

# ***Update on Shared Parenting***

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# Family Law in Practice 2011

## Update on Shared Parenting

### 1. Best Practice Shared Parenting Orders

The 2010 Best Practice Guidelines for Lawyers Doing Family Law Work do not make specific reference to best practice in relation to shared parenting orders, however they do have comprehensive guidelines in respect of children's matters generally.

Given the statutory presumptions and legislative intention towards shared parenting, these guidelines must underpin our practice in parenting matters, whether they be matters within which shared parenting is sought or ordered, or otherwise.

Turning to the guidelines, whilst some of them would seem to be the most basic premises or conduct guidelines in parenting matters, it is worthwhile sometimes to return to the basics which we must focus on:-

- Remember that the Court's paramount consideration is the best interests of the child – which is of course legislatively mandated in any event;
- We must advise our clients of the manner in which the Court approaches children's matters and that ultimately what the Court determines to be in the best interests of the children may not be what either parent has advocated for;
- Seek specific instructions in relation to cultural issues which are relevant to consideration of the best interests of the child;
- Ensure that negotiations in relation to parenting matters are kept separate and distinct from negotiations on all other matters – children's issues are not bartering tools;
- Provide appropriate information to clients on the damaging effects upon children of conflict and disputes between their parents or encouraging children to become enmeshed in the parents' disputes by taking sides or expressing tainted wishes;
- Don't let clients be motivated by anything other than the best interests of their child when making an Application for parenting orders;
- Ensure that where appropriate, clients are advised to engage in appropriate FDR measures prior to seeking the Court's intervention;
- Advise clients that child support and the living arrangements for the children do not go

hand in hand and that they ought not be motivated by issues of child support when seeking Orders pertaining to the living arrangements for the children;

- Discourage any client that wishes to structure the children's living arrangements to achieve a more favourable child support outcome (either as payer or payee). Sadly, it is a widely held view amongst experienced practitioners that a child support issue often lies behind children's disputes;
- Encourage your client to inform children about adult separation in a child focused and age appropriate manner;
- Make appropriate referrals to professional persons and/or bodies in circumstances where there are issues relating to the child's emotional health or allegations of abuse and family violence of any form;
- Ensure that our clients are aware of our ability to breach our duty of confidentiality in circumstances of disclosures of abuse or the whereabouts of a child subject to a location or recovery Order – in this regard we must balance our duty with the perceived threat to a child's life or health (mental and physical) and as such the threat must be sufficiently serious to consider such a breach
  - o Always consult with senior colleagues or senior advisors at the Law Society if in doubt;
- Ensure that we advise our clients in respect of both the procedural and legal ramifications of allegations of abuse of any kind -
  - Magellan listing
  - Potential consequences for a parent where allegations are found to be vexatious or malicious
- Never pressure a client to agree to arrangements for children where it is clear that they do not consider those arrangements to be in the best interests of the child(ren)

For assistance in framing orders where domestic violence is involved, see the Full Court decision in *Oakley and Cooper [2009] FamCAFC 133*.

At paragraph 59 the Full Court said:

*The legislature has spelt out in the Act a clear direction to a Court hearing a parenting application and making parenting orders to ensure when considering children's best interests that they be protected from physical or psychological harm as a result of being exposed to, amongst other matters, family violence.*

The Court referred to the launch of the Family Court's publication "Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged" and said some of the recommendations may help Courts in framing orders which could assist the future wellbeing of children in these types of cases, including consideration of the making of conditions; whether an order should be supervised by a family consultant or the parties referred to an external parenting orders program for longer term supervision and support and whether any parenting order or injunction would be inconsistent with a family violence order.

The Court spoke of the need to ensure that children are protected so far as possible by orders designed to shield them from physical or psychological abuse and which, in appropriate circumstances, facilitate suitable therapeutic measures.

In relation to the orders generally, the normal requirements of drafting apply. Every effort should be made to ensure that orders properly reflect the intention of the parties and that they are expressed in clear and unambiguous terms.

