FAMILY LAW – SETTLING OUT OF COURT

AND THE

NEW SHARED PARENTING REGIME

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FAMILY LAW – SETTLING OUT OF COURT AND THE NEW SHARED PARENTING REGIME

Dispute Resolution

Comparing the options of Family Law Dispute Resolution and knowing which option is the best for your client.

> *"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good person" – Abraham Lincoln*

Family Law Rules

New Family Law rules took effect from March 2004 and involved a complete redraft of the existing rules.

The main purpose of the rules is expressed to be to ensure that each case is resolved in a just and timely manner and at a cost to the parties and the Court that is reasonable in the circumstances of the case.

Before starting a case, generally each party must comply with the pre-action procedures set out in Schedule 1, including attempting to resolve the dispute using primary dispute resolution methods including negotiation, mediation and arbitration.

The exceptions include urgent applications, cases involving allegations of fraud or family violence or child abuse and matters where there is a genuinely intractable dispute.

Options Available

Lawyers acting in the interests of their clients were generally using and recommending pre-action procedures as a matter of course before the requirements were prescribed by the Family Law Rules 2004 or the Shared Parenting legislation.

Usually the first letter set out the pertinent aspects as known to the solicitor from initial instructions and conveyed the desire of a party to "resolve the matter amicably" and an early offer of settlement.

Quite often such initial offer was unrealistic or deliberately high. However usually; in any event, in property matters further disclosure was required and at the very least the offer set out the parameters of the dispute from one party's perspective and invited a response from the other together with the prospect of further negotiation and at least the possibility of some form of alternative dispute resolution either as a precursor to or in tandem with the bringing of proceedings.

The changes brought by the rules and the new legislation have the effect of formalizing these otherwise informal arrangements, however go further in making the

arrangements mandatory in many cases with cost consequences for the parties and possibly their lawyers.

Types of Pre-action Procedures

There is a great range of ADR (Alternative Dispute Resolution) options outside the court process that may be suitable in the circumstances of a particular case. The options include the following:

- **Informal assistance from helpful third parties** such as family members, co-workers, friends or others who know the parties and want to help them resolve their dispute.

- **Party to party negotiations.** There are of course many instances where parties are able to talk and resolve their issues without consulting lawyers and we are all familiar with the situation where even after involving lawyers the parties are able to meet in an informal venue such as a coffee shop and resolve their dispute. Often in such cases lawyers are only approached to explain the process and what the court is likely to do and this is enough for the parties to go off and resolve their issues. The importance of the role of the lawyers in encouraging and facilitating this cannot be underestimated.

- **Lawyer to Lawyer negotiation.** This can proceed by correspondence or discussion with an emphasis on trying to reach agreement or at least on narrowing the issues which may provide a springboard for further negotiation in an informal forum such as a round table meeting either with or without the parties. Undoubtedly a significant number of cases are resolved in this manner with varying degrees of formality but with the lawyers trying to assist the parties to resolve their dispute.

- **Collaborative lawyering**. In the collaborative law process the parties and their representatives commit themselves to resolving the case without court intervention. The participants agree to give complete, full and open disclosure and to engage in informal discussions and conferences with the purpose of reaching a settlement. Outside experts are engaged on a similar basis. The parties proceed on the understanding that if the matter is terminated as a collaborative law matter, then it will be necessary for new lawyers to be appointed.

- **Settlement meetings** which are still conducted on a reasonably informal basis but with other professionals involved such as a counsellor, accountant or other expert.

- **Mediation** – There is no single definition. A classic definition is that of Folberg and Taylor (1984) "Mediation is a process in which the participants

with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and aim to reach a consensual agreement that will accommodate their needs."

There are many different strands of mediation and an equally wide range of styles. As with settlement conferences, consideration can be given to involving neutral experts in the mediation. For instance in the course of negotiations, the parties and/or their lawyers may propose that experts be engaged to undertake reports or appraisals as part of the solution to a dispute regarding children or accountants engaged to resolve factual issues or undertake valuations in property matters.

