

# ***Sharing the Children: Where are We Now?***

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## Sharing the Children: Where Are We Now?

### The 2006 Changes – Impact at the Coalface

The provisions of the *Family Law Act* relating to 'parenting' cases are largely contained in Part VII of the Act.

Part VII was significantly changed by amendments in 1995 [*Family Law Reform Act 1995*] and in 2006 [*Family Law Amendment (Shared Responsibility) Act 2006*].

Before looking at the 2006 amendments, it is helpful to look briefly at some of the changes introduced in the 1995 amendments.

In their interim report on the 1995 amendments, Rhoades, Graycar and Harrison note that "there was no real 'mischief' to which the Reform Act's co-parenting reforms was responding, nor was there evidence that children were being harmed by the law and practice governing custody and access" and further that "the need to encourage parents to share their parental responsibilities after separation was not based on any uncontested research information".

In summarising the 1995 amendments the Parliamentary Library Bills Digest No. 126, 2010-11 issued in respect of the current (2011) amendments noted as follows:

*"The objectives of the legislation were said to be: to remove the proprietorial and 'winner takes all' connotations of the old law of custody and access by emphasising the continued sharing of parental responsibility; to promote and encourage continued contact between both parents and their children post-separation; to promote private agreement of arrangements; and to shift attention to the rights of children and away from those of parents. The child's best interests remained the paramount consideration in decision-making, although there was a general statement in the opening part of the legislation that, subject to the best interests test, children had a right of contact on a regular basis with both parents and with significant others. For the first time, reference was made to family violence as a factor in decision-making on the best interests of the child, and detailed provisions were introduced concerning the inter-relationship between family violence orders and orders for contact. Courts were instructed to endeavour not to make parenting orders that exposed a person to an unacceptable risk*

of family violence.”The commentary of the same Bills Digest provides the following useful summary of the 2006 reforms:

#### “The 2006 reforms

Just over a decade later, the Howard Government, in response to the House of Representatives Committee report, *Every picture tells a story*, introduced the 2006 reforms. These went further than the 1995 reforms in a number of important respects and were the subject of considerable debate. Most notably, the legislation promotes equal sharing of time post-separation much more actively than its predecessor, in a number of ways:

- there is a presumption of ‘equal shared parental responsibility’ (section 61DA). This presumption is not applicable in cases where there are reasonable grounds to believe one of the parties has engaged in family violence or child abuse (subsection 61DA(2)) and it is rebuttable on the basis of evidence that would satisfy a court that its application is not in the child’s best interests (subsection 61DA(4))
- where an order for equal shared parental responsibility is made, a court must consider whether making an order for the child to spend equal time with both parents is in the best interests of the child and reasonably practicable (subsection 65DAA(1)). If so, then it must consider making such an order (paragraph 65DAA(1)(c)). If an order for equal time is not made, then a court must consider making an order for ‘substantial and significant time’ with both parents (subsection 65DAA(2)). ‘Substantial and significant time’ must include weekdays as well as weekends, and must be such as to allow both parents to be involved in the child’s daily routine
- the traditional checklist for determining the best interests of the child is now divided into two tiers: primary considerations and additional considerations. The ‘primary’ considerations are:
  - (a) the benefit to the child of having a meaningful relationship with both of its parents, and
  - (b) the need to protect the child from harm or from being exposed to abuse, neglect or violence (subsection 60CC(2))
- these primary considerations have been described as ‘the twin pillars’ of the parenting provisions in Part VII

- the 'additional' considerations (subsection 60CC(3)), are those from the traditional checklist, with the notable addition of the so-called 'friendly parent' provision (paragraph 60CC(3)(c)), which requires a court to take account of the willingness of each parent to facilitate a close relationship between the child and the other parent
- parents are required to attend family dispute resolution (FDR) and obtain a certificate from a family dispute resolution (FDR) practitioner before they can apply to court for parenting orders, unless there are concerns about family violence and abuse or other exceptions, including urgency (section 60I). The legislation was accompanied by a significant investment in new community-based FDR services, including Family Relationship Centres, and in other specific forms of service provisions such as contact centres."

In *MRR v GR* [2010] HCA 4 the High Court made it clear that in determining whether an equal time order or a substantial and significant time order should be made, the Court must not only consider what will be in the child's best interests but that it is reasonably practical for the child to spend such time with each parent.

In an article published in (2010) 24 AJFL 255 *Chisholm & Parkinson* in summarizing the consequences of the decision state as follows:

*Where s65DAA applies, in order to make a parenting order that children have equal or substantial and significant time with each parent, in contested matters the Court must now make a specific finding that the child spending such time with the parents is reasonably practicable having regard to the factors listed in s65DAA(5), distinct from its assessment of what is best for the children (even if some of the same factual material might be relevant to both issues). Failure to do so will mean the Court has no power to make an order for equal time or substantial and significant time, even though the judge may consider such an arrangement to be in the child's best interests with regard to the s60CC factors.*

In *Cowley & Mendoza* [2010] FamCA 597, Murphy J succinctly summarized the legislative pathway the Court should follow in parenting matters, stating:-

***“Summary of Principles***

*The decision in MRR, in combination with the legislative requirements (and bearing in mind the Full Court’s decision in Goode v Goode [2006] FamCA 1346; (2006) FLC 93-286), would, then, appear to me to require a Court contemplating the making of parenting orders to:*

- *First apply a presumption that it is in the best interests of the subject children for their parents to have equal shared parental responsibility in respect of them;*
- *Next, make findings as to whether any “family violence” or “abuse”, as each is defined, exists;*
- *Further or alternatively, then make findings, by reference to s 60CC(3) about such matters pertaining to best interests relevant to the issue of whether parental responsibility should be shared equally;*
- *Determine, accordingly, whether the presumption of equal shared parental responsibility is, as a result of findings about each (or, perhaps, both) of the above matters, respectively, inapplicable or rebutted or, presumption or not, whether such an order should be made;*
- *If the presumption is inapplicable or rebutted, and such an order should not otherwise be made, make findings about best interests relevant to a determination of what ultimate orders are in the best interests of these particular children in their particular circumstances (s 65D; s 60CA; s 65AA). (As the Full Court put it in Goode, the enquiry about best interests is “at large”);*
- *If the presumption is not inapplicable or rebutted, or if it be determined that an order for equal shared parental responsibility should in any event be made, the Court must (s 65DAA) then proceed to:*
  - o *Make findings as to whether the subject children’s best interests are best met by an order for equal time; and*
  - o *Make findings as to the matters prescribed in s 65DAA(5), and, as a result;*
  - o *Make findings about whether an equal time order is reasonably practicable (that is, in the words of the High Court, make “a practical assessment of whether equal time parenting is feasible”); and*

- *If it is not, conduct the same process, but this time with findings directed to a consideration of whether a “substantial and significant time” order (as defined – see s 65DAA(3)) should be made;*
- *If neither an equal time order, nor a substantial and significant time order, should be made, proceed to determine the orders which the earlier findings point to being in the subject children’s best interests. (s 65D; s 60CA; s 65AA).*

*It might be thought that, as a matter of logic, if neither party seeks an order for either equal time or substantial and significant time, a consideration of the power to make such an order may become moot. But, that is clearly not so.*

*First, the Court must (subject to procedural fairness) formulate proposals, independent of the parties, consistent with findings about the children’s best interests. (See, eg. U v U, above). Secondly, while, in accordance with the High Court’s judgment in MRR, s 65DAA contains the power to make those orders, the section also plainly casts an express obligation upon the Court to consider the exercise of the power to make each such order in the prescribed manner when the precondition to its application is met (viz. an order is to provide for equal shared parental responsibility). That statutory obligation exists despite the fact that, in any given case, neither party seeks an order of either type.”*

For a discussion of the appropriate principles to apply in respect of parental responsibility see the decision of Murphy J in *Wattel & Evans* [2010] FamCA 411 where the comments of His Honour include the following:

“14. The parents of children each have, by the fact of parenthood alone, parental responsibility for each of those children. (s.61C). That means that each parent has, in respect of each child, “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children” (s.61B). That situation is not affected by any change in the nature of the parent’s relationship, for example by them separating or re-marrying (s.61C(2)).

15. Parental responsibility can, though, be altered by the making of a parenting order by the court but only to the extent that the order confers duties, rights, responsibilities or authority in relation to the particular child or children the subject of the order. However, a parenting order does not *per se* remove or diminish any aspect of parental responsibility; the order must expressly do so or doing so must be necessary to give effect to the order (s.61D(1) and (2)).

