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CHILDREN & PARENTING DISPUTES

Everything you need to know

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GETTING EQUAL TIME WITH YOUR CHILDREN

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GETTING EQUAL TIME WITH YOUR CHILDREN

A common question I hear from family law clients is:

> **I have recently separated from my partner and I wish to have equal time with the children. How do I get equal care of the children?**

It is not an "automatic right" of the parent to get equal care. rather it is a right of a child to have a meaningful and safe relationship with each parent, if it in fact is in their best interests. This sometimes leads to equal shared care but other times not.

HOW THE COURTS DECIDE

Generally, the Courts will consider following factors when deciding on equal care:

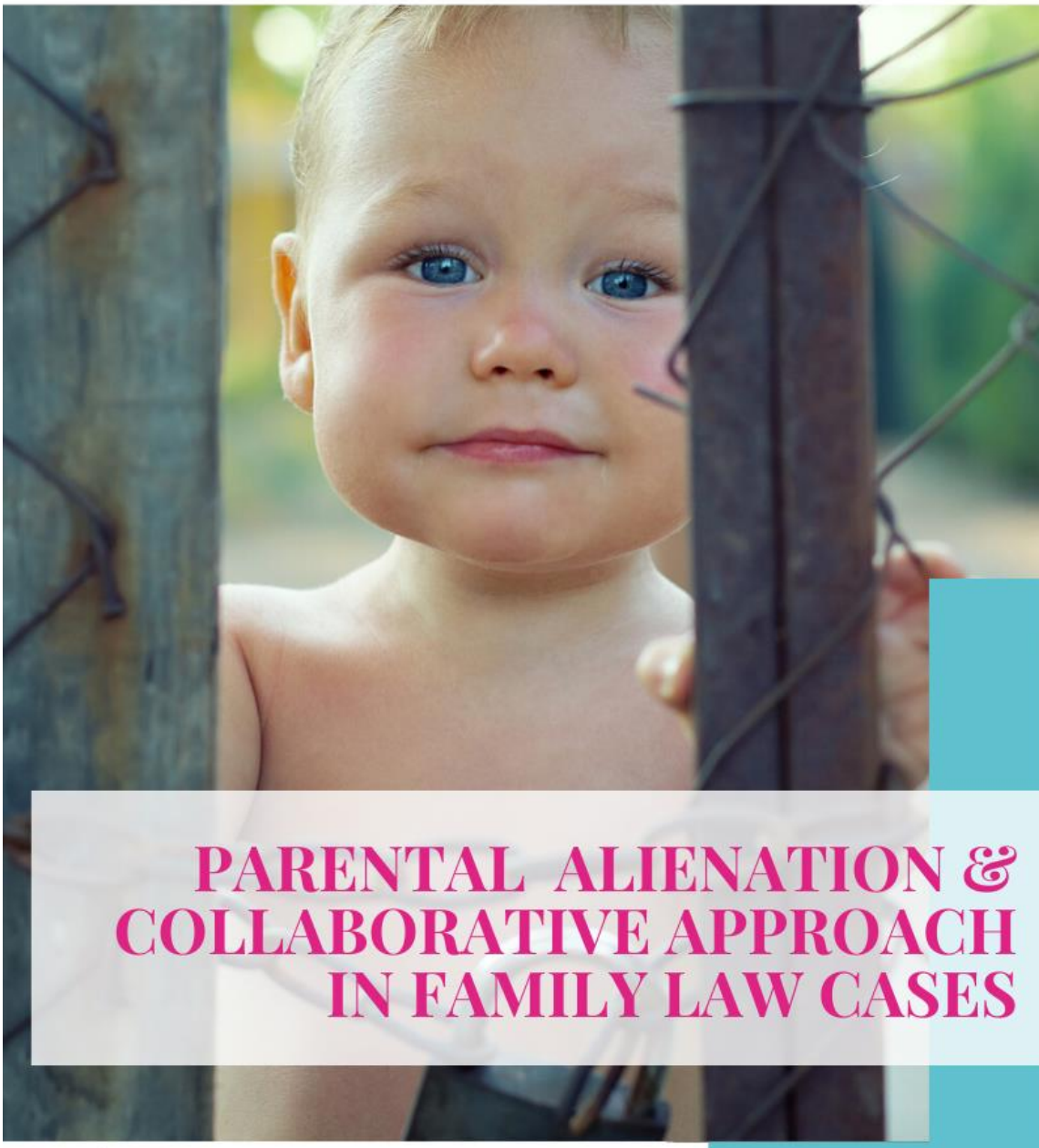
1. ***Is there a history of both parties contributing actively towards the parenting?*** For example, if you are a parent that has traditionally taken the children to sports and extracurricular activities, this may assist your argument. If you were the main breadwinner that works long hours and was not there a lot to partake in the children's regular routine activities, your argument could be complicated.

