change in circumstances has the effect of taking parental responsibility away from the parents, or giving it to anyone else. Even if a parent has had no involvement with the upbringing of a child, that parent still has parental responsibility.

Parental responsibility may be changed in some situations. For example, one parent may have died or have abandoned the child, or have become too ill to play any part in the child’s upbringing. Arrangements may have been made for the child to be cared for by grandparents or foster parents or other relatives. The law deals with this problem by allowing courts to make orders transferring the legal responsibilities of parenthood to somebody else, or changing them in various ways. These are parenting orders and as such, the court will make whatever order appears to be in the child’s best interests, having regard to the evidence that has been put before it.

Each parent has parental responsibility for their child unless a court makes a parenting order or other decision transferring parental responsibility, or some part of it, to another person (refer to s 61C(3)).

The law’s changing terminology

In years gone by, the court frequently made orders giving one parent ‘custody’ and the other parent ‘access’. In 1996 these terms were dropped from the Family Law Act. ‘Custody’ gave one parent greater rights over the child than ‘access’ gave to the other parent. Parliament wished to reinforce the idea that both parents continued to be important as parents and not merely as visitors or playmates, after separation.

So the law was changed. Instead of ‘custody orders’ the court made a ‘residence order’ in favour of the person with whom the child would mainly live, and a ‘contact order’ in favour of the other parent. The law was also changed at that time so that the ‘residence parent’ had no greater decision-making powers than the ‘contact parent’. As a result, each parent has ‘parental responsibility’ (formerly ‘guardianship’), and there is no legal connection between decision-making and arrangements for the children to live with or spend time with parents.

In 2006, with the passage of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, Parliament took the view that it is better to avoid all language that might suggest that one parent was the winner and the other the loser, or that one parent was more important than the other. It was therefore decided to stop calling orders 'residence' or 'contact'. Instead, the Act now simply says that the family courts can make orders dealing with various topics, including with whom the child should live and with whom the child should spend time or communicate – resulting in 'live with' orders, 'spend time with' orders and 'communicate with' orders.

Orders for shared parental responsibility – consultation

An order for shared parental responsibility creates an obligation to consult about major long-term issues. The Family Law Act (s 65DAC) provides that in relation to major long-term issues, the order for equal shared parental responsibility *'is taken to require the decision to be made jointly'*. More specifically, the Act also says that the order requires each of the parents *'to consult the other person in relation to the decision'* and *'to make a genuine effort to come to a joint decision'* about the issue. What will constitute consultation, and what will be treated as a genuine effort, will depend on the facts of each case.

Obligations created by a 'time with' order

As an example – the order is for the child to spend time with Parent B, who is to collect the child at the start of his or her time with the child. Parent A would contravene the order by concealing the whereabouts of the child when Parent B comes to collect the child. Similarly, Parent A would contravene the order if he or she deliberately induced in the child an unwillingness to go with Parent B. Contravention of parenting orders is dealt with later in this Appendix.

In one case, it was held that a mother contravened the order by telling the child that it was the child's decision whether or not to go with the father. The obligation is to make a reasonable effort to comply with the order. In another case, the court said that Parent A would not contravene the order if he or she made genuine attempts to have the child go with Parent B, but those attempts were frustrated by the attitude or behaviour of the child. For example, it might be unreasonable to force a very upset and protesting child to go to a parent, although such cases depend very much on the particular circumstances.

What if Parent A refuses to send the child to Parent B because Parent A believes it would not be in the child's best interests? This would be a contravention of the order. However, there could be circumstances in which it would be dangerous or disadvantageous to the child to be sent to the other parent, such as a reasonable fear of violence or abuse. The way the law deals with this is to say that although Parent A is contravening the order, he or she will not be punished if the court finds that Parent A has a *reasonable excuse* for refusing to send the child. If the question arises in court, it is up to Parent A to prove that in all circumstances there was a reasonable excuse.

What is a parenting plan and how is it different from a parenting order?

The big difference between parenting plans and parenting orders, is that orders create obligations and plans do not.

A parenting plan is a written document recording an agreement between the parties (s 63C). Since 2003, parenting plans cannot be registered in a court.

Before 2003, it was possible to have parenting plans registered, and once registered they were enforceable, just like parenting orders. It is difficult to imagine that a court would consider enforcing a parenting plan made so long ago. For practical purposes therefore, registered parenting plans can be disregarded.