16. But, when a court is to make a parenting order, it must apply a presumption that it is in the best interests of the subject children for their parents to have “equal shared parental responsibility” for those children. The latter expression is not defined, but reference to s.61B would seem to render a meaning that all of the duties, powers, responsibilities and authority which, by law, parents have in relation to children are to be shared, and shared equally.
17. The statutory presumption just referred to is rebuttable in circumstances where the court has reasonable grounds to believe that there exists abuse or family violence as defined (s.61DA(2)) or where the court considers that it is in the best interests of the children for the presumption to be rebutted (s.61DA(4)).
18. No statutory provision other than s.60CC governs how best interests is to be determined in that context. Section 60CC, it has been noted, is headed “how a court determines what is in a child’s best interests”. It is, then, again called into use in this context.
19. The ambit of the legislative provisions referred to thus far is narrowed by reference to s.65DAE and the Note to s.65DAC. The latter section makes it clear that sharing parental responsibility (whether equally or not) is not a passive activity; it requires those having shared parental responsibility, or aspects of it, to make joint decisions and to consult and attempt to reach agreement in order to do so. However, the section goes on to provide that consultation is not required unless the decision is about a “major long-term issue” – an expression that is defined.
22. Thus, if the presumption of equal shared parental responsibility is not rebutted, then, absent specific provision in the parenting orders, the consultation and genuine effort to reach a decision required by s.65DAC applies, but (subject to specific provisions in the Orders) only in respect of “major long-term issues”.
23. Equally, the application of the presumption will mean that decisions during time spent between parent and child that are not about “major long-term issues”, can be made by the parent exercising the time without the necessity for the consultation and joint effort otherwise required in respect of “major long-term issues”. (s.65DAE(1) and (2)).

**Priority of Considerations in s.60CC:**

In the course of his Judgment in *Heiden & Kaufman* [2011] FMCA fam 478, Federal Magistrate Harman discussed the priority if any of considerations under s.60CC and made the following comments:

116. In dealing with s.60CC I am required to consider the primary considerations of the benefit to the children of having a meaningful relationship with both of their parents and the need to protect the children from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence.
  
117. There are a number of particularly significant issues that relate to the primary considerations. Firstly, as remarked Carmody J in *Dylan & Dylan* [2007] FamCA 842, the primary considerations are not more important than the additional considerations. Indeed, there are circumstances in which the additional considerations may well not only inform the primary considerations but outweigh them. Secondly, the primary considerations are not ranked in any order of priority. Accordingly, notwithstanding much current misinformation in popular debate there is no prioritization of the benefit to a child of having a meaningful relationship with a parent over and above the child's protection. Indeed, such an argument is a nonsense.
  
118. The Act of by its own description does not prioritise or suggest that there should be any prioritisation. Secondly, the first of the primary considerations, first chronologically and in no other manner, is the benefit to the child of having a meaningful relationship with both parents. It is thus clear that there must firstly be found to be a benefit and, secondly, that the focus is not upon one parent's relationship with the children but both parent's relationships. In many cases, and I find that this one, those relationships are inextricably linked with the child's best interests and indeed each parent's relationship with the child is interlinked with the others.

**Impact of the 2006 Reforms:**

The aim of the 2006 reforms was to bring about "generational change in Family Law" and a "cultural shift" in the management of separation, "away from litigation and towards co-operative parenting".

The changes included new and expanded family relationship services partly based on a recognition that many disputes about children after separation were driven by relationship rather than legal problems.

***Have the reforms been successful in achieving the outcomes sought and what issues, problems and concerns have they given rise to at the coalface?***

**The AIFS Evaluation and the Lawyer's Perspective:**

The Australian Institute of Family Studies was commissioned by the Australian Government to undertake an evaluation of the impact of the 2006 changes.

The evaluation involved data being collected from 28,000 people involved in the Family Law system, including parents, grandparents, family relationship services' staff, clients of family relationship services, lawyers, court professionals and judicial officers. The evaluation also involved 1724 court files.

Following are some comments and findings largely drawn from the evaluation and other sources, firstly as to the impact of the reforms from the lawyer's perspective and secondly, from the psychologist's perspective:

- **A significant proportion of separated parents are able to sort out their post-separation arrangements with minimal engagement with the formal Family Law system.**

**Lawyer's Comment:**

There has undoubtedly always been a significant proportion of separating parents who have been able to sort out arrangements and overcome their difficulties outside the system. Others have no doubt been assisted by minimum professional intervention. In my view the shared care culture would have influenced the arrangements made. Discussion around the barbecues has undoubtedly been to the effect that things had changed, that arrangements for post-separation contact of parents with children had become more equal and fathers were being given more opportunity to be involved in their children's lives. One of the objectives of the 2006 reforms was to encourage greater involvement by both parents in their children's lives after separation and in my view this is being achieved.

- **There is evidence that FDR is assisting parents to work out their parenting arrangements. About two-fifths of parents who used FDR reached agreement and did not proceed to court.**

**Lawyer's Comment:**

It is clear that there has been an increased resort to ADR and the requirement for parents to undertake mediation before instituting court proceedings has had a significant impact on this culture developing. This reflects one of the policy objectives of the 2006 changes which was to help separated parents agree on what is best for their children rather than litigating. My own experience from mediation is that a significant proportion of couples coming to mediation achieve a resolution. Mediation enables professionals to stress and encourage the adoption of child focused practices which undoubtedly have the potential to result in better outcomes for children.

- **A significant proportion of families who actively engage with the Family Law system have complex needs, involving issues such as family violence, child abuse, mental health problems and substance abuse and these families are the predominant clients both of post-separation services and the legal sector.**

**Lawyer's Comment:**

It is my experience as advocate, Independent Children's Lawyer and Mediator that a significant proportion of families engaging with the Family Law system have complex needs of the type outlined and the trend is for an increasing number of cases to involve one or more or even all of these elements. One aspect of concern is the possibility that a significant proportion of these families do not engage with the legal system at all and make arrangements outside the system which may not be child focused and in fact may place children at risk.

- **Judicially determined orders for shared care time increased post-reform, as did shared care times in cases where parents reached agreement by consent.**

**Lawyer's Comment**

My strong hunch (although not based on research) is that the number of judicially determined orders for shared care have increased post reform. The requirements of the legislation would make this almost obligatory and anecdotally it is clear that the requirements of the reforms and the changed culture have impacted on judicially determined orders. I have no doubt that there have also been more shared care times in cases where parents have reached agreement by consent.

- **Generally, shared care time did not appear to have a negative impact on the wellbeing of children but irrespective of care-time arrangements, parents who expressed safety concerns described their child's wellbeing less favourably than those who did not hold such concerns.**

**Lawyer's Comment**

I will leave it to Denise and the social scientists to comment on this one.

- **Families where violence had occurred were no less likely to have shared care-time arrangements than those where violence had not occurred. Similarly, families where safety concerns were reported were no less likely to have shared care-time arrangements than families without safety concerns. Further, the pathways to these arrangements included decisions made without the use of services and decisions made with the assistance of family relationship services, lawyers and courts.**

**Lawyer's Comment**

My suspicion based on experience in both the court system and mediation is that unfortunately this may be true to a significant extent although perhaps not to the same extent as shared care arrangements occur in situations not involving violence or safety concerns. My concern is that

the all pervading shared care culture results in shared care arrangements being entered into in situations where they are clearly not appropriate.

- **There is evidence that encouraging the use of non-legal solutions, and particularly the expectation that most parents will attempt FDR, has meant that FDR is occurring in some cases where there are very significant concerns about violence and safety.**

**Lawyer's Comment**

Again my concern is that FDR is occurring in some cases where there are significant concerns about violence and safety. To some extent this possibly reflects a continuing lack of understanding in some sections of family violence and the way in which it affects children and parents.

- **While aspects of the reforms sought to place more emphasis on the importance of identifying concerns about family violence and child abuse, other aspects including s.117AB which obligates courts to make a costs order against a party found to have “knowingly made a false allegation or statement” in proceedings, and s.60CC(3)(c) which requires courts to consider the extent to which a parent has facilitated the other parent's relationship with the child contribute to a reticence among some lawyers and their clients about raising such concerns.**

**Lawyer's Comment**

The AIFS study indicates that these provisions have given rise to a reticence among lawyers about raising concerns about violence and safety in case they lead to an adverse inference being drawn against their client or even a costs order resulting. Whilst I have no direct experience of this, I can see that it could be a factor in allegations being downplayed or not pushed in some instances.

