Residence: separation, relocation & with whom the children live

The Significance of the Changes

- The Shared Parenting reforms commenced on 1 July 2006.
- The hype surrounding the new legislation spoke of 'significant reforms', 'a cultural shift in how family separation is managed', 'co-operative parenting', and 'moving away from litigation'.
- The government's aim was clearly to change the culture of family separation by placing the focus on parents sharing the responsibility for raising their children.
- There is no doubt that the 2006 amendments made very significant changes to the law relating to parenting.
- The legislation forces judicial officers to consider certain prescribed factors in determining the best interests of the child which are still the paramount consideration.

Some of the changes include the following:

- The presumption of equal shared parental responsibility which can only be rebutted by establishing abuse, or violence or if it is not in the child's best interests;
- A requirement (where equal shared parental responsibility is ordered) that the court consider whether children spending equal time with both parents is reasonably practicable and in the best interests of the child. If it is not appropriate, then the court must consider substantial and significant time with each parent and again whether this is in the child's best interest and reasonably practicable;

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- It is important to note that the application of the presumption does not automatically lead to equal time.

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

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

- The child's 'views' rather than 'wishes' are still important in determining best interests.

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

- (From 1 July 2007) Requiring parents to attend family dispute resolution before taking a parenting matter to court unless there is family violence or abuse (but not neglect).

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

The significance of Parenting Agreements in place prior to proceeding

- Parents have always been able to come to their own arrangements independent of the Courts.

- It is natural for parents to want to be a significant part of their children's lives following separation as it is before separation.

- The objects of the new Act in s.60B recognise the benefits to children of both their parents having a meaningful involvement in their lives to the maximum extent consistent with the best interests of the child.

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

- It is likely that as the culture changes, more and more couples will incorporate some form of shared parenting in their agreements.

- Couples mediating whether before or after obtaining legal advice are likely to consider shared care.

- One can reasonably anticipate that an expectation will develop that when couples separate, parenting responsibilities are to be shared other than in cases where one or other parent has by their actions or conduct (abuse or violence) excluded themselves from the possibility of a shared care regime.

- Parenting Plans are more common.

- Parents get assistance to develop Parenting Plans from the various relationship centres and attendance on Family Dispute Resolution Practitioners.

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

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

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

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

- A solicitor in giving advice about parental responsibility on separation is obliged to inform parties that they could consider a parenting plan and inform them where they can get further assistance about developing a parenting plan and it's contents.

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

- The Family Relationship Centres will encourage people to use parenting plans and if entered into, these will need to be taken into account in later parenting proceedings but they are not legally binding.

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

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

- Under s.64D a parenting order is subject to a subsequent parenting plan entered into by the parties unless the court itself orders otherwise in exceptional circumstances (including the need to protect the child from harm, evidence of coercion, duress).

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

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

- The word has no doubt got out that parties should not enter into parenting plans without legal advice but of course many people separating never go to court anyway and may be happy with an "informal agreement" at least until a significant dispute arises.

The right of Children to have a meaningful relationship with both parents

- Apart from shared parenting, a crucial issue is how a court determines what is a 'meaningful relationship' and what is necessary to maintain a meaningful relationship.

- The tension between maintaining a meaningful relationship and the right of a party to move has arisen as a huge issue in the relocation area where one parent wishes to relocate and the other parent contends that the 'meaningful relationship' clause of the Family Law Act and the presumption of equal shared parental responsibility gives them the right to prevent the relocation.

- Difficulties arise in children maintaining a meaningful relationship with both parents when they are geographically distant.

There was no attempt to define relocation or to establish a list of considerations for relocation cases in the new legislation.

In **C & C,** FM Brown considered the difficulties in balancing the right of a parent to move with the right of a child to have a meaningful relationship with both parents and said:

"At the end of the day, one of the primary functions of 'the *Family Law Act* is to provide for mechanisms for separated parents to assume lives which are separate from the other parent concerned".

This reflects a dichotomy in the legislation in that aspects of the legislation such as 'shared parental responsibility' and 'shared care' imply a coming together of parties to be more involved in raising their children yet as FM

Brown notes one of the primary functions of the FLA is to provide ways for the parents to be separate. This tension will inevitably need to be resolved by the Full Court in an appropriate case.