Legal effect of parenting plans

Although its terms cannot be enforced, a parenting plan can be relevant as a matter of evidence in future proceedings between the parties. It would be a written record to the effect that the parties had agreed on the matters stated in the parenting plan, and could therefore be relevant evidence in later proceedings. For example, if Parent A argued in later parenting proceedings that the child should have no involvement with Parent B, but had made a parenting plan previously agreeing to Parent B spending time with the child, Parent A could expect to be challenged in cross-examination to justify this change of mind.

Although parenting plans cannot be enforced, they can have an effect on previously made court orders. A parenting order is subject to a later parenting plan – unless the parenting order says that it can only be changed by a later court order (s 64D). This means a parenting plan can relieve a party from obligations under a parenting order, although because parenting plans are not enforceable, it cannot create new obligations.

For example, suppose a parenting order provided that the child should spend each Sunday afternoon with her father. The parties subsequently make a parenting plan to the effect that the mother should arrange for the child to spend each Sunday afternoon with the grandmother, not the father. In this situation there would be no legal obligation on the mother to send the child to the father because that part of the parenting order had been changed by the parenting plan. If the parties wish to create an obligation on the mother to send the child to the grandmother,

they would need a new parenting order to that effect.

To summarise this example:

Parenting order, made on 1 January

Child to spend each Sunday afternoon with her father.

Parenting plan, made on 1 March

Child to spend each Sunday afternoon with her grandmother.

Legal position

- If the mother sends the child to the grandmother on Sunday afternoons she is not in breach of the parenting order (because it has been changed by the parenting plan).
- If the mother fails to send the child to the grandmother, she is not breaking the law (because the parenting plan is not enforceable).

Enforceability and drafting styles

It's best to use different drafting styles for parenting orders and parenting plans – as orders are enforceable and plans aren't.

For example, in a parenting plan the parties may wish to include things such as their long-term aspirations for the child, or their hopes for a better relationship between themselves. While the parties might find it useful to record these wishes in a parenting plan, such statements would usually be inappropriate for parenting orders, because they don't set out any obligations that could be realistically enforced.

In general, the appropriate style for drafting parenting orders sets out fairly clearly the specific obligations that the parties have in relation to the child. The drafting style appropriate for parenting plans is not limited in this way.

Family violence and parenting orders

The definition of family violence in the Family Law Act is very broad, and means violent, threatening or other behaviour by a person that coerces or controls a family member, or causes a family member to be fearful. For examples of behaviour that would be considered family violence, see 'family violence' in the Glossary.

Family violence is a serious problem and issues relating to it often arise when families separate. In such situations, it is important to **get legal advice**. Some aspects of the law are outlined below.

In addition **1800RESPECT** provides a confidential and professional counselling, information and referral service that is available 24 hours a day, 7 days a week.

Family violence orders

State and territory laws provide for magistrates courts to make 'family violence orders'. These are made to protect potential victims of violence. Applications for such orders can be made by the police on behalf of a person, or by the person who fears violence.

While the details of the law vary from one state or territory to another, in general the magistrates court can make a family violence order if it is satisfied that a person is at risk of one or other kind of violence. Sometimes, an offence such as assault may have been committed but this is not always necessary. If there have been threats, stalking and similar behaviour the court might consider it appropriate to make a family violence order.

The order will normally say that the person from whom violence is feared must not engage in certain behaviour – eg must not come within a certain distance of the other person's home or workplace, and must not stalk or harass the person. If the person breaches the order, that is an offence for which he or she can be punished.

Normally, courts will hear each party before making any order. In urgent situations, a person who fears violence from another person may obtain a family violence order of an interim kind without notifying the other person. Such interim orders are designed to protect the person for a limited period – until the case comes back to the magistrates' court, at which time both parties will have a chance to present their cases before a final order is made.

In practice, it is common for the parties to agree to the making of a family violence order – but without any admissions that one party has been violent or that the other is at risk. What that achieves is a situation in which there is a binding order – eg that the parties must not come near each other but the court has made no findings against any party.

The family court needs to know about previous family violence orders and risks to children

When parenting cases come before the family courts the parties are obliged to tell the court about any family violence order that has been made and is in force – refer to the Family Law Act s 60CF. The court will want to avoid making a parenting order that is inconsistent with the existing family violence order – refer to s 60CG. Issues about the relationship between parenting orders and family violence orders are dealt with in detail in Part VII Division 11 of the Family Law Act (ss 68N-68T).

When considering what parenting order to make, the court must take into account, among other things, the circumstances in which a family violence order has been made – refer to s 60CC(3)(k).