- **There is evidence that many parents misconstrue equal shared parental responsibility as allowing for “equal” shared care time and in cases in which equal or shared care time would be inappropriate, it is considered that this can make it more difficult for relationship service professionals, lawyers and courts to encourage parents to focus on the best interests of the child.**
- **Many parents and some professionals do not understand the difference between shared parental responsibility and shared care time. A common misunderstanding is that shared parental responsibility allows for “equal” shared care time.**

**Lawyer’s Comment**

In my view the requirements of the legislation are still regarded as cumbersome and confusing by many and still not understood by parties and even lawyers in some cases. The decision in *MRR v GR* [2010] HCA 4 is a good illustration of how different views can be taken of essential aspects of the legislation at the highest levels. There is still in my view a widespread misapprehension in the public that the legislation provides for equal shared time in most instances. This gives rise to disillusionment in many cases particularly among fathers when equal shared time does not result. These misunderstandings also often make it difficult for lawyers and other professionals to achieve a child focused outcome where equal time is not appropriate. There seems to have been a submergence of developmentally appropriate outcomes for children to the dictates of equal or substantially shared time for parents.

- **The changes have encouraged more creativity in making arrangements, either by negotiation or litigation, that involve fathers in children’s everyday routines as well as special activities.**

**Lawyer’s Comment**

In my view at the coalface there has undoubtedly been more emphasis on how parents and particularly fathers can be more involved in their children’s lives.

- **Legal sector professionals had concerns arising from the parallel operation of the Federal Magistrates Court and the Family Court, including the application of inconsistent legal and procedural approaches and concerns about whether the right cases are being heard in the most appropriate forum.**

**Lawyer's Comment**

It has, in my view, become increasingly apparent that there are different practices and processes applying in the Federal Magistrates Court and the Family Court. The most apparent feature of the Federal Magistrates Court is the heavy listing of matters on a routine basis. It is not uncommon for duty lists to have in excess of 30 matters and sometimes over 40 matters listed and this significantly narrows the opportunity for what could normally be regarded as a "proper hearing" of matters in the early stages. When this is combined with the docket system and the normal variants of personality and practices and views between judicial officers it is increasingly difficult for lawyers to predict outcomes for clients with anything even approaching a degree of certainty.

- **The new substantive parenting provisions introduced by the 2006 reforms tendered to be seen by lawyers and judicial officers to be complex and cumbersome to apply in advice-giving and decision-making practice. There is concern that legislation that should be comprehensible to its users – parents – had become more difficult to understand even for some professionals.**

**Lawyer's Comment**

See comment above on page 13.

- **The majority of parents in shared care time arrangements reported that the arrangements worked well for them and their children.**

**Lawyer's Comment**

Again this is a matter for comment by Ms. Britton and the social science professionals.

- **Up to one-fifth of separating parents had safety concerns linked to parenting arrangements.**

**Lawyer's Comment**

I cannot quibble with the data on this aspect. However I suspect that many parents and particularly women with safety concerns may feel that they have no alternative but to submerge such concerns to the desire of the other parent for substantial or equal time with the children and what they perceive as the support of the system for such desire under the 2006 reforms.

- **The majority of parents who attempted family dispute resolution reported that it worked well.**

**Lawyer's Comment**

My experience as a mediator tells me that participation in mediation offers a welcome process and outcome for many disputing parties. Whilst participants are quite often very happy with the process and pleased to achieve a resolution without the cost or stress and delay associated with court proceedings, many may feel that in achieving such they have agreed to an outcome which is a compromise and which they do not always consider is in the best interest of their children.

- **A majority of lawyers perceived that the reforms have favoured fathers over mothers and parents over children.**

**Lawyer's Comment**

I think there is a widespread view at the coalface that the 2006 reforms were favourable to men and in most cases offered them a better outcome than they could have hoped to achieve in the pre-2006 environment.

- **Financial concerns, including child support liability and property settlement entitlements, were perceived by many lawyers and some family relationship professionals to have influenced the care-time arrangements that some parents sought to negotiate.**

**Lawyer's Comment**

A colleague of mine in delivering a paper on child support, unhesitatingly stated that in her view “behind most intractable contact disputes lay a child support issue” and I am inclined to believe this is the case, particularly where when asked what contact they are seeking they happily nominate a specified number of days in each year which just so happens to coincide with a child support marker. I have no doubt that many lawyers do believe that child support and property settlement often have an important bearing on the contact one or other party might seek. It is hard to obtain statistics on this because the answer lies in motivation rather than factual matters.

**The AIFS Evaluation and the Psychologist's Perspective:**

- From a social science perspective, it is encouraging that so many separated couples have responded positively to the requirement to consult with social scientists and mediators (not always one and the same) prior to litigating. I am not so naive, however, as to assume that all of these people are doing so because they recognise that unresolved relationship issues are at the heart of most of their disputes. No. Many are clearly doing so because they have to and, although they would love to save the cost of litigation, they are not ready to make significant shifts in respect of their own attitudes or behaviour in order to resolve their parenting disputes.
- The research has found that fathers who never saw their child/ren were less likely to meet their child support obligations. This implies a causal connection between the two factors, but I believe the reverse is also often true – that is, that when fathers do not pay child support they are less likely to be voluntarily allowed significant time with their child/ren by mothers. My experience tells me that both dynamics are possible and at times both can be at play in the one dispute.
- It is not surprising that where there is shared parental decision making there is more child support compliance. So often as to be repetitious, we hear the query, “Why should I pay when I don't have any say in what happens to my child?” It is all very well for us to tell parents that the children have rights and they have responsibilities, but this will not alter the fundamental sense of unfairness which arises from being shut out of a child's life post separation.

- It is interesting that there has been a general trend in the community between 1997 and 2006/7 for more shared care, defined by between a 35%:65% and a 50%:50% split. There was, however, a more significant increase (2% to 13%) for judicially determined orders than for orders achieved by consent (10% up to 15%) during that period. The key here in my view is that the court has largely followed the community trend rather than led it. Greater sharing of child care post separation is clearly something that the community wants for a host of reasons on which we can at this stage only speculate. I assume that the following are all contributing factors: women being ever more likely to want to work post separation; large and small employers in both private and public sectors moving to accommodate more flexibility in the workplace for both fathers and mothers on their payrolls; and increased mobility of people in general with the corollary that there is less available family support to help with child care.
- The courts, family report writers and lawyers in my experience have tended to take the view since 2006 that for shared care to be effective and child friendly a reasonable working relationship between the parents is ideal if not essential. It is not surprising to me then that the AIFS research found generally better quality inter-parental relationships in post separation families with some form of shared care than for other forms of care.
- However, it does surprise me that the research discovered that families who have experienced domestic violence or who have safety concerns regarding one or both parties have been no less likely to end up with shared care arrangements than those without violence. This then begs the question as to whether it is possible (in the light of the overall perception by parents in shared care arrangements that their parenting relationships are relatively positive) that shared parental responsibility and shared care (not necessarily equal shared care) are in fact improving the quality of the parental alliances even in families which have had violence or safety concerns.
- Across the range of care arrangements examined by the study, mothers and fathers reporting safety concerns also provided less positive evaluations of their children's wellbeing. The trend was most marked in respect of the opinions of mothers expressing safety concerns and whose children were in shared care arrangements. My comment on this is that care must be taken not to accept that children in shared care where there have been reported safety concerns are in fact not doing as well as they would in other care arrangements because one parent says so. The dangers of

such an assumption are obvious. Further studies will no doubt look at not only the self report of parents, but also objective measures of child development and emotional adjustment.