Arbitration

Arbitration is a process of private adjudication in which an impartial and independent third party (or parties) makes a binding award on the basis of some objective standards and measures.

The abovementioned description of arbitration and the following descriptions of other common types of ADR, are extracted from a paper by Professor John Wade entitled "Family Arbitration" and presented as part of the 2001 Breakfast Seminar Series convened by Queensland Law Society CLE and Bond University.

On-the-Papers Arbitration

This is a decision making process whereby the arbitrator receives written submissions from the disputants and makes a decision based on those documents without normally seeing or speaking to the disputants or their witnesses.

Early Neutral Evaluation

A process whereby an expert in a particular field is employed by some or all of the disputants to give a non-binding opinion on the likely outcome if the dispute continued to a Court hearing.

Mediation-Arbitration

This involves a combination of processes. The arbitrator is expressly authorized by the parties to act initially or at any chosen time as a mediator

but with authority to switch to a decision-making role if the assisted negotiation is unsuccessful.

These are only intended as some examples of the large variety of options available to the lawyer as a tool in resolving a particular dispute.

Lawyers have a role as Dispute Resolution Managers and it is part of that role to consider ADR and the form of ADR most appropriate for the particular client and their dispute and the role of lawyers in supporting each process.

While experience is probably the most essential element in determining the most suitable ADR option for a particular dispute there are many useful indicators of "appropriate" family intervention processes accessible through the Bond University Dispute Resolution Centre and other channels. I will produce examples of these when delivering this paper.

A more complete analysis of the role of lawyers in mediation and the advantages and disadvantages of mediation can be found in a paper which I did earlier in 2006 located on the Brisbane Mediations website www.brisbanemediations.com.au entitled "The Lawyer and Mediation."

Mediation is not appropriate for all situations and generally intake sessions are undertaken to assess the suitability of clients for mediation.

Mediation is inappropriate or less likely to be successful when:

- The parties are out of control physically, emotionally or psychologically;
- Where clients do not have the willingness or capacity to mediate or their mental competence is in question;
- There are indications of physical or sexual abuse;
- Drug or alcohol addiction is present;
- A power imbalance between the parties is indicated and not amenable to the mediation process;
- Mediation is used by one party to gain information that will or may be used to manipulate, control harm or disadvantage the other party;

The lawyers have a role to play in determining when mediation is not appropriate.

The lawyer may be concerned that the client may be placed in a vulnerable position vis-a-vis the other spouse.

Where there is a possibility of reconciliation, counselling or therapy may be more appropriate.

Power imbalances whether perceived or actual and the need for proper disclosure are important issues to consider in determining suitability for mediation.

There are many forms of power in a relationship including financial, emotional, physical, psychological, status, language and information.

Sometimes of course going to Court or at least bringing an action is necessary or unavoidable and I refer you to an article by Professor Wade aptly titled "Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge" in volume 18 of the Mediation Quarterly 2000-2001 at pages 259-280.

Professor Wade identifies numerous indicators that individually or cumulatively suggest that certain conflicts may need a judicial or arbitrated decision.

Disclosure is vitally important for the success of mediation and arbitration and in fact all forms of ADR.

It is also important that lawyers as well as mediators are aware of the impact and importance of timing and the emotional aspects of separation.

Parties are sometimes more ready to achieve a resolution than at others and if interventions are attuned to the stages and dynamics of the process and the changing circumstances of the parties then they are more likely to succeed.

The Shared Parental Responsibility Regime

A full analysis of the extensive provisions of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (the Shared Parenting Act) and ancilliary changes is beyond the scope of this paper. The handbook recently published by the Family Law section of the Law Council of Australia as part of its national seminar series on the new legislation and changes does that adequately and if you have not already done so then I strongly recommend you read it thoroughly. Rather, I want to provide a practical overview of some of the changes and assess their impact on day to day practice.

The hype surrounding the changes talked of "generational change", "cultural shift in how family separation is managed", "co-operative parenting", "moving away from litigation" etc.

The issue will be how much things actually change from a practical viewpoint because of the new legislation.

