

Significant changes to the Family Law Act effective from May 2024

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There are a number of amendments that will alter the Family Law Act (the Act) and change the way the Federal Circuit and Family Court of Australia approach parenting matters. In this blog, we explore four primary changes to the Act and how they may impact your family law parenting matter:

1. Removing the presumption of 'equal shared parental responsibility';
2. A new definition for 'best interests of the child';
3. Grounds for making changes to final parenting orders; and
4. Role of the Independent Children's Lawyer.

The Family Law Amendment Act passed Parliament on 19 October 2023 and will take effect in relation to all family law matters after 6 May 2024.

Will my current parenting orders be changed?

The changes to the Act do not apply 'retrospectively'. This means the new law is only applicable to matters that are decided by the Court after 6 May 2024, not before.

As such, the legislative changes do not automatically 'open up' parenting matters that have already been finalised.

Four key changes to the Family Law Act from May 2024

The amendments to the Family Law Act aim to make the family law system safer and simpler for separating families to navigate and ensure the best interests of children are placed at its centre.

Many changes are being made to the Act, including changes to the language used and the types of legislative power given to Judicial Registrars and Judges. There are also major substantive changes to how the Court will deal with parenting matters.

1. Removing the presumption of ‘equal shared parental responsibility’ and reference to ‘substantial and significant time’

As of 6 May 2024, there will no longer be a legislative ‘presumption’ that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility in relation to the long-term decision-making for the children.

Instead, the Court may now be more open to more tailored arrangements for parental responsibility. For example, it may become more common for a parent to have ‘sole parental responsibility’ for a specific issue and shared parental responsibility for the remaining issues.

There will also no longer be any reference to ‘substantial and significant time’ under the legislation.

Ultimately, it will be some time before we see how the Court will apply these new laws to specific circumstances and see what the practical effect of them will be.

Parents will, as always, still be encouraged to consult with each other about major long-term decisions in relation to their children and when doing so, having regard to the children’s best interests as the paramount consideration.

1. A new definition for what is in ‘the best interests of the child’

The most important consideration in relation to determining the best interests of the child will remain the same as it was previously – that arrangements for children must be made in their best interest and not the interests of the parents.

From 6 May 2024, the Family Law Act will no longer require the Court to consider ‘primary’ and ‘additional’ considerations when determining what is in a child’s best interest. Instead, there will be six ‘general considerations’ and two ‘further considerations’ (applicable only if a child is Aboriginal or Torres Strait Islander).

The new structure is non-hierarchal and focuses on a core list of considerations to best promote the child’s welfare and development. The Court is not required to give more weight to any one

factor over the others, although the Court still has the discretion to place whatever weight they deem appropriate to a certain consideration.

Six general considerations when determining best interests of the child

The six general considerations when determining the best interests of the child are:

1. The need to promote the safety of the child and each person who has care of the child, whether or not this person has parental responsibility for the child (including safety from family violence, abuse, neglect or other harm).
2. Any views expressed by the child.
3. The developmental, psychological, emotional and cultural needs of the child.
4. The capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs.
5. The benefit to the child of being able to have a relationship with the child's parents and other people who are significant to the child, where it is safe to do so.
6. Anything else that is relevant to the particular circumstances of the child.

When determining what is best for the child/children, the Court will give greater weight to the need to protect a child from physical or psychological harm or from being subjected to, or exposed to, abuse, neglect or family violence over the benefit to a child of having a meaningful relationship with both parents. This has always been the case, and this approach will continue under the new legislation.

Further considerations specific to Aboriginal or Torres Strait Islander children

The further considerations under the Family Law Act specific to Aboriginal or Torres Strait Islander children are:

- The child's right to enjoy their Aboriginal or Torres Strait Islander culture by having the opportunity to connect with, and maintain their connection with, members of their family and with their community, culture, country and language.
- The likely impact of any proposed parenting order on the child's right to enjoy their Aboriginal or Torres Strait Islander culture.

The objects of this legislation are:

- to ensure that the best interests of the child are met, including ensuring their safety; and
- to give effect to the Convention on the Rights of the Child adopted in New York on 20 November 1989.

It is important to note that to the extent that the *Family Law Act* departs from the Convention on the Rights of the Child, the *Family Law Act* will prevail.

1. Making changes to final parenting orders

From 6 May 2024, the Court may only entertain a new application after final parenting orders are made about children if:

•there has been a "significant change in circumstances" AND

•it is in the child's best interests for the Final Order to be reconsidered OR

•there is agreement from all parties to the final order, even if there has not been a significant change of circumstances or it is not in the child's best interests.

It is generally the case that continued litigation over a child is not in their best interests. This principle was first established as the rule in Rice v Asplund, and following 6 May 2024 has been codified under the Act.

The changes to the Act provide that the Court may have regard to the following factors when considering whether to entertain a new application after final parenting orders are made about children:

•The reasons for the Final Order and the material on which it was based;

•Whether there is any new material available that was not available to the Court that made the Final Order;

•The likelihood that if the Final Order is reconsidered, the Court will make a new parenting order that affects the operation of the Final Order in a significant way; and

•Any potential benefit or detriment to the child that might result from reconsidering the Final Order.

1. Independent Children's Lawyers

An Independent Children's Lawyer (ICL) is an independent, impartial party to family law proceedings.

As children are not allowed to attend court, sometimes an ICL will be appointed to represent the child's best interest in a family law matter. A Court will appoint an ICL when it needs to hear an independent assessment about the child/ren's best interests.

If an ICL is appointed in a matter from 6 May 2024, the ICL will have an obligation under the legislation to meet with and speak with the children that the proceedings relate to.

While under the old legislation, ICLs could speak with the children if they considered it appropriate to do so, it will now be a requirement unless:

•the child is under the age of 5 years (unless deemed appropriate);

•the child does not want to meet with the ICL or express their views; or

•there are ‘exceptional circumstances’ (for example, such a meeting would expose the child to psychological harm that cannot be safely managed).

Ultimately, how the Courts will adopt these changes and, in turn, what practical effect these changes will have on families is still yet to be seen. There will continue to be an element of uncertainty until such time as matters are decided by the Court in line with the new legislation.

Get help from a family lawyer

It’s not unusual for parents to have different views about what is in their child’s best interests, and the ambiguity that will accompany these legislative changes is likely to cause further uncertainty.

If you’re working through parenting arrangements after separation and you need assistance to ensure the best interests of the children are being protected, our family lawyers have significant expertise and experience in all aspects of parenting disputes.

Contacting Smith Family Law

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