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LAWYERS

DISCUSSION PAPER

# “PARENTAL RIGHTS” AND THE BEST INTERESTS OF THE CHILD

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## 1. INTRODUCTION

- 1.1. The cornerstone of parenting matters in Australian Family Law is the principle that the best interests of the child are paramount<sup>1</sup>. All discussion about time with the child, where the child lives, attends school and how they are able to communicate with the parents, is assessed against that threshold test.
- 1.2. Sometimes, what is in the best interests of the child does not align with the expectations of either or both parents. It is those situations where the Court may be asked to decide how the child's best interests are met.
- 1.3. Where a parent's expectations differ from the Court, or the outcome is unsatisfactory to them, it can appear that their "rights" as a parent have been ignored in favour of the "rights" of the other parent. This can lead to frustration, anger and ongoing conflict.
- 1.4. In actual fact, such rights as parents may have are always secondary to the rights of the child.
- 1.5. Therefore, it is beneficial for separated parents to understand how the law in Australia deals with parenting issues and how best to approach parenting issues when a relationship breaks down.

## 2. PARENTS HAVE OBLIGATIONS TO THE CHILD

- 2.1. It is unfortunate that parents occasionally use their children as a means of frustrating the other parent. At law, a parent must play a role in encouraging and facilitating the relationship so that any children are able to have a meaningful relationship with both parents. This is a right of the child<sup>2</sup>.
- 2.2. A child has the right to voice their opinion in parenting matters<sup>3</sup>. However, it is important to note that the Court will weigh the child's opinion against their age and maturity.
- 2.3. It is the right of the child that they will be housed, fed, educated and supported<sup>4</sup>. Parents have a duty of maintenance of the child and that means child support. Child support can be assessed and paid either through the Child Support Agency or through private agreement by the parents. It can be formalised through a Child Support Agreement. Child support does not enrich the parent who receives it and the

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<sup>1</sup> Family Law Act s60CA

<sup>2</sup> s60CC(2)(a)

<sup>3</sup> s60CC(3)(a)

<sup>4</sup> s60CC(3)(ca)



formula used to calculate child support looks at a number of factors to determine the appropriate level of payment. There are various appeal mechanisms in place if a parent is of the view that the assessment is not correct, however, it is important for parents to remember the significant and ongoing costs of raising children and balance that against what they are assessed as being liable for.

- 2.4. Parents, in defending their own interests, sometimes fail to appreciate that one aspect of their responsibility is to help ensure that the child has a normal, healthy and loving relationship with the other parent and that parent's family and friends. All relevant relationships will be considered by the Court when deciding what is in the best interests of the child.<sup>5</sup>
- 2.5. Occasionally, a parent will minimise their contact with the child. This may be deliberate because it inconveniences the other parent, it may be because they are not interested in spending time with the child, or they may find it hurtful to see the child. Whatever the reason, the role that each parent plays in making decisions about long term issues in relation to the child, how the parent spends time and communicates with the child are all considered by the Court.<sup>6</sup>
- 2.6. Practical consideration is also given to matters of geography and whether it is impractical and expensive for the child to spend time and communicate with the other parent<sup>7</sup>. For example, where one parent lives in a different country it will not be possible, in most situations, for communication to occur daily, or for regular time to be spent with the non-resident parent.

### 3. CHILDREN ARE NOT PROPERTY

- 3.1. Additional factors that the Court will take into account are the attitude of the parents to their parental responsibility. Obviously, where a relationship ends, there can be difficulties in communication between the parties and arrangements concerning a child can take on characteristics similar to a division of property.
- 3.2. Parents will demonstrate their attitude to parental responsibility<sup>8</sup> by their involvement and communication with and about the child.
- 3.3. Where a parent has an obligation to pay for the maintenance of the child, that payment is not consideration for time spent with the child nor can it be used as a means to bargain with the other parent.

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<sup>5</sup> s60CC(3)(b)

<sup>6</sup> s60CC(3)(c)

<sup>7</sup> s60CC(3)(e)

<sup>8</sup> s60CC(3)(i)



- 3.4. Successful and ongoing involvement in decisions made about long-term issues related to the child will demonstrate maturity and an acceptance of parental responsibility. That those decisions can be made jointly is in the best interests of the child.

## 4. ALTERNATIVES

- 4.1. If a child is too young to stay with a parent for more than one consecutive night, an alternative approach may assist a parent in spending additional time. Alternative approaches can also be discussed where the child resists staying with the other parent.
- 4.2. The key to any alternative approach is that the parents must have the child's best interests in mind. It is natural that a parent whose child is resistant to stay the night would feel distress about that situation. However, if the child is traumatised by the prospect - or when a little older is staunch in their opposition - the best way to overcome the matter is an alternative proposal.
- 4.3. Perhaps eating a meal with the child before returning them to the other parent for bedtime will alleviate some of the tension felt by the child. It provides the parent with the opportunity to spend time with the child and encourages the wary child to feel secure.
- 4.4. Other suggestions could be to attend sporting matches, movies, going for a walk and visiting grandparents.

## 5. SUMMING UP

- 5.1. Parents are often frustrated when they do not have enough time with their child or when their ability to contact the child is obstructed by the other parent. Where Consent Orders exist, both parents must remember that for the Orders to have been made, the parties have consented.
- 5.2. If no agreement has been reached, it is advisable that parents seek counselling or mediation to assist in achieving an outcome. (It is important to note that in most cases, counselling or mediation are required prior to seeking relief from the Court). Often, conflict will crowd thoughts and confuse matters. Where clarity exists, parents will be better resourced to identify what is in the best interest of the child.



- 5.3. Parents who understand that the child's best interests are not necessarily met by what each parent may want or need, are more likely to come to a satisfactory agreement in parenting matters. This benefits all parties: the child, because the conflict is resolved and the parents, because a level of trust exists that has enabled the matter to progress to agreement

For further information in relation to the issues discussed in this paper, please contact either Fiona Davis or Roger Curtis.

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