The Family Law Act has provisions designed to alert the state and territory child protection authorities when someone raises issues of child abuse in family court proceedings. The party who makes such an allegation must file a notice to that effect, and the court then notifies the child protection authority. Also, certain court officers and professionals are permitted to notify the child protection authority in some cases, and are required to do so in the more serious cases – refer to s 67ZA.

If a party makes an allegation that there has been family violence or that there is a risk of family violence and that it's relevant to the parenting proceedings, the party must file a notice in the prescribed form. When such a notice is filed, the court is obliged to deal with the case promptly – refer to ss 67ZBA, 67ZBB.

It is now a requirement for all initiating applications in the Federal Circuit Court to have this notice completed and filed at the start of any parenting proceedings.

Financial matters and parenting orders

Orders about financial matters are not parenting orders. Depending on the matter, they might be orders about spousal maintenance, property settlement or child support.

Nevertheless, parenting orders can touch incidentally on financial matters. In one case, it was held that an order providing for financial support to enable access could be categorised as an 'access' order (and therefore, a 'parenting order' under the current legislation). So an order providing for financial support to enable a person to spend time with a child, or communicate with a child, could be treated as a parenting order.

In another case, the appeal court said that it was open to the trial judge to make an order that required the mother to contribute to the costs of the child's travel to spend time with the father in the United States, as this constituted a parenting order for the child's welfare that the judge concluded was in her best interests.

On the other hand, even if the court considered that a financial adjustment would be for the benefit of the child, it would not necessarily be a parenting order. So an order requiring a major transfer of one parent's assets to another would be a property order, not a parenting order. Likewise, an order requiring continuing payment for the support of a child would be a child support order, not a parenting order.

There may not always be a clear boundary between orders about money or resources that form part of parenting orders and those that do not. In practice, an order seems likely to be seen as a parenting order if it deals incidentally with a financial matter in the course of setting out arrangements for the child. An order requiring a parent to provide a child with an opportunity to telephone the other parent would be a simple example. In cases of doubt, legal advice should be sought.

The term *child maintenance* orders was used before the child support system was created in the 1980's. It is still possible for the court to make orders relating to child maintenance, but only in very limited circumstances – eg in the unusual circumstances where a parent might be ordered to support a child after the age of 18, or where a step-parent might be ordered to pay child maintenance. Apart from such cases, the financial support of children by parents now falls under the separate child support legislation. Orders on this subject are not parenting orders and should not be included in an application to the court to make parenting orders.

Obligations created by parenting orders

Under section 65DA of the Family Law Act, the court must include in the parenting order particulars of the obligations that the order creates and the consequences that may follow if a person contravenes the order. If a party is unrepresented, the court is obliged to explain the availability of programs to help people understand their responsibilities under parenting orders, as well as the availability and use of location and recovery orders. This is to be done *'in language that is likely to be readily understood by the person to whom the order is directed or the explanation is given'*. If the court fails to do so, however, the parenting orders are still valid.

Section 65DA also provides that information can be conveyed by way of a document. When the court makes parenting orders, it routinely provides a pamphlet setting out these matters, for example

Pursuant to Section 65DA(2) of the Family Law Act 1975 (Cth), the particulars of the obligations these Orders create and the particulars of the consequences that may follow if a party contravenes these Orders are included in these Orders, annexed hereto.

ENFORCEMENT OF PARENTING ORDERS

Enforcement requires action by the other party

Parenting orders are orders of the court and people are legally obliged to obey them. Normally a person's contravention of an order will only be dealt with by the court if the other party takes steps to have the order enforced. This is similar to other civil proceedings, such as commercial law – eg if the court orders one party to pay money and the party fails to do so, the other party needs to go back to court and have it enforced. It is different from the criminal law system, where it is the task of the police to enforce the law. It is also different from child support, where a government agency is responsible for taking steps to enforce child support obligations.

In short, if a parent fails to obey a parenting order, the other party may go back to court and have the order enforced. This is done by making a fresh application to a family court.

What the court can do to enforce parenting orders

Part VII, Division 13A of the Family Law Act has detailed provisions relating to the enforcement of parenting and other children's orders. A summary is outlined below.

Contravening (disobeying) a parenting order

The Act speaks of a person who contravenes an order – a person who is bound by an order who intentionally disobeys it, or makes no reasonable attempt to comply with it (s 70NAC). For example, if an order requires a parent to hand the child to the other parent at a particular time and place, the parent would contravene the order if he or she intentionally failed to do so, or disregarded the order and acted as if it did not exist.

Another form of contravention is where *another* person intentionally frustrates its operation – eg if a parent’s partner deliberately prevented the parent from delivering the child as required by the parenting order.

