

Children and Family Law

The same law applies to children whether the parents are/were married or were in a de facto relationship. In this legal information fact sheet we have referred to the “other parent” and to the “father”; the same law also applies to gay and lesbian parents.

How do I make arrangements about the children?

Arrangements for the children can be informally agreed between the parents, set out in a written and signed parenting plan or made into court orders. Court orders are often made by consent, reflecting the agreement of the parties. In cases where no agreement can be reached, an application can be made to the court to determine what the parenting orders should be.

How do I get “full custody”?

The term “custody” is no longer used. Under current law, it is a question of who the child “lives with” and how much time they “spend with” and “communicate with” the other parent.

At what age can my children choose who they live with, and/or choose how often they see the other parent?

There is no set age at which a child can choose who they live with, or choose when (or whether) they see the other parent. A child is legally a minor until he/she turns 18.

While a child may express strong views about who they want to live with, those views are just one of a number of factors to be taken into account by the court when deciding who he/she will live with. Any decision concerning a child’s living arrangements, including working out when they see the other parent, must be made in the best interests of the child.

I’ve been told that we share the kids 50:50. Is that right?

No.

The law does not say that children must spend

equal amounts of time with each parent after their parents separate.

The law does say that, where the parents have equal shared parental responsibility (see below), the parents (and the court) must consider whether an arrangement where the child spends equal time with each parent is:

- (a) in that child’s best interests and
- (b) reasonably practicable.

If the answer is “no” to either (a) or (b) then the court must consider whether the child should live with one parent and spend “substantial and significant” time with the other parent. Again, the parents (and the court) have to consider whether the arrangements are in the child’s best interests and reasonably practicable.

What is equal shared parental responsibility (ESPR)?

The legal term “parental responsibility” means all the “duties, powers, responsibilities and authority, which parents have in relation to their children”.

Both parents are presumed to have “equal shared parental responsibility” for their children until they turn 18.

In practice, this means that both parents should consult each other about the long term, important decisions that affect their children. These decisions may include where the children will go to school, the religion (if any) that the children will follow, what sort of medical treatment the children will have and which of their extended family they should continue to see etc.

ESPR is not the same as “equal shared care” where the children spend an equal amount of time with each parent.

What are my rights over the children?

You do not have rights over your children. You and the other parent have responsibility for the children’s care, welfare and development.

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What if I have concerns about children's safety?

The "primary consideration" or first concern of parents (and the court) is the need to protect children from harm or exposure to family violence.

You need to consider this when making a decision about who the children live with, and spend time with.

Can the children's father take the kids away from me?

If there are no court orders, then the children can either live with you or with the father. It is a question of what is in their best interests. It is not just the father's decision. If the father does take the children away from you, and you think that this is not the best for the children, you may be able to apply to court for orders that the children live with you, and for a recovery order to have the children returned to your care.

If you already have court orders, which say that the children live with you, then the father cannot take them away from you. If he does so, you should apply to court immediately for a recovery order.

My children's father says he is taking me to court straight away to get court orders about the children. Can he do this?

No.

Before he applies to court, you will both have to attend family dispute resolution (mediation) to try to reach agreement about living arrangements for the children. You may attend family dispute resolution at a Family Relationship Centre (FRC) or with any other accredited family dispute resolution practitioner (FDRP/mediator).

If there has been family violence in your relationship, it may not be appropriate for you to attend family dispute resolution. You may receive a certificate from the FDRP exempting you from attending.

If you are not able to reach agreement with the help of the FDRP, or you were exempted from attending because of family violence, then the father may be able to make an application to court. An application

to court has to include a certificate from the FDRP, which certifies that you have both attended at family dispute resolution and made a genuine effort to resolve the issues relating to your children or that the matter was not suitable for family dispute resolution.

The court will look at all the evidence from you and the father and decide what living arrangements will be the best for your children, and how much time they will spend with the other parent.

Can I move interstate or overseas with the children?

Moving interstate, overseas or a significant distance from where you live now, is known as "relocation". You must have the consent of the other parent to relocate with the children, or a court order which allows you to relocate with the children.

If you relocate without the permission of the other parent, they may apply to court for an order to bring you back to where you were living before. This can be very disruptive for the children, and may not be good for your case in the long term.

If the other parent does not agree to you relocating, and you have a good case for moving, you may be able to apply to court for an order that the children live with you and which permits you to relocate. You will have to attend family dispute resolution with the other parent first.