Post-separation Parenting

CHAPTER CONTENTS

Introduction

There are basic principles that apply in determining the best interests of the child when couples separate and disputes arise about the care of children for whom they have parental responsibility. Part VII of the Commonwealth *Family Law Act 1975* (Cth) (Family Law Act) sets out the responsibilities and roles of parents in relation to their children, and matters are heard in the Family Court of Australia or the Federal Circuit Court of Australia.

Where the issues involve the protection of a child from harm, the Queensland *Child Protection Act 1999* (Qld) is relevant, and issues regarding child care and child safety are dealt with by the respective state courts. However, there is a requirement on the parties to family law court proceedings to disclose any child protection matters that a party is aware of to the proceedings (ss 60CH, 60CI Family Law Act).

Each of the relevant courts has their own set of legislation that is used in addition to the Family Law Act. Careful reference to the relevant legislation for each court is recommended, as there are differences and common practices. In this chapter, unless specifically indicated, a reference to the court is a reference to any court exercising jurisdiction under the Family Law Act.

The Family Law Act and Children of Separated Parents

The objects and principles of the Family Law Act focus on the importance of both parents playing an active role in the lives of their children after separation and encourage an emphasis on post-separation parenting. The best interests of the child remain the paramount consideration (s 60CA Family Law Act).

The objects (s 60B Family Law Act) are to ensure that the best interests of children are met by:

- ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child
- protecting the child from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence
- ensuring that children receive adequate and proper parenting to help them achieve their full potential
- ensuring that parents fulfill their duties and meet their responsibilities concerning the care, welfare and development of their children.

The principles underlying these objects are focused on children spending regular time with both parents and other significant people. Section 60B(2) of the Family Law Act contains relevant principles, except when it is or would be contrary to a child's best interests:

- Children have a right to know and be cared for by both their parents regardless of whether their parents are married, separated, have never married or have never lived together.
- Children have a right to spend time and communicate on a regular basis with both their parents and other people significant to their care, welfare and development (e.g. grandparents and other relatives).
- Parents jointly share duties and responsibilities concerning the care, welfare and development of their children.
- Parents should agree about the future parenting of their children.
- Children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Under s 60B(3) of the Family Law Act, an Aboriginal or Torres Strait Islander child's right to enjoy their Aboriginal or Torres Strait Islander culture includes the right to maintain a connection with that culture, to have the support, opportunity and encouragement necessary to explore the full extent of that culture consistent with the child's age and developmental level, and the right to express the child's views and to develop a positive appreciation of that culture.

Parenting Plans

Parents are strongly encouraged to enter into parenting plans in relation to the arrangements for their children. Parenting plans are informal agreements and are to be in writing, made between the parents of a child, signed by the parties and dated. An agreement is not a parenting plan under the Family Law Act, unless it is made free from any threat, duress or coercion (s 63C(1A) Family Law Act). Section 63C(2) of the Family Law Act specifies that a parenting plan may deal with one or more of the following:

- the person or persons with whom a child is to live
- the time a child is to spend with another person or other persons
- the allocation of parental responsibility for a child (s 63C(2B)), specifically with the allocation of responsibility for making decisions about major long-term issues affecting the child
- the form of consultation the persons are to have with one another and about decisions to be made about the exercise of that responsibility, if two or more persons are to share parental responsibility for a child
- the communication the child is to have with another person or other persons
- the maintenance of the child
- the process to be used for resolving disputes about the terms and operation of the plan

- the process to be used for changing the plan to take account of the changing needs or circumstances of the child or parties to the plan
- any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

The person or persons referred to in s 63C(2) of the Family Law Act may be either a parent of the child or a person other than a parent of the child (including a grandparent or other relative of the child) (s 63C(2A) Family Law Act). Parenting plans are not court orders and therefore cannot be the subject of enforcement or contravention applications.

Consent orders

If parents want to ensure that the terms of the parenting plan are enforceable by the courts, they can seek a court order by consent (by filing an Application for Consent Orders form the Family Court of Australia). The supplement guide can assist with the application. A reduction in the filing fee may apply depending upon the applicant's financial circumstances.

The court's regard

When making a parenting order, the court must have regard to the terms of the most recent parenting plan entered into by the child's parents if it is in the child's best interests (s 65DAB Family Law Act).

Effect of parenting plans on orders

Parenting orders are taken to be subject to later parenting plans entered into by persons to whom the orders apply (s 64D Family Law Act). It is possible, in exceptional circumstances, for the court to include in an order a provision that s 64D does not apply to the order (ss 64D(2)–(3) Family Law Act).

Parenting Orders

If parents cannot agree about the parenting arrangements for their children after separation, pre-action procedures must be complied with prior to filing an application for parenting orders with the court. All parties (unless the matter falls within one of the exceptions) are now required to attend family dispute resolution before bringing any applications for parenting orders (see Family dispute resolution).

No party is to use the pre-action procedures for an improper purpose, and correspondence or discussions between the parties should not include material that may cause the other party to adopt an entrenched, polarised or hostile position.

Parenting orders deal with the same issues regarding parenting of children as parenting plans (see Parenting plans) (s 64B Family Law Act).

The Family Law Act distinguishes between major long-term issues and those matters that fall within the day-to-day needs of the child. Parties with parental responsibility are not required to consult with each other in relation to decisions on issues that are day-to-day issues (s 65DAE Family Law Act).

Major long-term issues

Major long-term issues about which parents must consult and cooperate are defined in s 4(1) of the Family Law Act and include the child's:

- education
- religious and cultural upbringing
- health
- name
- living arrangements where those changes make it significantly more difficult for the child to spend time with a parent.

The child's best interests

The Family Law Act provides that when deciding to make a particular parenting order, a court must regard the best interests of the child as the paramount consideration (the paramountcy principle) (s 60CA Family Law Act). The considerations by which a court determines what is in a child's best interests are divided into primary and additional considerations (s 60CC Family Law Act).

Primary considerations

The primary considerations are the benefit of the child having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm from exposure to abuse, neglect or family violence. However, the court is required to give greater weight to the need to protect the child from physical or psychological harm from exposure to abuse, neglect or family violence than the need to have a meaningful relationship with both parents.