Change is nothing new in Family Law. Since 1975 the *Family Law Act* (FLA) has been amended many times. The current changes are, however widely, regarded as the most substantial since the inception of the Act.

The changes provide for:

- A new presumption of equal shared parental responsibility
- Emphasis on best interests (one could ask what has changed?)

- Shared care subject to provisions regarding abuse, neglect and violence
- Compulsory dispute resolution before taking matters to court
- Greater focus on the needs of children and less adversarial proceedings
- New obligations to try to resolve matters outside court
- Working collaboratively with other services;
- Changes to court processes
- A new enforcement regime
- Accreditation of "family counsellors" and "family dispute resolution practitioners"

In terms of services the changes encompass:

- Family Relationship Centres (FRCs);
- Family Relationship Advice Line;
- Expanded community based mediation services;
- Expanded Parenting Orders Program;
- Expanded early intervention services;

- Family law violence strategy (released 26 February 2006).

- New combined Court Registry for the Family Court and Federal Magistrates Court.

The new law emphasizes the importance of both parents remaining meaningfully involved in their children's lives in cases where there are no issues of abuse or violence.

It is important to stress however that while a new presumption of equal share parental responsibility has been introduced, consideration of equal time or substantial or significant time as well as equal shared parental responsibility itself will be subject to the best interests of the child which remains the paramount consideration.

The note to Section 61DA is significant and provides that the presumption of equal shared parental responsibility relates solely to the allocation of parental responsibility for a child and does not provide for a presumption about the amount of time the child spends with each of the parents.

There is therefore no presumption of equal time.

THE LANGUAGE HAS CHANGED

As lawyers we have new terminology to deal with.

Residence and contact now become "living with", "spending time with" and "communicating with".

We have new concepts to deal with such as "equal shared parental responsibility", "equal time", "substantial and significant time", "long-term issues", "close relationship" and "reasonably practical".

Orders are simply referred to as "Parenting Orders".

We have the "independent child's lawyer" rather than the "child representative" and we also have "family consultants" and "family dispute resolution practitioners".

WILL OUR ROLE AS LAWYERS CHANGE?

Our present role?

- We take instructions;
- We give legal advice and try to educate our clients about legal processes and what they might realistically be able to achieve;
- We reality test and try to manage our clients expectations;
- We comply where necessary with pre-action procedures;

- We assist our clients to bring applications before the Court seeking relief where appropriate;

- At times we engage experts to provide opinions and reports to help clarify best interests and to manage and resolve competing expectations;

- We generally negotiate within achievable parameters and within the confines of our client's instructions;

- We advocate for our clients in proceedings and hearings when negotiations break down.

- We draft orders reflecting any agreement reached.

In my experience most lawyers with a significant involvement in children's matters have a child-focused approach and direct their efforts to resolving matters as expeditiously and as inexpensively as possible.

Nevertheless there have been pressures for reform and the changes seek to respond to those pressures.

New obligations

Under the new regime we will still do all of the above but many of the ground rules will change. There will be a need to undertake dispute resolution before proceedings are launched (although this will be phased in over time) and we will need to give

emphasis to the new shared parenting factors set out in the legislation in advising our clients, negotiating outcomes, drafting orders and conducting proceedings.

We also now have an obligation to inform persons consulting us that they could enter into a Parenting Plan and where they can get assistance to do so and the content of the Plan.

As practitioners we will have an obligation to advise our clients of the possibility that the children may be spending "equal" or "substantial and significant" time with each of them. As advocates we will seek to obtain outcomes within the scope of the legislation.

The court however is not bound to require children to spend equal time with each parent, but rather is obliged to consider whether such an order would be in a child's best interest and if it is and it is practicable to do so, whether an order should be made in such terms.

We are also obliged to give certain documents to parties (see Section 12E).

So while we will have new obligations to comply with, essentially our role will remain the same but with a new emphasis on "shared parenting" arising not only from the specifics of the legislation but perceptions of our clients as to what it all means and the pressures such perceptions bring.

