

**FAMILY LAW
CHILDREN'S ISSUES**

Apart from decisions involving a property settlement, one of the major decisions that will need to be made upon separation will often include who a child/children will live with (known previously as 'residence' or 'custody'), where the child is to live, and how the non-resident parent will spend time with the child/ren (known previously as 'contact' or 'access').

This newsletter outlines some of the problems that may arise with children's living arrangements once orders have come into place, what is taken into consideration where a parent wishes to move interstate or overseas with the child, and how to obtain assistance in the form of spouse maintenance and child support.

Access Problems - Enforcement of Parenting Orders

Where orders relating to the parenting of children are in place, whether entered into by consent, or after a hearing by the Court, positive obligations are created on each party.

Not complying with such Orders can have serious consequences.

What is "Contravention"?

Parties must generally comply with the Orders and encourage contact with the child/children.

A person contravenes an order if they;

1. intentionally fail to comply; or
2. make no reasonable attempt to comply, or
3. intentionally prevent compliance/aid a contravention of the order by a person bound by it.

A person will not contravene an order where they have a "reasonable excuse" for not complying, and the resulting disrupted living arrangement period was not longer than was necessary in the circumstances. Examples include where a party does not understand their obligations, or where they believed the contravention was necessary to protect the health/safety of a person.

Enforcement

Enforcement proceedings may be taken in relation to contravention of parenting orders. The *Family Law Act 1975* divides consequences of breaching parenting orders into 4 categories;

1. *Contravention alleged but not established:* generally application dismissed, but costs can be awarded against complainant and Court may vary the Parenting Order;
2. *Contravention Established, but Reasonable Excuse established:* Once the contravention is proved, the Court can make orders to "compensate" the complainant for the lost time spent with the child/ren and may order costs against the complainant;
3. *Contravention without Reasonable Excuse (less serious):* for a first time breach, the Court can order the person to enter into a bond (with conditions such as attending counselling) and that the contravening party participate in a post-separation parenting program.

4. *Contravention without Reasonable Excuse (more serious):* Where previous contravention has been established at Court, Orders can include;

- Varying the orders - including changing living arrangements from one parent to the other;
- Imposition of community service orders;
- Imposition of a bond or fine;
- Imprisonment.

Relocation - Interstate, Rural or Overseas Moves

Sometimes a parent with whom the child/ren live may wish to relocate interstate, overseas or to a rural area. This may be because;

- the parent is offered a job interstate/overseas;
- the parent wishes to move to their place of origin;
- the parent needs to relocate in order to care for a relative;
- the parent would be financially better off elsewhere.

In *AMS v AIF and AIF v AMS* ([1999] HCA 26), the High Court found that where a party with residence wishes to "relocate", it is not necessary for that parent to show "compelling reasons" for the move. The Court will primarily consider the best interests of the child, balanced with the right of the parties to enjoy their freedom of movement.

Subsequent cases in the Family Court have approved *AMS*, and further outlined the necessary considerations when determining whether a relocation should be favoured;

- The legitimate interests of both parents will be reviewed, and the Court will identify

which proposal is preferable, taking into account the best interests of the child as being paramount;

- The Court will consider the need to ensure continuation of the child's relationship with the other parent.
- Considerations are the benefit to the child/ren of having a meaningful relationship with both parents and protecting the child from abuse including psychological harm.
- The effect on the child/ren of the separation from the other parent or other persons with whom the child has been living
- The extent to which prior responsibilities toward the child have been fulfilled.

A *legitimate interest* means that the move must be "*bona fide*", that is, the move should be founded on sound reasons such as social, emotional or economic reasons, as opposed to an intention to hinder the other parent from spending time with the child/ren.

Child Support

The *Child Support (Assessment) Act 1989* NSW establishes a scheme for child support which is regulated by the Child Support Agency ("CSA") run through the ATO.

Child support can be arranged by:

- private agreement, or
- entering into a child support agreement, which can be lodged with CSA, or
- by application for assessment to CSA.

How is Child Support assessed?

Upon receipt of the application, CSA assesses the taxable income of the liable parent and determines the amount of child support payable depending on the number of children that parent is liable to support. Child support payments can then be made directly to the spouse or collected by CSA.

The general formula is calculated, firstly, by the CSA calculating your *Child Support Income* by adding your relevant taxable income plus any supplementary income. From this amount your *Exempt Income* (calculated by reference to the relevant Centrelink pension rate and the number of dependant children) is deducted to give your *Adjusted Income*. The *Adjusted Income* is then multiplied by a Child Support Percentage, which depends on the number of children to be supported. The applicant's income is also taken into account if their income is over a certain threshold.

The above formula will not apply in all cases. If a departure from normal assessment is required, or if a party is unhappy with the assessment, they can apply to the Child Support Registrar for review, and if this is not satisfactory, to the Family Court.

How do I Apply?

Calculators for the CSA formula and Application forms are available from CSA's website at www.csa.gov.au. Contact CSA on 131 272 for further assistance.

Spouse Maintenance

A party with the majority of the care for a child/ren may find themselves in need of further financial assistance in order to adequately support themselves and the child/ren.

An application for spousal maintenance from the other party can be made at the time of a property settlement, or at any other time. Further, spousal maintenance can be reviewed, and then increased or decreased where either party's financial position has changed.

Criteria for Eligibility

The Court will only make an order for spousal maintenance where the following conditions are met;

1. The applicant spouse has a "need" - interpreted to mean more than the basic necessities or survival income - the applicant needs to show their expenses exceeds their income; and
2. The other party has a "surplus income" - that is, that party's income exceeds their expenses or needs.

The matters which are taken into account in assessing the applicant's "need" include;

- whether they have the care and control of a child of the marriage;
- their age and state of health;
- their physical or mental (in)capacity for "gainful employment";
- the standard of living before and after the separation;
- the duration of the marriage and the effect on earning capacity;

For further information please don't hesitate to contact:

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