Additional considerations

The additional considerations are:

- any views expressed by the child and any factors (e.g. the child's maturity level or level of understanding) that the court thinks are relevant to the weight it should give to the child's views
- the nature of the relationship of the child with each of the child's parents and other persons (including any grandparent or other relative of the child)

- the extent to which each of the child's parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child, to spend time with the child and to communicate with the child
- the extent to which each of the child's parents has fulfilled, or failed to fulfill, the parent's obligations to maintain the child
- the likely effect of any change in the child's circumstances including the likely effect of any separation from either of their parents, or any other child or person (including any grandparent or other relative of the child with whom they have been living)
- the practical difficulty and expense of a child spending time 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
- the capacity of each of the child's parents and 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
- the maturity, sex, lifestyle and background (including culture and traditions) of the child and either of the child's parents, and any other characteristic of the child the court thinks are relevant
- if the child is an Aboriginal or Torres Strait Islander child:
    - the child's right to enjoy their Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people that share that culture)
    - the likely impact any proposed parenting order will have on that right
- the provisions of s 60CC(6) of the Family Law Act
- the attitude towards the child and to the responsibilities of parenthood demonstrated by the child's parents
- any family violence involving the child or a member of the child's family
- 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 nature of the order, the circumstances in which the order was made, any evidence admitted in proceedings for the order and any findings made by the court in, or in proceedings for, the order
- 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
- any other fact or circumstance that the court thinks is relevant (s 60CC(3) Family Law Act).

Presumption of equal and shared responsibility

Section 61DA of the Family Law Act provides that when making a parenting order, the court must presume that it is in the best interests of the child for their parents to have equal shared parental responsibility for them. Importantly, this presumption relates solely to parental responsibility and not the amount of time a child spends with each of the parents.

The presumption of equal shared parental responsibility will not apply (ss 61DA(2)–61DA(4) Family Law Act):

- in cases where there are reasonable grounds to believe that a parent of the child or a person who lives with a parent of the child has engaged in abuse of the child or another child who, at the time, was a member of the parent's family or that other person's family
- in interim hearings where the courts consider it would not be appropriate for the presumption to be applied.

The presumption can also be rebutted by evidence that satisfies the court that it would not be in the best interests of the child if the parents have equal shared parental responsibility.

The concepts of equal, substantial and significant time and reasonable practicality

Section 65DAA of the Family Law Act clearly states that if a parenting order provides or is to provide that the parents have equal shared parental responsibility, the court must consider the possibility of the child spending equal time, or substantial and significant time with each of their parents, provided certain requirements are met. This provision has been the subject of consideration by the High Court of Australia (see the case *MRR v GR* [2010] HCA 4).

Equal time

In relation to equal time (s 65DAA(1) Family Law Act), the court must consider whether the child spending equal time with each parent would be in the best interests of the child and reasonably practicable. If both points apply, the court must consider making an order to provide (or include a provision in the order) for the child to spend equal time with each parent.

Substantial and significant time

If the court does not make an order for equal time, then the court must consider whether the child spending substantial and significant time with each parent would be in the best interests of the child and reasonably practicable (s 65DAA(2) Family Law Act). If both points apply, the court must consider making an order to provide (or include a provision in the order) for the child to spend substantial and significant time with each parent.

Pursuant to s 65DAA(3) of the Family Law Act, a child will be taken to spend substantial and significant time with a parent only if the time the child spends with the parent:

- includes days that fall on weekends and holidays, and days that do not fall on weekends or holidays
- allows the parent to be involved in the child's daily routine and occasions and events that are of particular significance to the child
- allows the child to be involved in occasions and events that are of special significance to the parent.

Section 65DAA(3) of the Family Law Act does not limit the other matters to which a court can have regard in determining whether the time a child spends with the parent would be substantial and significant.

Reasonable practicality

In determining whether it is reasonably practicable for a child to spend equal time, or substantial and significant time with each of the child's parents pursuant to s 65DAA(5) of the Family Law Act, the court must have regard to:

- how far apart the parents live from each other
- the parents' current and future capacity to implement an arrangement for the child spending equal time or substantial and significant time with each of the parents
- the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement at that time
- the impact that an arrangement of that kind would have on the child
- such other matters as the court considers relevant.

Some of the factors in s 60CC(3) of the Family Law Act may also be relevant, for example the attitude of the parents toward the child and the responsibilities of parenthood.

Independent Children's Lawyers

An independent children's lawyer represents the child's interests in proceedings and is appointed under a court order (s 68L Family Law Act). The order can be made on application of a party or on the court's own initiative. The independent children's lawyer is not the child's legal representative and is not obliged to act on the child's instructions in relation to the proceedings (s 68LA(4) Family Law Act).

Sections 68LA(2), (3) and (5) of the Family Law Act set out the role and duties of the independent children's lawyer, who must:

- form an independent view of what is in the best interests of the child, based on the evidence available
- act in relation to the proceedings in what they believe to be in the best interests of the child

- make a submission to the court suggesting the adoption of a particular course of action, if satisfied that the adoption of that course of action is in the best interests of the child
- act impartially in dealings with the parties to the proceedings
- ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court (s 68L Family Law Act)
- analyse any report or other document that relates to the child and is to be used in the proceedings to identify those matters most significant for determining what is in the best interests of the child, and must ensure that those matters are properly drawn to the court's attention
- endeavour to minimise the trauma to the child associated with the proceedings
- facilitate an agreed resolution of matters, to the extent to which doing so is in the best interests of the child.

The independent children's lawyer cannot be required to disclose to the court any information that the child communicates to them. However, the independent children's lawyer may disclose information that the child communicates if they consider the disclosure to be in the best interests of the child, even if the disclosure is against the wishes of the child (ss 68LA(6)–(8) Family Law Act).

An independent children's lawyer is commonly appointed in more complex cases of allegations of sexual abuse, extreme conflict between the parents, issues concerning the capacity of one or both parents to care for the children, issues where siblings are being separated or in cases where a party has no legal representation.

The role of an independent children's lawyer is to help the court make orders in the best interests of the child. Steps taken to perform the role include:

- presenting evidence of matters relevant to the issues in dispute and to the care of the child, which the parties do not bring to the attention of the court
- requesting the parties, the child and other significant persons to attend upon experts for assessments (e.g. a family report or psychological or psychiatric assessment)
- obtaining reports or information from a variety of people or institutions (e.g. medical practitioners, hospitals, schools, kindergartens or day care centres) concerning the children, the parents or other significant persons. This information may be obtained with the consent of the relevant party or by subpoena and can be used for any hearings in the matter.

The independent children's lawyer should obtain evidence about any particular view of the children and place these before the court. This may depend upon the age, maturity and any other factors relevant to whether the child is able and willing to express any views. Children are not compelled to express a view (s 60CE Family Law Act).

The independent children's lawyer is not bound by the views of the child when making submissions about what is considered to be in the best interests of the child.

The costs of the independent children's lawyer may be paid initially through legal aid funding, but a contribution may be required from parties with adequate means.

Views of children

Whilst a child cannot be required to express their views (s 60CE Family Law Act), there are sections of the Family Law Act that require the consideration of their views if they are expressed. For example, in determining whether to make a particular parenting order, the court must consider any views that are expressed by the child (ss 60CC(3)(a), 60CD(1) Family Law Act).

