

Family Law & Parenting Arrangements Guide



Parenting Arrangements Guide

It is well known that children will be better off if their parents can co-operate and co-parent in an amicable way. Sometimes this is possible, other times this is more challenging. The intention of this guide is to give you information and advice to consider when deciding the arrangements to put in place for your children.

This guide is general advice on parenting matters; it is not adapted to your personal circumstances.



Parenting arrangements

This guide contains general advice relevant to family law parenting matters. We strongly recommend you seek legal advice as this is a general guide only and can not be relied upon in the absence of legal advice.

If you would like legal advice tailored to your circumstances, please do not hesitate to contact our office and we will be happy to discuss your situation with you at a free initial consultation.

Important issues to consider first:

If you have not seen your child for a prolonged period of time it is recommended you take action as soon as possible to ensure their relationship with you is not damaged.

If there is family violence or abuse it is recommended you seek advice about obtaining a Protection Order.

If you have urgent circumstances such as risk of a child being taken from Australia or being abused you should seek urgent advice as urgent Court action may be necessary.

The law:

The Family Law Act 1974 sets out how the Court must decide parenting matters.

The Family Law Act can be easily located on the internet and we encourage all parents to read it in conjunction with this guide. The sections of the Family Law Act relevant to children are between section 60 to section 70.

Best interests of children:

When deciding arrangements for children, the best interests of the children are the paramount consideration.

There are two primary considerations that the Family Law Act states must be applied when considering the best interests of children:-

- 1. The highest priority is to protect children from physical or psychological harm, or being subjected to or exposed to abuse, neglect, or family violence; and**
- 2. Parents should promote the children having a meaningful relationship with both parents.**

The secondary considerations as to the best interests of the children are as follows:-

- 1. Any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;**
- 2. The nature of the relationship of the child with:**
 - a. each of the child's parents; and**
 - b. other persons (including any grandparent or other relative of the child).**
- 3. The extent to which each of the child's parents has taken, or failed to take, the opportunity:**
 - a. to participate in making decisions about major long-term issues in relation to the child; and**
 - b. to spend time with the child; and**
 - c. to communicate with the child;**
- 4. The extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;**
- 5. The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:**
 - a. either of his or her parents; or**
 - b. any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;**

- 6. the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;**
- 7. The capacity of:**
 - a. each of the child's parents; and**
 - b. any other person (including any grandparent or other relative of the child);****to provide for the needs of the child, including emotional and intellectual needs;**
- 8. The maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;**
- 9. If the child is an Aboriginal child or a Torres Strait Islander child:**
 - a. the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and**
 - b. the likely impact any proposed parenting order under this Part will have on that right;**
- 10. The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;**
- 11. Any family violence involving the child or a member of the child's family;**
- 12. If a family violence order applies, or has applied, to the child or a member of the child's family--any relevant inferences that can be drawn from the order, taking into account the following:**
 - a. the nature of the order;**
 - b. the circumstances in which the order was made;**
 - c. any evidence admitted in proceedings for the order;**
 - d. any findings made by the court in, or in proceedings for, the order;**
 - e. any other relevant matter;**
- 13. Whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;**
- 14. Any other fact or circumstance that the court thinks is relevant.**

The Court will consider the primary and the secondary considerations listed above when determining what arrangements are in the best interests of children.

The primary considerations will not always be more important than the secondary considerations. The Court will consider the particular circumstances of the children to decide what is most important in each case.

The Court will always prioritise protecting children from harm above all else. The Court will act in a cautious way if it appears that there is a risk of harm. The Court will attempt to put in place safeguards that ameliorate or prevent the risk of harm and still allow children to spend time with their parents. For example, if there is family violence occurring at changeover, the Court may order the use of a contact centre for changeovers.

Weighing up the competing factors of what is overall in the best interests of children is not a simple exercise. Often there are many different competing factors, e.g. it would be in the best interests of children to reduce their travelling time to and from school, but also in their best interests to attend a good school which may involve further travel.

The Courts often employ the assistance of family consultants to investigate and report on the best interests of children (for more information please see the Family Reports section below).

Balancing the factors relevant to working out what a Court will do in the best interests of a child is something that we will advise you on based on your individual circumstances as your matter progresses.

Parental responsibility:

There is a starting point that both parents have equal shared parental responsibility for children if it is in their best interests.

This means that both parents should be involved, and make a genuine effort, to make joint decisions regarding long term issues for their children.