Ambiguities and imprecise drafting give rise to miscommunication between parties whose ongoing relationship is very often marked by poor communication and ambiguities will inevitably give rise to unnecessary allegations of contraventions which waste the Court's time and increase the cost and frustration level for parties.

So often we see contraventions arise which are the result of poor drafting causing parties to interpret the same order differently and which could have been avoided with more time and care at the drafting stage.

In terms of specific orders, I could do little better than refer you to the notes, papers and precedents provided by His Honour Federal Magistrate Slack in a seminar presented on practice in the Federal Magistrates Court on 1 December 2009.

In the course of the seminar His Honour remarked on the importance and benefits of a properly prepared and thoughtful application commenting that the application is the most important document that a solicitor will prepare for a client but that *"unfortunately, it has become the document that is treated with the most disrespect"*. A sample of draft orders prepared by FM Slack which I find quite useful is attached to this paper.

## 2. Current trends in the Court

## 2.1 Equal Time

Of course there is now the decision of the High Court in MRR v GR [2010] HCA 4 which has in effect “turned upside down” the issue of the matters required to be considered before equal time will be ordered.

The relevant chronology in MRR v GR is as follows:-

1993 – 2007	Parties live together in an intact relationship in Sydney
January, 2007	Parties relocate to Mt Isa, Queensland and continue to live there as a family unit.
August, 2007	Parties separate and some time after the mother returned to Sydney with the child. Mother remains in Sydney and advises she will not be returning to Mt Isa with the child. Father returns to Mt Isa and files proceedings in the Federal Magistrates Court seeking the return of the child to Mt Isa.
October, 2007	Interim Orders of FM Coker requiring the return of the child to Mt Isa and thereafter living in a shared care arrangement.
1 April, 2008	Final Orders requiring Mother and child to remain in Mt Isa and for the child to live in an equal time arrangement between Mother and Father with parental responsibility to be shared equally.
15 May, 2009	Mother’s Appeal is dismissed by the Full Court of the Family Court.
2 October, 2009	Mother given special leave to appeal to the High Court.
December, 2009	The Mother’s Appeal against the decision of the Full Court of the Family Court upheld. (Reasons published on 3 March 2010). 1 April, 2008 Orders set aside Matter remitted for rehearing de novo

It is the interpretation of the Court (comprising French CJ and Gummow, Hayne, Kiefel and Bell JJ) in respect of s65DAA which has had a dramatic effect on existing jurisprudence of parenting matters and the practice in respect of shared parenting.

The Court commented at paragraph 9:-

*"Each of sub-ss (1)(b) and (2)(d) of s65DAA require the Court to consider whether it is reasonably practicable for the child to spend equal time or substantial and significant time with each of the parents. It is clearly intended that the Court determine that question. Sub-section (5) provides in that respect that the Court "must have regard to" certain matters, such as how far apart the parents live from each other and their capacity to implement the arrangement in question...."*

Ultimately the Court determined, at paragraph 13:-

*"s65DAA(1) is expressed in imperative terms. It obliges the Court to consider both the question whether it is in the best interests of the child to spend equal time with each of the parents (para (a)) and the question whether it is reasonably practicable that the child spend equal time with each of them (para (b)). It is only where both questions are answered in the affirmative that consideration may be given, under para (c) to the making of an Order. The words with which para (c) commences ("if it is") refer back to the two preceding questions and make plain that the making of an Order can only be considered if the findings mentioned are made. A determination as a question of fact that it is reasonably practicable that equal time be spent with each parent is a statutory condition which must be fulfilled before the Court has power to make a parenting order of that kind."*

Their Honours went on to note if a Court was unable to make "such a finding" then the legislation required consideration of the prospects of the child spending substantial or significant time with each parent and a consideration of that sub-section required the answering of the same questions concerning the child's best interests and reasonable practicality.

The Court found that His Honour FM Coker treated his answer to the question posed under para (a) as being determinative of whether an Order should be made.