On a day to day basis this will undoubtedly bring more pressures from what were formerly "contact" parents for more time with their children and more involvement in their lives. These pressures will impact on our role in negotiating settlements and drafting orders. Similarly there will be pressure from parties opposed to such changes who fear the government has gone too far.

It will be left to the Court to resolve these competing interests within the strictures and confines of the legislation. For us as lawyers it is a new environment with the full extent of the guidelines and their impact unclear.

SO WHAT HAS CHANGED?

There are clear messages and indeed obligations for the courts and practitioners to at least consider shared care.

Some of the changes include the following:

- The presumption of equal shared parental responsibility which can only be rebutted by establishing abuse, or violence;

- A requirement (where equal shared parental responsibility is ordered) that the court consider whether children spending equal time with both parents is reasonably practicable and in the best interests of the child. If it is not appropriate, then the court must consider substantial and significant time with

each parent and again whether this is in the child's best interest and reasonably practicable;

- The Court has now been told what factors it must consider in determining what is in the child's best interests and these factors include two tiers; primary and additional considerations;

- In deciding the best interest of the child, the Act makes the right of children to have a meaningful relationship with both their parents and to be protected from harm the primary factors for Courts to consider.

- The various factors in determining best interest will still be considered in light of the individual circumstances of the case.

- Requiring parents to attend family dispute resolution before taking a parenting matter to court unless there is family violence or abuse (but interestingly not neglect).

- Amending the definition of family violence to require that a fear or apprehension of violence must be "reasonable" ie. whether a reasonable person in the same circumstances would fear for or be apprehensive about his or her personal wellbeing or safety;

- The requirement for parents to consult on" long term issues" and make a genuine effort to make the decisions jointly where an order for "shared parental responsibility" is made.

- No obligation, however, to consult on issues that are not major long term issues;

- A new emphasis on parenting plans including provision for parenting plans to override court orders.

Pre-action Requirements under the *Shared Parenting Act*

Requirement for parties to attend Family Dispute Resolution before embarking on proceedings

Section 60I requires the parties to attend Family Dispute Resolution before embarking on proceedings under Part VII of the Act.

- This requirement will be phased in over time (possibly to coincide with the rollout of the Family Relationship Centres – FRCs)

- Initially in Phase 1 (applying until 30 June 2007) the existing dispute resolution provisions contained in the Family Law Rules 2004 will continue to apply.

- From 1 July 2007 it will be mandatory to have a certificate from an accredited family dispute resolution practitioner before parenting proceedings can be commenced.

- Family dispute resolution may of course be provided outside of the FRCs.

- Family dispute resolution and family dispute resolution practitioner are defined in Sections 10F and 10G respectively. Family lawyers are not automatically included as family dispute resolution practitioners.

- The court "must not hear an application for a Part VII Order" unless the applicant files the certificate from the accredited family dispute resolution practitioner. The certificate must be filed with the application.

- Section 60I requires the making of a "genuine effort" to resolve the issues.

- A certificate is not required in circumstances of child abuse or family violence or urgency or in respect of consent orders and other circumstances set out in Section 60I(9), including interim proceedings and some contraventions.

- The requirements only apply to parents wishing to apply for parenting orders, or orders regarding child maintenance and child support and do not apply to parents who work out parenting arrangements for themselves.

- The *Shared Parenting Act* amends the definition of 'family violence' so that a requirement of 'reasonableness' is added to the existing definition.

- The definition of family dispute resolution does not specify any particular form of dispute resolution providing it helps people to resolve disputes and the practitioner is independent of the parties, so it could involve mediation, conciliation, or any other form of dispute resolution.

- The Court can order costs in appropriate cases.

- **Parenting Plans**

    - The *Family Law Act 1975* (FLA) already contains provisions relating to parenting plans.

    - The new legislation provides a broader role for parenting plans but yet they create no legal obligation.

    - Parenting Plans provide an informal means for parents to reach their own agreement about children's issues.

    - The new Section 63C(2) specifies the matters with which a parenting plan may deal.

    - A solicitor in giving advice about parental responsibility on separation is obliged to inform parties that they could consider a parenting plan and

inform them where they can get further assistance about developing a parenting plan and it's contents.