Long term issues include:-

- 1. Education or extra-curricular activities;**
- 2. Medical treatment;**
- 3. Religious beliefs; and**
- 4. Living arrangements, including in what location the children live.**

If the Court considers that equal shared parental responsibility would not be in the best interests of the children, an order for sole parental responsibility may be made.

Sole parental responsibility means one parent can make all decisions without consulting the other parent.



**McNamara
Law**

Some of the common reasons for sole, rather than equal parental responsibility, are:-

- ✓ **Family violence or intractable conflict;**
- ✓ **Child abuse by a parent;**
- ✓ **A failure of any communication between parents;**
- ✓ **Significant substance abuse by a parent; and**
- ✓ **Demonstrated ability of a parent being incapable of child focused decisions.**

Whether there is equal or sole parental responsibility is important for two reasons:-

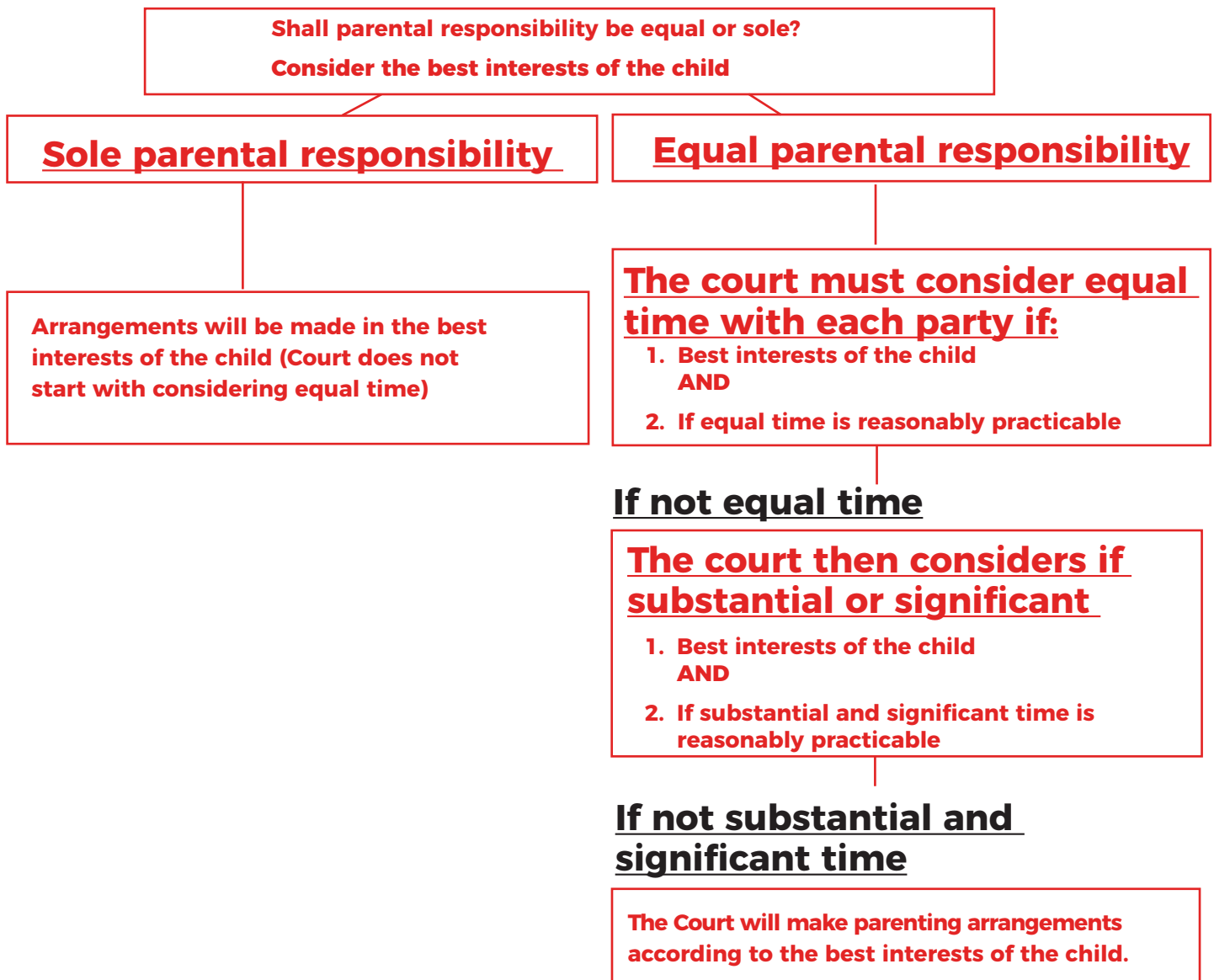
- 1. It enables or disables each parent to be part of decision making for their child; and**
- 2. The Court will approach the decision of how much time the child spends with each parent differently depending on whether there is equal or sole parental responsibility**