The effect of the judgment is that a Trial Judge cannot make an Order for a child to spend equal (or substantial and significant time) with each parent without making a finding, separate from its consideration of what will be in the child's best interests, that it is reasonably practical for the child to spend such time with each parent.

In the Full Court decision of MRR v GR [2009] FamCAFC 81 (at 96 and 97) the Full Court considered His Honour's consideration of s60CC considerations as satisfactory in circumstances whereby His Honour did not expressly address reasonable practicality.

The High Court held that those matters (being the s60CC considerations) could be relevant only to the question posed under para (a) of s65DAA(1) and not the question posed under para (b) (at paragraph 14).

Other comments from the High Court in this matter include:-

- *s65DAA(1):-*
  - o *is concerned with the reality of the situation.... not whether it is desirable that there be equal time;*
  - o *requires a practical assessment of whether equal time is feasible.*

*(at para 15)*

Their Honours said the Full Court **should** have held:

- It was not open to the Federal Magistrate to find it was reasonably practicable for the child to spend equal time or substantial or significant time with each of the child's parents; and
- It was not open to the Federal Magistrate to consider making an Order for equal time.

***So how has the decision of the High Court affected the Court's interpretation of the shared parenting provisions in the Act?***

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*

MRR v GRR has been cited in approximately 130 judgments (according to [www.austlii.edu.au](http://www.austlii.edu.au) since the delivery of the High Court's reasons in March 2010.

Two recent examples from the Family Court include:-

Appleton & Appleton [2011] FamCA 70 (delivered 17 February, 2011) wherein the Court held (at para 95) -

*In the event that an order is made allocating equal shared parental responsibility, either presumptively or otherwise, the Court is then obliged to consider both the advisability and practicability of the child spending equal, or alternatively, substantial and significant time with each of the parents (s 65DAA).*

Broom & Falcon [2011] FamCA 67 (delivered 16 February, 2011) at para 219 -

*As there is to be an order for equal shared parental responsibility, I am bound to positively consider those matters required by s 65DAA.*

It is therefore clear that in light of the decision in MRR v GR the hurdles to overcome in respect of an equal time or shared care order have just become exponentially harder.

Collu & Rinaldo [2010] FamCAFC 53 was the first relocation case considered by the Full Court after the High Court decision in MRR v GR.

The Full Court was critical of the trial judge for making findings that an Order should be made for equal shared parental responsibility prior to considering the relevant statutory considerations and, in particular, s60CC of the Act.

This case is worthwhile reading to assist in understanding the approach to be taken following MRR v GR.

At paragraphs 334 & 335 the Full Court dealt with the Order in which the statutory provisions in Part VII are best considered. They said:

*"[Section 60CA](#) of the Act provides that in deciding whether to make a particular parenting order in relation to a child the Court must regard the best interests of the child as the paramount consideration. "Parenting order" is defined in [s 64B](#). [Section 60CC](#) then sets out how to determine what is in a child's best interests. [Section 60CC\(1\)](#) provides that in determining what is in the child's best interests the Court must consider the matters set out in [s 60CC\(2\)](#) being the primary considerations and the matters set out in [s 60CC\(3\)](#) being the additional considerations. In other*



words, the matters in [s 60CC](#) could be described as the “best interests” considerations and they must be considered.

There is a possible overlapping of a number of the considerations in [s 60CC](#) of the Act. For example, the first primary consideration in [s 60CC\(2\)\(a\)](#) of the Act, which deals with a child having a meaningful relationship with both of his parents may overlap with the additional consideration in [s 60CC\(3\)\(b\)](#) which requires consideration of the nature of the relationship of a child with each parent and other persons. So also any finding as to the nature of the relationship of a child with a parent would be relevant to consideration of [s 60CC\(3\)\(d\)](#) which requires consideration of the likely effect of any changes in the circumstances of a child including the likely effect of separation from a parent. It is for this reason that there is some attraction in the idea that perhaps the additional considerations in [s 60CC\(3\)](#) should be looked at before consideration of the primary considerations in [s 60CC\(2\)](#): *Mazorski v Albright* [\[2007\] FamCA 520](#); [\(2007\) 37 Fam LR 518](#) per Brown J.”