Up until now there has been no authoritative statement by the Full Court as to how the primary considerations under s.60CC of the Act relate to the additional considerations. **Parkinson notes (Relocation in the Era of Shared Parental Responsibility, released May 2008)** that "the distinction between the primary and additional considerations is very relevant to relocation cases because one of the reasons why it might be considered that relocation should be harder after July 1, 2006 is that one of the primary considerations is the benefit to the child of a meaningful relationship with both parents". Parkinson goes on to state that "The lack of guidance by the Full Court on how to apply the distinction between primary and additional considerations generally, and specifically in the context of relocation cases, has led to significant differences of approach by Trial Judges in domestic (relocation) cases".

Tension arises from the relationship between a parent's 'right' to freedom of movement and the principle that the best interests of the child are paramount and this is particularly so after the July 2006 reforms because of the designation as a primary consideration of the benefit to the child of a meaningful relationship with both parents. In **M and K** [2007] FMCA Fam 26 at para 56, Federal Magistrate Altobelli is in little doubt as to how this tension should be resolved, stating that "If the legislature had intended to somehow elevate parental mobility to an equivalent status with the existing considerations in s.60CC it could have done so. Clearly the post 1 July 2006 amendments do not".

In **Mazorski v Albright** (2007) 37 FAM LR 518, Justice Brown considered the question of what constitutes a "meaningful relationship" within the meaning of the 2006 amendments. At page 526, Her Honour commented:

> *"What these definitions convey is that 'meaningful', when used in the context of 'meaningful relationship', is synonymous with 'significant'*

which, in turn, is generally used as a synonym for 'important' or 'of consequence'. I proceed on the basis that when considering the primary considerations and the application of the object and principles, a meaningful relationship or a meaningful involvement is one which is important, significant and valuable to the child. It is a qualitative adjective, not a strictly quantitive one. Quantitive 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."

Parkinson concludes an authoritative resolution is required, stating that the decisions of the Trial Judges on relocation "vary enormously depending not only on their own facts and the evidence before the Court but also on the personal values of Judicial Officers and their understandings of the relevant legislation." He also notes however that the overall pattern of reported decisions is that a majority of domestic relocation cases are allowed even in situations where there has been, prior to relocation, shared care.

On an interim basis, however clearly where a parent moves unilaterally without seeking the permission of the court or the other parent, the court takes a dim view and usually the meaningful relationship clause is used to base an order that the relocating parent return the child at least until the matter is properly determined.

Equal, Substantial and Significant Time in Parenting Plans and Reasonably Practicable Arrangements

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

However clearly Judges are now obliged to consider 'equal time' and 'significant and substantial time' where the presumption of equal shared parental responsibility applies.

How this applies in the context of relocation was the subject of comment by their Honours Chief Justice Bryant and Justice Finn in **Taylor and Barker** (2007) FAMCA 126 where at paragraph 83 they stated:

"83. However consistently with what the Full Court said in **Goode**, the options of the child spending 'equal time' or 'substantial and significant time' with each parent must now be given separate and real consideration, notwithstanding that a relocation proposal may also have to be given subsequent consideration, with the advantages and disadvantages of that proposal then being balanced against the advantages and disadvantages of an 'equal time' or 'substantial and significant time' arrangement. Not to approach a case involving a relocation proposal in this way, would devalue the imperative imposed by the Act to consider whether it is in the best interests of a child in a case to spend 'equal time' or 'substantial and significant time' with each parent."

Assuming that in most cases the presumption of equal shared parental responsibility will be upheld then a critical issue will be how the courts assess whether 'equal time' or 'substantial and significant time' should follow and how the courts determine 'best interests'.

Similarly one can reasonably expect that report writers (who play an important role in the Court) will reflect these changes in society and give increasing credence to shared care in their reports. In my view this is occurring.

Judges often rely on family report writers for assistance in determining the child's best interests. However, not every case involves a report writer of course and the conclusions of the report writer are not always followed.

Whilst the Judicial Officer must necessarily consider the new legislation, there is still sufficient scope to come to his or her own conclusion based on factors such as 'best interests' and 'practicality' and how the various 'primary' and 'additional' considerations are weighed in particular fact situations.

McIntosh (Cautionary Notes: Shared Care of Children in Conflicted Parental Separations released April 2008) considers that for advisers and legal practitioners, as well as for decision makers, "it is important to take into account what social science can tell us about what will benefit children, particularly what constitutes a developmentally meaningful relationship with their parents" and that "the new guidelines, although more prescriptive than the old, still focus on the child's best interests and the new concepts are consistent with the use of social science".