How the Court decides living arrangements for children:

If the Court or the parents decide that equal shared parental responsibility is appropriate, the Court must consider whether an equal time (e.g. alternating weeks) arrangement is in the child's best interests.

Conversely, if sole parental responsibility is decided, then the Court does not begin by considering an equal time arrangement, and simply looks to what arrangements would be in the best interests of the children.

Deciding the new parenting arrangements



In summary, if equal shared parental responsibility is in place, and if your child spending equal time with each parent is reasonably practicable (workable) and in the best interests of the child, then you could consider the option of an equal time arrangement.

If your child spending equal time with each parent is not reasonably practicable or is not in the best interests of the child, but the child spending substantial and significant time with each of parent is reasonably practicable and in the best interests of the child, you could consider the option of an arrangement of substantial and significant time.

Substantial and significant time means:

- 1. Time on both days that fall on weekends and holidays; and days that do not fall on weekends or holidays; and**
- 2. Time that allows the parent to be involved in the child's daily routine and occasions and events that are of particular significance to the child; and**
- 3. Time that allows the child to be involved in occasions and events that are of special significance to the parent.**

Finally, if equal time is not appropriate and if substantial and significant time is not appropriate, then the Court looks at what other arrangements are in the best interests of the child. This might mean a range of types of arrangements, eg where the child spends from Saturday and Sunday on alternate weekends with holiday time, or it might mean supervised contact.

Some of the factors to be considered when considering parenting arrangements are:

- 1. The age and developmental needs of the child (whether short or longer visits are appropriate);**
- 2. The level of communication between the parties;**
- 3. The ability of each parent to be available and to support the child;**
- 4. The distance between the parent's homes;**
- 5. The frequency that the child moves between households;**
- 6. Any conflict between the parents;**
- 7. Any particular needs of the child; and**
- 8. Any other circumstances relevant to the child or the parents.**

We recommend seeking legal advice regarding what arrangements would be best for you and your children.

Parenting Plan/Consent Orders:

To encourage future cooperation and co-parenting it is recommended that parents consider making a Parenting Plan or enter Consent Orders for arrangements for their children.

A Parenting Plan or Consent Orders may deal with one or more issues including the following:

- a. with whom a child is to live;**
- b. the time a child is to spend with another person or other persons (including holidays and special days);**
- c. the parental responsibility for a child;**
- d. if there is shared parental responsibility for a child it is desirable to include the form of communications about decisions to be made to avoid future conflicts;**
- e. the communication a child is to have with another person or other persons;**
- f. maintenance of a child (can not be in Court Orders);**
- g. the process to be used for resolving disputes;**
- h. the process to be used for changing arrangements to take account of the changing needs or circumstances of the child or the parties;**
- i. where the child is to live (non – relocation clauses);**
- j. barrier alerts (preventing a child being removed from Australia);**
- k. restraining clauses or injunctions;**
- l. any other aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.**

A Parenting Plan is not binding, and parents can not be punished by the Court for not following a Parenting Plan.

The Court is required to have regard to the terms of the most recent Parenting Plan in relation to the child when making an Order in relation to a child. Therefore a Parenting Plan has some legal value even if it is not binding.

Court Orders are binding, and there can be penalties imposed by the Court for non-compliance.

Depending on your particular circumstances, a binding or non-binding arrangement may be indicated or preferred.

If you seek Orders that must have legal force, eg barrier alerts to prevent children leaving Australia, non-relocation Orders, or Orders restraining a person's behaviour, these must be in Court Orders, as they will not be enforceable in a Parenting Plan.

Court Orders about the arrangements for a child are final. An Order may only be changed if the parties agree, if there is a significant change in circumstances, and/or if it is in the best interests of the child.

Therefore, before locking in an Order you should consider whether you will always be content with the arrangements in the Order, as the Order may not be able to be changed in the future.

If you have young children it is important to frame Orders in a way to suit their needs as they age. For example, the time they spend with the parent they don't live with may extend or change over time. Future schooling arrangements should be considered.

