

# COVID-19: What courts consider when making orders about children

FACTSHEET

*This factsheet is part of a series from Legal Aid NSW that aims to help answer your questions about COVID-19 and family law.*

**You may be worried or confused about how COVID-19 will affect you and your family. Sometimes a crisis can make legal problems worse or new problems might develop. Legal Aid NSW understands that there will be a lot of questions about family law issues, parenting and staying safe. This series of fact sheets will give you helpful information and contacts to support you and your family to manage all the changes that are happening in our community.**

If you have children when you separate, you will need to make parenting arrangements that cover all the things that will be relevant for parenting children. It can be helpful to know what the court will consider important.

## What does the court think is important?

When making orders about parenting arrangements for children, the court must consider what is in the children's best interests. This requirement is set out in law under the *Family Law Act 1975* (Cth). The Act sets out some of the things the court must look at when deciding what is in children's best interests. The court encourages parents to make their own decisions about their children. If parents cannot make a decision then the court expects that parents will seek assistance from a mediator or counsellor to reach agreement unless it is urgent or there are risks in the family.

If parents reach an agreement about parenting arrangements themselves, or with the help of a family dispute resolution practitioner or a lawyer, they might want to turn this agreement into consent orders. A consent order is an agreement that is approved by a court. The court has to be satisfied that the agreement is in the best interests of the child before it can make the orders. You can read [our factsheet on parenting plans and consent orders](#).

## How does the court decide what is in a child's best interests?

The [Act sets out](#) the primary, or most important, considerations, for the court when it is deciding what is in a child's best interests. The Act also sets out some other considerations.

The most important considerations are:

### Parenting agreements: what's what?

There are 3 types of arrangements that parents can have to decide what happens to their children.

Many separated parents are able to make informal **parenting arrangements** about where children should live and how much time they should spend with the other parent or carers.

Parents can also enter into more formal agreements, called **parenting plans**. Parenting plans are written plans that are agreed, signed and dated by the parents. A parenting plan is not a legally enforceable agreement.

Sometimes, parents who are able to reach agreement about caring arrangements for their children turn this agreement into **consent orders**. A consent order is an agreement that is approved by a court. Consent orders are often prepared with the help of a lawyer or family dispute resolution service. They are then lodged in court. Once consent orders are approved by the court, they are legally enforceable, so if you are preparing your own consent orders, it is important to get legal advice.

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- the need to protect the child from physical or psychological harm, and from being subjected to, or exposed to, abuse, neglect or family violence and
- the benefit to the child of having a meaningful relationship with both of the child's parents.

The need to protect the child from physical or psychological harm, including abuse, neglect or family violence, will outweigh other considerations.

Additional considerations include:

- views expressed by the child, considering the child's maturity and level of understanding
- the kind of relationship the child has with each parent and with other important people, for example grandparents or siblings
- how much each parent has participated in the child's life, including how much they have spent time with and communicated with the child
- whether each parent has met their obligation to maintain the child, for example paying child support
- the effect on the child of any change in arrangements, including whether siblings will be separated from one another
- the practical difficulty and expense of a child spending time with and communicating with a parent
- the maturity, sex, lifestyle and culture and traditions of the child and the child's parents, including, for Aboriginal or Torres Strait Islander children, the right to enjoy their culture
- the capacity of each parent to provide for the needs of the child, including emotional and intellectual needs
- any family violence involving the child or a member of the child's family and, if a family violence order has been made, and what that order says
- the willingness and ability of each parent to encourage a close and continuing relationship with the other parent.

## What does a parenting order cover?

The parenting orders that the court makes can cover things like:

- who a child will live with
- how much time a child will spend with a parent or other important people
- how parental responsibility will be allocated
- how parents will communicate about a child
- how any disputes about what is set out in the orders will be worked out

## What is parental responsibility?

Parental responsibility means the capacity of parents to make important decisions about their children. Each parent has parental responsibility for their child unless the court makes an order saying otherwise.

When making parenting orders, the court will

- Presume that it is in a child's best interests for the parents to have equal shared parental responsibility, unless a parent or someone who lives with the parent has engaged in child abuse or family violence.

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- Look at other evidence and decide if equal shared parental responsibility is not in a child's best interests.

## What is equal shared parental responsibility?

A court can make an order that the parents of a child have 'equal shared parental responsibility'. Equal shared parental responsibility means that both parents share the responsibility to make major decisions about their child. This means parents need to talk to each other about major long-term issues affecting their child, including the child's education, religion, health, the child's name and any changes to the child's living arrangements that would make it much more difficult for the child to spend time with the other parent. Such decisions should be made jointly.

This doesn't generally include day-to-day decisions about things like what the child wears or eats.

If the court makes an order for both parents to have equal shared parental responsibility, it must also consider whether it is practical and in the child's best interests for the child to spend equal time or substantial and significant time with each parent.

## What is substantial and significant time?

[Substantial and significant time](#) includes children spending weekdays, weekends and holidays with each parent, and each parent having meaningful involvement in the child's daily routine. It includes children spending significant events and special occasions with each parent.

In deciding whether it is reasonably practicable for a child to spend equal time or substantial and significant time with a parent, the court must consider:

- how far apart the parents live
- whether the parents can communicate and cooperate with each other and resolve difficulties, now and in the future, and
- the effect on the child of any proposed arrangements.

## How does COVID-19 affect the process?

The pandemic does not alter the responsibilities of parents to act in the best interests of their children and to comply with court orders or parenting agreements. Because of the pandemic, there have been some practical changes to the way people can access the courts. There may also be some practical difficulties arising from the pandemic in relation to your parenting arrangements.

You should get legal advice if you are thinking about making a court application or you have concerns about how your current arrangements are working. You can also read answers to frequently asked questions that have been published by the [Federal Circuit and Family Court of Australia](#).

## How can I get help?

For free legal help call 1300 888 529 or [call your local Legal Aid NSW office](#).

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If you need an interpreter, call the Translating and Interpreting Service on 131 450 and ask for LawAccess NSW. If you find it hard to hear or speak, call the National Relay Service on 133 677 and ask for LawAccess NSW or visit [www.relayservice.gov.au](http://www.relayservice.gov.au).

This factsheet is intended as a general guide to the law. Do not rely on this information as legal advice. We recommend you talk to a lawyer about your situation. This information is correct at the time of writing, however, it may change.

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