Reasonably Practicable Arrangements

In **Sampson and Hartnett** (No. 10) (2007) FamCA 1365 at paragraph 41, their Honours Chief Justice Bryant and Justice Warnick set out the Court's approach as follows:

"41. Section 65DAA requires the Court, if the parents are to have equal shared parental responsibility, to consider firstly, a child spending equal time with each parent and secondly, if the first consideration is rejected, a child spending substantial and significant time with each parent. After considering whether equal or substantial and significant time would be in the best interests of the child, the court 'must' consider whether doing so is reasonably practicable.

Subsection (5) deals with reasonable practicality and requires the court to consider:

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

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

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

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

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

Triangulation in the Family System - Types of Care Arrangements

- Undoubtedly since the changes, parents are more often considering shared residence as an option.

- The risk is that by focusing on their own rights, parents may ignore the needs of children.

- Children must be the focus and we are told that they all have individual needs and that these necessarily involve a consideration of factors such as age, developmental needs and capabilities and degree of attachment to one or other or both parents.

- Some children are able to cope with change and adapt to it better than others and children within the same family can have different needs, different preferred options and different coping abilities.

- There are many different types of arrangements even within a shared care regime. These include:
  - split week
  - alternate weeks
  - alternate fortnights
  - different days to suit work rosters
  - A 5/5/2/2 or a 5/2/5/2 arrangement

- The image of children moving from house to house with their suitcases is one that has been evoked **(Tucker 2004).** Parents can often disagree about what children take between houses and what each home provides for them and this can have implications depending on

the relative earning capacity of the parents. Children also have differing abilities to cope.

- According to **Tucker (2004)** "Shared residence can work well when a child easily adapts to change, they have strong attachment relationships with each parent and step-families and extended families, their lifestyle comes first with easy access to friends, sport and other interests, when siblings have similar temperaments and all can cope with the demands, when parents provide predictability and minimise 'the suitcase factor', when parents truly are co-parenting and have the emotional and material resources to manage this arrangement."

- **McIntosh** (2008) finds that data from recent Australian studies suggests "That shared physical care is an arrangement best determined by the capacity of parents to exercise maturity, to manage their conflict and to move beyond egocentric decision-making in order to adequately embrace the changing developmental needs of their children".

- An issue of some importance is how the assessment of appropriate contact regimes at particular developmental stages interposes with the mandated requirement to consider 'equal time' or 'substantial and significant time' in most cases under the new legislation. Clearly the Judges have sufficient latitude in considering best interests to take account of social research about the needs of children and their coping ability at particular developmental stages.

- For a detailed literature review and an analysis of the respective cases for and against Shared Care, we recommend the paper by psychologist Vince **Papaleo** titled "**Shared Parenting – One Size Does Not Fit All"** presented to the Melbourne Intensive convened by the Leo Cussen Institute in May 2006.

- **Papaleo** notes there is "a lack of clear, compelling evidence that any particular post-separation contact arrangement on its own is better than

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

What factors does the Court consider in determining best interests

The overriding principle is that the best interests of the child or children remain the paramount consideration.

In **Clapton and Sprenger** (2007) FamCA 1184 at paragraph 71, Her Honour Justice May commented:

> "71. The fundamental principle is now set out in s.60CA which says:
>
> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

The child's best interests are ascertained by a consideration of the objects and principles in s.60B and the primary and additional considerations in s.60CC. There are two primary considerations and thirteen additional considerations.

The first of the two primary considerations is the benefit to the child of having a meaningful relationship with both parents. The second is the need to protect the child from physical or psychological harm or from being subjected to or exposed to abuse, neglect or family violence.

The additional considerations include the views of the child, the nature of the relationship of the child with each of the parents, the willingness and ability of each parent to encourage and facilitate a close and continuing relationship between the child and the other parent and the attitude to the child and to the responsibilities of parenthood demonstrated by each parent.

At this stage, however, there has not been any authoritative statement from the Full Family Court on the relationship between the primary and additional considerations (**Parkinson** 2008).

The comments above in relation to the importance of social science and the need to consider developmental needs of children at particular ages and stages must of course be borne in mind in considering best interests.

Goode v Goode and the Legislative Pathway

- **Goode v Goode** [2006] FamCA 1346 delivered on 15 December 2006 was the first decision of the Full Court of the Family Court which dealt in a meaningful way with the application of the new Part VII of the *Family Law Act,* since introduction of the *Family Law (Shared Parental Responsibility) Act* 2006.