2. ***Do the parties reside close to each other?*** This is an important consideration because if you have for example separated from your spouse and have moved to the other side of the city it would be difficult for you to argue that you can see the children half the time as their schooling, social network and the like could be severely interrupted given the distance and logistics with transport and organisation. Would you be able to take the children to and from school?

3. ***The children's ages/maturity.*** If the children are very young, the argument for shared care could be problematic. If the children are too old the argument could equally be complicated. Young children require routine and stability whilst older children can have many commitments and need flexibility.

4. ***The children's preference.*** Generally, if they are at a mature age, the children get a say in the parenting arrangements. Note however that the children's say is only one of the components when deciding what is best for the children, not the sole deciding fact.

There is no "one size fits all". Therefore, in order to receive accurate legal advice that is tailored to your specific circumstances- you should always consult a lawyer experienced in conducting family law cases.



PARENTAL ALIENATION & COLLABORATIVE APPROACH IN FAMILY LAW CASES

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PARENTAL ALIENATION SYNDROME & COLLABORATIVE APPROACH IN FAMILY LAW CASES

Parental alienation seems to be increasing, according to a lot of family law solicitors in Australia.

MEANING OF PARENTAL ALIENATION SYNDROME

What is parental alienation syndrome (PAS)?

Essentially, it occurs when one parent influences the child against the other parent, by emotionally manipulating the child. Usually, the child (of any age from a toddler to teen) is initially not aware this is happening, but they start to behave in a hostile manner towards the other parent (or could be avoidance behaviour).

Parental alienation takes many forms from subtle statements to the child to deliberate and obvious “campaigns” against the other parent.

It can also be unintentional.

In difficult separations, the parents are distressed and often can’t cope with their own emotions, let alone monitor how their children will end up reacting to their behaviour. “Innocent” alienation, unfortunately, is still a destructive by-product of the parent’s behaviour.

ORIGINS OF THE TERM PARENTAL ALIENATION SYNDROME

The term Parental Alienation Syndrome (PAS), originated in the United States in the mid-1980s. Although this syndrome is not formally recognised in psychological manuals, the Australian Family Law Courts, therapists and mediators widely recognise it as a syndrome that operates in family disputes.

Many Family Dispute Resolution practitioners believe that the best approach to parental alienation cases come from a collaborative approach. Having the best interests of the child as the primary focus (both short term and long term) is important. But also important is looking at how realistic different types of agreements are for the parents to be able to cope with and comply with the terms of any finalised agreement.

FAMILY THERAPY WHEN NO AGREEMENT LOOKS POSSIBLE

Sometimes, arguments, distress and anger between the parties prevent any reasonable agreements from being reached. Family therapy may help especially if the threat of mediation and ultimately a Court hearing is removed from the equation. For some parties, therapy with no time constraints is a more effective long-term solution to addressing issues and how they and their children can move forward. Agreements can later be made with their lawyers' involvement to help guide them and offer legal security and safety to both parties.

FAMILY DISPUTE RESOLUTION VS FAMILY THERAPY

FDR is usually only a 3 session process, one with each parent and one joint session. Sometimes, Family Dispute Resolution (FDR), does not solve the problem of parental alienation. The parents might agree, say, on how to share the responsibilities and time with the children or how to better communicate. But this might not fix the underlying emotions and the alienation continues. The role of FDR is not to finely examine past and present relationships in the same way as Family Therapy does. FDR is more of a collaborative approach to reach some resolution on the issue, rather than therapeutic.