- If a solicitor gives advice to parties in connection with a parenting plan, then effectively, they are required to advise the party about the new shared care provisions of the legislation (See s.63DA re obligations of advisers which sets this out in detail).

- The Family Relationship Centres will no doubt encourage people to use parenting plans and if entered into, these will need to be taken into account in later parenting proceedings but they are not legally binding.

- People may enter into parenting plans before or without receiving legal advice.

- Section 65DAB requires the court to have regard to the terms of the most recent parenting plan when making a parenting order in relation to a child if it is in the best interest of the child to do so. Solicitors are obligated to advise parties of this, but of course they may have entered into a parenting plan prior to seeing a solicitor.

- Under Section 64D a parenting order is subject to a subsequent parenting plan entered into by the parties unless the court itself orders

otherwise in exceptional circumstances (including the need to protect the child from harm, evidence of coercion, duress).

- Thus as a practical issue parenting plans although creating no legal obligation will still be taken into account in later parenting proceedings and can beat a court order in other than "exceptional circumstances".

- So the new Act encourages such informal agreements but their consequences can be significant.

- One suspects that the word may get out that parties should not enter into parenting plans without legal advice and lawyers may be reluctant to advise parties to use parenting plans. This could diminish the thrust of the Government's move towards informal agreements but of course the large majority of people separating never go to court anyway and may be happy with an "informal agreement" at least until a significant dispute arises.

- One of the first steps then that the solicitor should take, is to ask the client "is there an existing parenting plan?" as if so, the Court must have regard to it.

- **Family Relationship Centres (FRCs)**

- Although not specifically mentioned in the legislation, our clients are at least likely to have heard of these from government discussion and media campaigns.

- The likelihood, however, is that in the early stages most people will not have access to a Centre and as demand grows, the Centres rolled out (65 are to be provided) will be unable to cope with such demand. The Centres are to be phased in over four years, with the first two in Strathpine and Townsville and a further six Centres to be introduced in July 2007 including Centres at Maroochydore, Upper Mount Gravatt and the Gold Coast.

- There is no requirement for the parties to attend a Family Relationship Centre prior to commencing proceedings. FRCs should not be seen as simply another process on the way to court.

- The Centres and the Government's community education campaign and other programs will be part of what the Government refers to as the "cultural change".

- They will undoubtedly heighten the profile of "shared care" and "equal time" as achievable objects for parties and this heightened awareness will see more emphasis on shared care in negotiations and an

increasing need for solicitors to take account of same in advising their clients.

- The success of the Centres will undoubtedly depend on the experience and expertise of the people who run them and the ability of the Centres to handle the demands which will inevitably be placed on them.

- Note however that Family Relationship Centres will not provide legal advice to clients and clients will not be legally represented in sessions at the Centres. The Centres will refer clients for legal advice where appropriate and parents will of course be free to obtain timely legal advice of their own.

- The FRCs will be able to provide clients with information about how to contact Family Lawyers or else refer clients to the Law Society for information about Family Lawyers.

- The Centres will be able to adjourn a session to enable clients to obtain legal advice.

Anecdotally, I understand that while the Centres are receiving a reasonable number of enquiries, they are certainly not overwhelmed and if anything the response to date has been less than expected. This may be because

people are taking time to become aware of the existence of the Centres or may reflect their geographical limitations.

DRAFTING ORDERS

Orders drafted must take account of the new language introduced on the Bill becoming law from 1 July 2006.

As stated above, we no longer have residence and contact parents. Rather, we have "live with" and "spend time with" and a myriad of other phrases.

"Spend time with" has an element of artificiality. It is hard to refer to someone as the "spend time with" parent.

In drafting orders, we will no doubt note that people's expectations will most likely have changed following the introduction of the legislation.

Parental responsibility provisions are now of increased importance as the new provisions of "equal time" or "substantial and significant time" only apply if there is an order for equal shared parental responsibility.

