

# Parenting Orders in the Family Court and the Federal Magistrates Court

*This information is based on the law as at July 2010. It is written for the use and benefit of women who contact the Women's Legal Centre (ACT) and is to be read in conjunction with the specific advice given to those women when they contact the Centre.*

## **What is a parenting order?**

A parenting order is an order made by the Court which states who your child is to live with and who else they are to spend time with.

- Who your child lives with used to be known as *residence* (and prior to that *custody*).
- Who your child spends time with or communicates with used to be known as *contact* (and prior to that *access*).

There is now a presumption of equal shared parenting responsibility. This means that you and the other parent have an equal role in making decisions about the big, long term issues in your child's life, for example, their health, education and religion.

It is important to note that there is no presumption that your children will live "week about" with each parent: the Court must consider what is in your child's best interests.

Once an order is made both parties are legally required to abide by its terms i.e. it becomes a legally enforceable document.

## **Do I have to have an order?**

You do not have to have a Court order, however, most people find them useful when it comes to organising their lives after separation.

It is generally accepted that children need to know when they are going to see the significant adults in their lives. If that routine is then formalised by way of an order, then the child will know exactly when he/she is to see the parent or other person.

Most women also like having the 'protection' of a Court order: a document that acknowledges them as being the parent with whom their child lives and something that they can rely upon in the future should 'things turn nasty'.

As an alternative to a parenting order, you may prefer to make a parenting plan (see the Centre's tipsheet *How do I get a Parenting Order by Consent ?*) For orders made after 1 July 2006, a parenting plan made after the order may effectively change the order. In some exceptional circumstances a subsequent order will be required to vary the order.

### **How do I get a parenting order?**

- If you can agree with the other parent or person involved (eg grandparent, step-parent) you can have your written agreement approved as a 'consent order' by the Court, or
- If you cannot agree, you may need to apply for the Court to make an order.

See the Centre's tip sheets: *How do I get a Parenting Order by Consent?* and *How do I apply to the Federal Magistrates Court for a Parenting Order?*

### **Who can apply for an order?**

You can apply if you:

- are separated
- are divorced
- were never married to your child's Father
- never lived with your child's Father
- have been in a same sex relationship and your child was born as a result of IVF or some other type of artificial insemination or donor program
- are the child's grandparent
- are anyone else who is not even a relative of the child, but is or has been concerned with their care, welfare and development

Most applicants (the person bringing the application) or respondents (the person responding to the application) in Family Court or Federal Magistrates Court proceedings, however, will be the child's parents.

### **When can I file an application?**

Most applications are filed shortly after separation. There is now compulsory Family Dispute Resolution (FDR) (mediation) for all new parenting applications to the Family Law Courts. See the Centre's tip sheet *Family Dispute Resolution*.

### **What does a parenting order look like?**

A 'typical' order in relation to a child of school age could read as follows:

- 1) That the Mother and Father shall have equal shared parental responsibility for the child of the relationship SARAH JANE JONES (DOB 1.3.1998).
- 2) That the child shall live with her Mother.
- 3) That each of the parties shall take all reasonable steps to ensure that the child spends time with her Father as follows:
  - a) each alternate weekend from 5pm Friday to 9am Monday;
  - b) each alternate Wednesday from after school until the start of school Thursday;
  - c) half of all ACT school holiday periods, commencing with the second half of the 2010 ACT school holiday periods and each alternate year thereafter, and for the first half of the 2011 ACT school holiday periods and each alternate year thereafter;

- d) each Tuesday at 7pm, by telephone, with the Father to telephone the child;
- e) each Fathers' Day from 9am to 5pm with the child to spend each Mothers' Day with her Mother; and
- f) for two hours on her and her Father's birthday, should those birthdays fall on days when she would not otherwise be with him, with the child to also spend two hours with her Mother on each of their birthdays, should they fall on days when the child is with her Father

or such other time as the parties may agree.

#### **What if I have a young child?**

If your child is a young child then the amount of time they spend with the other party is usually something less than the orders in the above example. If your child is very young then it will usually not be appropriate for them to stay overnight with the other party. A lot will depend upon how much time the other person has had with your child to-date and their existing relationship with your child.

#### **How detailed should the orders be?**

In some cases, it is a good idea for the orders to be very specific, and in other cases it is better if they can be as flexible as possible. This will depend upon how much communication, trust and good-will you have with the other parent or person.

Sometimes you need to spell out who will be responsible for your child's transport to and from seeing the other person. Usually the person who your child is visiting is the one responsible for the transport there, and the person who your child is returning to is responsible for the transport back again.

