THE SHARED PARENTAL RESPONSIBILITY LEGISLATION – THE NEW REGIME

In this paper my purpose is not to detail and analyse the extensive provisions of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (the Shared Parenting Act) and ancilliary changes. 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 recommend you read it thoroughly. Rather, my intention is to provide a practical overview of the changes and their context and impact from a practitioner's viewpoint and to assess their significance for us as solicitors in day to day practice.

WHAT DOES THE GOVERNMENT WANT?

In general terms the government is talking of 'significant reforms'; 'generational change', 'cultural shift in how family separation is managed'; 'support for family relationships'; 'co-operative parenting'; 'moving away from litigation'; 'additional services for families', etc.

In a recent letter to legal practitioners the Attorney-General The Hon Philip Ruddock stated inter alia as follows:

> "The Australian Government is undertaking the most significant reforms to the family law system in 30 years. Our goal is to change the culture surrounding family separation from one that is focused on an adversarial court-based approach to one that puts the needs of children first and helps parents determine what is best for their

children in a co-operative manner. The legal profession will play an important part in achieving this goal."

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

Of course change is nothing new in Family Law and as practitioners we have come to expect it. Since 1975 the *Family Law Act* (FLA) has been amended more than 65 times and many of such amendments have been substantial (Kennedy 2006). 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;
- Family Relationship Advice Line;
- Expanded community based mediation services;
- Expanded Parenting Orders Program;
- New children's contact services;
- 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 point to emphasize from the outset is that while a new presumption of equal shared 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.

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".

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

WHY THE CHANGES?

A simplistic view would be to say that the current changes are the Government's response to substantial pressure from the men's lobby.

The picture is however undoubtedly far more complex.

Papaleo notes that "A combination of societal, financial and economic factors has brought the structure of post-separation parenting under review'.

It would seem that some of the factors noted by Papaleo and others which have had an impact on this development would include the following:

- The greater prevalence of separation and divorce today;
- The greater role of women in the workforce and the fact that for some a shared care arrangement may be a necessity;

- The time pressures of raising children in modern society;
- The costs of raising children particularly in single parent families;
- A greater emphasis in the research on the importance of both parents in the lives of their children;
- The rise in the power and influence of the men's movement;
- The trend towards fathers being more actively involved in their children's lives (Seltzer 1991 as noted by Papaleo 2006);
- The rapid pace of social change;

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.

Indeed the Hon. John Fogarty AM in a wide ranging article reviewing 30 years of change in the Family Court noted that "the successes in Family Law are due in large part to the manner in which lawyers have developed both individual and collegiate skills" (Fogarty 2006).

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.

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 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" 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.

Many of the changes introduced by or arising from the new legislation will impact on us daily in our practices. The changes are substantial and include the following:

- Family Relationship Centres (FMCs)

    - 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.

    - There is no requirement for the parties to attend a Family Relationship Centre prior to commencing proceedings. FMCs 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 FMCs 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.

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 FMCs).

- 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 FMCs.

- 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 *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.

- <u>Parenting Plans</u>

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

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

    - 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 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.

    - 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 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.

OTHER CHANGES

Shared Parenting

The real question for us in practice will be to consider what is meant by "shared parenting" and to determine when shared parenting is suitable and to what extent.

Equal shared parental responsibility will be a starting point for the court to take into account when making a parenting order but of itself this does not mean parents will spend equal time with their children.

People separating resolve their issues at different stages, some no doubt without seeking legal advice and many of such arrangements would involve some form of shared parenting.

Other parties will continue to consult lawyers who will advise in relation to shared parenting.

The concept of shared parenting permeates the legislation and will arise in practical terms when the court has to determine whether it is in the child's best interests and reasonably practical for the child to spend "equal" time or "substantial and significant" time with each parent. The need to consider the best interests brings in the provisions of Section 60CC with its two tiers or primary and additional considerations and the requirement of "reasonable practicality" brings in Section 65DAA(5) which includes the normal shared care type factors including (e) which provides for the court to have regard to such other matters as it considers relevant.