WHY PARENTAL ALIENATION IS IMPORTANT TO BE ADDRESSED

If parental alienation is not addressed, it could become an inter-generational problem.

For example, a father might walk out on a young family and this might be history repeating for the third generation in a row under marital stress. The hurt and distress of grandparents' actions on their son, might never have been addressed, and then the effects could be felt 50 years later. The behaviour of the now adult grandson might be a symptom of inter-generational Parental Alienation

CHANGE OF CUSTODY WHEN A PARENT ALIENATES THE OTHER PARENT

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CHANGE OF CUSTODY WHEN A PARENT ALIENATES THE OTHER PARENT

To see how the Family Law Courts treat parental alienation, here is a summary of a case recently decided where custody was changed:

(Lankester & Cribb [2018] FamCAFC 60 (6 April 2018)

This was a case of severe alienation of the child against the father where the mother simply could not accept that he should have any relationship with their child whatsoever (despite him being cleared of allegations of sexual interference).

At the time of hearing the child was 8 years old and had lived primarily with the mother since separation. Litigation had been going on for 7 years! The parties had separated when the child was 6 months old. Court proceedings started when the child was only about 12 months old).

Child Protection was advised that the child was distressed at handover to the father for contact visits, and allegations were made that there may have been sexual assault.

The mother questioned the child about the allegations repeatedly and took the child to the hospital to be examined for sexual abuse.

The child exhibited separation anxiety, but this was determined to be normal for her age.

Allegations of sexual assault were made shortly after orders were made for gradually increasing time with the Father.

There was an investigation into the sexual assault allegations, with the determination being made that there was insufficient evidence to support the allegations.

However the mother appeared not to accept this and she was determined not to support the child's relationship with the father. The mother alleged the child showed "extreme distress at even the mention of the father's name, extreme fear of his attendance at kindy, bed wetting after contact with the father, her being inconsolable after each contact visit, screaming nightmares about the father, locking the house doors in fear of the father" [28]

Due to the Mother being unwilling to support the child having any relationship with the Father, the Judge ordered that the child live with the Father.

The mother's contact time ordered was limited to the following:

First 6 months: prohibited from seeing the child at all;

Then 6 months: supervised for 3 hours every second weekend;

Then 6 months: supervised from 9am to 5pm one day every second weekend;

Then 12 months: unsupervised on alternate weekends from 9am to 5pm on Saturday and Sunday;

Then finally: unsupervised on alternate weekends from 9am Saturday until 5pm Sunday.

The father was also granted sole parental responsibility

The mother appealed but was unsuccessful changing custody back to her. The child remains living with the father.

MOVING ABROAD WITH YOUR CHILD AFTER DIVORCE

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MOVING ABROAD WITH CHILD AFTER DIVORCE

WHAT HAPPENS WHEN THE PARENTS ARE SEPARATED AND DON'T AGREE?

The High Court of Australia has recently confirmed that children's wishes although relevant, are not the only deciding factor in parenting cases.

In the recent case of a wealthy family, the Boldemontes – there were 3 children, two sons and a daughter. The parties had separated in 2010, and in 2014, interim parenting orders had been made by consent in the Family Court. The 2014 interim parenting orders allowed for the parents to take the children for international holidays provided that relevant information was given to the non-travelling parent like tickets and itinerary etc.

RELOCATION DISGUISED AS A "HOLIDAY"?

On 14 January 2016, Mr Boldemonte and the parties' two sons travelled to New York for a holiday despite not complying with the 2014 interim parenting orders. Ms Boldemonte reluctantly agreed to the holiday as a result of pressure from Mr Boldemonte. The parties' daughter did not attend the holiday.

On 26 January 2016, Mr Boldemonte decided that he wished to remain living in New York and on 29 January 2016, his solicitors advised the mother that the boys also wished to remain living in New York. After hearing of this Mrs Boldemonte started court proceedings in the U.S. for the return of the boys in accordance with the Hague Abduction Convention.

Mr Boldemonte in defending his case filed further evidence to the effect that Ms Boldemonte was too frail to care for the boys and that they may not elect to live with her if compelled to return to Australia.