#### **What if there is a history of domestic violence?**

In many cases involving parenting orders in the Family Court or Federal Magistrates Court there are also Domestic Violence Orders in the ACT Magistrates Court or a NSW Local Court. You must be very careful to let each of the Courts know of any orders that have been made in the other Court(s) so that there is no conflict between the two lots of orders.

You can mention a Family Court or Federal Magistrates Court order in a Domestic Violence Order, for example:

That the respondent shall not come within 100m of the applicant *except for the purposes of spending time with the children pursuant to an order of the Family Court or Federal Magistrates Court.*

Sometimes when there has been a history of domestic violence it is better if you do not meet the other person involved when your child is picked up or dropped off. Instead you can drop off and pick up at a changeover centre (such as Marymead), use a changeover service, or drop off and pick up at a public place, for example, McDonalds, or if there is a serious question of safety, near a police station.

### **Can I ask for a supervisor?**

It may be appropriate for someone else to be present when the other parent spends time with your child if, for example:

- your child is very young
- your child has not seen that person for a long time
- your child has been or is at risk of being exposed to domestic violence or abuse
- there are concerns about the other parent's capacity to care for your child

Sometimes the visits should be supervised for only a short period of time, until your child feels comfortable with the person. Sometimes if your child has been abused someone else should be present on a long-term or even indefinite basis.

If there is a high level of conflict with your ex-partner and you have an existing contact order, you can apply to enter the Marymead Contact Program ([www.marymead.org.au](http://www.marymead.org.au)).

If your relationship with the other parent or person is still a good one, and there is no history of domestic violence, then you could be the supervisor, if your child lives with you. Otherwise, you can use a relative, a mutual friend or a contact centre.

### **What does the Court consider when making Parenting Orders ?**

The Court is required as a first step to consider the presumption of equal shared parental responsibility. The presumption will not apply if the Court believes that there has been or is a risk of family violence or child abuse, or if there is other evidence that indicates that it should not apply.

If equal shared parental responsibility applies, the Court must consider whether or not an *equal* time parenting arrangement would be *reasonably practicable* and in the *best interests* of your child.

In cases where this will not be appropriate, the Court will then assess whether or not it is reasonably practicable, and in your child's best interests, to have *substantial* and *significant* time with the other parent. Substantial and significant time includes week days (not just weekends) to enable both you and the other parent to be involved in your child's daily routine and special events.

In working out what is *reasonably practicable* the Court will consider things like:

- how far apart you live from the other parent
- your capacity to communicate with each other
- your capacity to resolve difficulties with each other
- the impact that such an arrangement would have upon your child

It might therefore not be reasonably practicable for the other parent or person to see your child more than on alternate weekends if you are incapable of communicating with each other in a reasonable and polite manner.

### **What if the other person does not comply with the order?**

If the other parent or person does not do what the order says then they are “in contravention” of it. If this happens on a regular basis then you should bring a Court application for contravention against the other parent or person. The Court may then ‘punish’ that person. The person will, however, have a defence to your application if they can establish to the Court’s satisfaction a ‘reasonable excuse’ for contravening the orders. This may be, for instance, a claim that a child was not presented for contact with the other parent because they had been observed to be under the influence of drink or drugs the last time they were supposed to be caring for the child.

You will have to go through FDR and obtain a certificate before you make a contravention application *unless* the contravention relates to an order that has been made in the previous 12 months and the Court is satisfied that there has been a serious disregard of the obligations imposed by the order.

### **Can I change the orders ‘down the track’?**

You may find that orders that have been made, either by consent or by a Judge or Magistrate, need to be changed at some stage in the future.

If there has been a significant change of circumstances in relation to your child, such as re-partnering, re-marriage, recovery from mental illness or drug addiction, or much improved financial circumstances you can bring a further application in the Court at some stage in the future to vary the existing orders. You can also agree to vary the orders and do consent orders again.

### **Is there anything else I should know about?**

It is very important that when you separate you make arrangements for your children that you believe are in your child’s best interests, rather than agree to something for the sake of simply ‘keeping the peace’ because the other person has asked for it.

#### **About the Women’s Legal Centre**

The Women’s Legal Centre (ACT & Region) Inc. is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women’s access to justice. The Centre offers free, confidential telephone advice Monday to Friday 9.30am to 12.00 noon, and face to face appointments, when appropriate.

The numbers for legal advice (weekdays 9.30am to 12 noon) are:

Local	6257 4499
Outside Canberra	1800 634 669

The Women’s Legal Centre is funded by the Indigenous Justice and Legal Assistance Division, Commonwealth Attorney-General’s Department.