The way that the court informs itself of the views of a child is by:

- having regard to the contents of a report (s 62G Family Law Act)
- making an order for the child to be independently represented
- such other way the court thinks appropriate (s 60CD(2) Family Law Act).

Where a report is prepared by a family consultant pursuant to s 62G of the Family Law Act, that consultant must ascertain and include in the report the views of the child (s 62G(3A)), unless this would be inappropriate in light of the child's age, maturity or any other special circumstance (s 62G(3B)).

Contravention of Parenting Orders

Contravening a parenting order means disobeying the orders and other obligations that affect children. Contravention applications are very technical and are dealt with in a quasi-criminal manner. It is necessary for the applicant to establish a breach of an order and, if established or admitted, the proceedings move into considering if the respondent has a reasonable excuse or not. Depending upon the outcome, the application or parts of it may be dismissed, or if no reasonable excuse is established, penalties may be imposed. Before filing a contravention application, it is important that consideration is given to the client's desired outcome. In many instances, a variation to the orders is requested or required, and a better approach may be to file an application seeking that variation.

A person is taken to have contravened an order under pt 7 of the Family Law Act if, and only if, the person is:

- bound by the order and they have:
    - intentionally failed to comply with the order
    - made no reasonable attempt to comply with the order
- not bound by the order and they have:
    - intentionally prevented compliance with the order by a person who is bound by it
    - aided or abetted a contravention of the order by a person who is bound by it (s 70NAC).

Remember, a subsequent parenting plan varying an order may mean no breach of an order has occurred.

Section 70NAE(2) of the Family Law Act provides that a person has a reasonable excuse for contravening an order if they did not understand the obligations imposed by the order, and the court is satisfied that the respondent ought to be excused in respect of the contravention.

Where the respondent is alleged to have contravened a parenting order that provides for a child to live with, spend time with or communicate with a person, or provides for the allocation of parental responsibility in relation to a child of a person (s 70NAE(4)–(7) Family Law Act), the respondent is taken to have had a reasonable excuse for contravening the order only if:

- the respondent believed, on reasonable grounds, that their actions were necessary to protect the health and safety of the child or themselves
- the period that the child did not live with, spend time with or communicate with the person, or for which the respondent hindered or prevented the discharge of the parental responsibilities, was no longer than necessary to protect the health or safety of the person they were protecting.

The court retains the power to vary an order regardless of whether or not it finds that a contravention has occurred (s 70NBA(1) Family Law Act). If the court is considering varying the order that is alleged to have been contravened, the court must:

- have regard to any parenting plan that has been entered into since the order was made (s 70NAA(2) Family Law Act)
- consider whether it is appropriate to vary the order to include some or all of the provisions of the parenting plan, if a subsequent parenting plan has been made (s 70NBB(2)(d) Family Law Act).

Contravention alleged but not established

Where the court does not find that the respondent committed the alleged contravention (s 70NCA Family Law Act), the court may order the applicant to pay some or all of the other party's or parties' costs (s 70NCB Family Law Act).

As a significant deterrent to parties bringing unfounded contravention applications, the court must consider making an order for costs if the applicant has previously brought contravention proceedings, and, on the previous occasion, the court was not satisfied there had been a contravention or did not otherwise make an order dealing with the respondent (s 70NCB(2) Family Law Act).

Contravention with reasonable excuse

Where the court is satisfied that a contravention has been committed, but the respondent proves that they had a reasonable excuse for contravening the order, the court may order and must consider making an order that compensates for the time the applicant did not spend with the child as a result of the contravention, unless doing so would not be in the best interests of the child (s 70NDB(1)–(2) Family Law Act).

When the court does not make an order for 'make up time', the court may order the applicant to pay some or all of the other party's or parties' costs (s 70NDC Family Law Act). The court must consider making an order to that effect if the applicant has previously brought contravention proceedings, and, on the previous occasion, the court was not satisfied there had been a contravention or did not otherwise make an order dealing with the respondent (s 70NDC(2) Family Law Act).

Less serious contravention without reasonable excuse

A less serious contravention will be established where the court is satisfied that a person has contravened a primary order without reasonable excuse and:

- no court has previously made an order imposing a sanction for contravention or adjourning previous contravention proceedings (s 70NEA(2) Family Law Act)
- a court has previously made an order imposing a sanction for contravention or adjourned previous contravention proceedings, but the court is satisfied it is more appropriate to deal with the current contravention as a less serious contravention (s 70NEA(3) Family Law Act).

This type of contravention does not apply if the court finds that the person who contravened the order has behaved in a way that shows serious disregard for their obligations under the primary order (s 70NEA(4) Family Law Act).

If the court finds that the contravention is a less serious contravention, it may (pursuant to the Family Law Act):

- make an order directing the person who committed the contravention or that person and another person to attend a post-separation parenting program (ss 70NEB(1)(a), 70NED, 70NEF, 70NEG)
- make a further parenting order compensating a person for the time not spent with the child (ss 70NEB(1)(b), 70NEB(4)–(5))
- adjourn the proceedings to allow a party to apply for a further parenting order that discharges, varies, suspends or revives a primary parenting order (s 70NEB(1)(c))
- require the person who contravened the order to enter into a bond (ss 70NEB(1)(d), 70NEC)

- make an order requiring the person who committed the contravention to pay compensation for any expenses incurred as a result of the contravention in which the applicant was prevented from spending time with the child (s 70NEB(1)(e))
- order the person who contravened the order to pay some or all of the costs of the other party or parties (s 70NEB(1)(f))
- order the person who brought the application to pay some or all of the costs of the contravening party if the court makes no other orders (ss 70NEB(1)(g), 70NEB(7)).

More serious contravention without reasonable excuse

A more serious type of contravention will be established where the court is satisfied that a person has contravened a primary order without reasonable excuse and:

- no court has previously made an order imposing a sanction for contravention or adjourning previous contravention proceedings, but the court is satisfied the respondent has demonstrated a serious disregard for their obligations (i.e. a serious contravention) (s 70NFA(2) Family Law Act)
- a court has previously made an order imposing a sanction for contravention or adjourning previous contravention proceedings (s 70NFA(3) Family Law Act).

In cases where the court regards the contravention as serious, the court must:

- make an order that provides for the contravening party to pay all of the costs of the other party, unless the court is satisfied that doing so is not in the best interests of the child (s 70NFB(2)(g) Family Law Act)
- consider making the other most appropriate order (s 70NFB(2) Family Law Act)
- make at least one other order if the court does not make a costs order (because doing so would not be in the best interests of the child) (ss 70NFB(1)–(2) Family Law Act).

