



What does best interests of the child mean in family law?

Date: Monday January 30, 2023

The phrase “best interests of the child” is commonly used in family law proceedings involving children. It conveys a level of ambiguity, and where families are on a path of litigation and asking the Court to decide, the Court then has judicial discretion to determine what is in the best interests for each child.

What is in the best interests of one child may not be for another child. However, if your matter is before the Court, unfortunately, a Judicial Officer, a Judge, Senior Judicial Registrar or Magistrate will make a decision as to what is in your child’s best interests. Noting, this Judicial Officer will never have met your child.

The best interest principle is a cornerstone principle of [parenting proceedings](#) in the Family Court. It is important to consider its meaning and implications for all Court matters, whether by consent or seeking the Court to decide.

What the Family Law Act says about the best interests of the child

The *Family Law Act 1975* (Cth) prescribes that the court must regard the best interests of the child as the ‘paramount’ and most important consideration in making a [parenting order](#).

The best interests of the child include two primary considerations.

Firstly, the benefit to the child of having a meaningful relationship with both parents; and

Secondly, the need to protect the child from physical or psychological harm from being [subjected to, or exposed to, abuse](#),

[neglect or family violence.](#)

If there is any inconsistency between the two primary considerations, the court must give greater weight to the latter, being the need to protect the child from harm

The *Family Law Act* also sets out additional considerations which the court must carefully consider if they are of relevance. For example:

any [views expressed by the child](#);

the nature of the child's relationships with both parents and other significant people in the child's life (for example, siblings and [grandparents](#));

any family violence;

the expense and practicalities associated with matters of [child relocation](#);

whether the child is of Aboriginal or Torres Strait Islander descent; and

the capacity of each child's parents or any other person to provide for the emotional and intellectual needs of the child.

The list of additional considerations is not exhaustive, and the court has the discretion to consider any other fact or circumstance they believe relevant to the best interests of the child.

Managing equal shared parental responsibility against the best interests of the child

At first instance, parents have equal shared [parental responsibility for their child](#). Unless there is an order departing from shared parental responsibility, then the starting position is equal shared parental responsibility. This means both parents must consent to major or long-term decisions for their child.

These decisions include where a [child attends school](#), major health decisions, a change of gender, religion and where a child will reside (which affects the time the child spends with the other parent).

In some matters, it is not appropriate for the parents to have equal shared parental responsibility, and the Court will order one parent to have sole parental responsibility for some or all of the major decisions for the child.

For matters where the Court decides it is in the child's best interest to have sole parental responsibility, this may be where the family has a long history of family violence, and the parties are unable to communicate with one another. One parent does not have the capacity to make major decisions for the child, or the parents are so hostile to one another by forcing a position where they must make decisions together, this will expose the child to further conflict.

It is not a "light" decision of the Court to differ from shared or equal parental responsibility.

There are a number of different orders which cascade to try and provide both parents with the capacity to be involved in decision-making for their child. However, this is balanced against the need for the Court to have parents litigating each decision for their child for the rest of the child's childhood.

For matters concerning deviating from shared parental responsibility, parents are encouraged to seek legal advice from practitioners experienced in family law.

Independent Children's Lawyer

For matters which are litigated before the Court and have an element of risk, a child's best interests may be represented by an [Independent Children's Lawyer](#) ("ICL").

An ICL is a lawyer appointed by the court to represent the best interests of a child in parenting matters during family law proceedings.

The role of the ICL is to assist the Court in gathering information and collating evidence to represent the child's best interests. As the name suggests, an ICL remains independent, objective and focused on promoting the child's best interests during family law proceedings. In order for an ICL to form a view as to what parenting orders are in the best interests of the child and present this opinion to the court, the ICL must gather information to assist their determination.

Meillon and Bright Director [Kristie Smith](#) is an Independent Children's Lawyer who has a varied ICL practice.

Get help from a family lawyer

Navigating parenting proceedings can be a confusing and emotionally exhausting task. Following separation, parents are often unable to agree on what arrangements are best for their child or children. Understanding the best interests of the child is essential in all parenting matters, and it is important to remember that what is in the best interests for one child might not be the same for another child.

Our team of experienced family lawyers can assist you with working through parenting proceedings and the options for the care arrangements in the best interests of your children.

The information contained in this article is of general nature and should not be construed as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.