- The research also picked up the fact that FDR is occurring in some instances where there are very significant concerns about violence and safety (for parties and / or children). Although there is evidence that the 2006 amendments brought with them better screening of issues such as violence, mental disorders and substance misuse, the point is made that there is still a need for “professionals across the system to have greater levels of access to finely tuned assessment and screening mechanisms applied by highly trained and experienced professionals.” I agree, but make the point that removing the option to mediate when a desire to do so is expressed by both parties, including the alleged victim of previous violence of one form or another, is not going to be the answer in all cases. In our experience, being able to sit across the mediation table (whether with or without legal representation) from a person who has a history of intimidation and disempowerment is often a liberating step in moving towards a more assertive and confident level of functioning. Provided the mediator has the skills to manage any actual or perceived power imbalances then many positive outcomes can be achieved through mediation with such couples.
- Couples dealing with domestic and family violence are more likely than most separated couples to not receive adequate support or assistance with resolving their dispute other than through more traditional means – such as Protection Orders and fully litigated Federal Magistrate’s and Family Court orders. Many of the government funded FDR agencies have such strict guidelines in respect of mediating issues when there has been an allegation of domestic violence, that some separated parent couples who are adamant that they don’t want to go to court and really want to mediate, feel disadvantaged financially and in other ways by being denied this service.
- If power imbalances are not allowed to carry over into mediation, lawyers are encouraged to support parties (particularly those claiming to have been DV victims) in attending mediation as excellent outcomes can be achieved with the assistance of a mediator who is sensitive to the needs of children.
- If one or both party’s capacity to mediate is compromised by fear and abuse, then they should clearly not be placed in a situation in which they are disadvantaged as a result. However, I would

assert that there is nothing to stop them from being similarly compromised in a trial where they are required to give evidence in the presence of the alleged perpetrator of the abuse against them and where their anxiety and panic could possibly be misinterpreted by the judicial officer. The chance of a fair and child friendly mediation outcome, despite allegations of abuse, is enhanced by sensitivity and firmness on the part of the mediator and such strategies as use of the shuttle conference, legal advice and support for both parties and good screening systems.

- As a last resort, mediators should remain confident enough to determine that certain disputes are not suitable to mediate. In some cases there is no doubt that continuing with mediation is not likely to produce a positive outcome. I recall a case where the parents' accounts were totally disparate in regard to the children's relationships with one of the parties. With the benefit of a psychologist colleague's report on child inclusive interviews with each of the children, the children's comments being totally consistent with those of one of the parents, we had no option but to report the matter to child welfare authorities and inform the parties that we considered their dispute was unsuitable for mediation.
- A responsible approach to child safety and wellbeing by all professionals involved is what is needed. Please don't take the hard line that because your client has made or denied an allegation which involves a risk of harm to a child, then that account represents the gospel truth. Most of the time in my experience, the truth is an elusive thing somewhere between the parties' accounts. When children are involved, there needs to be at least some degree of circumspection on even the parties' legal representatives in working towards ensuring safety for all children. The stakes are high and the outcomes for children can be lethal. These issues are not those where posturing and legal game playing can be justified. Please step back in children's matters and try to imagine you are in a position that allows you to take a bi-partisan view. Question your client accordingly. Even if you don't this will happen when they are interviewed by a mediator or family report writer or when they have their first stint in the witness box.
- The AIFS research provides evidence that many parents still confuse equal parental responsibility with equal time. This is consistent with my experience, although the community are undoubtedly becoming better educated and more sophisticated in respect of these issues. Many still miss the fact that the child's best interests are of paramount importance and that the importance for

children's healthy development of having meaningful relationships with both parents underlies the greater emphasis since 2006 on their having at least substantial time with both parents.

- A criticism of the 2006 changes is that they have promoted a focus on parents' rights rather than children's needs. I still hear too often, "I want week about shared care. That's what I'm entitled to and that's what the Court will give me". When apprised of the reality of the situation these parents (usually fathers in my experience) are often distressed and angry as they had the perception that "50:50 share care" would happen as a matter of course.
- How refreshing it is for me as a psychologist to hear, "I just want what's best for the kids and I don't want them caught up in conflict." What a great starting point for working with a family. Then I can really do my stuff – what I have been trained for and what I believe in. Unfortunately, it seems that no matter what changes are made to the Family Law Act though, the hard core of the separated parent population represented by a small percentage of our family law clients will continue to be driven largely by their own needs, their own emotional responses to separation and to life in general and a need to win or to at least pay back over and above what is best for their children. The difficult thing for psychologists and other social scientists engaged in working with these people and for lawyers trying to advise them is that their insight into the causes of their own behaviour is most likely very deficient. Having said this though, many is the time when the apparently most hardened and bitter parent will surprise by taking on board a new way of viewing their children's needs and what their capacity to help meet them through making an attitudinal shift.
- It is great when parents who were previously locked in mortal combat can sit down together with a psychologist or other social science professional and (often with their lawyers) talk about creative ways of parenting their children cooperatively instead of having a court tell them what they must do. Common sense tells us that litigated court orders are often very blunt instruments lacking in finesse and that when we help parents tailor make an agreement according to the unique circumstances of them both and their children, that agreement has a better chance of success.

- I have noticed many things since 2006, some of which have surprised me. They include:
  - Less resistance by mothers to shared care than expected - even when it means they need to retrain and go back to work ahead of what they previously planned. (Have they perhaps in some instances been liberated?)
  - More readiness on the part of many fathers to rearrange work schedules, take on organisation of children and running of households than I expected. (Men are definitely more domesticated than they used to be.)
  - Unfortunately, a strong nexus in many cases between outcomes requested in children's and financial matters (so what's new?) to the frequent disadvantage of mothers in particular, as we all know that women tend to receive lower incomes than men for comparable work and to have less chance of reaching management levels. Their lifestyles and the lifestyles of the children who live with them are often negatively impacted when the financial contribution by the children's fathers is significantly reduced as a result of the fathers taking on a greater share of child care. It is artificial from a social science perspective to say that property and child support matters have nothing to do with parenting issues.
  - Little change to the number of situations where one parent hijacks parenting completely – and I can vouch that it is often fathers who are guilty of this and not just mothers – to the extent that children refuse to spend time with the other parent when it seems to an educated and experienced evaluator that there is no good reason for this to be the case.
  - Cases where parents agree on arrangements which on the facts may not be child friendly, although I have to say this is not often my experience. Domestic violence, child abuse or neglect and other social problems are issues which all diligent family report writers raise as a matter of course in their assessment process and these issues should also be screened for in any mediation intake.

### **Examining the Idea of “A Meaningful Relationship” and what works best for the Children**

#### **“Meaningful Relationship”:**

Section 60CC of the *Family Law Act* sets out how a court determines what is in a child's best interests and reads as follows:

*How a court determines what is in a child's best interests*

*Determining child's best interests*

- (1) *Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).*

*Primary considerations*

- (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.*

*Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).*

*Additional considerations are set out in Section 60CC(3) and practitioners would be familiar with them.*

### **The Lawyer's Perspective:**

The court has examined the idea of a meaningful relationship in a number of cases and I instance the following:

*Mulvany & Lane* [2009] FamCAFC 76 was an appeal against a decision of FM Howard at first instance permitting the mother to take a then five year old child who had been born in the course of the parties' marriage, to live with her in Hong Kong and spend time with the father in Australia.

Ms Britton was the reportwriter in this case in which the court upheld the appeal against His Honour's decision.

The Full Court held that His Honour FM Howard had acted on an erroneous interpretation of s.60CC(2)(a) by holding that where a child only has one parent participating in the parenting proceedings, it will be a primary consideration in determining the child's best interests, that the child have a meaningful relationship with that parent (my emphasis).

Finn J noted that “it is indeed unfortunate..... that the legislation does not give some clearer indication of the weight to be attached to the child’s relationship with a person other than his parent, compared with the child’s relationship with the natural parent in the determination of proceedings between a parent and a person other than a parent”.

The court held that FM Howard did not attempt to define what was meant by the expression “meaningful relationship” but wrongly phrased the relevant question as “what outcome will best ensure that S has a meaningful relationship with his mother” rather than “what is the benefit to the child of having a meaningful relationship with his mother”.

In *Mazorski & Albright* [2007] FamCA 520 Brown J concluded that “a meaningful relationship... is one which is important, significant and valuable to the child “and further that “it is a qualitative adjective, not a strictly quantitative one. Quantitative concepts may be addressed as part of the process of considering the consequences of the application of the presumption of equally shared parental responsibility and the requirement for time with children to be, where possible and in their best interests, substantial and significant”.

At para 152 Her Honour noted that: “There is no doubt that it is in the child’s best interests to have an ongoing, strong and significant relationship with both of her parents” and later that: “I am satisfied the mother acted proactively and constructively to ensure that the child maintains a clear picture of her father, his role in her life and his importance to her”.