CHILDREN'S WISHES DIDN'T DECIDE THE CASE EVEN THOUGH THEY WERE IN THEIR LATE TEENS

Interim parenting orders were made by the Family Court of Australia requiring the boys' return. At that time, the parties' sons were nearly 17 years old and nearly 15 years old. The parties' daughter was nearly 12 years old. It was accepted that the boys had lived primarily with Mr Boldemonte and the parties' daughter primarily with

Ms Boldemonte following the making of the 2014 orders. Further, the parties' eldest son was effectively estranged from Ms Boldemonte.

After appeals were exhausted the matter went to the High Court who dismissed the father's appeal. stating that the views or wishes of children "are but one consideration of a number to be taken into account in the overall assessment of a child's best interests" and that the Court will "take into account not only the views expressed by the child but also "any factors…that the Court thinks are relevant to the weight it should give to the child's views." The factors that the provision gives as relevant are the child's maturity or level of understanding, but plainly the Court may consider other matters to be relevant."

BE CAREFUL BEFORE SIGNING THE KID'S PASSPORTS AND GIVING TO YOUR EX!

The case also highlights the problems with a parent attempting to relocate their children overseas -while deceptively making out to the other parent that they are just going on a holiday with the kids. the parent left in Australia not travelling has to be careful before allowing passports to issue for overseas holidays. Some countries are not a signatory to the Hague Convention which means their government or enforcement agencies will not get involved in enforcing any Australian orders for the return of the children.

WANTING TO RELOCATE WITH CHILDREN?

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WANTING TO RELOCATE WITH CHILDREN? RELOCATION OF CHILDREN CASES

HOW HARD IS IT TO RELOCATE CHILDREN OVERSEAS WHEN THE OTHER PARENT OPPOSES?

When the courts consider cases on relocation of children, there is usually an extraordinary reason behind the application.

However, in the case of Ellis & Murphy [2018] FamCA 468 (22 June 2018) the main reason given by the mother was that she herself felt isolated here and wanted to go back to the country where her family was (taking the children with her permanently). She also complained about what verbal intimidation from the father.

FACTS OF THE CASE:

- Parents were both from the UK and had moved to Australia separately
- They began living together in 2009, separating in 2015
- They had two children, who were 4yrs and 7yrs old by the time of the court trial
- Both parents agreed in principle that the children should live with mother and spend time with father
- The issue was whether the mother could relocate with children to the UK
- The father's family was in the UK.
- The parties were unable to co-parent effectively – they had vastly different parenting styles, and did not trust one another, for example:
    - the father filmed changeovers "just in case" mother made false accusations against him.
    - the mother alleged family violence based on her evidence that the father would raise his voice in arguments, and she felt scared by that (but the Judge found "the parties have not been involved in family violence – just conflict")
    - the mother argued that the children could maintain a strong relationship with their father, even if they were overseas (e.g. Skype, etc) but the Judge disagreed, saying it was 'possible' but not 'probable'
    - the mother had myriad reasons for returning to the UK but mainly that she felt isolated from her family and wanted to avoid conflict with the father (which the court determined was just differing parenting styles and not family violence).

COURT DECISION:

The children were too young for their expressed wishes to be given substantial weight, but the eldest did indicate wanting to stay in Australia.

In the end, the children were ordered to stay living in Australia, live with the Mother, and spend substantial time with the Father. Although the mother got the sole primary responsibility for long-term decisions about the children in addition to custody, she was refused relocation of the children overseas.

SOCIAL MEDIA AND FAMILY LAW: THE IMPACT ON PARENTING PROCEEDINGS

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SOCIAL MEDIA AND FAMILY LAW: THE IMPACT ON PARENTING PROCEEDINGS

One increasingly popular form of evidence in parenting proceedings is that which is obtained via social media. Evidence obtained from sources such as Facebook and Twitter can sometimes provide beneficial (and conversely sometimes very damaging) evidence for parents. Social media and family law is a delicate mix. This type of evidence can often be used for the following reasons:

TO SHOW INTENTION

If one party is intending to relocate with the children without the consent of the other party, it may come to the attention of the non-relocating party through a social media post. Or if one party is intending to breach orders by not returning children to the parent with whom they live, this may also be disclosed on social media. Copies of these posts may be useful to annex to affidavits which will be read by the judge in the case.

