

'Best Interests Of The Child' In Family Law



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Cecilia Lee, Solicitor, Women's Legal Services NSW on 9 June 2015. This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This factsheet looks at:

- What are the best interest principles?
- How do the best interest principles influence parenting arrangements?

Primary Considerations - s 60CC(2)

- A. The benefit to the child of having a *meaningful relationship* with both of the child's parents; and
 - B. The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence (paramount consideration)
- Note: a *meaningful relationship* is more about the nature and the quality of the relationship the child has with each parent than the quantity of time spent
 - **S 60CC(2A)** – the court is to give greater weight to protecting the child from harm than having a meaningful relationship with the parents

Essey v Elia [2013] FCCA 1525

Father applied to the FCCA seeking Equal-Share Parental Responsibility (ESPR) and 'spend time' with the child. Mother sought sole parental responsibility and for Father to be restrained from contacting or communicating with the child. Mother provided evidence of a severe level of family violence including sexual assaults, damaging property, causing death or injuries to animals, financial abuse and isolation. The court ordered sole PR to Mother. This case showed how the court applied the primary considerations by making orders to protect the child, which clearly outweighed the benefit the child could have had from her relationship with the father.

Additional Considerations - s 60CC(3)

- A. Any views expressed by the child
 - There is no age benchmark before the court will consider the child's views – it operates on a sliding scale
 - Views of the child are usually evidenced through a Family Consultant, an Independent Children's Lawyer, subpoenaed material or parent's affidavits
 - **Tip:** Your client should seek legal advice about what to put in an affidavit!
- B. The nature of the relationship of the child with each parent and other persons (such as grandparents)
 - The court looks at the quality and the quantity of the time spent together, the nature of parent's care, emotional closeness and how much they know about each other
 - The court will also look at the child's relationship with siblings, grandparents and new partners of parents etc.
- C. The extent each parent has taken and not taken to participate in making major decisions regarding the child, time spent and communication with the child. Also the extent to each parent fulfilling their obligation to maintain the child
 - This focuses on each parent being responsible for maintaining their own relationship with the children and replaces the old "friendly parent" provisions that existed prior to 2012
- D. The likely effect of any changes in the child's circumstances including the effects of separation
 - The court will consider any destabilising effects the changes may bring to the child's life
 - **Tip:** If a parent who seeks to make changes to the current arrangement, they must show how the changes proposed could benefit the child



- **Tip:** attachment theory may be relevant for mothers with babies who need to spend more time with the child to establish a bond for their child's emotional development
- E. The practical difficulty and expense of a child spending time with and communicating with a parent
 - **Tip:** If a parent is seeking to relocate, they should consider practical and cost-effective methods of how the child could maintain their relationship with the other parent
- F. The capacity of each parent and any other persons
 - For example, the strength of their emotional bond with the child, availability of time to care for child's day-to-day needs such as cooking, cleaning and drop off/pick up from schools/pre-schools, the type of housing they are in, intellectual capacity, willingness to attend parenting programs/course
 - **Tip:** If alleging capacity issues due to mental health issues, anger management problems, drug/alcohol abuse or parent's lifestyle, clear and factual evidence is required
- G. The maturity, sex, lifestyle (including tradition) and background of the child and of either of child's parents
 - This can also looking at developmental and behavioural characteristics of a child and cultural traditions or other particular lifestyle considerations
- H. For Aboriginal or Torres Strait Islander children only: the child's right to enjoy his/her culture and the likely impact of parenting orders
 - If Aboriginal or Torres Strait Islander, the court **must** turn its mind to this consideration
 - The court has held that Aboriginal and Torres Strait Islander children are better able to cope with racial discrimination if living within their community, that community actively reinforces identity, self-esteem and if brought up in ignorance of their Aboriginality, they may suffer an identity crisis in adolescence (*In the Marriage of B & R (1995) 19 FamLR 594*)
- I. The attitude to the child and the responsibilities of parenthood, demonstrated by each of the parents
 - In determining whether each parent has the correct and positive attitude to their parenting responsibilities, the court will look at the emotional maturity of the parent especially their capacity to put their children's needs before their own
- J. Any family violence involving the child or a member of the child's family
 - Court must review available evidence to determine if family violence occurred
 - **Tip:** Making a formal report to the police and reporting to other government agencies or health professionals would help the parent who is the victim of FV to provide evidence to the court
- K. Any family violence order that applies to the child or a member of the child's family
 - Note that Family Law orders will override state-made protection orders to the extent of any inconsistency
- L. To make the orders that would least likely to lead to further court proceedings
 - The Courts deem excessive litigation as not in the best interests of the child
- M. Any other fact or circumstance that the court thinks its relevant
 - For example, religion, surrogacy and a parent's criminal record

Orbel & Maldera [2014] FCCA 949

Maternal Grandmother (MG) granted sole PR and orders made for child (8 years old) live with her. Father didn't take part in the proceedings and acquiesced to the order. Mother was not involved in the proceedings and hadn't been in the child's life for a long time. Four years later, Father made an application for the child to live with him - Father was living with a new partner and 3 young children. MG sought for the orders not to be changed. The court made orders that the child live with the Father and spend time with MG. Sole PR was given to Father. In reaching this decision, the court considered:

- **Primary Considerations** – No presumption in favour of parenthood, however non-parents (MG) usually have higher bar in persuading court the child should live with them

- **Additional Considerations:**

- Views of the child (through the family consultant) – no strong preference of where to live



- Nature of the child's relationship with MG and Father – good relationship with both
- Time spent with parties – Father had showed efforts to spend as much time with child as possible
- Effect of changing the orders – change of residence not going to be too disruptive and child resilient
- The capacity of MG and Father – concerns Father may prevent child spending time with MG
- The maturity and background of the child and Father
- Attitude of the Father

Practical tips

- If your client is needing to prepare an affidavit, they should look at the above s 60CC factors relevant to their matter, address each and link back to what they're seeking
- Where there's been family violence, give specific detail in affidavit and look at definition in [s 4AB FLA 1975 \(Cth\)](#)

Further resources

- Family Court website: www.familycourt.gov.au
- Ask LOIS webinars and Factsheets on Family Law. For example:
 - [Aboriginal and Torres Strait Islander Children's Matters](#)
 - [Changing parenting orders and 'significant change in circumstances'](#)
 - [Children resisting contact with a parent and parental alienation](#)
 - [Children's views in family law](#)
 - [Grandparents seeking time with, or care of children](#)
 - [Family violence reforms, a review of trends since the 2012 changes](#)
 - [Parenting arrangements](#)
- Refer your clients for legal advice with:
 - Women's Legal Services NSW: www.wlsnsw.org.au
 - Local Community Legal Centre: www.clcnsw.org.au
 - Legal Aid NSW: www.legalaid.nsw.gov.au