In *Moose & Moose* [2008] FamCAFC 108 an appeal to the Full Court against a decision of His Honour Justice Bell, one of the grounds of the father’s appeal was an assertion of failure by His Honour to give consideration to the father having a meaningful relationship with the children.

Boland J at paragraph 71 stated:

*“The question then raised in this appeal is - Did His Honour appropriately consider, give reasons and craft orders to enable these children to have a relationship with their father, which was even if not optimal, important, significant and valuable to them, or were orders which would have fostered such a relationship, inappropriate because of risk of physical or emotional harm to them?”*

and at para 79:

*“In summary, I am satisfied that His Honour fell into appealable error in his consideration of s.60CC(2)(a) and (b) as, having found no unacceptable risk of physical abuse by the father, he failed to consider, (having found the children believed they had been subject of sexual abuse), if it was possible or appropriate to make orders to promote a meaningful relationship for the children with the father both in the shorter and more significantly the longer term.”*

### **The Psychologist’s Perspective:**

As a psychologist, I am in the first instance of the view that a meaningful relationship (in the sense of being positively rather than negatively “meaningful”) is not necessarily an ideal relationship. It is rather one which in my professional opinion is more likely to serve the child’s best interests than not, if facilitated and maintained.

I start from what I think is a generally held community view that, provided a parent is known to a child from an early age and is not considered to present an unacceptable risk of physical, sexual or emotional risk or neglect to the child, then the child is likely to be better off having a relationship with that parent than not having one.

From a psychological standpoint, a meaningful relationship between a parent and a child is quite different at different developmental stages in a child’s life, based on varying needs of children as they grow.

**For the neonate (from birth to three or four months)**, a meaningful relationship with a “parent” (and that word is not necessarily attached to biology when used in a psychological sense) is one on which the tiny human depends for his / her very survival. Basic physical needs must be met and the baby learns to trust - a vital requirement for normal human development - based on cries of hunger and discomfort being responded to appropriately. The child needs relationships with adults who are not egocentrically driven and put the child’s needs first. There should be allowance for the neonate to have at least one primary carer and the relationship of the child with secondary attachment figures should not be at the expense of the primary relationship or relationships.

Non-resident parents of neonates need to accept the need for the child in the first instance to spend most of its time sleeping and feeding. Times with the child for this parent in a separated situation should be short and frequent and ideally cause minimal disruption to the routine of the child and the primary attachment

figure/s. This has special meaning if the child is breast fed in which case the right of the child to establish a bond with the mother in a peaceful way should be respected.

**For Infants from four to twelve months of age**, the need for sleep declines and the need for socialization and cognitive stimulation gradually increases. At about six to eight months, normal infants discriminate between the people they come into contact with and prefer one or two special people over all others. Even with a maternal primary caregiver, some babies attach to the father or a grandparent or older sibling in preference to the mother. Others do not form single attachments at all and make multiple attachments simultaneously. I like the observations of Schaffer (Schaffer and Emerson, 1964) that:

*...being attached to several people does not necessarily imply a shallower feeling towards each one for an infant's capacity for attachment is not like a cake that has to be shared out. Love, even in babies, has no limits (1977, p 108).*

I wish parents would remember this when locked in mortal combat over the amount of time they are having with their infant children.

Children of this age typically display (normal) separation anxiety when the distance between them and their mother becomes uncomfortable, the mother providing a secure base from which the infant can explore the immediate environment and the distance travelled in these excursions becoming greater over time. A meaningful relationship for a typical father (as opposed to a father who is the primary carer) at this time will be focused on play and socialisation (whilst they still need to be aware of and responsive to the child's physical needs). We know there are benefits to children cognitively and emotionally from the greater physical stimulation and louder communication provided by fathers over mothers. The latter tend to be more soothing and calming in their interaction although some experts believe that when a father is the primary caregiver, he is more likely to behave like a mother would be expected to behave - that is, more like a classic nurturer than a fun figure (Field, 1978; Lamb, 1997). Children ideally should have a balance of parenting styles.

Regular overnight stays away from the primary carer are not usually recommended at this stage of development. Common sense tells us that the average infant can cope with occasional sleep-overs without the primary carer, provided familiarity is maintained in their normal routine and they are not left with strangers. It may be that as our thinking advances further, it will be realized that in separated families, both parents can safely spend *substantial* periods of time with children who are even this young. Cooperation

between parents and synchrony in routines will minimize negative impact on the infant. The ideal at this age is generally considered to be one or two hours at a time with the non-resident parent several days a week, so that the infant can learn to trust this parent as well as his or her primary carer (Wallerstein, Lewis and Blakeslee, 2000). Such an arrangement allows for a meaningful relationship with the child for the non-resident parent as well as the resident parent.

**For toddlers from one to three years of age**, attachment to the primary carer and to other interested persons takes on major significance, especially when considering the viability of contact with non-resident parents. The most important prerequisite for secure attachment is thought to be the sensitive responsiveness of the caregiver to the infant's needs – especially to states such as anxiety, fear, fatigue and illness. Secure attachment leads to a sense of control over the environment, as the infant starts to venture further and further away from attachment figures and to develop a sense of self worth.

In the second and third years of a child's life, all areas of development proceed at an enormous rate – from fine and gross motor skills to social and imaginative play which involves cooperation and the taking on of roles such as leader and follower. Normal three year olds can communicate quite complex ideas in comprehensible sentences and have extensive vocabularies, even tailoring speech to suit their listeners' needs (Schatz and Gelman, 1973). From this capacity to communicate comes early socialization and the ability to form many levels of relationship across all age groups. Associated with the toddler's discovery of a sense of autonomy – a self separate from the primary attachment figure and able to make decisions which do not necessarily correspond with the requirements of the carer - is a period of negativism which is often described as the "terrible twos" or "terrible threes" and is associated with the continual use of the word "NO". Children at this age need firm and appropriate limits at the same time as they need the sense of security which allows them to test their emerging abilities. Parents and other carers need patience, persistence, and a clear and positive sense of self to handle them appropriately.

A meaningful relationship with a parent at this age requires frequent contact since toddlers lack the ability to hold memories of attachment figures for extended periods of time (Lund, 2005). Provided logistically possible and practicable, a more equitable form of shared care, including overnight stays with the contact parent, can be considered – provided the child is attached to the contact parent and the contact parent has necessary parenting skills. If the toddler has coped with overnight stays with babysitters, sleeps through the night, allows the contact parent to comfort him or her in stressful situations and the contact parent's home is

appropriately equipped, this augers well for extension of contact periods. Secure attachment to both the primary and contact carers will predispose to a successful increase in time with the contact parent.

**Pre-schoolers from four to five years of age** tend to think magically and typically attribute causation in what adults would consider an irrational manner. They have difficulty understanding their parents other than in terms of their relationship to them (McIntosh, 2003) and in family law disputes they will often align themselves with one parent and alienate themselves from the other for no reason other than to simplify matters. Their understanding of the world is very concrete and experientially based and play is extremely important for their cognitive and physical development – through physical activities, social activity with peers, and most importantly through fantasy play which is known to foster creativity, greater verbal fluency, better story telling and greater capacity to sit quietly (Singer, J., 1973). A meaningful relationship between a child of this age and a parent will facilitate fantasy and imaginative play and tidiness will have a lower priority than the child's freedom to explore their environment.

A meaningful relationship at this stage of a child's life will involve the parents spending significant periods of time with their child and not being domestically violent or using frequent physical punishment (Singer and Singer, 1981). Boys of this age with authoritarian parents have been found to lack social competence with their peers, to demonstrate an external locus of control and to lack spontaneity and intellectual curiosity, later demonstrating anger and defiance in relation to authority figures (Baumrind, 1971, 1980). In addition, pre-schoolers with overly permissive parents tend to be immature and to lack self control. Authoritative parenting, however - that is, more collaborative parenting whereby the parent's authority is implicit and does not need to be imposed - achieves the best results, children demonstrating better pre-school performance, social adjustment, independence and contentment (Baumrind, 1980; Dornbusch et al., 1987; Lamborn et al., 1991) and after parental divorce and separation, authoritative parenting is associated with better adjustment by children of all ages (Hetherington and Clingempeel, 1992). Pre-school and school aged boys fare worst in separated female led households in that they show a higher rate of behaviour disorder and social interaction problems than girls who live with their mothers or children of either sex living with both parents. They frequently become angry and unruly, and if the mother responds with harshness the situation tends to become worse (Baldwin and Skinner, 1989). Boys in particular need meaningful (and preferably authoritative) relationships with their fathers at this and subsequent stages of development. If one parent is significantly more available than the other then the child should probably live with this parent, as preschoolers still need a high level of contact with their parents. Advocates of traditional post separation

parenting arrangements suggest every second weekend, together with mid week short visits. Shared care advocates on the other hand, are likely to recommend four nights a week with one parent and three with the other – perhaps with reversals each week (Lund, 2005). Where distance is an issue but the child is attached to both parents, Lund suggests that periods of two to three weeks away from the primary parent are acceptable by this age.