The existing case law and social theory in relation to shared parenting will therefore continue to assist lawyers and the Court in determining whether shared parenting is suitable and likely to work in a particular situation ("reasonable practicality").

For a helpful summary of past and more recent decisions of the Family Court and Federal Magistrates Court exploring the issue of shared parenting, I recommend the reading of a paper presented by Justice Alwynne Rowlands to the 14th Annual Masterclass Conference in Sydney 2005. Included in the decisions referred to by Justice Rowlands is a recent decision of Chief Justice Bryant in C v B [2005] Fam CA 94 where Her Honour the Chief Justice granted joint residence on a week about basis in the circumstances of that case.

Justice Rowlands notes that the reluctance of the Court to order a physical sharing of children by their parents "follows the general tenor of expert evidence provided to the Court by child psychiatrists, psychologists, social workers and family court counsellors".

Federal Magistrate (now her Honour Justice) Ryan considered shared parenting in the marriage of H [2003] FMCA fam 41 and outlined the following factors that the court should consider in cases where a party seeks equal shared care of a child:

- The parties' capacity to communicate on matters relevant to the child's welfare.
- The physical proximity of the two households.
- Are the homes sufficiently proximate that the child can maintain their friendships in both homes?
- The prior history of caring for the child. Have the parties demonstrated that they can implement a 50 / 50 living arrangement without undermining the child's adjustment?
- Whether the parties agree or disagree on matters relevant to the child's day to day life. For example, methods of discipline, attitudes to homework, health and dental care, diet and sleeping pattern.

- Where they disagree on these matters, the likelihood that they would be able to reach a reasonable compromise.
- Do they share similar ambitions for the child? For example, religious adherence, cultural identity and extra-curricular activities.
- Can they address on a continuing basis the practical considerations that arise when a child lives in two homes? If the child leaves necessary schoolwork or equipment at the other home, will the parents readily rectify the problem?
- Whether or not the parties respect the other party as a parent.
- The child's wishes and the factors that influence those wishes.
- Where siblings live.
- The child's age.

These factors are of course also often the ones considered by counsellors and others asked to provide reports on shared parenting matters.

WILL WE STILL USE REPORT WRITERS AND RELY ON ACCEPTED PSYCHOLOGICAL RESEARCH?

Solicitors will no doubt continue to obtain reports to assist in resolving family disputes, including issues relating to shared parenting. Immediately prior to the inception of the legislation, I was acting for the mother where the father was strongly pursuing shared parenting on an equal time basis. As is not unusual in such cases agreement was reached for a private family report to be obtained to assist in resolving the dispute. The report made it clear that the level of conflict between the parties made it unsuitable for an equal time arrangement and this

was all the more so because one of the two children expressed a strong view that a week about arrangement not be implemented. The matter resolved shortly following the issue of the report.

In my view one can reasonably anticipate that more and more of these matters will be the subject of family reports where consideration will be given to the factors referred to in the legislation and those detailed above by Federal Magistrate (now Justice) Ryan.

What will undoubtedly change is that more parties will seek a shared care arrangement and quite possibly equal time and that in writing reports the experts will need to consider the thrust of the legislation and pay closer attention to whether the case is one suited to a shared parenting arrangement.

No doubt some report writers may be more in favour of shared parenting than others, although the extent to which such opinions are given rein will be tempered not only by the changes to the law but by the facts and circumstances of individual cases.

Similarly it can be expected that whilst it is the function of the Court to interpret and apply the law, some Judges will be more inclined to favour shared parenting than others. Justice Le Poer Trench for instance is one Judge who has researched the evidence on shared parenting and is accepted as a firm believer in same (Baker 2006).

Of course it is only a small minority of cases that go to trial. The Family Court submission to the House of Representatives Standing Committee Inquiry of 2003 emphasized that only about six percent of applications filed by parents result in determination by a Judge (Rowlands 2005). It can be expected that many such cases will involve complex issues and be unsuited to a shared parenting arrangement. The decisions made and the jurisprudence which develops

however, will help mould the culture which will impact on all matters, whether litigated or not.