Section 70NFB(2) of the Family Law Act sets out the orders that the court can make in cases of serious contravention:

- a community service order (where the court is empowered under s 70NFC of the Family Law Act to do so)
- an order that requires the person who contravened the order to enter into a bond
- a further parenting order that compensates for the time the applicant did not spend with the child
- a fine of not more than $10 800
- a sentence of imprisonment in accordance with s 70NFG of the Family Law Act. The court must not impose a sentence of imprisonment unless it is not appropriate for the contravention to be dealt with by any other provisions, or unless it is satisfied that the contravention was intentional or fraudulent (s 70NFB(4) Family Law Act). Sentences of

imprisonment cannot be imposed in relation to child support contraventions (s 70NFG(5) Family Law Act)

- an order requiring the person who committed the contravention to pay compensation for any expenses incurred as a result of the contravention in which the applicant was prevented from spending time with the child
- an order that the person who committed the contravention pay some or all of the costs of another party.

Family Dispute Resolution

The Family Law Act now compels separated parents with children to make a genuine effort to resolve that dispute by family dispute resolution before applying to the courts for an order (s 60I(1) Family Law Act). Parties must:

- participate in negotiations, conciliation, mediation, arbitration or counselling
- comply with their duty of disclosing relevant facts, reports and concerns.

Family relationship centres are dispute resolution forums, and their purpose is to give separating parents a place to go to discuss the needs of their children and agree on parenting arrangements without going to court. Dispute resolution practitioners are independent of all the parties (s 10F Family Law Act). The centres provide information, advice, dispute resolution and other relevant services. They do not provide legal advice.

The first hour of dispute resolution is provided free of charge (or low cost) to give parties the opportunity to come up with a parenting plan. Further dispute resolution assistance and other services are provided either free of charge or at a cost that is determined by each centre and usually based on the client's income. A national Family Relationship Advice Line exists to offer both legal and non-legal advice.

A family dispute resolution practitioner is a person who is (pursuant to the Family Law Act):

- accredited as a family dispute resolution practitioner under the Accreditation Rules (s 10A)
- authorised to act on behalf of an organisation designated by the Minister for Families, Community Services and Indigenous Affairs (s 10C(1)(b))
- a Family Court counsellor and mediator
- engaged to act as a family dispute resolution practitioner by s 93D of the *Federal Circuit of Australia Court Act 1999* (Cth)
- authorised by a Family Court to act as a family dispute resolution practitioner.

Communications with a family dispute resolution practitioner are confidential (s 10H Family Law Act), though there are some exceptions to this, such as where consent is provided that disclosure is necessary:

- to protect a child on the reasonable belief of the practitioner
- to prevent or lessen a serious and imminent threat to life, health or the property of a person
- to report or prevent an offence involving violence or a threat of violence
- to assist the independent children's lawyer in their role
- to provide an s 60I Family Law Act certificate.

Admissions or disclosures of child abuse or risk of child abuse should be disclosed by the practitioner if there is no other source of the information, but generally the communications cannot be used in court (s 10J Family Law Act).

Parties are required to have attended a dispute resolution program and obtained the requisite certificate from a family dispute resolution practitioner before bringing most applications for parenting orders (the certificate needs to be attached to the initiating application). It should be noted that non-compliance with these provisions does not affect the validity of the proceeding or any orders made (s 60I(11) Family Law Act).

There are exceptions to the requirement to attend family dispute resolution before filing an application (s 60I(9) Family Law Act):

- the application is made by consent
- the application is in response to an application another party has made under pt VII
- the court is satisfied, on reasonable grounds, that there has been or there is risk of abuse of a child by one of the parties, or there has been or there is a risk of family violence by one of the parties
- the application relates to contravention, and there are reasonable grounds to believe that the respondent has shown a serious disregard for their obligations under the order
- the application is urgent
- one or more of the parties are unable to participate effectively in family dispute resolution (including for reasons associated with remoteness)
- by reason of any other circumstance set out in the Family Law Act.

Family counselling and counsellors

Family counselling is a process in which a family counsellor helps (s 10B Family Law Act):

- persons to deal with personal and interpersonal issues in relation to marriage and issues relating to the care of children
- children who are affected or likely to be affected by separation or divorce to deal with personal and interpersonal issues.

The term 'family counsellor' (s 10C Family Law Act) applies to the following strictly limited persons who are:

- accredited as a family counsellor under the Accreditation Rules (s 10A Family Law Act)
- authorised to act on behalf of an organisation designated by the Minister for Families, Community Services and Indigenous Affairs (a list of organisations designated for this purpose is published annually)
- authorised to act as a family counsellor (i.e. Family Court counsellors) (s 38BD Family Law Act)
- engaged to act as a family counsellor under the Federal Circuit Court of Australia Act 1999 (Cth)
- authorised by a state Family Court to act as a family counsellor.

Communications with a family counsellor are confidential, but there are similar exceptions to those set out above in relation to family dispute resolution practitioners (s 10D Family Law Act), and communications cannot be used in court as a general rule (s 10E Family Law Act). However, s 10E(2) of the Family Law Act specifically provides that the confidentiality does not apply to admissions by an adult that a child under 18 has been or is at risk of abuse (or such a disclosure by the child), unless there is sufficient evidence of the admission or disclosure available from other sources.

It should be noted that for a significant period of time, the family law courts have not provided the services of court counsellors.

Family consultants

Family consultants are distinct from family counsellors and family dispute resolution practitioners. They may have significant involvement in the proceedings if disputes cannot be resolved and the matter proceeds to the court for determination. Family consultants prepare family reports ordered by the court or requested by the parties during the course of proceedings.

Family consultants are often present in the courtroom and may give, on oath, evidence of their observations of the parties. Their assessments may occur after only brief consultation with the parties, but can involve more in-depth interviews with the parties and the children.

It can also involve consideration of the material filed and any documentation produced under subpoena.

The primary function of a family consultant is to provide services in relation to proceedings under the Family Law Act (s 11A) including:

- assisting and advising people involved in the proceedings
- assisting and advising the court and giving evidence
- helping the parties to resolve disputes regarding the child's time with each parent
- reporting to the court under ss 55A (report concerning the arrangements for children for the purposes of a divorce application) and 62G (family report)
- advising the court about appropriate programs and services to which the court can refer the parties.

The communications with a family consultant are not confidential, although there is an exception when the family consultant acts as a family counsellor or family dispute resolution practitioner if authorised to do so under s 38BD of the Family Law Act. It is important for a party to understand the role being played by the family consultant in those circumstances. In general, evidence of anything said to, by or in the company of the family consultant is admissible in proceedings (s 11C Family Law Act), and, in performing their functions, the family consultant has the same protection and immunity as a judge of the Family Court (s 11D Family Law Act).