**Primary school age children from six to twelve years of age** is the time when the peer group starts to take on greater significance in the child's life, the child spending approximately 40% of his or her waking time with peers – at school, in extracurricular activities and simply "hanging out". Children in middle childhood develop a new sense of self which is in large part defined by how they feel they are perceived by their peers and how they perceive their peers. High self esteem during this period of development has been found to predict satisfaction and happiness in later life whilst low self esteem is associated with adult depression, anxiety and poor adjustment academically and socially (Harter, 1993).

The role of teachers and other adult trainers also overtakes that of the parents in many ways. Parents still, however, are of vital importance in supporting and directing the developing child. Their capacity to assess and interact with the significant others in their child's life and to facilitate and support the child's activities is most important and forms the basis of meaningful parental relationships at this developmental stage. In order to foster self esteem, parents should aim to give their school age children the sense that they have faith in them to control their own behaviour within certain boundaries (Harter, 1996). They need to encourage exploration, explain what they are doing, listen to their children and have realistic expectations of them in order to promote academic success (Stevenson, Lee and Stigler, 1986) and parental behaviour at home influences the school age child's social behaviour and contributes to whether or not they are accepted by their peers (Rubin and Sloman, 1984), greatly influencing the child's later social and career opportunities and success.

As at all stages of child development, meaningful relationships with both parents are ideal and significant time spent with each parent is conducive to healthier development of both sexes (Lund, 2004). Fathers are finally being recognized for their importance in healthy development through the primary school years, there having been many research studies to support this assertion. For instance, girls with daily access to their fathers were found to have significantly better problem solving skills than their counterparts in mother headed single parent households (Fry and Grover, 1982). Steve Biddulph, in *Raising Boys (2003)*, tells us

that at the age of about six, there is a "sudden switching on of boys' masculinity" and that across all cultures they "lock onto" their dads (or step dads) at this age. In *More Secrets of Happy Children (1998)*, he also refers to the important role of fathers in their daughters' development – particularly in shaping their self esteem (p128).

Lund (2004) points out that if the parents each spend set nights each week with the primary school age child, this reduces the need for negotiation about homework and extracurricular activities, as each becomes skilled at dealing with the subjects and activities associated with those particular days of the week. There would still, however, need to be negotiation about weekend activities with such an arrangement. Children of this age have been found to prefer longer blocks of time to "ping ponging" between homes and the more the father is experienced as a "real parent" instead of a "visiting" or "recreational parent", the more likely the child is to behave similarly across households and the less likely to be a discipline problem for either parent (Lund, 2004). This is often compelling information for mothers in negotiation over parenting arrangements and a positive indicator for week about arrangements – provided the logistics of the situation are suitable (proximity of both homes to the school and peer group, financial ability to provide for all of the child's material needs in each household, etcetera). Where long distances exist between parents' homes, Lund recommends up to six weeks at a time for the primary school child with their "other" parent, preferably together with brief monthly contact – alternating between the child's and the long distance parent's local areas. It must also be remembered to allow for holiday time with the primary care parent. There is a variety of arrangements which are child friendly at this age and which also allow for meaningful relationships between the child and both parents.

**Adolescence** is a time of tumultuous change at the best of times. The major developmental tasks of this period in an individual's life are individuation or emancipation from parental control and development of a new identity based on changed physical appearance and newly acquired capacity for hypothetico-deductive reasoning. The sense of self established during adolescence will be reflected throughout adulthood and will influence the degree to which the adolescent ultimately achieves his / her potential. Pressures arise as a result of such issues as becoming sexually active, deciding on a career path, confronting philosophical tensions and embarking on a journey via which a belief system will ultimately be established. Core beliefs are likely to eventually reflect parental beliefs - but will probably involve rejection or serious modification of those beliefs - at least in the first instance. The conflict with parents and culture along the way is stressful for the young person as well as for parents and significant others, such as siblings. Adolescence is a risky

time too. Figures recently published by the Australian Institute for Suicide Research and Prevention indicate that in 2003, of the 2200 Australians who suicided, 14% were aged 15-24. Addiction to cigarettes, alcohol and illegal drugs is also a huge problem within this age group. Sexually transmitted disease and teenage pregnancy are still issues which can derail a young person's life – sometimes permanently.

The role of parents at this time ideally involves a delicately balanced gradual relinquishment of control in favour of the self control of their offspring, whilst remaining available as benevolent advisors. Time with peers is of vital importance to the normal adolescent and has a most significant role in helping to define identity. When parents are seen as too strict, the peer group will be turned to more. When the parents are inclusive and encourage negotiation, there is less orientation towards the peer group (Fuligni and Eccles, 1993). Adolescents remain closer to their parents, achieve better at school, are happier, demonstrate better mental health, and are less likely to engage in delinquent behaviours if their parents are authoritative in parenting style (Silverberg, et al., 1992; Fletcher et al., 1995; Steinberg and Darling, 1994) rather than authoritarian or excessively permissive, indifferent or uninvolved (Maccoby and Martin, 1983).

Adolescents caught up in family conflict will often withdraw from the family into relationships outside the home, the peer group providing the sense of belonging, community, and stability that the family cannot and undesirable friends can provide the context to forget their worries through anti-social behaviours of one kind or another (Herbert, 1996). Another common solution is for distressed, confused and ambivalent adolescents to reduce uncertainty and emotional pain by aligning themselves with one parent at the expense of their relationship with the other. This is concerning, since we know that both parents play important roles for adolescents. The adolescent who is secure in the unconditional love of rational and "together" parents, can afford to indulge in the luxury of such hot debates. When one or the other or both parents are emotionally fragile as a result of the need to adjust to separation, the adolescent may feel unable to access this normal developmental tool.

Steve Biddulph recommends that separated primary carer mothers consider sending their sons to live with their fathers when they are about fourteen, since they are difficult to manage at this age and unconsciously need limit setting by a strong male figure (Biddulph, 1998, p111). This is difficult for a mother to do if she has little faith in the father's nurturing qualities or if she does not communicate well with him. In addition, such action could be contra-indicated if the boy has observed his father being violent and would certainly be dangerous if he has been the victim of the father's violence (Johnston, 1998). Lund (2004) refers to the

tendency of adolescent boys to "migrate" to their father's home from traditional mother based custodial arrangements, in order to explore their relationships with their fathers and to consolidate the male identification process.

Girls have traditionally been thought to need the support and guidance of their mothers during adolescence and in my experience, the mother will more than likely be the one to receive an adolescent daughter's vote for a traditional custodial arrangement – for much the same reason as the opposite tends to be the case for boys. However, this will of course depend on a host of variables – such as the personalities of the adolescent girl and her parents, the history of conflict resolution within the family, the capacity of the father to "let his little girl grow up" and the mother's ability to parent without dominating.

Lund (2004) points to the need to respect each adolescent's preference and to the normal desire to spend more time with peers, one parent's home often being used as a base, but the number of nights spent there possibly not differing greatly from the number spent at the other parent's home. She also points out what we all know - that at adolescence, the importance of joint decision making and improved communication is likely to be even more important than at earlier stages of development, because of the need for parents to unite in dealing with the oppositional behaviour of their offspring. By this stage it is to be hoped that both parents have meaningful relationships with their teenager that can be maintained with a modicum of maturity and will on the part of the parents.

**Finally**, I would like to add that although the *Family Law Act* in my lay understanding of it discourages any nexus between the concept of meaningful parental relationships and child support, in my view as a psychologist parents who do not accept a responsibility to financially support their children into adulthood (especially when they have the capacity to do so) are not serious about commitment to parenting and the meaningfulness of their relationships with their children risks being tainted as a result. Their children's self esteem is also at risk in these circumstances.