It is important to remember that social media needs to be considered in context. For example, if the resident parent has posted that they intend to relocate with the children, be sure that you didn't agree or like that post if you wish to oppose the relocation using social media as evidence of the other party's intention. By the same token, producing a social media post six months old expressing an intention to relocate as evidence in support of an urgent application to restrain relocation, may not assist your application, especially if there is also evidence of an ongoing social media dialogue between the parties since that post.

TO SHOW SUITABILITY OR UNSUITABILITY OF ONE PARENT

If one parent's lifestyle puts into question their suitability to parent, evidence of this may be sourced from social media. Drug consumption or excessive alcohol consumption may be evidenced on social media and put before the court as evidence of suitability.

Denigrating the other party or other people relevant to the child and/or the proceedings on social media, sadly is a common occurrence. If one party uses social media to denigrate the other parent, that evidence is often used against them as evidence of the author's own unsuitability or lack of insight.

FAMILY VIOLENCE

Threats against the other party (or their family) posted on social media may be used both in family law and intervention order proceedings.

INCONSISTENCIES IN SWORN EVIDENCE AND CREDIBILITY

Social media may be used to counteract the other party's evidence. For example, if alcohol consumption is an issue in a particular case and one parent has sworn they haven't consumed alcohol for six months, a Facebook post in which they make comments about being intoxicated and includes a photo of them consuming alcohol from the previous weekend may be used to raise question about the credibility of their evidence in the proceedings.

RELATIONSHIPS

Social media may be used as evidence of relationships between parties to the proceedings and other relevant individuals. If parenting arrangements are made between parents via social media, those communications may also be used as evidence of the historical contact arrangements between parents.

WELFARE OF CHILDREN

Children's social media pages may be relevant when the court is considering the welfare and wishes of the child.

Social media can be a beneficial source of evidence however it can also be damaging for your case. It is important for clients to be advised that they should not in any way discuss their family law proceedings, documents filed in the proceedings or make any comments about the judge, the family report writer, the other party's legal representation or any other people involved in the case on social media. Even if they think their account is 'private' and only their friends and family can access their posts, invariably the evidence will end up in the hands of the other party and possibly in front of the judge.

TRY TO KEEP YOUR SOCIAL MEDIA UNDER CONTROL DURING FAMILY LAW PROCEEDINGS

In general, is it important to be moderate in your social media activity even before court proceedings are commenced. Expressing your anger, frustration or disappointment at the other parent over social media may seem acceptable to you, however in a courtroom, it may be described as disparaging behaviour, or even worse, as family violence. Once it's posted, it's in the social media universe and can be difficult to control.

BREACH OF PARENTING ORDERS – WITHHOLDING KIDS

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BREACH OF PARENTING ORDERS – WITHHOLDING KIDS

So you finally got some court orders about your child's right to spend time with you.

But what happens when the other parent is withholding the children with excuses and parenting orders are breached?

This was looked at in the recent case of Raki & Perez Varela (2018)

BACKGROUND OF RAKI V PEREZ CASE

- Parties began a relationship in 2004/2005
- Child, R, 10yo (almost 11) born in 2007
- Parties separated in 2008
- Parenting proceedings have been going on since 2010
- Final orders were made in March 2013
    - Mother had alleged sexual abuse, but the court did not find enough evidence to support this; Court believed the only risk with child's time with Father was Mother's increasing anxiety
    - Court orders made for the Father to have regular contact
- September 2013- Father claimed Mother had contravened by withholding child
- March 2016, further parenting orders were made by consent largely the same as the March 2013 orders. They included a condition that parents were not to take the child to individual counselling without the agreement of both parties
- September 2016, Father filed another contravention application for the same reason, alleging Mother was withholding child and obstructing time. Father later withdrew the application after mother eventually made the child available.
- June 2017, Mother applied for orders that allowed her to take R overseas and for sole parental responsibility for medical care
- August 2017, Father filed another contravention against mother for 6 contraventions – 3 cases of not facilitating his time with the child, and 3 cases of the child attending counselling without his consent
- Mother said she acted on the advice of child services workers and that she had a duty to protect her child and not to force the child to go if he did not want to
- The three (withholding time) contraventions were proven.
- Mother admitted she took children to a psychologist without Father's consent, but says she was advised to by child services after taking the child to a hospital for anxiety to do so

COURT DECISION

The court found that the Mother believed the referrals to a psychologist was necessary to protect the child, and that her belief was reasonable in circumstances. Her contraventions on this basis were reasonably excused.