Family reports

Family reports are often available to assist the court determining interim and final parenting arrangements. The types of matters the report writer will usually consider in their report include:

- the attitude of each party to parenting
- the relationship between the parents
- the relationship between each of the parents and the child
- the relationship between the child and any other relevant adult (e.g. a de facto spouse)
- the needs and attachments of the child (this is often the way in which the court receives evidence of the wishes of the child).

A report prepared by a family consultant may be received into evidence pursuant to s 62G(8) of the Family Law Act, and when otherwise prepared by an expert, a family report can be admitted as evidence in the proceedings and form part of the information used by the court to determine parenting orders (s 79 *Evidence Act 1995* (Cth)). It is common for family reports to be given to the court both orally and by way of a written report. The report writer will usually be available for cross-examination at a final hearing (not at an interim hearing).

Obligations on legal practitioners

Legal practitioners have a clear obligation to provide documentation or information (ss 12B–E, 63DA Family Law Act) about:

- legal and possible social effects of proceedings (including consequences for children)
- the role of family counsellors, family consultants, family dispute resolution practitioners and arbitrators
- the steps involved in the proceedings.

Obligations on advisers

Advisers include legal practitioners, family counsellors, family dispute resolution practitioners and family consultants (ss 60D(2), 63DA(5) Family Law Act).

Pursuant to s 60D of the Family Law Act, advisers who give advice or assistance to a person about matters concerning a child in relation to the Family Law Act are required to encourage that person to consider their child's best interests as paramount and, where that child is at risk of harm, to advise that this should be given greater weight than the benefit of a meaningful relationship with both the child's parents.

Advisers are required to inform clients that they could consider entering into a parenting plan and provide them with information about where they can get assistance to do so. There are many aspects about the use of a parenting plan that need to be discussed with the client. These are set out in detail in s 63DA of the Family Law Act and include:

- the option of arrangements being made that provide for the child to spend equal time or substantial and significant time with each of the parents, if those arrangements are reasonably practicable and in the best interests of the child
- parental responsibility and how disputes can be resolved
- if there is an existing order, it may include a provision that the order is subject to the parenting plan they enter into
- future variations to the parenting plan
- the availability of programs to help with compliance with the parenting plan
- information regarding the fact that a court would take into consideration the terms of a parenting plan when making a parenting order (s 65DAB Family Law Act).

Advisers are not required to give advice as to whether the option is appropriate in the circumstances.

Obligations on the court

Part IIIB of the Family Law Act imposes obligations on the court to help accommodate any possible reconciliations and to refer parties to family counselling, family dispute resolution or to arbitration.

The objects set out in s 13A of the Family Law Act, clearly reflect the Federal Parliament's desire to encourage reconciliation and alternative dispute resolution, and to discourage the use of the courts to resolve family law disputes.

Family Violence Orders

The parties to proceedings (and anyone else who is aware) must inform the court of the existence of a family violence order relating to the child or a member of the child's family (s 60CF(1) Family Law Act).

When a person raises an allegation of family violence or risk of family violence as a consideration for the court, that person is required to file a Notice of Risk (s 22A.02 *Federal Circuit Court Rules 2001* (Cth), and s 67ZBA Family Law Act).

Family violence and the court

Part VII of the Family Law Act ensures the safety of children is prioritised in parenting matters.

The definition of 'family violence' includes socially or financially controlling behaviour and the exposure of a child to family violence, while the definition of 'abuse' includes serious neglect and causing a child serious psychological harm including the child being subjected to or exposed to family violence.

When considering applications for parenting orders, courts are directed to enquire about past or future risk or previous experience of abuse or family violence (s 67ZBB Family Law Act).

When advice is provided on parenting agreements, the adviser's obligations have been amended and new obligations have been imposed to encourage parents to prioritise a child's safety.

Parties are required to notify the court of allegations of family violence or abuse as well as disclose any involvement of child welfare agencies.

If there has been or is a risk of family violence or abuse, the court is prohibited from hearing an application unless the applicant has indicated in writing that they have received information from a family counsellor or family dispute resolution practitioner about the services and options available to them in the circumstances (s 60J(1) Family Law Act). However, the proceedings or any order made are not affected by failure to comply with that requirement (s 60J(3) Family Law Act). Accordingly, in cases where allegations of family

violence and/or abuse are made, the applicant should include in their affidavit a statement of the information regarding the services and options provided to them.

Part VII div 11 of the Family Law Act deals with the relationship between parenting orders and family violence orders. Section 68P sets out the requirements for the court when making an order or granting an injunction that is inconsistent with an existing family violence order. In particular, it must identify the inconsistency and give an explanation of the order, its purpose, the parties' obligations and how the contact provided for by the order is to take place. The court must also give a copy of the order or injunction to all persons bound by it within 14 days (s 68P(3) Family Law Act). To the extent of any inconsistency with orders made under the Family Law Act, the family violence order is invalid (s 68Q Family Law Act).

Other Orders Relating to Children

Relocation matters

An application by a parent wishing to relocate to another country or within Australia is one that is frequently before the courts for determination. These cases are often complex, and there is no rule of thumb that can be easily applied to predict the outcome of such an application.

The approach for Australian courts is ultimately to determine the matter on the basis that the best interests of the child are paramount but not the sole consideration, and determine which of the competing proposals are in the child's best interests (see the case *A v A: Relocation Approach* (2000) FLC 93–035).

The court cannot determine a case by simply deciding with whom the child should live and then deciding whether the relocation should be allowed. Instead, the courts are required to evaluate each of the competing proposals and consider all of the matters set out in the Family Law Act in ss 60B and 60CC, and then indicate which of those matters in the particular case has greater significance and where the balance lies.

The genuineness of the reasons for relocating and the advantages to that parent and their family are clearly factors that will need to be weighed with all other evidence. If the relocation is motivated by a desire of one parent to exclude the other from the child's life, then the application is likely to fail. The right of a parent's freedom of movement is also one factor to be considered, and a court cannot make orders that prevent a parent from moving. A court can, however, make orders preventing the removal of a child from a particular area, and the practical effect of such an order may well be that the parent also does not move.

It is clear that the decision-making pathway set out in the Family Law Act must be applied to all applications for parenting orders (including relocation), and a determination made by the court must be based on the evidence before it and the best interests of the child being the paramount consideration. The proposals of the parties are to be considered as part of such a determination (see *Goode v Goode* [2006] FamCA 1346; *McCall v Clark* [2009] FamCAFC 92 and *MRR v GR* [2010] HCA 4).

Restraining orders

Sections 68B and 114 of the Family Law Act provide the court with the power to make orders or grant injunctions as it considers appropriate for the welfare of a child.