## **Conclusion**

In this paper we have attempted to set out where we are currently at in respect of the 2006 reforms. We have included an analysis of the AIFS Evaluation of the reforms. Other reports including the Family Court's Violence Review by the Honourable Professor Richard Chisholm (The Chisholm Review) and the Family Law Council Report on Improving Responses to Family Violence in the Family Law System, have looked at

Family Law matters including the issue of family violence and child abuse. The Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 is a response to the various reports and how the Family Law System deals with family violence. We will leave it to other speakers to detail the changes the new legislation introduces and to comment on same.

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**APPENDIX**

**A Random Selection of Ten of Denise’s Recent Reports**

**Collation of Raw Data:**

*Referral Source:* 1 ICL referral and 9 privately engaged  
*No. Children in sample:* 23  
*Size of Families:* 1 with 4 children; 2 with 3; 6 with 2; and 1 with 1 – average 2.3 children  
*Developmental Stages of Children:* 1 adolescent; 16 in primary school, 1 pre-schoolers and 5 toddlers  
*Other Notable Family Features:* four sets of twins out of the ten randomly selected cases  
*Periods of Separation:* Widely variable between 1 and 10 years  
*Preferences:*

	Fathers	Mothers	Report Writer
Equal shared parental responsibility	8	6	9
Sole parental responsibility to father	2	0	0
Sole parental responsibility to mother	0	3	0
No stated preference P R	0	1	1
Equal shared care	4	1	0
Live with father / time with mother	3	1	0
Live with mother / time with father	1	6	4
According to the children’s wishes	2	0	0
Not sure	0	1	0
Tailor made for each child	0	0	3
Interventions followed by review	0	0	1
Several options depending on findings re abuse...	0	0	1
Unknown preference for care	0	1	1

*Issues:*

Family and Domestic violence alleged by mother against father	8
Family and Domestic violence alleged by father against mother	2
Child abuse / neglect alleged by mother against father	4
Child abuse / neglect alleged by father against mother	5
Substance abuse alleged by mother against father	6
Substance abuse alleged by father against mother	2
Mental health issues alleged by mother against father	5
Mental health issues alleged by father against mother	4
Financial issues reported by mother	3
Financial issues reported by father	3
Communication difficulties between parents reported by mother	10
Communication difficulties between parents reported by father	10

**Case Summaries:**

**1.**

**Facts:**

- Three primary school aged children - a boy followed by mixed gender twins;
- Parents separated for about a year;
- Parents live more than an hour apart;
- The mother has re-partnered;
- Children live with mother and spend four nights with father every second weekend plus time on school holidays;
- Father wants equal shared parental responsibility and for the children to live with him and spend weekends with mother;
- Mother wants equal shared parental responsibility and to retain the status quo.

**Issues:**

- Family violence alleged by the mother against the father and denied by the father;
- Allegations by each of the parents that the other is in one way or another neglectful towards the children;
- Substance abuse allegations by both against the other;
- Some evidence of mental health issues for the father and allegations of same against the mother, but denied;
- High level of parental and extended family conflict;
- Poor parental communication;
- Education a major issue, especially for eldest, evidence indicating he is a bright child;
- Issues with the religion the children are being raised in.

**Recommendations:**

- Equal shared parental responsibility;
- Arrangements to essentially remain the same initially apart from introduction of another night each fortnight with the father;
- Shared driving for father's time with the children;
- Telephone communication both ways;
- Eldest child only to change to larger and better resourced school (closer to the father's home) in two years;
- Several alternatives given for this child's living arrangements to facilitate attendance at the new school – room for negotiation between the parents or alternatively for a judicial decision, the living arrangements for the other two children to remain the same;
- Parents to attend post separation parent training;
- Review two years after introducing changed schooling for first child;
- ADR process to be established for future parenting issues.

**2.**

**Facts:**

- Updated assessment and report;
- Four children including a young adolescent, twin primary school boys in different grades and a primary school aged girl;
- Parents separated for eight years;
- Three children living with the father and the youngest with the mother;
- Only the father has re-partnered;
- Father wanting sole parental responsibility, for the youngest child to stay with the mother, one of the twins to go to boarding school and the other two children to live where they want, with the parents equally sharing school holidays;
- Mother wanting equal shared parental responsibility and equal shared care for all four children.

**Issues:**

- Mother was incarcerated for indecent dealing in relation to one of the children;
- The father says the mother does not represent a risk of sexual abuse of the children;
- Family violence alleged against the father;
- Concerns about each parent's coping capacity;
- Substance abuse allegations against the father;
- Lack of trust from mother towards father;
- Lack of communication between the parents;
- Different behavioural issues for each of the children;
- The parents and children working with an experienced psychologist and FDRP.

**Recommendations:**

- Attendance at family psychologist and FDRP for mediation of any parenting issues;
- One of the twins to be permitted to attend boarding school;
- Equal shared parental responsibility for all children except the twin attending boarding school, for whom the father should have sole parental responsibility;
- Two of the children continue to live with the father and spend time with the mother two or three nights every second weekend and every other week for one evening until 7.00 pm;
- The youngest child continues to live with the mother and spends time with the father two or three nights every second weekend and every other week for one evening until 7.00 pm;
- The three children not attending boarding school spend every weekend and one night every second week together;
- The parents attend sessions with the family's psychologist and FDRP towards developing consistent parenting arrangements across the two households;
- The parents work with the psychologist towards phasing in week about shared care for the three children who are not at boarding school – as guided by the psychologist and tolerated by the children;
- The parents share equally the weekend leave of the child who is boarding;
- The three children who are not boarding spend half the school holidays with each parent;
- The child who is boarding spends most of the school holidays with the father, but has three days per fortnight during each school holiday period with his mother (during his siblings' time with her).

**3.**

**Facts:**

- Two primary school aged children – a boy and a girl;
- Parents living in relatively close proximity;
- Parents separated about three years;
- The father has re-partnered;
- One younger paternal half sibling;
- Both children living with the father and not seeing the mother at all;
- The father wants "what's best for the children" but at a loss to facilitate any time at all for them with their mother and wants sole parental responsibility in his favour;

- The mother asking for equal shared parental responsibility, time with the children as well as an explanation of why they don't want to see her.

**Issues:**

- Mutual allegations of situational domestic violence;
- Allegations against the mother of physical abusing the children;
- Substance abuse allegations;
- Possible mental health issues;
- High level of parental conflict;
- Non-existent communication between the parents;
- Cultural differences;
- Probable financial issues complicating parenting issues;
- Report writer concerns regarding possible alienation of the children against the mother by the father.

**Recommendations:**

- Equal shared parental responsibility – clearly defined;
- Psychiatric assessments of both parents by the one psychiatrist;
- A therapist to work with the family with the aim of addressing the children's relationships with each parent and also providing both parents with parent training;
- Process established for ADR for future parenting disputes;
- ICL appointed;
- Parents and ICL to be advised if the therapist considers the children are ready to spend time with their mother;
- Revue of progress and updated report in six months.

**4.**

**Facts:**

- One primary school aged child, a boy;
- Parents separated over ten years;
- Mother living in urban area and the father approximately an hour away in a more rural area;
- Child living with father and not seeing mother at all, but up until a few months earlier had always lived with the mother;
- Both parents have re-partnered;
- Mother in a blended family with partner's older son;
- Father has no other children in household;
- Father wants sole parental responsibility and for the child to continue to live with him and attend his new school, seeing the mother only when his step brother is not there;
- The mother wants the previous status quo (based on court orders) to resume, with child living with her and spending time with the father one night per week as well as every second weekend and with equal shared parental responsibility.

**Issues:**

- Allegations that the father was violent and controlling towards the mother;
- Allegations of physical abuse of the child by his maternal step brother;
- Allegations of substance abuse against the father;
- High levels of parental conflict;
- Communication difficulties between the parents;
- Schooling issues for the child;
- Denial by the father of time with the mother;
- Problems with child support when the child lived with the mother.

**Recommendations:**

- Equal shared parental responsibility;
- The child to return to live with the mother and to attend his former school;
- Time with the father to resume as it was before the child's change of residence;
- The maternal step brother is not allowed to be alone with the child;
- The child and the step brother attend counselling together and separately as indicated;
- A review and updated report after six to twelve months.