Some examples of possible orders drafted since the inception of the new legislation are as follows:

Equal Shared Parental Responsibility (Parents)

<***Name of parents***> are to have equal shared parental responsibility for ***<name of child>.***

Sole Shared Parental Responsibility

<***Name of parent***> is to have sole parental responsibility for the ***<name of the child***>.

Children to live with each Parent for *Equal Times*

<Name of child> *are to live with* <***name of parent>*** as follows: <***specify period>*** and are to live with <***name of parent***> as follows: <***specify period>.***

Children to live with each parent for substantial and significant time

The children are to live with <***name of Parent 1>*** [*periods which include both weekends and holidays and other days, and which allow Parent 1 to be involved in the child's daily routine and occasions and events that are of particular significance to the child and to Parent 1]* and to live with <***name of Parent 2>*** *[periods which include both weekends and holidays and other days, and which allow parent 2 to be involved in the child's daily routine and occasions and events that are of particular significance to the child and to Parent 2]*

Children to live with each parent, but live with one parent for less than substantial and significant time

The children are to live with ***<name of Parent 1>*** and to live with ***<name of Parent 2>*** for ***<specify>*** *[periods which*

- *do not include both weekends and holidays and other days, or*
- *do not allow Parent 2 to be involved in the child's daily routine, or*
- *do not allow Parent 2 to be involved in occasions and events that are of particular significance to the child, or*
- *do not allow Parent 2 to be involved in occasions and events that are of particular significance to Parent 2].*

Children to live with one parent and spend such time with the other as the parents agree

The children are to live with ***<name of parent>*** and spend such time with ***<name of parent>*** as they may agree between them and failing agreement at the following times: ***<specify periods>.***

Children to have communication with a parent

The children may communicate with ***<name of parent>*** by phone on ***<specify times>***

Or

<name of parent> may communicate with the children ***<specify times>*** and ***<name of parent>*** shall facilitate such communication.

Children to spend time with Grandparents or Relative

The children are to spend time with ***<name of Grandparent/Relative>*** as follows: ***<specify periods>.***

Other Useful Tools

- The handbook on the Children's Cases Program produced jointly by the Family Court and the Family Law Section of the Law Council of Australia.

- The Best Practice Guidelines for Lawyers doing Family Law work prepared jointly by the Family Law Council and the Family Law Section of the Law Council of Australia and particularly the section relating to ADR.

- Mediator locator site – www.mediatorlocator.com.au

- List of Approved mediators kept by the Queensland Law Society.

- The Law Society Mediation Centre. The Queensland Bar Association operate a similar centre for mediations and arbitrations.

- The Family Law Section of the Law Council of Australia keeps a list of approved arbitrators. As at October 2006 the total number of approved Family Law Arbitrators across Australia stood at 111. The full list is available on the Family Law Section website at www.familylawsection.org.au

- See in the marriage of H [2003] FMCA Fam 41 where then Federal Magistrate (now Her Honour Justice) Ryan considered shared parenting and outlined certain factors that a court should consider in cases where a party seeks equal shared care of a child.

- For a detailed study of the needs of children at particular stages of their development and contact regimes that might suit or accommodate their needs at those stages, see paper by Psychologist, Denise Britton titled "Development Needs of Children and Contact Regimes" presented to the Queensland Family Law Residential in September 2005.

- For a detailed literary review and an analysis of the respective cases for and against "Shared Care" see paper by Psychologist, Vince Papaleo titled "Shared

Parenting – One Size Does Not Fit All" presented to the Melbourne Intensive convened by the Leo Cussen Institute in May 2006.

In this paper I have only attempted to provide a mudmap of the pre-action requirements for dealing with Family Law matters and the types of ADR available to meet the requirements; with a basic look at selecting which method is appropriate for a particular dispute. I have also provided an outline of some aspects of the new Joint Parenting legislation and particularly aspects related to settling out of court, such as Parenting Plans and the Family Relationship Centres.

There are many aspects which I have not covered, the Children's Cases Program introduced under Division 12A of the Act, being a case in point which is a topic in itself. My aim has been to provide a basic understanding of the thrust of the new legislation and to point out signposts which may assist general practitioners to gain a greater understanding.

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