Review clauses are sometimes included in Court Orders, however in our view the current law and approach of the Court to review clauses is that they may not be enforceable, so be careful before locking in to Orders.

If an Order is in place and the parties then sign a later Parenting Plan it will override the previous Order.

In exceptional circumstances the Court can stipulate that an Order can only be amended by future Orders. These exceptional circumstances are normally when the Court has evidence that there has been physical or psychological harm or family violence or if one of the parties is likely to use coercion or duress in the future to get an agreement.

Mediation before Court:

If parents can not agree on the arrangements for a child it is necessary for the parties to attend a mediation (and obtain a s60I mediation certificate) before applying for the Court to determine arrangements.

There are exceptions where mediation is not necessary including family violence/abuse, urgency, breach of Orders, or a party's inability to mediate.

The Court Process:

The timeframe from starting a Court application to the completion of a trial can take between 12 – 18 months in most cases. Not all cases go all the way to a trial; as soon as the parties agree the Court can be informed and consent Orders made if the Court is satisfied the Orders are in the best interests of children.

As there are a number of steps involved in the Court process, the below is intended to give a brief description of each stage.

Urgent Proceedings:

Usually there is a requirement that parties attend mediation prior to applying to a Court for parenting Orders. However, this requirement does not apply for urgent proceedings or those involving child abuse or family violence.

The Court will only accept an urgent application without a mediation certificate being filed if an Affidavit explaining the need for urgent application is filed with the Court application documents.

There may be a need to issue urgent Court proceedings where:-

- 1. There is family violence or child abuse;**
- 2. There is an imminent risk of family violence or child abuse/neglect;**
- 3. A parent intends to relocate a child without consent;**
- 4. There is a risk that a child will be taken out of Australia;**
- 5. A child has been removed from their primary carer causing significant impact on the child;**
- 6. There is a risk to the child as a result of alcohol or drug dependence/consumption.**
- 7. Any other reason that is genuinely urgent and significant to the child.**

In an urgent application it may be usual to seek Orders including:-

- 1. Making urgent arrangements for who the children will live with;**
- 2. Seeking the Federal Police recover children;**
- 3. Restraining a person from contacting or approaching another party;**
- 4. Placing a barrier alert with immigration to prevent children being taken from Australia.**

If a barrier alert is sought asking to prevent a child leaving the country, it is possible to complete and lodge a form with the Australian Federal Police after you have filed your Court documents that will start the barrier alert being in place prior to your actual Court hearing date.

Where a child is removed from their primary carer it is recommended that a Recovery Order be applied for as soon as possible to maximise the chances of recovery success.

We strongly recommended you seek our advice before making an urgent application to the Court.

Court documents:

The necessary documents to start Court proceedings are:-

- 1. Initiating Application – detailing what Orders you want the Court to make;**
- 2. Affidavits – a detailed description of the relevant facts by you or other witnesses;**
- 3. Annexure regarding Family Violence/Child Abuse – this details whether there is a risk to the child and states where that risk is described in your Affidavits.**

The necessary documents to respond to Court proceedings are:-

- 1. Response – detailing what Orders you want the Court to make;**
- 2. Affidavits – a detailed description of the relevant facts by you or other witnesses which comments on the facts in the Affidavits of the other party;**
- 3. Annexure regarding Family Violence/Child Abuse – this details whether there is a risk to the child and states where that risk is described in your Affidavits**

Service and time to respond:

If you are making an Application to the Court, after it is filed, it must be served personally on the other party.

If the other party can not be located you may seek a location Order (asking a Government agency to reveal their address) or substituted service Orders (asking to serve the other party by post, email, social media, or another method).

If you are responding to an Application you have 14 days from the date the Court documents are served on you to file your Response documents.

Court documents can be drafted urgently if the need arises, but usually it takes approximately 1 – 2 weeks for the documents to be drafted, reviewed, and then finalised.

It is important that all of the factors relevant to the best interests of the children are contained within your Affidavits as evidence in the Family Court system is initially by what is contained in Affidavits.

Subpoenas:

After Court proceedings have started either party may issue subpoenas to obtain evidence.

Some commonly issued subpoenas are:-

- ✓ **Obtaining education/schooling records including attendance records;**
- ✓ **Medical/health care provider records including counselling notes or reports;**
- ✓ **Child safety records;**
- ✓ **Police Department records;**

Subpoenas can only be issued for documents that are directly relevant to the Court proceedings.

