

Understanding the best interests of the children in family law matters

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When a Court order is made in relation to children, the most important consideration is the best interests of those children. This is known as the paramount consideration and is enshrined in Section 60CA of the *Family Law Act* ("**the Act**"), which provides that:

"In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

This concept is extracted from the United Nations Convention on the Rights of the Child, which proclaims that:

"In all actions concerning children… the best interests of the child shall be the primary consideration".

This may leave parents who are navigating co-parenting after separation to wonder what "best interests of the child" actually means and how are those best interests determined.

What does "the best interests of the child" mean?

The term "best interests of the child" is not actually defined in the Act. Previous iterations of the Act referred to the term "*welfare*" rather than the current phrase "*best interests*".

The reality is that "best interests" is likely to look different from child to child (and sometimes even between children of the same family). Some might argue that the phrase is deliberately broad, so as not to limit the scope of determining what is in the best

interests for a child.

Best interests can refer to a child's:

- safety;
- welfare;
- happiness;
- health (mental and physical); and

can extend to cultural considerations or even a child's academic performance (although academics is unlikely to be an issue prioritised over all else). The phrase allows for each case to be determined based on the unique circumstances of a particular child and their family.

Rather than defining the phrase "best interests of the child", the notion that a Court must regard the best interests of the child as paramount solidifies that any parenting order should put a child's interests above a parent's (or any other person's) interests. It requires Courts to make decisions on the basis that a child's rights and needs should override those of any other person or body.

How are "the best interests of the child" determined in family law disputes?

Instead of defining the phrase "best interests of the child", the Act seeks to guide decision-makers by setting out six matters that must be considered by a Court when determining what is in a child's best interest. They are:

1. what arrangements would **promote the safety** (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of:

1. the child; and
2. each person who has care of the child (whether or not a person has parental responsibility for the child);

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.

If the child is an Aboriginal or Torres Strait Islander child, there are further matters which the Court must consider.

Those are:

1. the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary:

1. to connect with, and maintain their connection with, members of their family and with their community, culture, country and language; and

2. to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

2. to develop a positive appreciation of that culture; and

3. the likely impact any proposed parenting order under this Part will have on that right.

The above matters are non-hierarchical, which means that they are not ranked in any particular order that deems one matter more important than the other. Consideration of "the best interests of the child" will require a balance of all the above matters.

In one case, a child's views may be given more weight than a parent's capacity to provide for particular needs of the child. In another case, the developmental, psychological, emotional and cultural needs of a child may be considered on-par or more important than the benefit to the child of being able to have a relationship with another significant person.

Although they are non-hierarchical, in practice, significant weight is likely to be given to a child's safety above other matters.

Separated parents must put the best interests of the child first

What is clear from the provisions of the *Family Law Act* and past decisions of Judges made under the Act is that each parent should strive to behave in a way that is consistent with and promotes the best interests of their child. This will mean putting your own wishes and needs aside and prioritising your child's safety, needs, and personal views (so far as it is appropriate, practical and safe to do so, taking into account their age and maturity level).

It is widely recognised that generally, children benefit from being able to maintain meaningful relationships with both of their parents and other special people in their lives, for example, grandparents. Separation can significantly disrupt a child's relationship with their parents given that it usually means that a child is spending less time with one or both of them.

Most parents devote their lives trying to do what they think is best for the children, and endeavouring to set them up for a happy and healthy future. This should not change simply because a child's parents decide to separate.

Get help from a family lawyer

If you're having difficulty with parenting arrangements post-separation, including issues related to, for example:

- arrangements for spending time with children;
- developing a parenting plan;

- where the children should live;
- co-parenting arrangements generally;
- drugs, alcohol or family violence-related issues; or
- any other parenting dispute,

please contact a member of our team who can provide you with free initial advice for your specific circumstances.

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.