

W6 – Children (Part 2)

Parenting Orders – Guiding Principles

Guiding Principles When Making Orders

Meaning of parenting order and related terms – what does a parenting order deal with?

- Section 64B of the FLA.
 - The allocation of parental responsibility.
 - Whom the child is to live with.
 - Not 'custody'.
 - Whom the child is to spend time and communicate with.
 - Maintenance of a child.
 - The process to be used for resolving disputes about the terms or operation of the order.
 - Any aspect of the care, welfare or development of the child.
 - Does not cover child support though, that is dealt with by a different jurisdiction.
 - Parental responsibility dwindles as the child gets older (JWB and SMB; Gillick).

Part 7 of the FLA confirms that the Court must consider the welfare and best interests of the child.

- Welfare.
 - The word welfare has a wide meaning and may cover the comfort, health, moral, intellectual, economic and physical wellbeing of a child.
- Best interests.
 - Section 60CA of the FLA – the child's best interests are the paramount consideration in making a parenting order.
 - The term 'best interests' to be decided in light of the particular facts and circumstances of a matter. There must be a clear long-term benefit to the child.
 - Interests referred to in Part VII in relation to a child includes matters related to the care, welfare or development of the child (section 4 of the FLA).
 - Contemporary social standards, not totally subjective but objective – existing social standards (Marriage of Horman).
 - Child's happiness has been taken into account (Marriage of K).
 - Must be based on own facts of the case, discretion applies. There must be a clear benefit to the child on a long term basis.

Legislative Pathway (However, No Full Court Authority Yet)

Preliminary Step – Parenting Orders as the Court Sees Proper (Section 65D(1) of the FLA)

Section 65D(1) of the FLA states that a Court may make a parenting order as it thinks proper.

Step #1 – Best Interests of the Child Assessment (Section 60CC of the FLA)

Section 60B of the FLA provides that the objects of Pt VII of the Act are to ensure that the best interests of the child are met, including by ensuring their safety and to give effect to the Convention of the Rights of the Child.

Best interests of a child are the paramount consideration (section 60CA of the FLA) to be considered by examination of the considerations set out in section 60CC of the FLA.

Section 60CC of the FLA – How a Court Determines What is in a Child’s Best Interests

- (1) The Court must –
 - (a) Consider the **matters** set out in **subsection (2)**; and
 - (b) If the child is **Aboriginal or Torres Strait Islander**, also consider the matters set out in **subsection (3)**.
- (2) The Court must consider the following matters –
 - (a) What arrangements would promote the **safety** (including the safety from being subjected to, or exposed to, family violence, abuse, neglect or other harm) of:
 - (i) The child; and
 - (ii) Each person who has care of the child (whether a person has parental responsibility); and

When considering subsection (2)(a), the Court must include consideration of –

- Any history of family violence, abuse or neglect involving the child or a person caring for the child (whether or not the person had parental responsibility for the child) (section 60CC(2A)(a) FLA); and
- Any family violence order that applies or has applied to the child or a member of the child’s family (section 60CC(2A)(b) FLA).
- If one parent is Indigenous and the other is not, the Court will make an order that still encourages the child to explore that culture as per above sections.

Court to Consider Risk of Family Violence (Section 60CG of the FLA)

- In considering what order to make, the Court must, to the extent that it is possible to do so consistently with the child’s best interests being the paramount consideration, ensure that the order is consistent with any family violence order (section 60CG(1)(a) FLA) and does not expose a person to an unacceptable risk of family violence (section 60CG(1)(b) FLA).
- For the purposes of section 60CG(1)(b), the Court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

Citation	Melounis & Melounis (No 4)
Held	<p>Altobelli J provided helpful guidance in relation to the meaning of the simplified best interests consideration ‘to promote the safety of a child and their carer’ pursuant to section 60CC(2)(a) of the Act in the context of high conflict parenting.</p> <ul style="list-style-type: none">- No definition for the word safety.- Thus, looked at the definitions in the Oxford English Dictionary of:<ul style="list-style-type: none">• Promote – to advance the interests of, move to a stronger or more prominent position and to put forth, move forward.• Safety and safe – to be free from hurt or damage; unharmed and free from danger; secure. <p>The amendments require an even higher standard of protection for children and those who care for them.</p> <p>Given the children’s exposure to high levels of parental conflict (including ongoing exposure), Altobelli J considered parental conflict to be a form of other harm under section 60CC(2)(a) of the Act finding that a parenting order that exposes the children to other harm does not promote the safety of the children.</p> <p>Emphasis on the Court’s need to proactively address high-conflict situations to promote</p>

W9 – Property and Financial Settlement (Part 2)

Property

Bringing an Application

Jurisdictional requirement – either party to the marriage is an Australian citizen, is ordinarily resident in Australia or is present in Australia (section 39(4) FLA).

Matrimonial cause – proceedings arising out of the marital relationship – between the parties to a marriage with respect to the property of the parties to the marriage or either of them (Marriage of Kowalski). There must be a matrimonial cause.

Time limits –

- Anytime prior to divorce.
- Within 1 year of the date of divorce.
- 12 months from when the divorce becomes final.
- If no divorce (but separated), then no clock is ticking.
- Section 44 FLA Out of Time Applications – must demonstrate hardship if they were not granted leave (ie. financial hardship).
 - Seek leave to apply for property settlement out of time.
- How long do de facto couples have? Two years from date of separation.

What is Property?

Section 4(1) FLA – property, in relation to the parties to a marriage (to a de facto relationship) or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion. So, it encompasses all property.

Case law has defined property to include (Marriage of Duff):

- Shares.
- Choses in action (eg. not tangible property – a personal right to possess or recover a debt).
 - A debt is owed to client – that is chosen in action, this forms property pool.
- Trust assets.
- Option granted by a Will to acquire a home.
 - Not property if you don't have it yet, but the option or right is still property.
- Funds gained from a personal injuries action.
- Interests from a partnership.
- Redundancy/long service leave entitlements.
- An expectation of future income.
- Superannuation.

Must There be Property Before Proceedings Can be Instituted? Generally, Yes.

- Requirement for some property, but maybe a very real possibility of property coming into existence (Marriage of Law-Smith and Senior).
- It is possible to make a claim in relation to property acquired after separation (Farmer and Bramley – husband won tattsлото after separation, which was enough for wife to commence proceedings).