Once a subpoena is issued it must be served on all parties to the proceedings.

It is possible to object to your own documents being produced to the Court or to the other party.

Documents produced by subpoena are held by the Court until the Court grants the parties leave to inspect, and then the inspection in most cases must be at the Court.

There is a limit of five (5) subpoenas for each party unless extended by the Court.

It is best to issue subpoenas early as they must be served at least 10 days before the documents are required to be provided.

First Court date and Interim Hearings:

At your first Court date the Judge will attempt to get a brief understanding of the issues and may make Interim (temporary) Orders.

It is useful to discuss the Orders you seek with the other party prior to appearing before the Judge to see whether Interim Orders can be made by agreement.

As the Family Court system is notoriously busy, agreement for Interim Orders will avoid the risk that the Judge does not have time to hear your matter.

If you are unable to agree to Interim Orders on the first Court date you may ask the Judge to conduct an Interim Hearing, to decide the interim arrangements.

Depending on the urgency of the matter and the time available to the Court, the Interim Hearing may occur on the first Court date, or the Judge may set a date in the future for the hearing.

At an Interim Hearing the Judge is only able to take into account agreed facts. The apparent exception to this rule is if there are serious allegations of risk to a child, the Court will act cautiously and put in place arrangements that ensure the safety of the child.

Interim Orders are intended to deal with issues that can not wait until a trial, some examples of which are:-

- ✓ **With whom the child initially lives and what time they initially spend with the other party;**
- ✓ **A request for a family report or independent child lawyer;**
- ✓ **Drug testing, psychiatric testing or other important initial enquiries;**
- ✓ **Schooling, medical, or travel arrangements for the child (if a timely decision is required)**

In most cases it will be useful for the Court and the parties to have obtained a family report prior to holding an Interim Hearing.

Family Reports:

A family report is a document that typically covers the background, issues, positions of the parties, views of the child, and gives recommendations as to what arrangements would be in the best interests of the children.

The family report is prepared by a family consultant, who may be appointed by the Court or privately funded by the parties.

The family consultant reads the relevant documents (including Court documents) and then interviews all the relevant parties including the children.

Depending on the age and relationship of the children with their parents, the family consultant will decide whether the children are interviewed and how that occurs, e.g. whether the children are viewed with both of their parents.

The recommendations of the family report are highly considered by the Judge, particularly on an interim basis, as they reflect an independent opinion of what is in the best interests of the children.

Usually the recommendations will cover who the children live with and the time to be spent with the other parent, equal/sole parental responsibility, arrangements for changeover, and any safeguards that might be necessary, e.g. drug testing, psychiatric evaluations, parenting courses.

If there are particular issues of dispute to be determined by the Court (e.g. which school a child is to attend) it is important that the family consultant be made aware of the issues so that they may express an opinion.

Independent Child Lawyers:

Where the Court believes that there is risk of harm to a child or is otherwise concerned regarding the welfare of a child, an independent lawyer for the child may be appointed.

The role of the independent child lawyer (ICL) is to make enquiries and present a view to the Court on what will be best for the child.

In Queensland the ICL does not usually meet or interview the child, this differs from State to State.

The ICL will issue subpoenas to obtain information, arrange a family report, and will take charge of matters such as drug testing or psychiatric evaluation if needed.

The appointment of an ICL may involve a significant amount of delay (2-3 months) for them to become appointed and make enquiries to a degree to be able to present their opinion to the Court.

The fees of the ICL are in the first instance funded by Legal Aid, however Legal Aid will seek recovery of costs from the parties if they are in a financial position to contribute.

Trial:

After a number of preliminary Court dates called mentions, the Judge will issue trial directions that state:-

- ✓ **dates for filing any further Affidavit material;**
- ✓ **dates for filing a case summary;**
- ✓ **a trial date**

Usually it takes approximately 6 to 18 months to arrive at a trial date after filing the initial Court Application.

The Court currently has a policy of overlisting to conserve court time. This means that sometimes your trial may be adjourned to another date if another more urgent Trial is also listed.

The initial evidence of the parties at trial will be solely what is contained in their Affidavits. The parties will not be able to produce additional evidence (other than what is already in their Affidavits) and will be cross-examined by the other party/their lawyer.

After oral evidence and cross examination, each party or their lawyer will make submissions to the Judge on the evidence, the findings they ask the Judge to make, and the Orders they seek.