The Family Court may issue a restraining order that, for example, may restrain a person from entering or remaining in the child's residence, or the place where a child is employed or educated, or restrain a person from remaining with the person who is entitled to the residence of the child. Injunctive relief may also be sought to secure the sole use and occupation of the former home if there is a dispute about who should live there. Applications for injunctions are complex, and clear evidence to support the making of the injunction will be necessary.

Location and recovery of children

Any person who is concerned with the welfare, care and development of a child may take action to locate and recover a child. The following orders are available to the court in assisting to locate and return a child who has been removed from their usual home:

- a location order
- a Commonwealth information order
- a recovery order.

A location order

The Family Court has the power to make an order directing a person to supply information about the location of a child (s 67M Family Law Act). The order may be applied for by:

- a person with whom, under a parenting order, the child lives, spends time or communicates with
- a person who, under a parenting order, has parental responsibility for the child
- a grandparent or any other person concerned with the care, welfare and development of a child (s 67K Family Law Act).

The best interests of the child remain the paramount consideration for the court when deciding whether to make a location order (s 67L Family Law Act). A location order applies for a period of 12 months, or longer if the court considers it appropriate (s 67M(4) Family Law Act).

Any person required to provide information under the order must do so, regardless of any other law which might apply. The information is provided to the court and only distributed further in limited circumstances (s 67P Family Law Act). This sort of order is appropriate for parties who believe that the child is still in Australia.

A Commonwealth information order

A Commonwealth information order is a location order directed to a Commonwealth body. The most usual type of Commonwealth information order is made against Centrelink (s 67N Family Law Act).

Recovery order

The Family Court has the power to make a recovery order, which requires the return of the child and authorises police to stop and search vehicles and enter premises for that purpose (s 67U Family Law Act). The order may be applied for by:

- a person with whom, under a parenting order, the child lives, spends time or communicates with
- a person who, under a parenting order, has parental responsibility for the child
- a grandparent or any other person concerned with the care, welfare and development of a child (s 67T Family Law Act).

A recovery order directs that the child be returned to the applicant or to some other person.

The court has further powers to make directions for the day-to-day care of the child pending the child's return. It can also prohibit further removal of the child and authorise the arrest of a person who has previously removed the child.

If a recovery order is made without notice to the other party, a further interim hearing, of which the respondent must be informed, will follow shortly (usually within a few days) after the initial hearing.

Changing a child's name

The parent with whom the child lives (i.e. a child under 18 years) does not have the right to change either the given name or surname of the child without the consent of the other parent. Consideration of the sections of the Family Law Act or parenting orders concerning parental responsibility and major long-term issues is important if a change of a child's name is proposed. Any determination will involve a consideration of what orders should be made in the best interests of the child.

Sometimes a parent changes a child's name (usually the surname) without the consent of the other parent, by simply calling the child by the new name. The desire to change the surname of a child often occurs in cases where a parent separated from their spouse, commences to live in a de facto relationship, remarries or changes their own name.

The Full Court of the Family Court held that a parent will not be prevented from changing a child's surname unless the court is satisfied that:

- the change was or is to be made without the consent of the other parent

- the name change does not promote the welfare of the child (see Change of Name Provisions under the Births, Deaths and Marriages Registration Bill (Qld) 2003 Research Brief, Chapman & Palmer (1978)).

The court also held that, in deciding whether there should be any change of surname, a court should consider the following matters:

- the best interests of the child, which is of paramount importance
- the short and long-term effects of any change to the child's surname
- any embarrassment likely to be experienced by the child if their name is different from that of the parent with whom the child resides
- any confusion of identity that may arise for the child if their name is changed or is not changed
- the effect that any change in surname may have on the relationship between the child and the parent whose name the child bore during the marriage
- the effect of frequent or random changes of name.

The following matters should also be considered (see *Beach & Slemmler* (1979) FLC 90–692):

- the advantages, both in the short-term and the long-term, which will accrue to the child if the change of name is permitted
- the contact that the father has had and is likely to have in the future with the child
- the degree of identification that the child has now with the father
- the degree of identification that the child has now with the mother and stepfather
- the degree of identification that the child will have with a child that is about to be born to their mother and any likely confusion in the future if their father's surname is restored
- the desire of the father that the original name be restored.

The court has also indicated that a further option may be available, namely a hyphenated name (see *Mahoney & McKenzie* (1993) FLC 92–408). The court held that:

- the court attached no significance to the manner of the registration, which was the husband's surname and did not find a particular attachment or identification with either parent's surnames
- a number of benefits could be expected to arise from the use of a hyphenated surname for the child, because:
    - the child had an ongoing relationship with both of their parents, although they did not live together

- the hyphenated surname might facilitate the recognition by others of the child circumstances and the ease with which the child had accepted such circumstances
- the use of the hyphenated surname offered the child a middle road in times of rapidly changing social attitudes.

The court had some reservations about the utility of a general adoption of hyphenated surnames but said that any choices that might need to be made were best left to the child in his mature years.

The issue of a child's surname is a matter that falls within general parental responsibilities. When a child's surname is a contentious issue, it may be appropriate to seek a specific issues order preventing or seeking the change of a child's surname. Evidence to support the need for either order will need to be provided by an affidavit.

Foreign residence orders

Australian courts are required to recognise and give effect to registered overseas residence orders.

The orders that may be registered in Australia are those of a prescribed overseas jurisdiction, which includes New Zealand, Papua New Guinea and most states of the United States of America.

The procedure for registering overseas residence orders is contained in reg 23 of the *Family Law Regulations 1984* (Cth).

Once an overseas residence order is registered, it has the same force and effect as if it were an order under the Family Law Act. No court in Australia that is aware of the order can then exercise jurisdiction for the residence of or contact to the child concerned, unless:

- every person who has rights of residence or contact under the foreign order consents
- substantial grounds exist for believing that the welfare of the child would be adversely affected if the court does not exercise its jurisdiction.

The Family Court cannot make an order affecting the residence of or contact to a child who is subject of an overseas residence order unless it is satisfied that:

- the welfare of the child is likely to be adversely affected if the order is not made
- there has been such a change in the circumstances of the child since the making of the overseas residence order that the order ought to be made (s 70J(2) Family Law Act) (see Klassen & Brooks (1986) FLC 91–765).

Child Abduction

When a person has allegedly abducted a child, full details of the alleged abductor and the child should be sent immediately to the nearest office of the Australian Federal Police (AFP). As soon as possible, a certified copy of the relevant 'live with' order, recovery order or court application should also be sent to the AFP. Details of the child and parent are then maintained on a warning list for a period of three months, unless a further request is received by the AFP. If there is a parenting order that provides for a child to live with or spend time with a parent/other person, or there are proceedings pending, and there is a fear of abduction overseas, the child can be placed on an airport alert list by contacting the AFP.