- Before the enactment of the *Family Law (Shared Parental Responsibility) Act* 2006 there was no presumption of Equal Shared Parental Responsibility. It was the rebuttable presumption arising under s.61DA which was new.

- Also new were the obligations of the Court to consider equal time or substantial and significant time where the presumption applied.

- The Court could however still make an order for equal shared parental responsibility or equal time other than by applying the presumption.

The Legislative Pathway

In **Goode** the Court said that "In making interim decisions the Court will still often be faced with conflicting facts, little helpful evidence and disputes between the parents as to what constitutes the best interests of the child. However, the legislative pathway must be followed" and in an interim case that would involve the following:

" (a) identifying the competing proposals of the parties;

(b) identifying the issues in dispute in the interim hearing;

(c) identifying any agreed or uncontested relevant facts;

(d) considering the matters in s.60CC that are relevant and, if possible, making findings about them (in interim proceedings there may be little uncontested evidence to enable more than a limited consideration of these matters to take place);

(e) deciding whether the presumption in s.61DA that equal shared parental responsibility is in the best interests of the child applies or does not apply because there are reasonable grounds to believe there has been abuse of the child or family violence or, in an interim matter, the court does not consider it appropriate to apply the presumption;

(f) if the presumption does apply, deciding whether it is rebutted because application of it would not be in the child's best interests;

(g) if the presumption applies and is not rebutted, considering making an order that the child spend equal time with the parents unless it is contrary to the child's best interests as a result of consideration of one or more of the matters in s.60CC, or impracticable;

(h) if equal time is found not to be in the child's best interests, considering making an order that the child spend substantial and significant time as defined in

s.65DAA(3) with the parents, unless contrary to the child's best interests as a result of consideration of one or more of the matters in s.60CC, or impracticable;

(i) if neither equal time nor substantial and significant time is considered to be in the best interests of the child, then making such orders in the discretion of the Court that are in the best interests of the child, as a result of consideration of one or more of the matters in s.60CC;

(j) if the presumption is not applied or is rebutted, then making such order as is in the best interests of the child, as a result of consideration of one or more of the matters in s.60CC; and

(k) even then the court may need to consider equal time or substantial and significant time, especially if one of the parties has sought it or, even if neither has sought it, if the court considers after affording procedural fairness to the parties it to be in the best interests of the child. "

Prior to Goode, **Cowling** (1998) FLC 92-801 with its emphasis on ensuring stability in interim hearings was the bible for practitioners. In **Goode** however the Full Court held that to simply maintain the status quo is no longer sufficient to satisfy the best interests of a child and that it is necessary to go through the exercise of considering the factors set out in s.60CC. In doing so the court pointed out that it may be the case that "stability derived from a well-settled arrangement may ultimately be what the court finds to be in the child's best interests, particularly where there is no ability to test controversial evidence, but that decision would be arrived at after a consideration of the matters contained in s.60CC".

The Act provides guidance as to the meaning of 'substantial and significant time'.

The concept of 'substantial and significant time' is defined to mean:

(a) The time the child spends with the parent includes both:
    i. days that fall on weekends and holidays; and
    ii. days that do not fall on weekends and holidays; and
(b) the time the child spends with the parent allows the parent to be involved in:
    i. the child's daily routine; and
    ii. occasions and events that are of particular significance to the child; and
(c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

In **KML & Rae** [2006] FMCA Fam 528 – Unreported, Halligan FM was charged with assessing the competing proposals of the parties for the children to spend time with them.

He said that "where the court will need to consider the option of making a substantial and significant time order, the court will be greatly assisted if the parties provide the court with sufficient evidence about the child's interests and activities, as to what they are, when they occur, and what the child's participation involves, to enable the court to make a proper assessment of the suitability of the alternatives. This evidence should include sufficient detail for the court to both decide whether any particular proposal entails substantial and significant time, and if such an order is to be made, to be able to frame it to best achieve the purpose of such an order".

Disentitling Conduct and Rebutting the Presumption of Equal Shared Parental Responsibility

When a parenting matter comes to Court the presumption of equal shared parental responsibility must be applied unless there are reasonable grounds to believe that a parent or a person who lives with a parent has engaged in abuse of the child or family violence.

If it is appropriate to apply the presumption, it is to be applied in relation to both final and interim orders unless in the case of the making of an interim order, the Court considers it would not be appropriate in the circumstances to apply it.