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*
  - o *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.*

## 2.2 Rebutting the presumption of equal shared parental responsibility

Before looking at some recent decisions where the Court has resolved that the presumption has

been rebutted, it is important that we start with an understanding of both the concept of parental responsibility and the legislative pathway which must be followed.

His Honour Justice Murphy in Wattel & Evans [2010] FamCA 411 sets out the process of examination the Court must engage in when disputes as to the appropriate allocation of parental responsibility arise<sup>1</sup>.

Firstly s61C of the Family Law Act which provides:-

- (1) Each of the parents of a child who is not 18 has parental responsibility for the child;*
- (2) This position is not affected by the change in the nature of the parent's relationship, ie separation or either or both parent remarrying;*
- (3) The position is subject to any order of a Court.*

Therefore by becoming parents each of the mother and father has, until such time as an Order of the Court is made, all the duties, powers, responsibilities and authority which, by law, parents have in relation to children<sup>2</sup>.

It is clear by the terms of s61D that a parenting Order <sup>3</sup> does not of itself displace the position set out in s61C, rather the Court must specifically provide for the allocation of parental responsibility in order for the underlying parental responsibility to be displaced<sup>4</sup>.

When the Court is asked to make parenting Order, it is bound by the terms of s61DA to apply the presumption contained therein, namely:-

- (1) when making a parenting Order in relation to a child, the Court must apply a presumption that it is in the best interest of the child for the child's parents to have equal shared parental responsibility for the child*

The presumption applies unless the Court has reasonable grounds to believe there has been abuse of the child or another child, family violence or if the Court is satisfied that it would not be in the best interests of the child for the responsibility to be shared<sup>5</sup>.

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<sup>1</sup> See para 13 referring to Lansa & Clovelly [2010] FamCA 80

<sup>2</sup> See s61B Family Law Act 1975 (Cth)

<sup>3</sup> See definition of parenting order in s64B Family Law Act 1975 (Cth)

<sup>4</sup> Section 61D(2) Family Law Act 1975 (Cth)

<sup>5</sup> Section 61DA(2) and s61DA(4)

s61DA(3) provides that in reference to an interim Order, the presumption applies unless the Court considers that it would not be appropriate to so apply.

Before embarking on the method by which the best interests of the child are determined, in Wattel & Evans<sup>6</sup> Murphy J notes that the legislative provisions are narrowed by a consideration of s65DAC and he comments:-

*...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<sup>7</sup>*

"Major long-term issues" are clearly defined in s4 of the Act and do not need re-stating herein.

The responsibility and requirement for consultation which is inherent in sharing parental responsibility will be practically difficult to achieve in matters where there is "*entrenched and apparently intractable conflict*"<sup>8</sup>.

This practical consideration therefore imposes upon the Court the need to consider the practical reality of the matter before it, in addition to the legislatively provided for considerations in s60CC.

This was highlighted by the Full Court in Chappell and Chappell (2008) FLC 93-382 where the Full Court said<sup>9</sup>:-

*We accept that in determining what is in the child's best interests the Court must take into account the prescribed matters in ss60CC(2) and (3), one of which requires the Court to consider whether it would be preferable to make the order least likely to lead to the institution of further proceedings. In our view, it would be an appropriate exercise of discretion in some cases to find that application of the presumption would not be in the child's best interests because the track record of the parents would suggest a high probability of deadlock, which would inevitably lead to further proceedings.*

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<sup>6</sup> Ibid

<sup>7</sup> Para 19

<sup>8</sup> Wattel & Evans [2010] FamCA 411 at par 24

<sup>9</sup> Para 75

In VR and RR (2002) FLC 93-099 the Court noted that orders limiting or curtailing the parental responsibility of a parent should be made only in circumstances which warrant it and in practice, such orders are rare. The Full Court commented <sup>10</sup>

*....in our view it is clear from the legislative scheme that any intervention by the Court in the due performance of an aspect of parental responsibility, that seeks to interfere with or diminish the responsibility of either parent to care for the child in the manner that parent deems appropriate, should be made only where the Court is of the view that the welfare of the child will be clearly advanced by that Order being made.*

By reference to the following cases we see how, in recent times, the Court has held that it is appropriate to rebut the presumption of shared parental responsibility.