**5.**

**Facts:**

- Two primary school aged children, a boy and a girl;
- Final separation seven years ago;
- Father has re-partnered;
- Mother did not present for interviews and report written without her input other than via affidavit material (evaluation and recommendations heavily qualified as a result);
- The children live with the mother and spend time with the father and his partner every second weekend for four nights as well as for one night every other week and for half the school holidays;
- The father wants equal shared parental responsibility and equal shared care on a week about basis;
- The mother's proposal unknown.

**Issues:**

- Mother had reportedly alleged verbal abuse by father;
- Physical health issues for mother;
- Limited communication between parents;
- Overseas travel;
- Possible financial issues.

**Recommendations:**

- Limited evaluation because of absence of mother;
- No recommendations as such but comments about:

- The children (particularly the elder) not supporting the father's request for equal shared care; and
- The children's comments indicating that their mother's resistance to overseas travel with the father could be around her own insecurities and separation issues.

**6.**

**Facts:**

- Two children, both boys, one in primary school and one toddler;
- Parents separated about a year;
- The father has re-partnered;
- Both parents living with their parents;
- The father also has an older child who lives with him and his parents;
- Children living with the mother and her parents and spending time with the father and his parents three nights every second weekend according to interim orders;
- The father wants equal shared parental responsibility and equal shared care;
- The mother is struggling to accept even the current arrangements and wants sole parental responsibility in her favour.

**Issues:**

- Allegations of violence against the father which he denies;
- Allegations of roughness by the father with the children, which he denies;
- Serious allegations of alcohol abuse by the mother against the father, with some evidence in support;
- Some issues with communication;
- Over involvement of extended families in the dispute;
- Evidence of poor school attendance;
- Claims of neglect and abuse in relation to the father's older child;
- Age of younger child and attachment to mother;
- Separation anxiety of older child;
- Safety issues.

**Recommendations:**

- Equal shared parental responsibility;
- Children's time with the father to remain as is and holiday time added;
- Otherwise to live with mother;
- Father to undertake not to drink alcohol when caring for the children;
- Appropriate child restraints to be provided;
- Both parents attend parenting orders programs;
- Therapy for older child and for parents as indicated;
- ICL appointed;
- Review no less than six months after implementation and prior to final orders.

**7.**

**Facts:**

- Three children, all girls, including a pre-schooler and two toddlers, one of whom is physically and mentally disabled;
- Parents separated for disputed period of time – mother says longer than father;
- The mother has re-partnered;
- Children live with mother;
- Elder two children spend time with father three single nights per week and youngest two nights;
- Father wants equal shared parental responsibility and equal shared care in single days;
- Mother wants “what’s best for the children” and also wants sole parental responsibility in her favour.

**Issues:**

- Family violence of relatively minor kind alleged by both parents against the other in the context of separation;
- Evidence father has absconded with children in the past;
- Mutual concerns expressed about the other’s parenting – mostly from an emotional perspective;
- Some safety issues alleged on both sides;
- Claims of personality disorder by each parent against the other;
- Some evidence of depression for mother in the past;
- High level of parental conflict;
- Communication issues, but improving;
- Financial issues;
- Severe developmental delay and possible mental disorder for one child;
- Care of children intensely demanding.

**Recommendations:**

- Equal shared parental responsibility;
- Tailor made care arrangements around the specific needs of the children;
- Work towards equal shared care;
- Set days with each parent and one weekend each fortnight with each parent;
- Phase arrangements in;
- Some time for the developmentally delayed child with each parent without the other two children to provide some respite for each parent as well as for the other two children;
- Post separation parenting program for both parents;
- Appoint a family therapist to support and advise on parenting issues.

**8.**

**Facts:**

- Two children – mixed gender toddler twins;
- Parents separated approximately one year;

- Children live with mother and maternal grandmother and see the father eight times per month for two and a half hours at a time;
- Father lives with his parents;
- Father a shift worker who works for several days straight at a time and then has time off in a block;
- Mother is not working;
- Mother primary carer for the children since birth;
- The father wants equal shared parental responsibility and gradually increasing amounts of time with the children each year - until the mother and he eventually have equal shared care;
- The mother wants the status quo maintained indefinitely and is happy to have equal shared parental responsibility.

**Issues:**

- Physical, financial, emotional and verbal violence by the father alleged by the mother and vaguely denied by the father;
- Lack of interest in and competence caring for the children alleged by the mother on the part of the father prior to separation and also vaguely denied by the father;
- Substance abuse and associated aggression alleged by the mother against the father but not mentioned by the father;
- Moderate parental conflict around financial matters;
- Poor level of parental communication;
- Major financial issues;
- Separation anxiety on the part of one of the children;
- Father an alleged flight risk according to the mother but denied by the father.

**Recommendations:**

- Equal shared parental responsibility;
- The children to continue to live with the mother;
- Two and a half hour blocks with the father to immediately extend to four hours and increase to five and then seven hours over the course of approximately one month;
- After two months of spending time with the father for a full day every second day that he is not working, then time with the father to increase to a maximum of two days and one night in any block of four or five days that he is not working – until the children are aged three years;
- Between the ages of three and four, during each four or five day block when the father is not working, the children to spend up to three days and two nights at a time with him (approximately three days and two nights with the father each eight to ten days.)
- The father to undertake to ensure the children attend any extracurricular / daycare activities arranged for them by the mother;
- Special day time with both parents;
- Telephone communication for the children with each parent when with the other parent – up to once per day;
- Parents to attend a post separation parenting program;
- Changeovers at neutral and public locations;
- No overseas travel until after the children are aged four, terms to be agreed on.

**9.**

**Facts:**

- Two children – twin boys of primary school age;
- Parents separated for approximately four and a half years;
- Equal shared care ordered in early stages of separation but had been broken down for some time;
- Children living with mother and spending two hours per week with the father under supervision – according to new orders;
- Both parents have remarried;
- The father wants equal shared parental responsibility and for the children live with him and spend time with the mother fortnightly on weekends and for half school holidays and on special days;
- The mother proposes the reverse but is happy to have equal shared parental responsibility.

**Issues:**

- Violence against property alleged by the mother in respect of the father and denied by the father;
- Neglect and abuse of the children alleged by the mother against the father and absolutely denied by the father;
- Emotional abuse of the children alleged by the father against the mother – by virtue of encouraging the children to lie about him and cutting him out of their lives;
- Vague allegations of mental health issues against each parent by the other;
- Significant conflict over various issues including overseas travel by the mother;
- Poor parental communication;
- Issues over child support.

**Recommendations:**

- Equal shared parental responsibility;
- Parents to attend a post separation parenting program and specialized Triple P parenting program;
- Variable recommendations based on findings of the Court in respect of the allegations against the father – that is:
  - If not an unacceptable risk then live with the father and spend time with the mother three weekends in four, on special days and for half the school holidays;
  - If serious risk of harm then live with the mother and spend time with the father on weekends and during school holidays when the father can guarantee to be available to care for them under the supervision of his wife; and
  - If the father's behaviour found to be inappropriate but amenable to rectification, then after attending the above courses father to spend time with the children unsupervised according to his work schedule to a maximum of three weekends in four and half the school holidays.

**10.**

**Facts:**

- Two primary school aged children, a boy and a girl;
- Parents separated about two years;
- Children live with mother and have had mostly supervised time with the father ever since the separation;
- Neither parent has re-partnered;
- The father wants equal shared parental responsibility and time with the children every second weekend for two nights and for half the school holidays;
- The mother wants sole parental responsibility in her favour and for the children to live with her and spend only supervised time with the father until they are old enough to voice any concerns they might have about abuse by the father.

**Issues:**

- Allegations by the mother of child abuse of one and possibly both of the children by the father, which are denied by the father;
- Vague concerns expressed by the mother regarding the father's mental health – denied by the father;
- Disparity in the parents' accounts regarding conflict;
- Absence of any communication between the parents since the mother ceased supervising the father with the children;
- The mother alleged the father was not organised or competent to care for the children alone.

**Recommendations:**

- Equal shared parental responsibility;
- Children to live with the parents as agreed between the parents or failing agreement with their father every second weekend during school terms, on special days and for half the school holidays;
- The children otherwise live with their mother;
- The children communicate with their father in as open a manner as possible;
- The children attend ongoing confidential counselling and a protective behaviours course;
- Continue supervision for one month for a period of time at the commencement and conclusion of the father's time with the children on weekends; and
- Phase in the father's time with the children over a period of the first month;
- Supervisor to record and report on her observations to the mother's legal representative.