WILL IT BE HARDER FOR US TO MANAGE EXPECTATIONS AND NEGOTIATE?

- Undoubtedly we can expect a groundswell of change from fathers seeking shared care.

- It may make it harder for lawyers to negotiate acceptable outcomes when expectations are raised. We are all no doubt very much aware of such raised expectations from client comments over recent times such as "I have heard things are changing and that the kids will be living with me half the time".

- How all this ultimately pans out will be determined by how the court approaches the issues because as always, the court will set the bar.

- My view is that whilst there will be increasing demand for equal arrangements and many couples will resolve issues on this basis, far fewer of the cases which come to court will be suited to an equal shared arrangement, but there will be more orders made providing for greater involvement by what was formerly the contact parent.

- It will, in my view, be far easier to negotiate and obtain orders for more extensive time and involvement for the parent with whom the child does not predominantly "live with".

Undoubtedly many fathers will be under the misapprehension that shared parenting means equal time with the children.

Nevertheless, there will be greater scope for fathers to bring applications to spend more time with their children and in suitable cases these will no doubt be successful.

The old "normal" contact regime of alternate weekends and half holidays is likely to be a thing of the past and we will need to think more laterally and come up with creative solutions acceptable to the parties.

I can readily see more orders made providing for the less predominant parent having contact from after school Thursday until return to school Monday of one week and perhaps for at least part of a day in the other week (possibly after school and dinner if not overnight) together with extensive involvement and participation in the child's activities but whether it will go further, will remain to be seen.

It would seem that while many cases will not be suited to an equal sharing of time, or the parties may not be seeking same, there will be far more flexible contact arrangements with "significant and substantial time" to the less "live with parent".

Another factor which should not be overlooked is that although the prospect of equal time might attract, many men for instance may not want such responsibility or may not see their way clear to accommodate it. It will be interesting to see how many actively pursue an equal time arrangement.

It would come as no surprise that many men are so career focused as not to want equal time whilst others may not be prepared to put in the effort and sacrifice that equal time requires.

Now that the opportunity of shared parenting has been made available, many may simply decide they do not want it.

A further factor is that economic restraints will mitigate against families setting up two households for the care of their children on an alternate weekend basis and that it will prove to be an unrealistic option in most cases (Baker 2006).

Others for instance may actively acknowledge that in their particular circumstances such an arrangement is not in the 'best interest' of their children.

Similarly no doubt if one party does not have their heart in an equal time arrangement and is simply pursuing a child support agenda, then the predominant parent can be expected to resist this in the 'best interest' of the children.

The one certainty is that interesting times lie ahead.

We will also need to be more specific in spelling out the involvement of the lesser "live with" party in the child's life. Our drafting will need to be specific enough to cover everyday issues and precise enough to avoid confusion or breakdowns of communications which can otherwise of course often result in contraventions.

Drafting will need to take account of both the qualitative and quantitative aspects of the definition of "substantial and significant time".

In circumstances where the former contact party can do better, one could anticipate that the greater "live with" or "spend time with" parent may be even more willing or inclined to take a point should the opportunity arise through drafting.

WHAT DO SOME OF THE EXPERTS THINK?

- 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, I recommend a reading of a paper by psychologist Denise Britton titled "Development Needs of Children and Contact Regimes" presented to the Queensland Family Law Residential in September 2005. Britton emphasizes that her paper does not purport to provide formulae for parental contact at various stages of child development but a "range of models as illustrations…….".

- For a detailed literature review and an analysis of the respective cases for and against Shared Care, I recommend the 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.