### 2.2.1 2010 Cases

Clovelly & Clovelly (No3) [2010] FamCA 684

Interim judgment of Faulks DCJ

#### Orders (relevantly)

- Mother have sole parental responsibility for "C" aged 11yrs.

#### Facts

- Consent Orders made in 2007
- Father filed application seeking to spend more time with child
- Father lived in New Zealand and travelled to Australia for the purposes of spending time with the child each alternate weekend
- Court asked to implement interim arrangements to cover the period July to November, 2010
- Father advised during interim hearing that he would be returning to Australia however had

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<sup>10</sup> at 88,940

no firm arrangements for accommodation, employment or other financial support

### Expert Evidence

- Family reporter concluded:-
  - o Might best meet the child's needs if she were to spend time with her Father on a more flexible basis... in this way she can maintain a relationship with her Father, such that she is able to focus on her own interests and commitments and such that her time with him might be more meaningful and enjoyable

### Comments from the Bench

- Child has not formed a close emotional attachment to the Father
- Not a good fit between the father's parenting attitudes and the needs of the child
- Child feeling unease and resentful
- Child no longer wants to be centre stage in her parents ongoing conflict or be burdened with the task of appeasing her parents, in this case her Father
- Uncertainty of the Father's plans upon returning to Australia made assessing his proposals for the child's living arrangement very difficult
- Rebutted the presumption of shared parental responsibility for the following reasons:
  - o The issue is not what rights each of the parents have, but rather what responsibilities and obligations they have;
  - o In this instance the parents have demonstrated over a long period of time their total inability to agree on almost any matter;
  - o Neither party is able to put aside his or her views about any matter to enable a joint decision or a cooperative decision to be made;
  - o This in itself would mitigate against (at least on an interim basis) and at least on an interim basis determine, the issue that the presumption should not apply;
  - o Even though the statutory rebuttals did not apply the Court was satisfied after considering s60CC that the presumption should not apply;
  - o Relevant s60CC factors considered included
    - The evidence of the family consultant which was clear and unequivocal was that the child was expressing views about the time she spends with her father with such views not as a result of any particular coaching from the mother -

- As to the child's maturity the Family Consultant suggests:-
  - "she impresses as an eleven year old with strong views and determination... confident, well adjusted and sociable young individual who is well regarded by adults and her peers and who is well attaining the tasks of her development stage"
- As to the nature of the child's relationship with her parents and other persons
  - Child has a close relationship with her mother based on mutual affection and respect. This bond is not one which causes the child or the mother to be emotionally dependent upon the other
  - Held that the relationship between the child and the Father is not as close as that between the child and the Mother but is nevertheless an important relationship in her life
- As to the willingness and ability of each parent to facilitate a close and continuing relationship between the child and the other parent:-
  - Does not exist for either parent
  - In theory the Mother would like that to occur, I do not think in practice that is the case
  - Certainly not the case that the Father wants a close relationship between the child and her mother even though he might express that that is what he really wants
  - Neither parent prepared to put aside the animosity they feel toward the other to bring about a close and continuing relationship
  - Could not see that situation changing
- Practical difficulty and expense
  - Given that the recommendations of the Family Consultant were that the time should be something like a period of hours only and given the Father travelled from New Zealand to spend time with the child the Court held this to be a mitigating factor against the presumption applying
- Capacity of each parent to provide for the child's needs
  - Evidence of the Family Consultant
    - The Father is incapable of having sufficient empathy and