The presumption may be rebutted where the court is satisfied that the application of a presumption of equal shared parental responsibility would conflict with the best interests of the child.

In a paper entitled "**Shared Parenting Legislation Updated**" delivered for LegalWise in March 2008, Accredited Family Law Specialist Pippa **Colman** provides a useful summary of outcomes of recent cases under the Shared Parental Responsibility legislation. Included in the summary are instances where the court has found the presumption of equal shared parental responsibility to be rebutted and the examples provided include the following:

1. **Layman v Louise** [2007] FAM CA 27 – Mother unable to care for children due to serious mental illness. Presumption rebutted by reason of same.

2. **Conroy v Jones** [2008] FAM CA 7 - Parties locked in intractable conflict for more than six years. Longstanding dispute over child's name. Child divided emotional / psychological world in two. Need for this to be resolved.

3. **Bradley v Bradley** [2007] FAM CA 484 – Communication between parents exceptionally poor. Parties embroiled in conflict. Court held not appropriate to apply presumption.

4. **Lunn v Carpenter** [2007] FAM CA 196 – Evidence supported conclusion that mother and grandmother emotionally abused the children. No willingness by mother to facilitate / encourage relationship between children and father.

5. **BJZ v KEM** [2007] FMCA FAM 86 – Shared care arrangement lead to perpetual disputation. Father's continued drug use of concern. Equal shared care not in children's best interests.

6. **Weaver & Widdicombe** [2007] FAM CA 146 – Evidence that child at risk of family abuse – not appropriate for equal shared parental responsibility.

If presumption is to be avoided, then evidence must be given either in relation to abuse of the child or to family violence.

The presumption may however be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Other examples of where the presumptions were rebutted include:

1. **Rixon and Brenner,** a 2008 decision before His Honour Justice Fowler where His Honour found that the extremely high level of animosity of the mother and her new husband towards the father prevented any meaningful communication between the parents. Without this meaningful communication His Honour ordered that the father have sole parental responsibility and that he keep the mother informed about the child's wellbeing.

2. **M & A** 2007 where the Chief Federal Magistrate found the presumption was rebutted due to the father's violence towards the mother. His Honour found that the mother was frightened of the father and was quite worn out by trying to make the relationship work in any sort of functional way for the children.

3. **T and O** [2006] FMCA Fam 709 – Unreported decision of F.M. Brown. His Honour did not apply the presumption in s.61DA, accepting the family report's evidence that a shared

parenting regime was not a workable outcome based on the report writer's observations and recommendations.

4. **Pel and Nal** [2006] FMCA Fam 594 – Unreported.

   F.M. Halligan said that the presumption of shared parental responsibility did not apply as he was satisfied that the mother and her current partner were abusing the children.

A decision which clearly highlights some of the factors at play in interim parenting and relocation cases was that of **R & R** [2007] FMCA Fam 29. This case before F.M. Brown involved interim parenting arrangements for three children aged 9, 8 and 4. The mother had unilaterally removed the children from AS, Northern Territory to Y, South Australia in September 2006 alleging family violence and abuse. The mother contended that leaving in the manner she did was her "only option" due to the alleged domestic violence in the relationship. Y was about 1500 kilometres from AS. The father vehemently denied that he had ever behaved in an inappropriate or violent way towards the mother and sought the return of the children to AS. The case involved consideration of the children's entitlement to have a "meaningful " relationship with both parents. The mother sought to have the presumption of equal shared parental responsibility rebutted and argued it would neither be practical nor in the children's best interests for the children to spend either equal or substantial and significant time with the father as he sought on an interim basis. The father described himself as a "hands-on" father and asserted he had a "special bond" with the children. The mother's greatest objection to the children returning to AS was that it would constitute an unsafe environment for them.

Brown FM said "at this stage, I am simply unable to ascertain the truth or otherwise of the mother's assertions" and noted that "The Full Court of the Family Court has cautioned, on a number of occasions, regarding the difficulties which are likely to arise if the court, at the interim stage, involves

itself in issues of fact or matters relating to the merits of the parties' substantive cases in circumstances in which definitive findings of fact are not possible." His Honour referred to the framework of the new amendments as referred to in **Goode** and noted that "no distinction is made in the application of this legal framework to decisions made in respect of children at the interim or final stage".

His Honour further noted the comments of the Full Court in **Goode** that the requirement on the Court to consider making either an order for equal time or substantial and significant time "is an active task, rather than a tokenistic or mechanical one".