Reasonable excuse

There are many situations in which a parent may have a good reason for failing to comply with an order. An obvious example is where the child is seriously ill and is required to stay in bed – it would obviously be unreasonable for the law to make the parent risk the child’s health by taking the child to the other parent.

For this reason, the Act makes provision for situations where a person has a ‘reasonable excuse’ for disobeying parenting orders. The Act gives two examples of what is a reasonable excuse (s 70NAE).

First, if the person did not understand his or her obligations under the order and the court is satisfied that he or she ‘ought to be excused’. If a person simply refused to read the order or take any notice of it, the person would not have a reasonable excuse – the court would no doubt say that although the person did not understand the obligations under the order, there is no reason why he or she should be excused.

The second example includes the situation previously mentioned, where the child is ill. The Act says that it is a reasonable excuse if the person believes on reasonable grounds that the actions (ie not handing the child over, but leaving the child in bed) ‘were necessary to protect the health and safety’ of the child. The section goes on to say that there is only an excuse for the period necessary to protect the health or safety of the child – so once the child was well enough, the order would have to be obeyed.

These are not the only situations where a person might have a reasonable excuse for disobeying a parenting order. In other situations, the court might accept that the circumstances constituted a reasonable excuse. The Act does not attempt to give a complete list of what those situations might be.

Varying a parenting order in contravention proceedings

One of the things the court can do in a contravention case is *vary* the parenting order (s 70NBA). Suppose that a parenting order required the child to visit a grandparent every other Saturday afternoon, but the grandparent has since become so ill that this is impossible. Or suppose the parties had agreed that the child should not go to the grandparent on Saturdays when the child played football.

Sometimes arguments about a party not complying with an order can be resolved by modifying the parenting orders. The court’s power to change parenting orders when dealing with a contravention application is obviously convenient, because it means there is no need to have a separate proceeding to vary the parenting order.

Orders that can be made in less serious contraventions

The Act distinguishes between ‘less serious’ contraventions and ‘more serious’ ones (Part VII, Division 13A, Subdivisions E and F). The more serious contraventions include cases of repeated contraventions and contraventions where the person has ‘behaved in a way that showed a serious disregard of his or her obligations under the order’.

Where there is a less serious contravention, the orders the court can make tend to focus on avoiding problems in the future. The idea is that preventing problems in the future will often be better for the child than punishing someone who disobeyed an order. Some possible orders include

- requiring the person who contravened the order to attend a post-separation parenting program
- compensating a person for time lost with a child because of the contravention of the parenting order
- adjourning the proceedings to allow parties to apply for different parenting orders
- requiring the person who contravened the order to enter into a bond (and impose a fine if a bond is broken)
- requiring the person who contravened the order to compensate a person for lost expenses, or pay legal costs (s 70NEB(1)).

For the more serious contraventions, the court can also impose a community service order, or a fine, or impose a sentence of imprisonment of up to 12 months (s 70 NFB(2)).

In the most extreme cases a person who contravenes an order could be dealt with for contempt of court, which carries more severe penalties. This applies only when the contravention involves 'a flagrant challenge to the authority of the court'.

Who has to prove what before the court can impose a penalty?

The court can penalise someone for contravention of a parenting order only if

- the applicant satisfies the court beyond reasonable doubt that the person has contravened the order, and
- the person who has contravened the order does not show (on the balance of probabilities) that he or she had a reasonable excuse.

In other words, the applicant has to prove that there was a contravention – the person who contravened the order needs to prove there was a reasonable excuse.

Further information about enforcement

Enforcement is governed by the Family Law Act Part IV, Division 13A (ss 70NAA – 70NFJ and s 112AP (contempt)). Information about aspects of enforcement can be found at www.familycourt.gov.au

THE HAGUE CHILD ABDUCTION CONVENTION

Australia is a party to the Hague Convention on international child abduction. The purpose of the Convention is to discourage people abducting children to ensure that long-term parenting decisions can be made in the child's country of residence. The way the Convention works is that the courts of all Convention countries will order that abducted children must be returned to their home country, so the courts of that country can determine what is to happen to the child in the long-term. Each country designates an agency (called the Central Authority) to assist in administering the law.

For example, Parent A came to Australia from England, married Parent B (an Australian) and they had children. When the relationship broke down, Parent A took the children to England, telling Parent B it was for a holiday. Once in England, Parent A refused to return the children to Australia. The effect of proceedings under the Hague Convention would be that the courts in England would not deal with the long-term parenting issues, but instead would order Parent A to return the children to Australia. The parenting proceedings would be conducted in Australia not England, so Parent A would gain no advantage from having wrongfully abducted the children.