- understanding of the child's emotional needs to adequately provide for them
    - The relationship between the child and her Mother does provide that emotional and, to some extent, psychological and intellectual support
  - Attitude towards the child and the responsibilities of parenthood demonstrated by each of the parents
    - Each said that the other had gone out of their way to disrupt and/or destroy the relationship between that parent and the child
    - Each of them has exhibited an ability to put his or her own needs ahead of what the child really needs
    - Example on the part of the Father:-
      - Email sent to Mother regarding costs of presents for party's the child may attend whilst in his care – as he was paying child support he felt it was appropriate for the Mother to purchase the present for the party
    - "I find the pettiness in that context quite extraordinary and an adverse reflection upon the father's idea about his responsibilities as a parent"
  - As to the primary considerations
    - There is a need to protect the child from the psychological harm of forcing her to spend time with her father against her will. In this regard the family consultant has indicated that this may have an effect, if indeed she does not want to spend time with her father, of causing her to resent her mother's actions in making her do it and resent even more, perhaps, her father for making her do it as well

Seales & Pacillo [2010] FamCA 759

Judgment of Justice Rose

Orders



- Mother Ordered to have sole parental responsibility for the child (11 years old)

### Facts

- Final Orders made in September, 2003 after a contested hearing
- Both parties sought those Orders be discharged
- Mother sought
  - o Sole parental responsibility
  - o Child live with her
  - o Child spend time with the Father depending upon the findings made about alleged abuse of the child by the Father and/or the Father's child from a previous relationship
- Father sought
  - o Sole parental responsibility
  - o Child live with him
  - o Child spend time with the Mother on alternate weekends and during school holiday periods dependant upon the Mother not being under the influence of drugs or alcohol
- Numerous interim issues between 2003 and final hearing in 2010 including
  - o Father seeking and obtaining an Apprehended violence Order against the Mother in 2005
  - o Contravention proceedings in 2005, 2008 and 2010
  - o The Father's former girlfriend seeking and obtaining an Apprehended Violence Order against him in 2008
- Allegations of
  - o Physical abuse of the child by the Father
  - o Emotional abuse of the child by the Father
  - o Sexual abuse of the child by "S" (the child's half sibling)
  - o Emotional abuse of the child by "S"
  - o Unacceptable risk of abuse of the child by the Father and/or "S"

### Expert Evidence

- Dr B – Psychiatrist
  - o Although the child made negative comments about his father – don't believe they

are a true reflection of his feelings

- Child appeared remarkably comfortable with his father
- Discounted the child's complaints
- Wasn't struck by the allegations or risk posed by "S"... on the evidence there didn't seem to be sufficient concern to regard "S" as an unacceptable risk to the child
- Father does not have a great deal of insight into the understanding of children of this age, nor the situation that the child finds himself between the parents and also the inappropriate punishment... it's of major concern

#### Comments from the Bench

- Mother's affidavit material had themes of:-
  - Child showing fear or anxiety and resistance to spending any time with the Father;
  - Child having adverse reactions to verbal and/or emotional abuse directed to him by the father;
  - Child fearful of the Father;
  - Child exhibiting regressive behaviour and feigning illness;
  - Child stating that he wished to be dead and threatening to self-harm;
- Not satisfied on the basis of Dr B's evidence that the child's views in relation to the father should be discounted;
- Found that the child had a close and strongly bonded relationship with the mother and whilst there are positive aspects of the child's relationship with the father, it has been severely undermined by a combination of the child's reaction to the father's lack of insight together with his negative comments about the Mother;
- Although little weight attached to the evidence of Dr B in relation to the allegations against "S" the Court was not satisfied that "S" in fact either sexually abused the child or threatened to do so;
- Neither parent found to be willing to enable a continuing relationship between the child and the other party;
- Practical difficulties were obvious – Mother on the Central Coast and Father in Western suburbs of Sydney;
- Practical difficulty in respect of communication also – communication almost non-existent because of entrenched conflict that is a significant "handicap" to the child having effective communication with one party or the other;

- Whilst the Father alleged the Mother had been engaging in alienating behaviour, the Court balanced the limited evidence on that allegation with the Father's lack of insight and found that the Mother had not engaged in alienating behaviour;
- Mother found to have appropriate parental attitude;
- Father found to have a compromised parental attitude due to the stress and anxiety the child has suffered as a result of not only the conflicted relationship between the parties but also the father's behaviour;
- Found that there had been instances of family violence on the part of the Father, demonstrated by his language and demeanour which caused the child to reasonably fear or be reasonably apprehensive about his personal wellbeing or safety – thereby falling within the definition of family violence in s4(1) of the Act.
- Satisfied that the presumption did not apply pursuant to s61DA(2), namely that family violence had taken place
- Also concluded that it was in the best interests of the child for an order for sole parental responsibility to be made.