A temporary customs watch (known as a PACE Alert) can be requested following the filing of an application seeking orders restraining the removal of a child. That order will remain in place until seven days after the scheduled interim hearing date, unless a specific order is made and forwarded to the AFP and Customs (contact the AFP for the required information to make such an application).

The Family Law Act imposes penalties on transport authorities involved in the removal of children when they have been served with copies of the court orders (s 65ZA Family Law Act).

Passport controls

Under the *Australian Passports Act 2005* (Cth) (Australian Passports Act), an Australian passport will not be issued to an unmarried person under 18 years of age (the child), unless each person who has parental responsibility for the child consents to the child having an Australian travel document, or an Australian court order permits the child to have an Australian travel document, travel internationally, or live or spend time with another person who is outside Australia (s 11 Australian Passports Act). A person has parental responsibility for a child if, and only if:

- the person is the child's parent (including a person who is presumed to be the child's parent) and has not ceased to have parental responsibility for the child because of an order made
- under a parenting order, the child is to live with the person, the person has parental responsibility for the child or the person has guardianship or custody of, or has parental responsibility for, the child under a law of the Commonwealth, a state or a territory.

Where a father is not named on a child's birth certificate but has formally acknowledged paternity by signing a document to this effect, he has parental responsibility for the purposes of the Australian Passports Act.

Institutions, such as a government welfare agency, may also have parental responsibility under an Australian court order.

Where persons with parental responsibility are in separate locations, the non-lodging parent may provide consent through their closest passport office or Australian diplomatic or consular post.

Where one parent refuses to cooperate in making an application for a passport to be issued to a child, the other parent can bring an application (Initiating Application (Family Law) seeking both final and interim orders with a supporting affidavit) seeking that the court authorise the child to leave Australia and for a passport to be issued. If necessary, orders should be sought pursuant to s 106A of the Family Law Act authorising a registrar of the court to sign documents on behalf of a party who is refusing to do so.

If the consent of anyone with parental responsibility for the child cannot be obtained after all avenues have been exhausted, and there is no court order permitting the child to be issued with Australian travel documents, a written request for special circumstances under s 11(2) of the Australian Passports Act may be made. An officer delegated by the Minister for Foreign Affairs will consider the statement in support of the request to determine if a passport may be issued without the other person's consent.

It is important to consult with the Department of Foreign Affairs and Trade before filing such an application to ensure the orders sought are sufficient to meet the department's requirements. Except in exceptional circumstances, the party who has not cooperated should be given notice of the application.

When a parent suspects that the other parent might apply for a passport for a child in order to remove the child from Australia, the parent should:

- lodge a child alert request with the Department of Foreign Affairs and Trade to warn the department that there may be circumstances preventing the issue of a passport for the child. However, there is no guarantee that the placing of a child alert will prevent a passport or other travel document being issued to the child
- seek injunctive relief in the Family Court to restrain the removal of the child.

For further information visit the Department of Foreign Affairs and Trade passports website.

International child abduction

If a person has wrongfully taken a child from or to Australia, the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) may facilitate the return of that child to their home.

These Regulations, which incorporate the Hague *Convention on the Civil Aspects of International Child Abduction* into Australian law, establish a reciprocal system whereby countries agree to assist each other in returning abducted children to their homes.

In Australia, all incoming and outgoing applications for return of a child are assessed by the Commonwealth Central Authority, which is part of the Commonwealth Attorney-General's Department.

An application for return of a child from a non-convention country should be made in accordance with the laws that apply there, and it may be necessary to employ a lawyer in that country to take legal proceedings to recover the child. The consular section of the Department of Foreign Affairs and Trade may be able to provide a list of lawyers in that country. Unfortunately, this process can be more complicated, time consuming and expensive than the process under the convention. Further information is available from the Commonwealth Attorney-General's Department website.

Support services for parents whose children have been abducted are available through the International Parent Child Abduction Service provided by International Social Service Australia.

Obtaining Orders from the Family Court or the Federal Circuit Court

Initiating documents

Applicants must file an Initiating Application (Family Law) form to commence proceedings, setting out the final and interim orders they seek in either the Family Court or the Federal Circuit Court. The Federal Circuit Court also requires a supporting affidavit to be filed, but the Family Court only requires an initial supporting affidavit if interim orders are sought.

When parenting orders are sought in the Initiating Application (Family Law), a Notice of Risk must also be filed with the application.

Respondents use the Response to Initiating Application form in the Family Court, and a Response in the Federal Circuit Court. A respondent must also file a Notice of Risk when seeking parenting orders.

The Initiating Application form requires the applicant to answer all relevant questions and to set out in detail the nature of the orders being sought. The Initiating Application is prepared in triplicate along with a copy of any documents required to be filed with the form including the relevant certificate from a family dispute resolution practitioner (see Family dispute resolution (r 2.02 *Family Law Rules 2004* (Cth) (Family Law Rules)).

Generally, family law applications are filed in the Federal Circuit Court, however, the Family Court of Australia website does set out the types of matter that should be filed in the Family Court

The Family Court has an Initiating Application Kit (do-it-yourself) available on its website to assist people who are applying for parenting orders and representing themselves.

Interim applications

An application for interim parenting orders can only be filed where an Initiating Application has already been filed. That means that there must be an application for final orders yet to be decided. When proceedings have commenced and interim orders are subsequently

sought, an Application in a Case can be filed in both the Family Court and Federal Circuit Court, although each court has its own form. An affidavit containing the evidence relied upon to support the application must be filed at the same time as the application.

A response to an application must be filed with a supporting affidavit by the respondent, if they seek different orders than the applicant.

The application, response and affidavit forms for each court are available from the respective court's website.

Practical steps to obtain a court order

Filing

In all courts, the applications (the Initiating Application and Application in a Case), the supporting affidavit and the Notice of Risk are to be filed with the relevant court registry. If filing in the Family Court, a copy of other documents (as relevant) may need to be filed (rr 2.02, 2.05 Family Law Rules). A filing fee is payable depending upon the nature of the application and the applicant's financial circumstances.

In the Family Court, unless an urgent interim hearing date is allocated, a date for an initial procedural hearing before a registrar will be noted on the Initiating Application when filed. In the Federal Circuit Court, unless an urgent interim hearing date is allocated, a date for a directions hearing before a judge will be noted on the Initiating Application. On this first court date after the application is filed, the court will determine how best to progress the matter. In the Federal Circuit Court, it is best to be ready to argue for the orders being sought on the first return date. All of the Federal Circuit Court judges run their list of matters in the way they consider best meets the needs of the parties and the children depending upon the facts of a case.