- Papaleo notes there is "a lack of clear, compelling evidence that any particular post-separation contact arrangement on its own is better than any other and one size does not fit all" but that "each individual family and each individual within that family has special needs that need to be considered about which parents need to be flexible". He concludes that the focus should be less on adhering to previously accepted models of post-separation contact and parenting arrangements, and less on the crafting of contact plans that meet the needs of parents and more on the building of strategies to reduce parental conflict which he notes "so consistently correlates with poor child outcomes", the premise being that the research indicates it is the exposure of children to parental conflicts and not the contact arrangement itself, which will determine child adjustment outcomes.

- Both the Britton and Papaleo papers attach detailed reading lists on all aspects of Shared Care and its historical context and development.

Attached to my paper you will also see a schedule of options for contact prepared by researcher and clinician Dr. Joan Kelly. The schedule details a range of options including equal shared time and lists various advantages and disadvantages of each proposal.

A CLOSER LOOK AT THE "SHARED PARENTING" PROVISIONS

Objects of Part VII

The new Section 60B sets out the objects of the Part and goes further by including a series of principles underlying the objects.

The relevant provisions read as follows:

> "60B Objects of Part and principles underlying it
>
> (1) The objects of this Part are to ensure that the best interests of children are met by:
>
> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
>
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
>
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
>
> (d) ensuring that parents fulfill their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
>
> (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture). "

Note that Section 60B(2) is subject to the "best interests" principle.

Section 60CC defines how a court determines what is in a child's best interest and includes both "primary" and "additional" considerations which the court must consider (my emphasis).

Section 60CC(2) sets out the primary considerations as follows:

"(2) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence."

The additional considerations which the court must consider are set out in Section 60CC(3) and include the wishes of the child (now expressed as "views expressed by the child" and other factors some of which are similar to those previously contained in Section 68F of the FLA.

(3)(c) and (i) and particularly Section 60CC(4) are interesting and read as follows:

> "(3) Additional considerations are:
>
> (a) -
>
> (b) -
>
> (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
>
> (d) –
>
> (e) –
>
> (f) –
>
> (g) –
>
> (h) –
>
> (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
>
> (j) –
>
> (k) –
>
> (l) –
>
> (m) –
>
> (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfill, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
>
> (a) has taken, or failed to take, the opportunity:
>
> (i) to participate in making decisions about major long-term issues in relation to the child; and
>
> (ii) to spend time with the child; and
>
> (iii) to communicate with the child; and
>
> (b) has facilitated, or failed to facilitate, the other parent:

(i) participating in making decisions about major long-term issues in relation to the child; and

(ii) spending time with the child; and

(iii) communicating with the child; and

(c) has fulfilled, or failed to fulfill, the parent's obligation to maintain the child.

(4A) If the child's parents have separated, the Court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

S.60CC(5) makes it clear that the Court is not required to consider the primary or additional considerations in making consent orders.

NOTES:

1. There are now therefore two tiers of considerations for the court to take into account in determining best interest.

2. Section 60CC puts some flesh on the bone as to what the best interest of a child is. It is **mandatory** (my emphasis) for the Court to take the factors in Section 60CC into account in determining best interest so the power of the Court is fettered in this regard.

3. In deciding the best interest of the child there are also new factors for the court to consider such as requiring the court to take into account parents who fail to fulfill their major responsibilities such as failure to pay child support or to participate in the child's life or having consistently broken contact arrangements since separation.

4. Section 60CC(3)(c) incorporates the 'friendly parent' criterion referring to the willingness and ability of each parent to facilitate and encourage the child's relationship with the other parent.

5. Section 60CC(4) takes into account the parents' history and past performance as relevant factors in determining best interest.

Shared Parental Responsibility

Section 61DA provides that there is a presumption of equal shared parental responsibility when parenting orders are made and reads as follows:

> "61DA Presumption of equal shared parental responsibility when making parenting orders
>
> (2) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.
>
> Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).
>
> (3) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
>
> (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
>
> (b) family violence.
>
> (4) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.
>
> (5) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child."

If the presumption of equal shared parental responsibility is to be avoided, then evidence must be given either in relation to abuse of the child or to family violence. There is no explicit reference in the section to neglect as a way of avoiding the presumption.