## 2.2.2 2011 Cases

### Moer and Sands

Judgement of Brown FM

### Orders

- Father have sole parental responsibility in respect of decisions concerning health and education of the child aged 9 yrs.

### Facts

- Child had lived predominantly with the Mother since separation in early 2007.
- Father asserted that if current arrangement remained the same there was the potential to expose the child to an unacceptable risk that he will come to some form of psychological harm as a result of his mother's abusive and neglectful parenting of him.
- Mother opposed any significant change and seeks sole parental responsibility.

- Mother unilaterally withdrew child from school in 2009 as well as being generally unreceptive to school's advices and recommendations and disruptive to his attendance there – showing up for example in the middle of class in PJ's and rummaging through the child's books.

### Expert Evidence

- Psychologist
  - o Father said that he was motivated to make the application because of his perception that the child's mental health had deteriorated
  - o Mother similarly reported concerns but attributed the behaviour to the Father's violent and aggressive behaviour towards her;
  - o Evident that the child had serious emotional and behavioural disturbance;
  - o Needs parents that accept and act on the advice they receive from professionals even when that advice may be unpalatable to them;
  - o Each parent had very different accounts of who has been primarily responsible for initiating and maintaining conflict;
  - o Recommended that the child continue to attend current school and receive urgent professional psychological care;
  - o Live the majority of the time with one parent and spend three or four nights a fortnight with the other;
  - o Parents acrimonious and competitive relationship with each other was emotionally detrimental to the child;
  - o Court must minimise the conflict;
  - o Child would cope with being in the primary care of either parent.

### From the Bench

- Satisfied that the child is a disturbed child who is seriously at risk educationally;
- Patently obvious that the current arrangements for his care are not working particularly in terms of providing him with a satisfactory standard of education;
- The mother either consciously or unconsciously working against the school's efforts because she wants the child to attend another school;
- One of the main points of the Mother's case was that the child's behavioural problems were as a result of the Father's exposure of him to violence towards the mother

- However in the 2007 hearing the Mother's position was that the child should live equally between the parties;
- Accept that the child is significantly at risk due to his education being compromised;
- If the child is deprived of the opportunity to learn elementary skills, his progress through primary school and on to high school will be problematic. His social skills are likely to be retarded because he will not interact as fully as other children do with their peers;
- The duty to ensure a child attends school properly and has a regular education is one of the most fundamental and important responsibilities of being a parent. The Court was satisfied that the evidence currently indicates that the child is not having a regular or normal education;
- All unexceptional school activities are marked by conflict which causes the child distress;
- If the child continues to have a failed education there was no doubt that this has the potential to cause him significant psychological harm and that it was incumbent upon the Court to act decisively;
- Accept that the Father is far better placed to work with the school than the mother;
- Satisfied that the Mother can continue to have a meaningful relationship with the child notwithstanding there is to be a change of arrangements;
- Neither appropriate nor in the child's best interests to apply the presumption of shared parental responsibility;
- Pressing need for normalisation of child's attendance at school and ensuring he receives the necessarily support required to remedy his fallen academic standards

*Brown & Sidebottom [2011] Fam CA 47*

Judgement of Dessau J after hearing commencing July, 2010 and continuing part heard through October, 2010 and finalising in January, 2011-02-27.