His Honour noted that "At this juncture, the court is unable to determine definitively the truth or otherwise of many of the mother's allegations and held the mother had "other options to pursue, in regards to securing her own protection". These included an injunction or family violence order. The court gave pre-eminence to the need for the children to have a meaningful relationship with both their parents "particularly their father, at this interim stage".

On the issue of relocation, the court referred to the decision of the Full Court delivered by Warnick, J in **Campbell and Spalding** - Unreported citing the following passage:

> *"In my view it is clear that the interests of any child or children, including the children here, are very much connected with any questions directly affecting those children, such as relocation being determined by a Court without the impediment of a situation of recent development, which situation significantly alters the relationship of the child or circumstances of the child with regard to one of its parents from what it or they had been immediately beforehand."*

FM Brown noted that if the court acceded to the mother's proposals at this stage it would give "de facto approval to her unilateral action in changing the children's place of residence, which is contrary to the spirit of the Act".

In all the circumstances, His Honour held that in the interim, the children's best interests would be served if they returned to live in AS and ordered accordingly.

His Honour considered that in determining relocation matters "it is incumbent upon the court to ensure that such issues are adjudicated, as far as is possible, on a level playing field".

EXPECTATIONS

- We have already seen a groundswell of change from fathers seeking shared care.
- We are very much aware of raised expectations from client comments such as "I have heard things have changed and that the kids will be living with me half the time".
- Ultimately as always, the court will set the bar.
- One view is that whilst there will be increasing demand for equal arrangements and many couples will resolve issues on this basis, fewer of the cases which actually come to court will be suited to an equal shared arrangement, but there will be more orders made providing for greater involvement by what was formerly the contact parent.
- It is certainly now far easier to negotiate and obtain orders for more extensive time and involvement for the parent whom the child does not predominantly "live with".

There is undoubtedly greater scope for fathers to bring applications to spend more time with their children and in appropriate cases these will no doubt be successful.

The old "normal" contact regime of alternate weekends and half holidays is a thing of the past in most cases and we need to think laterally and come up with creative solutions tailored to the parties and to the needs of the children in particular cases.

There are many more orders made providing for the less predominant parent spending time with the children from after school Thursday until return to school Monday of one week and perhaps for at least part of a day in the other week (possibly after school and dinner if not overnight) together with extensive involvement and participation in the child's activities. Whether it will go further and "weekabout" or something approaching that becomes the norm is not yet clear but such orders are becoming more frequent.

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

Another factor which should not be overlooked is that although the prospect of equal time might be attractive, many men for instance may not want such responsibility or may not see their way clear to accommodate it.

Some may be so career focused as not to want equal time whilst others may not be prepared to put in the effort and sacrifice that equal time requires.

Others may actively acknowledge that in their particular circumstances a weekabout arrangement is not in the 'best interests' of their children.

The impact of arrangements on child support is an ever present underlying factor even if not openly acknowledged as such.

Economic restraints will undoubtedly mitigate against some families setting up two households for the care of their children on an alternating weekly basis. In others the prospect of less child support to be paid will accentuate the demand for equal care.

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

All this certainly makes for interesting times.

Lawyers need to be more specific in spelling out the involvement of the lesser "live with" party in the child's life. Drafting needs to be specific enough to cover everyday issues and precise enough to avoid confusion or breakdowns of communication which can otherwise often result in contraventions.

Drafting will also need to take account of both the qualitative and quantitative aspects of the definition of "substantial and significant time" and affidavits will need to be more sophisticated in detailing children's arrangements and how one or other parent is or can be involved in these arrangements.

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

Conclusion

The full impact of the 2006 changes is not yet clear particularly in the area of relocation.

There has however already been a substantial change of culture and this is reflected in:

1. changed community expectations regarding shared care;
2. the willingness of parties to at least trial and no doubt in many cases embrace shared care;
3. report writers giving greater consideration to shared care arrangements;
4. Judges giving credence to the new thrust of the legislation in determining 'best interests".

A note of caution arises from the Family Court's submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Shared Care in 2003 where in relation to a presumption of 50 / 50 care the court said:

> *"The difficulty is that if separated parents are exhorted to share their children equally the legislation will create a normative standard which will be unattainable in practice for many, which may jeopardize the best interests of the children and/or may bear no resemblance to the parenting responsibilities assumed in the pre separation family."*

Ultimately the impact of the changes will depend not only on the court's approach but on assessments of the impact of the changes on the children the legislation is intended to serve.

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