But she had to face sentencing on breaching the orders by withholding the child on the other 3 occasions.

The case has been adjourned for sentencing.

PENALTIES FOR BREACHING PARENTING ORDERS

Contravention of parenting orders are quasi-criminal proceedings and the Family Law Courts have the power to impose penalties. Such penalties can include any of the following:

- Compensating a party for time lost with their child as a result of a breach by the other party
- Ordering the other party to enter into a bond for a period of up to 2 years that may require that person to attend family counselling, family dispute resolution or 'be of good behaviour'
- In circumstances of a serious breach, making community service orders or even terms of imprisonment.

CHANGING PARENTING ORDERS – HOW TO CHANGE A COURT ORDER

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CHANGING PARENTING ORDERS – HOW TO CHANGE A COURT ORDER

VARIATION OF PARENTING ORDERS- WHEN CAN YOU CHANGE THEM?

To set aside, cancel or vary any final parenting order, parties must meet the threshold test. This test is set out in the case of Rice v Asplund (1979) FLC 90-725.

This case provides that where final parenting orders have been made, the court must be satisfied that there is significant change in circumstances before it sets aside or considers changing parenting orders.

The reasoning behind this is found in the *'best interests of the child principle'* but also in the public interest – to deter parents constantly going to court to reopen parenting orders on any whim, and to provide for certainty.

The Rice & Asplund test can be applied as a preliminary matter or at the end of a full hearing of a parenting matter.

THE TEST

Though the Court maintains its discretion and each case should be considered individually, the preference is to apply the rule as a preliminary matter. The factors that are sufficient to justify a significant change in circumstance are not closed. They are to be dealt with collectively in context and not separately.

The following factors may be considered:

1. Time elapsed since final orders given;
2. Relocation of a party;
3. New relationship of a party;
4. Variation in the children's wishes (note that younger children's "wishes" may not carry as much weight as older children who have formed some maturity);
5. Change in health of a party or any of the children.
6. Cases that tend to satisfy the test in changing parenting orders

Changed circumstances alone will not be enough for the Court to vary final parenting orders unless it is of a serious nature to justify changing orders, for example:

- Newly proven allegations of ongoing physical abuse or neglect of basic needs;
- A party is seeking to relocate with the child or children;
- The parties have since consented to new parenting arrangements (e.g. entered into a parenting plan, and therefore, the current Orders are no longer reflective of the actual arrangements for the child or children; or
- Either parent or children become disabled or suffer from a severe health disorder.

This list is not exhaustive and only an indication. Tailored specialist family law legal advice is recommended before bringing about an application to vary final parenting orders.

WHAT TO DO IF YOU BELIEVE FINAL PARENTING ORDERS SHOULD BE CHANGED:

At first instance, it would be wise if not mandatory to seek the assistance of alternate dispute resolution services such as with Relationships Australia. If that does not resolve the matter or it is deemed inappropriate for dispute resolution, then the next option is negotiation via lawyers or make the court application and negotiate after it is issued. It is a serious application to make. Tailored specialist family law legal advice is recommended before bringing about an application to change parenting orders.

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ABOUT US

Rigoli Lawyers are your trusted experts in family law. With over 25 years of experience helping Australians through the difficulties of separation and divorce, we know the right solution for your legal problem. Our team are Accredited Family Law Specialists, which means we've devoted extra time to gain knowledge and experience regarding family law matters. If you need us to help in the process, you know you'll get the best outcome with us.

While our experience gives us the confidence of knowing what to expect… we know that this is all new to you, which is why we support and guide you through every step of the way.

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WHAT TO DO NEXT?

If you want to know more, please contact us on (03) 8742 3199 and take advantage of our free half hour legal consults. They can be done in person, via Skype or telephone conference. You will be surprised how much can be accomplished in this time and how easy it will make it for you to decide on what to do next – having a plan is the key to getting the right outcome.

Warmest Regards,
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