On some occasions the Judge gives a decision on the day of trial, however it is more common for Judges to reserve (take time to consider) their decision, which means the result is given after the day of trial (sometimes a long period after trial).

The result of a trial will be binding Court Orders. As noted earlier the parties can agree to arrangements for their children any time before a trial, and can ask the Court to make binding Court Orders by consent.

Some advantages of agreements to Consent Orders is that by agreement, the parties reduce the level of conflict that their children are exposed to, they save on legal costs, and the parties have some control over the outcome (unlike when a Judge makes a decision).

Breach of Court Order:

In most cases parties do follow Court Orders, however, compliance with Court Orders can not always be guaranteed.

A common assumption is that any failure to comply with Orders is a breach. For a breach to have occurred, it must amount to:-

- 1. An intentional failure to comply with the Order; or**
- 2. A failure to make a reasonable attempt at complying with the Order; or**
- 3. The aiding or abetting of a person who is in contravention of the Order; or**
- 4. Intentionally preventing a person from complying with the order.**

It should also be a point of consideration that an Order binds the parties to it; it normally does not bind the child.

If an Order is the subject of a subsequent Parenting Plan, care should also be taken to establish whether the requirement to comply stemmed from the Plan or the Order.

If a Court establishes that a party is in breach of Orders, the next step is to decide whether that person had a reasonable excuse for the breach.

Deciding whether a person had a reasonable excuse to breach Orders can be complicated and depends on the circumstances of the parties and the facts of the alleged breach.

Penalties for Breach

If a breach with no reasonable excuse is established, the Court has a number of options available to it including:

- 1. Mandatory attendance of a parenting program;**
- 2. A further parenting Order that compensates the other party for the time lost;**
- 3. A costs Order made against the party (for legal costs of bringing the application);**
- 4. Require the party to enter into a bond, for a period of up to 2 years that may be with or without a surety or security requirement;**
- 5. Fines and community service;**
- 6. Imprisonment; or**
- 7. Making further parenting Orders that vary the original Orders.**

Child Support

Child support is most commonly assessed by the Child Support Agency based on the amount of time with each parent, the number of children, and the parents' taxable income.

A Binding Child Support Agreement can be made by parties to agree upon child support (including schooling, medical or other costs) to replace the child support assessed under the child support formula. Such an agreement is binding and can not be changed except by future binding agreement.

Applications to vary or depart from the child support calculated by the child support agency can also be made if the child support is not appropriate.

There are a number of reasons why child support can be varied including the special needs of the child, the assets and property of the parents, the costs of raising the child, debts of the parents, and other reasons.

Should you have child support queries, we recommend you seek more detailed advice.

General advice only:

This guide is intended to give a basic understanding of family law regarding children.

We repeat that it is not intended to be relied on in the absence of legal advice.

Should you have queries or seek advice on children or parenting family law issues our family lawyers would be happy to meet with you for a free initial consultation.

Please do not hesitate to contact one of our family lawyers on 13 58 28 to discuss your matter at an initial free consultation.

Our Family Lawyers are available to see you in our Ipswich, Springfield and Gatton offices at your convenience.

Our Offices:

IPSWICH

88 Limestone Street
PO Box 359
IPSWICH QLD 4305
T: 07 3816 9555
F: 07 3816 9500

SPRINGFIELD

GE Building Level 1, 6 Yoga Way
Springfield Qld 4300
PO Box 4629
T: 07 3470 3600
F: 07 3470 1300

GATTON

11 William Street
PO Box 116
GATTON QLD 4343
T: 07 5462 1566
F: 07 5462 3087

Our Family Lawyers:

Emario Welgampola | Special Counsel
Ipswich
E: emario.welgampola@mcna.com.au

Brock Harm | Associate
Gatton
E: brock.harm@mcna.com.au

Charmagne Haidley | Associate
Ipswich
E: charmagne.haidley@mcna.com.au

Daniel Brownlie | Associate
Gatton
E: daniel.brownlie@mcna.com.au



Each situation in family law work is usually different to every other to some degree. Most families are different to each other and children are individuals, and therefore this brief overview is intended only as a basic introduction and not to be relied on in place of legal advice.

The Family Law Act, previous family law cases, and other associated practice directions of the Court contain procedural rules and legal principles that are quite complicated and for this reason it is recommended that the advice of a lawyer is obtained prior to taking your matter to Court.