In Australia, the legal basis for proceedings under the Hague Convention is in regulations made under the Family Law Act. Proceedings under the Convention are heard in the Family Court of Australia, or the Family Court of Western Australia. They are quite different from parenting proceedings. This is because the purpose of the hearing is not to determine what arrangements should be made for the child, but whether the courts in Australia or the courts in the other country should determine the arrangements. The proceedings in Australia are not brought by a parent but by the Central Authority. While there are various exceptions, in general the court will make orders for return of the child so that the issues can be determined by the courts in the country of the child's habitual residence.

Parents will almost always need legal advice if there are to be proceedings under the Convention. A good starting point for information about the Convention and its operation in Australia is www.ag.gov.au/childabduction See also the *International Parental Child Abduction Legal Resource* at www.familylawsection.org.au/publications

STATE AND TERRITORY CHILD PROTECTION SYSTEMS

Although in general the law leaves it to parents to make decisions about their children, the law does provide a form of protection for children against neglect and abuse. In all states and territories, there is a child protection department (the names of these departments vary from one jurisdiction to another), which has the task of preventing children from being neglected and abused.

Under the child protection legislation of the states and territories, the child protection department is authorised to intervene in cases where it believes that a child is exposed to abuse or neglect of a serious kind. These laws generally contain requirements that certain professionals, such as medical practitioners, must notify the child protection department if they have reasonable grounds for believing that a child is at risk of being abused or neglected.

The child protection department, sometimes in combination with community-based agencies, can provide support for families who are having difficulty providing for their children. In cases where the department believes it is necessary, the department can apply to a children's court for an order to protect the child. For example, the order might provide that the child is to be removed into the care of the state department, or it might provide that the parents must accept the supervision of the department.



The child protection system has two essential components. The first is the government department – it has the resources to investigate cases where children might be at risk and decide what measures should be taken, including support for families. The second is the children’s court – it has the power to authorise the removal of children from parents, or take other measures it considers necessary to protect children.

By contrast, the family law system’s role is to assist in resolving disputes brought to it by family members. The family law system has no investigative capacity equivalent to the role of the child protection departments of the states and territories.

The family law system and the child protection system

Although the family law system and the child protection system are different, in some circumstances they will both be involved in a child’s life. For example, a child who is involved in family law proceedings may have also been the subject of investigation or court proceedings under the child protection system.

It is necessary for the law to deal with the problem that each system might reach a different conclusion. For example on the evidence before it, a family court might decide it is best for a child to live with a particular person. The child protection department may have reason to believe that the person is a danger to the child.

Fortunately, the Family Law Act provides an answer to this problem. The Act provides, in effect, that the child protection system trumps the family law system (s 69ZK). An order made by a family court cannot override the operation of the child protection system. Even though the family court might have made an order requiring a child to live with a particular parent, the child protection department could still intervene. If the children’s court so ordered, the child could be removed from that parent and placed elsewhere, such as foster care.

Obtaining consent orders

Parents can obtain consent orders from the Family Court of Australia or the Family Court of Western Australia by using that Court's Consent Orders kit. While there is no need to attend court, there is a fee for such applications. Legal assistance may be obtained in completing the form and formulating the orders for the court to make.

A registrar in the court will normally make the orders. In some cases the registrar might write to the parties for more information, so the court can be satisfied the orders will be in the best interests of the child.

All family courts, including the Federal Circuit Court of Australia (and the state and territory magistrates courts) can make consent orders when a case has been filed in that court, and the parties reach agreement.

CONTESTED PROCEEDINGS

It is common for parents involved in litigation about children to settle their cases at some stage after proceedings have commenced. This can happen as a result of negotiation or mediation, or counselling prior to the hearing. Sometimes it happens later, often on the first day of the hearing, or after the hearing has commenced and some evidence has been heard.

In some cases, it is easier for the parties to reach agreement once all the affidavit evidence has been filed and the parties' lawyers are present in court and able to negotiate. When this happens, the parties will often ask the court to make orders by consent. The orders will need to be drafted by the parties or their lawyers, and sometimes the court will adjourn the case for a time, to allow the parties to draw up agreed orders and present them to the court.

The court does not make parenting orders simply because the parties agree – the court has to form the view that the orders will be in the child's best interests. In practice, the fact that the parents agree on orders will usually lead the court to consider that the orders are in the child's best interests.