Note: The test for family violence is objective and it will not be enough to suggest the risk is only minor.

Parenting Time:

Section 65DAA deals with the actual time the children will spend with each parent and reads as follows:

"65DAA Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances

Equal time

(1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:

(a) consider whether the child spending equal time with each of the parents would be in the best interest of the child; and

(b) consider whether the child spending equal time with each of the parents is reasonably practicable; and

(c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

Substantial and significant time

(2) If:

(a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and

(b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and

the court must:

(c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and

(d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and

(e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

(3) For the purposes of subsection (2), a child will be taken to spend substantial and significant time with a parent only if:

(a) the time the child spends with the parent includes both:

(i) days that fall on weekends and holidays; and

(ii) days that do not fall on weekends or holidays; and

(b) the time the child spends with the parent allows the parent to be involved in:

(i) the child's daily routine; and

(ii) occasions and events that are of particular significance to the child; and

(c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Note 1. There is both a quantitative and qualitative aspect of 'substantial and significant time'.

Note 2. Section 65DAA(4) gives the Court flexibility in determining what level of time and involvement is appropriate in a particular case.

Reasonable practicality

(5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for the child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:

(a) how far apart the parents live from each other; and

(b) the parents' current and future capacity to implement an arrangement for the child spending equal time; or substantial and significant time, with each of the parents; and

(c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

(d) the impact that an arrangement of that kind would have on the child; and

(e) such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

(a) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (paragraph 60CC(3)(c));

(b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity – the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services."

Clearly the effect of these sections is for the court to consider whether in a particular case there should be 'equal time' or 'substantial and significant time' and what the latter means. Furthermore the court is required to consider whether the orders proposed are "reasonably practicable" and all this is subject to the overriding consideration of whether what is proposed is in the "best interests" of the children.

Section 65DAC sets out the effect of shared parental responsibility and imposes an obligation on parties to "consult" and make a "genuine effort" to come to a "joint decision" on major long-term issues relating to a child.

Major long-term issues are defined in Section 4(1) which provides as follows:

"4(1) major long-term issues, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

(a) the child's education (both current and future); and

(b) the child's religious and cultural upbringing; and

(c) the child's health; and

(d) the child's name; and

(e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

> Note: To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a major long-term issue in relation to the child. However, the decision will involve a major long-term issue if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent."

There is no need to consult on issues that are not major long term issues.

Some further views and considerations

Professor Chisholm (2006) has made a number of criticisms of the legislation including the following:

- The two-tier approach under Section 60CC downgrades the importance of Children's views by putting them into the category of an "additional" rather than a "primary consideration";

- The two-tier formulation "will lead to confusion and legal complexity". How for instance, he asks is the Court to go about the process of weighing up cases that involve competing factors involving both tiers. (As a comment, this raises the issue of whether say four or five additional factors outweigh one primary factor and presumably this will be determined by the court determining the best interests of the child which remains the overriding factor). Thus the Court will retain an overriding discretion to apply and weigh the "best interest" factors but appeals will no doubt result if it is considered they have underemphasized some factors and overemphasized others.

- There is no sound basis for the elevation of the two "primary" considerations above others in working out what might be best for a particular child.

By way of comment in relation to the relegation of the views (formerly wishes) of the child to an additional or secondary factor, one would have thought as a practical matter that particularly with mature age children, the wishes of the child will still have a significant impact on whether a party or parties seek an equal shared care arrangement and will mitigate against such arrangement in many instances and remain an important consideration for the Court, possibly even as part of the primary consideration of the benefit to the child of having a meaningful relationship with both parents.

It would seem clear that the use of the word "views" in relation to children is wider than wishes.

Changes to proceedings

The new Division 12A creates new legal procedures for the resolution of any proceeding under Part VII and any other proceedings under the *Family Law Act* where the parties consent.