The minimum time between filing the documents and the return date will be no less than 28 days, unless the matter is extremely urgent. In practice, the period between filing and the hearing will generally be up to three months because of a backlog of applications.

Service

The applications (including the supporting documents) and supporting affidavits must be served on the respondent. For details of the manner and time frames applicable refer to the rules of procedure of the family law courts.

Contesting the Initiating Application

On receiving an Initiating Application for parenting orders, the other party must decide whether to consent to or oppose the application.

If the party seeks orders different to those sought in the application, they must make, file and serve a response (Response to Initiating Application or a Response), an affidavit (if responding to an interim application) and a Notice of Risk. The time frames for filing response material can vary, but it should be filed and served as quickly as possible. In the

Federal Circuit Court it must be filed and served within 14 days of the date of service. If the material is not provided to the applicant in time for them to consider its contents, an adjournment may be necessary. Adjournments can have significant costs implications.

Case management

Children's matters in both courts are subject to div 12A of the Family Law Act. This division sets out the following principles to be applied:

- The court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.
- The court is to actively direct, control and manage the conduct of the proceedings.
- The proceedings are to be conducted in a way that will safeguard the child concerned against family violence, child abuse and child neglect, and the parties against family violence.
- The proceedings are to be conducted in a way that will promote cooperative and child-focused parenting by the parties.
- The proceedings are to be conducted without undue delay and with as little formality and legal technicality and form, as possible.

The family law courts attempt to limit the number of appearances the parties are required to make at court, and the process generally involves filing, interim hearings (if necessary), directions hearings and a trial.

The Federal Circuit Court has a docket system, which means that from the first time the matter is listed in court, it is listed before the judge who has the management of the matter up to and including its conclusion at final hearing.

The Family Court of Australia, due to the nature of some of the more complex matters it must deal with and the fewer judicial officers available to determine matters, can have longer waiting lists for final hearings. The Family Court also uses a Child Responsive Model. This model involves court events being managed by registrars initially and attendance upon a family consultant. If, after those events, parties remain unable to reach a final agreement, the matter is likely to be allocated to the docket of a particular judge and managed according to that judge's case management requirements. For some matters, this will mean an appearance before the judge to determine the outstanding issues and the making of directions about what documents (including further affidavits) parties need to supply before the continuation and final stage of the trial. Parties are expected to comply with those directions and cost consequences may flow from any failure to comply.

For other matters, the registrars may maintain more direct involvement until the matter is finally ready to be listed for final hearing, and then trial dates will be allocated. Family consultants may be present at each or any court event, but cross-examination of them prior to a final hearing is not common.

Final hearings

Essentially, final hearings are conducted in the usual way. Evidence is by way of affidavit of the parties and their witnesses. The applicant's case is heard first and each witness is made available for cross-examination. The respondent's case follows, and again each witness is made available for cross-examination. If there is an independent children's lawyer, their witnesses, including expert witnesses, are called last and are also made available for cross-examination.

Section 69ZT of the Family Law Act states that rules of evidence are not to apply unless the court is satisfied that the circumstances are exceptional. Evidence of children is not inadmissible solely because of the law against hearsay, and the court can give such weight (if any) to that evidence as it sees fit (s 69ZV Family Law Act).

Section 69ZX(1)–(2) of the Family Law Act gives the court wide powers and duties in relation to evidence, so the court can make orders and give directions about:

- the matters in relation to which the parties are to present evidence, who is to give that evidence and how it is to be given
- the matters in relation to which an expert is to provide evidence, how many experts will be required and how that evidence is to be provided
- the answering of questions or production of further evidence from parties, witnesses and experts
- the use and length of written submissions
- the timing and length of oral submissions
- the manner in which evidence is to be given including in relation to oral and affidavit evidence
- evidence of a particular kind that may or may not be presented by a party
- limiting or refusing cross-examination
- limiting the number of witnesses.

Once all of the relevant evidence is before the court, including any documentation under subpoena, each party is then asked to make submissions to the court. The judge may reserve their decision or provide an extempore judgment immediately.

Magellan matters

The Family Court has a list of matters referred to as Magellan matters that the court case-manages separately. These matters involve allegations of sexual abuse or significant physical abuse of a child. The matters are referred initially to the Magellan Registrar for consideration and initial directions. Usually, a family consultant is allocated to a matter and an independent children's lawyer is appointed. The matter is then listed as quickly as possible before the Magellan Judge for further consideration and directions.

According to the Family Court of Australia website, Magellan is based on the following principles:

- There is an inter-organisational approach to cases involving allegations of serious physical and sexual abuse.
- There is a focus on the children in the dispute.
- The cases are judge-led and managed from the start, with a tightly managed and time-limited approach.
- The court orders expert investigations and assessments from the respective state or territory child protection agency or the court family consultant.
- There is a court-ordered independent children's lawyer for every child, funded by Legal Aid.

Generally, the aim is to complete Magellan cases within six months from the case being listed into the Magellan program.

Appeals

An appeal against a final or interim order of a judge is made to the Full Court of the Family Court by completing a Notice of Appeal pursuant to r 22.02 of the Family Law Rules and filing it in the registry of the Family Court within 28 days of the decision. Appeals are dealt with under pt X of the Family Law Act. A filing fee may be payable depending on the financial circumstances of the appellant. The rules in relation to appeals are set out in pts 22.3 and 22.4 of the Family Law Rules and must be strictly adhered to. A single judge of the Family Court in practice hears an appeal from a decision of a judge in the Federal Circuit Court. Appeals to the High Court of Australia lie only by special leave of that court (s 95 Family Law Act).

The role of the judge is to determine issues of fact and, having done so, to apply the law to those facts and make the appropriate order. In determining the facts of the case, the judge must exercise their discretion on the merits of the case and make an appropriate finding. It may therefore be quite difficult to successfully maintain that the trial judge has made a manifest error on the facts of the case. An appellant may be able to do this if it can be established to the satisfaction of the appeal court that the trial judge decided some issues before all of the evidence was received or misconstrued the evidence.

It may be difficult for an appellant to show that there has been a miscarriage of justice. A miscarriage of justice will only be proved if it can be established that the conduct of the trial was interfered with (e.g. by tampering with the opposition witness, destruction of evidence, duress or fraud). Generally, the trial will not miscarry simply because available evidence was not produced at the trial.

A review of a registrar's interim order must be made within either seven days or one month, depending on the nature of the order (r 18.08 Family Law Rules). The review proceeds as a hearing de novo (a new hearing).

Appeals from state court decisions are made by filing in the Family Court a Form 20 Notice of Appeal within 28 days of the date of the decision and complying with the provisions of pt 22.5 of the Family Law Rules (state magistrate's decision). A single judge of the Family Court hears these appeals.

Legal Notices

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