When agreement is reached on the day of the hearing, affidavits by the parties will have been filed, as well as any expert reports. The parties, or their legal representatives, will normally explain to the court how the proposed orders will operate and answer any questions the court may ask about how the orders will benefit the child. For example, if there have been allegations of violence or abuse or neglect in the proceedings, the court might need to be persuaded that the proposed arrangements will be safe for the child.

Sometimes when a case has settled on the date of the hearing, or even at some stage after the hearing has commenced, there is a sense of urgency about drawing up the consent orders that embody the agreement the parties have reached. In these situations, there is an obvious advantage in having the orders finalised there and then, while the parties and their lawyers are in court and focused on the issues. On the other hand, mistakes can be made when orders are drafted hastily. Parties should keep in mind that it might be possible to ask the court to adjourn the hearing, to allow the parties to draw up the orders carefully before presenting them to the court.

OBTAINING CONSENT ORDERS BY APPLICATION

Relevant documents and instructions can be obtained from registries of the Family Court of Australia or Family Court of Western Australia, or downloaded from the Family Court's website www.familycourt.gov.au

- *Application for Consent Orders (do it yourself kit); and*
- *Application for Consent Orders Proposed Orders Template.*

Please note, the documents listed may change. Access the Family Court's website for the most up-to-date documents and information.

The Application for *Consent Orders (do it yourself kit)* contains the Application Form and some explanatory material. The Application Form is 26 pages long, but pages 13 – 23 relate only to financial orders, not parenting orders.

Parties seeking consent orders need to complete and file the Application for Consent Orders, along with a separate document that sets out the orders they are asking the court to make. The Application for Consent Orders Proposed Orders Template is a guide to help with this task, setting out sample cover sheets and displaying the formal consent orders.

Questions in the Application Form

The *Application Form* contains several parts that are of relevance to parenting orders.

Part A requires details about the parties, including their names and addresses etc.

Part B requires information about the relationship between the parties, such as when they cohabited and when they separated.

Part C requires information about certain aspects of the orders that are being requested, as well as any other relevant court cases and orders that involve the parties. Questions 10 to 13 of Part C are described below.

Question 10 asks about any ongoing cases that concern the family. *Question 11* asks about any relevant existing orders. So for example, any current proceedings in a children's court, or a state or federal magistrates court would be mentioned in answer to *Question 10*. If there were any such orders made, or any parenting plans, they would be mentioned in answer to *Question 11*.

The court needs to know the answer to these questions when considering whether or not to make the consent orders that are being requested. For example, if there was an existing order restraining one party from contact with the child, the court would want to know this before making a consent order providing for that party to have contact with the child.

Question 12 asks if there is a family violence order. The court would also want to know this. For example, if there was an existing restraining order preventing one party from being within 200 metres of the other, the court would be unlikely to make a consent order that involved one party collecting the child from the other's home.

Question 12A is similar – it asks if there has been any contact with the department responsible for child safety in relation to the child who would be affected by the consent orders. Clearly, before making parenting orders by consent, the court would want to know the situation in relation to any child protection investigations or procedures.

The purpose of questions 10 to 12A is to inform the court of any legal matters that might affect the desirability of making the consent orders. Once the court knows about such problems, it can deal with them – perhaps by declining to make the consent orders, or by seeking further information from the parties to be satisfied that making the consent orders would be in the best interests of the child.

Question 13 and *13A* are included because of certain obligations the legislation imposes on courts. One provision says that the courts should normally assume that it will be best for the child if the parents have equal shared parental responsibility. If the proposed consent orders do not provide for equal shared parental responsibility, the court needs to know more. For this reason, *Question 13* requires the applicants to explain why the presumption favouring equal shared parental responsibility does not apply, or if it does apply, why it is in the best interests of the child not to make an order for equal shared parental responsibility.

If the proposed consent orders do provide for equal shared parental responsibility, there are some legislative requirements that affect whether or not the court should make certain types of orders relating to the time the child is to spend with the parents. To deal with this, *Question 13A* asks for a brief explanation as to why the child spending equal time or substantial time with each parent is reasonably practicable, or if the child is not to spend time with each parent, why this is in the best interests of the child.

Part J is also relevant to parenting orders. It is the *Statement of Truth of Applicant* and contains a series of questions in the form of boxes that need to be ticked. These identify the applicant, and state that the applicant has read the application and the draft consent orders that the court is being asked to make. The questions also check that the orders are agreed upon by all parties, that the applicant is aware of his or her right to obtain independent legal advice, and has had 'independent legal advice on my relevant rights under the Family Law Act and the effect and consequences of orders being made in the terms proposed'.