It is beyond the scope of this paper to consider the less adversarial procedures in detail, however they will involve less formality in proceedings, more direct involvement and control by the Judicial Officer in the conduct of the proceedings, including the evidence to be called and relaxation of the rules of evidence. The new procedures apply to matters commenced by an application filed on or after 1 July 2006 and earlier matters by consent and leave of the court.

Proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form as possible.

Changes to Enforcement and Contraventions

A new compliance regime in Division 13A of the Act completely replaces the former *Family Law Act* contravention procedures.

There are now four different court outcomes possible and each of the four regimes has a subdivision dealing with the powers and obligations of a Court in the circumstances of that outcome.

The four outcomes are as follows:

- Where the contravention allegation fails (subdivision C).
- Where the allegation succeeds but reasonable excuse is established (subdivision D).
- Where there is a contravention without reasonable excuse but it is of a "less serious" nature (subdivision E).
- Where there is a contravention without reasonable excuse and it is of a serious nature (subdivision F).

The powers and obligations of the Court increase as the outcomes become more serious.

The civil standard of proof applies except where a serious sanction is contemplated eg. community service order or more serious.

Section 70NBA empowers a Court dealing with any contravention proceedings to vary the existing order.

Other Matters

- There are no substantive changes to the arbitration provisions of the *Family Law Act*.
- The Court's power to refer parties to external services has been considerably enhanced. (See Section 13C).
- The new provision in Section 117AB provides for a party who knowingly makes a false allegation to pay some or all of the opposing party's costs.

Child Abuse and Family Violence

- The changes (see new Section 60K) impose a mandatory obligation on the Court to determine and take action in relation to allegations of child abuse or family violence.
- The Court is required to deal with the issues raised by the allegation "as expeditiously as possible". This section is likely to create problems for the Court in view of the frequency of these types of allegations.
- There is a new definition of family violence which introduces an objective element of "reasonableness". A fear or apprehension of violence must be reasonable.
- Under Section 68Q a family violence order is invalid to the extent to which it is inconsistent with a subsequent order or injunctions made under the *Family Law Act*.
- Under Section 68R a Court making a family violence order has power to vary or discharge an existing order or injunction under the *Family Law Act*. There are restrictions on this power set out in Section 68R.

Independent Children's Lawyer

The child representative will now be called the Independent Child's Lawyer.

Otherwise the role of the children's lawyer is not substantially changed by the amendments but a description of the role is set out in Section 68LA.

The Independent Children's Lawyer is not the child's legal representative and is not obliged to act on the child's instructions. Rather, the duty of the Independent Children's Lawyer is to act on what he or she considers to be the best interests of the child.

The Court may make an order "for the purpose of allowing the Independent Children's Lawyer to find out what the child's views are on the matters to which the proceedings relate".

Section 68LA(5) sets out the duties of the Independent Children's Lawyer.

Relocation

The impact of the new provisions on relocation will be an important issue to be resolved under the new regime. It would seem on the face of it that relocation will be more difficult under the new provisions in that the difficulty and expense of contact following a relocation may impact on the child's ability to continue to have a meaningful relationship with the non-relocating parent and therefore not be in the best interests of the child. It will be interesting to watch how the Court resolves this issue.

Practice Direction 1 of 2006

This Practice Direction sets out certain steps which parties to each parenting case currently listed for trial on or after 1 July 2006 must take.

Conclusion

The extent to which the substantial changes contained in the new legislation impact on practice remains to be seen and this will depend largely on whether the cultural change sought by the government is achieved.

On one view, there has already been a substantial change of culture and this is reflected in report writers having given greater consideration to shared care arrangements, particularly over more recent times.

Lawyers are adaptable and can be expected to get behind the thrust of the legislation.

The directions contained in the new legislation are clear and the Court will need to give credence to these in determining "best interest". This combined with other initiatives and community expectations should bring significant change in appropriate cases. Ultimately the extent of such change will depend not only on the court's approach but on assessments of the impact of the changes on the children the legislation is intended to serve.

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