



## HOW DOES THE COURT DECIDE INTERIM RESIDENCE?

### Interim Residence

Most people want orders now, not in a couple of year's time as to what is to happen with their children. If the court makes orders now to put something in place until the final hearing, it does so in the "interim".

Residence orders are orders to decide where children are to live i.e. where they are to reside.

### Evidence on interim residence Applications

Evidence on Interim Residence Applications is by sworn statements (affidavits) and is NOT given by witnesses giving evidence in the witness box. The Court is often unable to decide who is telling the truth because no one has been cross-examined. The Court looks at less contentious matters such as:

1. The agreed facts;
2. The care arrangements prior to separation;
3. The current circumstances of the parties and the children;
4. The parties' respective proposals for the future; and
5. Child Protection Issues.

### The Test for deciding Interim Residence Applications

***In the reported case of Cowling and Cowling, the Court set out the test for deciding interim residence Applications:***

1. The Court must regard the best interests of the child as the paramount consideration;
2. The best interests of the child will normally be met by ensuring stability in the life of the child, pending a full hearing of all relevant issues. Accordingly, the Court must focus on promoting stability for the child. (In other words, Courts don't like the place where kids live being chopped and changed.)
3. Where the evidence at the hearing clearly establishes that the child is living in an environment in which he or she is well settled, the child's stability will usually be promoted by the making of an Order which provides for the continuation of that arrangement until the hearing for Final Orders, unless there are strong or overriding indications relevant to the child's welfare to the contrary.

Such indications would include, but are not limited to, convincing proof that the child's welfare would be really endangered by his or her remaining in that environment.



4. The Court is entitled to place such weight upon the importance of retaining the child's current living arrangements as it sees fit in all the circumstances. In determining what weight to place upon that, it is appropriate for the Court to take account of the circumstances of how the current arrangements came about. In particular, the Court may look at:
- (i) Whether the current circumstances have arisen by virtue of some agreement between the parties, whether it is an express or implied agreement.
  - (ii) Whether the current arrangements have been unilaterally imposed by one party upon the other (e.g. where one parent has abducted the child).
  - (iii) The length of time the current arrangements have been in place and whether there has been any undue delay in instituting proceedings or in the proceedings being listed for hearing.
5. Where the evidence does not establish that at the date of the hearing, the child is living in an environment in which he or she is well settled, some limited evaluation of the following matters needs to be undertaken to ensure that the decision of the Court promotes the child's **best interests**:
- (i) The wishes, age and level of maturity of the child;
  - (ii) The current and proposed arrangements for the day to day care of the child;
  - (iii) The period during which the child has lived in the environment;
  - (iv) Whether the child has any siblings and where they reside;
  - (v) The nature of the relationship between the child, each parent, any significant adult and his or her siblings;
  - (vi) The educational needs of the child.





## Relevant matters which the Court must take into account

Section 68F(2) of the Family Law Act sets out the relevant matters which the Court must take into account in determining what is in the child's best interests. These are:

1. Any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the Court thinks are relevant to the weight it should give to the child's wishes;
2. The nature of the relationship of the child with each of the child's parents and with other persons;
3. The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
  - (i) Either of his or her parents; or
  - (ii) Any other child, or other person, with whom he or she has been living.
4. The practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
5. The capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
6. The child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal Peoples or Torres Strait Islanders (and any other characteristics of the child that the Court thinks are relevant));
7. The need to protect the child from physical or psychological harm caused, or that may be caused, by:
  - (i) Being subjected or exposed to abuse, ill treatment, violence or other behavior; or
  - (ii) Being directly or indirectly exposed to abuse, ill treatment, violence or other behavior that is directed towards, or may affect, another person.
8. The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents.
9. Any family violence involving the child or a member of the child's family.
10. Any family violence orders that apply to the child or a member of the child's family.
11. Whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child.
12. Any other fact or circumstance that the Court thinks is relevant.



In determining Applications for Interim Orders, **the Court has a very wide discretion** on what matters are taken into account and what weight is placed on such matters.





## BENNETT CARROLL

Established in April, 1974, Bennett Carroll is well known as one of the largest law firms outside of the Brisbane CBD. Our well-balanced practice has over 30 years' experience in many areas of specialty including Commercial Law, Conveyancing, Family Law, Estates, Planning and Environment Law, Litigation and Personal Injury. We dedicate ourselves to quality work in these diverse areas and make a point of being accessible to our clients.

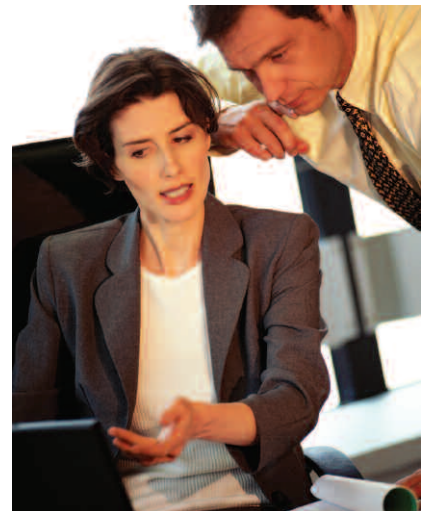
As the preferred solicitors for several National and International companies, we represent well known financiers and developers and hold a reputation for reliability that we intend to keep. Bennett Carroll prides itself on being prompt, accessible, and dealing with you in a language that you can understand; demystifying the law.

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We pride ourselves in being the market leaders in state-of-the-art technology combined with old-fashioned client service.

***The solicitors in our family law section are Warren Tegg, Kate Murphy and Joanne Bennett***



### Warren Tegg

Warren was admitted to practice as a Solicitor of the Supreme Court of Queensland and the High Court of Australia in 1979. He ran his own legal practice specialising in Family Law and Business Advice from 1980 until 2001 before merging with Bennett Carroll. Warren has been helping people with their Family Law problems since the inception of the Family Law Act in 1976.

Warren is Department Head with the Family Law division of Bennett Carroll. He brings to the department a wealth of experience that includes some five years running his own call centre for people with Family Law problems, as well as acting as a sessional mediator with Relationships Australia Queensland from 1989 to 1994. He is also the General Manager of the Master Guidance Company, which is a counselling service owned by Bennett Carroll.

Warren has served on a number of Queensland Law Society committees during his career and is currently a member the Small Practice Management division where he has been called upon to speak at State conferences on legal practice.



### Kate Murphy

Originally from Northern NSW, Kate studied at Queensland University of Technology graduating in 2005 with a Bachelor of Laws and a Bachelor of Business. She has a strong interest in Family Law, which extends to international law relating to marriage and children.

Kate was admitted to the Supreme Court of Queensland in 2006 and the High Court of Australia in 2007. Kate has over 4 years extensive experience in Family Law, as well as engaging in Criminal and Commercial Law. Kate has also had the benefit of being trained with Pauline Tesler, with a strong focus on negotiation.

Kate is a member of the Queensland young lawyers association.

### Joanne Bennett

Joanne graduated from Deakin University before completing her Professional Legal Training at Bond University in 2003 and was admitted in December that year.

Joanne is an experienced family lawyer and can offer professional assistance and guidance in all types of family law matters including those involving children and financial issues, de facto relationships, pre-nuptials and parental orders.

Joanne also has extensive Commercial Law experience in vital areas such as property, company structures, franchise agreements, joint venture agreements and leases.

***Family law is a very complex and emotional area of law; it will involve your whole family. This is why when things go wrong, you need an experienced team of friendly lawyers who are compassionate professionals with real life experience who understand your problems.***



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