In addition, the questions require the applicant to say that the facts stated in the application are within the applicant's knowledge and/or true to the best of the applicant's knowledge, information and belief, and that the orders sought are 'supported by evidence'. The applicant must state that he or she has signed and dated each page of the draft consent orders and also read and considered various sections of the Family Law Act that relate to children – ie 60B, 60CA, 60CC, 60CH, 60CI, 61DA, 64B, 65DAA, 67Z and 67ZBA.

Part K is a statement of a lawyer to the effect that the lawyer has given the applicant independent legal advice about the meaning and effect of the draft consent orders and explained their rights, entitlements and obligations.

Part L is entitled *Statement of Truth of Respondent*, and the questions are essentially the same as those of Part J.

Part M is the equivalent of Part K, applicable to the lawyer who gave independent legal advice to the respondent.

GLOSSARY

Glossary of legal terms

Access

A term previously used in the Family Law Act for the time a child spent with the parent they do not live with (see also 'custody'). The term 'contact' replaced 'access' in 1995. 'Contact' was removed by the *Family Law Reform Act 2006*. The Family Law Act now refers to children 'spending time with' and 'communicating with' parents or other persons.

Child

The Family Law Act does not define 'child', except to include an adopted and a stillborn child. When a child turns 18 parental responsibility ceases. Parenting orders cease to have effect when a child turns 18, or marries, or enters a de facto relationship.

Child abuse

Neglect, harm or violence (physical, emotional or sexual) against children.

Child support

Financial support for a child paid by a parent in accordance with the *Child Support (Assessment) Act 1989*.

'Communicate with' order

A form of parenting order, dealing with the communication a child is to have with a person.

Consent orders

Written orders made by a court based on the agreement of the parties. Consent orders are different to orders made after a contested or undefended hearing. A court will normally consider that the child's best interests will be served by putting into effect what the parents or other parties have agreed upon. In practice, a court is likely to refuse to make the proposed consent orders only if it is unclear that the proposed orders will be in the child's best interests. Consent orders have the same legal force as orders made after a court hearing.

Contact

A term previously used in the Family Law Act (introduced in 1996 to replace 'access' in the Family Law Act) to refer to time spent with a parent the child does not live with. 'Contact' was removed by the *Family Law Reform Act 2006*. The Act now provides that parenting orders include orders about children 'spending time with' and 'communicating with' parents or other persons.

Children's Contact Services	Specialist service providers that provide a venue for parents to spend time with children in a secure and supervised environment. See the Australian Children's Contact Services Association website at www.accsa.org.au
Custody	A term that was previously used in the Family Law Act to refer to an order for a child to live with one parent (see also 'access') 'Custody' is no longer used under the Family Law Act. See 'parenting order'.
Family courts	Refers to the courts that mainly exercise jurisdiction under the Family Law Act: the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia. Magistrates courts operating under state and territory laws other than in Western Australia also exercise limited jurisdiction under the Family Law Act, but are not generally referred to as family courts.
Family Court of Australia	See Appendix 1.
Family Court of Western Australia	See Appendix 1.
Family dispute resolution	A process intended to assist parties resolve family disputes with the assistance of an independent family dispute resolution practitioner. Also known as 'mediation'.
Family dispute resolution practitioner	A person who is accredited or authorised under the Family Law Act to assist in family dispute resolution. Also known as a 'mediator'.
Family Law Act	A federal law that applies to parenting proceedings and other proceedings in the family courts, such as divorce and division of property upon relationship breakdown.
Family Relationship Centre	An Australian Government funded centre providing information, counselling and mediation services in family matters, see www.familyrelationships.gov.au
Family violence	Violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the <i>family member</i>), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include: <ul style="list-style-type: none"> • assault • sexual assault or other sexually abusive behaviour • stalking • repeated derogatory taunts

- intentionally damaging or destroying property
- intentionally causing death or injury to an animal
- unreasonably denying the family member financial autonomy
- unreasonably withholding financial support
- preventing the family member from making or keeping connections with family, friends or culture
- unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

Examples of situations of a child being exposed to family violence include:

- overhearing threats of death or personal injury by a family member towards another family member
- seeing or hearing an assault of a family member by another family member
- comforting or providing assistance to a family member who has been assaulted by another family member
- cleaning up after a family member has intentionally damaged property
- being present when police or ambulance officers attend an incident involving the assault of a family member by another family member.

Family violence order

An order made by a magistrates court under state or territory laws, designed to protect a person from violence, harassment etc.

Federal Circuit Court of Australia

See Appendix 1.

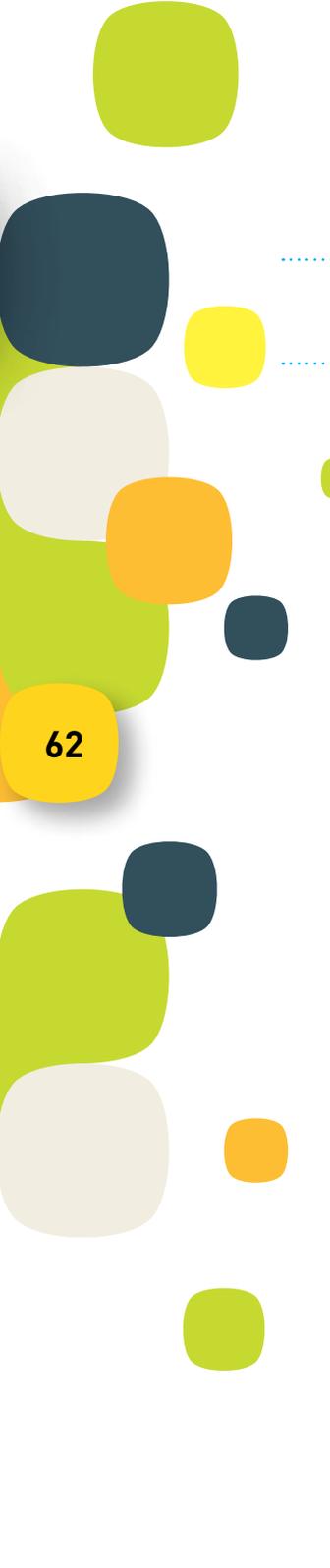
Final orders

Court orders made by consent, or after a hearing, that tell the parties what must be done and conclude the issues in the case. If final parenting orders have been made, the parties cannot re-litigate the issues unless the court is satisfied that there are changed circumstances making this appropriate.

Guardianship

A term that was previously used in the Family Law Act for decision making responsibility in relation to a child. 'Guardianship' was removed from the Act in 2006 and replaced with the term 'parental responsibility'.

Hague Child Abduction Convention	An international convention that enables courts in convention countries to order that abducted children must be returned to their home country, so the courts of that country can determine what is to happen to the child in the long-term. The Convention has been made part of Australian law by the Family Law (Child Abduction Convention) Regulations 1986. See also Appendix 1.
Independent children's lawyer	A legal practitioner appointed to help the court form a view on the child's best interests. See also Appendix 1.
Injunction	A court order that requires a person to do something, or refrain from doing something.
Interim orders	Court orders that apply for a limited period – typically, until the court has the opportunity to make final orders after a full hearing. Interim orders are often made in situations of urgency, and the court will often lack detailed evidence.
'Live with' order	A court order providing that a child should live with a particular person. Previously known as a 'residence' order (pre-2006), or 'custody' order (pre-1995).
Location order	A court order authorising public agencies to take steps to locate a child.
Magistrates court	Refers to the Magistrates courts of Queensland, Victoria, South Australia, Western Australia, Tasmania, the Australian Capital Territory and Northern Territory. The equivalent court in New South Wales is the Local court.
Mediation	A process in which a neutral third party helps parties resolve a dispute. Also described as 'family dispute resolution'.
Parent	A biological or adoptive parent. Where a child is born as a result of an artificial conception procedure, then the birth mother, and her partner if she has one, is generally considered to be a parent. In the Family Law Act 'parent' does not include a person who merely acts in the role of a parent (<i>in loco parentis</i>), even if that person is treated as a parent by the community with which the person identifies.
Parental responsibility	A term used to refer to the responsibilities and powers parents have in relation to their children. Formerly known as 'guardianship'.



Parenting plan

A written agreement between parents relating to the care of children, which has certain legal consequences.

Parenting order

A court order dealing with the care of children, including matters such as parental responsibility for children, who the children will live with and who the children will spend time with.

Presumption of equal shared parental responsibility

A presumption applied by a court that it is in the best interests of the child that their parents should have equal shared parental responsibility. The presumption can be rebutted by evidence that it would not be in the child's best interests, and does not apply where the court has reasonable grounds to believe that there has been child abuse or family violence. It is not a presumption about how much time children should spend with each parent.

Recovery order

A court order providing for a child who has been wrongfully removed from their parent to be returned.

Registrar

An officer of the Court who has authority to exercise certain delegated judicial functions. For example, in the Family Court of Australia, Registrars have authority to make parenting orders by consent.

'Spend time with' order

A court order made as part of a parenting order that sets out who a child is to spend time with. Formerly known as a 'contact' or 'access' order.