Orders

- Father have sole parental responsibility for the children aged 13 and 10;

Facts

- Children lived in mostly week about arrangement for approximately six years;
- Mother alleged serious risk to children's welfare due to Father's life long sexual abuse of them;

- Expert evidence (disputed by the mother obviously) is that mother suffers from paranoid delusional disorder;
- Long litigation history
  - o Mother first filed in 2003;
  - o Alleged sexual abuse then but ultimately final consent Orders for shared care;
  - o The mother then alleged sexual abuse again but that litigation also ended in 2006 with consent orders for shared care;
  - o In 2008 the Father commenced proceedings and the mother again alleged sexual abuse but these proceedings ended in consent orders whereby the children lived with the Father and spent time with the mother ;
  - o Mother started proceedings again in 2010.

### Expert Evidence

- Family Consultant
  - o Described the children as intelligent, good natured girls;
  - o Happy living with their father and his new wife;
  - o Children more mature than their age;
  - o Children felt relaxed and secure in Father's presence;
  - o Children expressed hurt and distress at their mother's conduct;
  - o The eldest daughter accepted that the Mother's behaviour might be as a result of mental illness and said that her mother "only gets so many chances";
  - o Children described feeling hurt as a consequence of her mother stalking her and her friends .... "she has ruined my primary school friendships" .... "I have cut all emotional ties with her";
  - o Eldest refused to see mother during interview process and said that if she was required to see her Mother she would just get on a train and go back to her Father;
  - o Family Consultant said that the strength of the child's feelings at present were such that she was genuinely unable to contemplate spending time with her mother either alone, with her sister or in a supervised situation;
  - o The youngest expressed willingness to spend time with her mother eventually with someone else present but wanted nothing to do with her until she started to take her medication again;

- Satisfied the children were giving their own views free from any outside influence or pressure;
  - Children need respite from these issues, their mother's behaviour and Court proceedings.
- Psychiatric Report
  - Professional opinion was absolutely clear that the Mother's behaviour is consistent with a paranoid delusional disorder;
  - Medication could not eradicate her delusions but her response to them could be substantially calmer if she adhered to treatment.

### From the Bench

- Whilst it is generally in the interest of children to have a good relationship with both parents it is sometimes not possible;
- Mother is the only source of these allegations – offers very little evidence of direct disclosures by the children – concerns are based on her own inferences drawn from the children's behaviour or from her understanding of the behaviour and propensity of men in general;
- Mother's belief based on things such as:-
  - The children being constipated from time to time was a result of the Father sodomising them;
- Satisfied that the children are not at risk of sexual abuse or any other abuse in their father's home;
- Satisfied that they are at very serious risk in their Mother's home, given her mental health issues and constant reinforcing to the children that they have been sexually abused;
- Clear on all the evidence that the mother's capacity to care for the children is extremely hampered by her view that, to protect them, she must severely restrict their movement;
- The mother's train of thought in her trial material gave an insight into what the children have endured;
- Father held to have only ever stepped in to stop the relationship between the children and the mother when there has been a genuine concern about the Mother's mental health;
- Mother does not have the capacity to facilitate relationship between the children and their Father;

- Court “sadly” held that Father should have sole parental responsibility – sadly used because the Mother’s mental health issues can be treated and if so she has the capacity to contribute to decision making for the children;
- However currently her mental health resulted in the presumption being rebutted in light of the abuse the children have suffered in the Mother’s care;

Pillai & Doshi (No 2) [2011] FamCA 36

Judgment of Justice Young in Melbourne

Orders

- Mother have sole parental responsibility for the children aged 6 and 4.

Facts

- Allegations of family violence, threats and abuse;
- Marital conflict, total lack of communication and alleged inappropriate influence upon both children;
- Father had refused all supervision of his time with the children;
- Father had rejected any role, influence or recommendation made by counsellors or social workers, the Family consultant or the ICL;
- Father sought that the children live with him and have sole parental responsibility;
- Mother sought the children live with her and have supervised time with the Father and that she have sole parental responsibility;
- Long litigation history commencing in 2007
- Defended Family Violence proceedings in Victoria with an Order being made in favour of the Mother for an undefined period of time – Father was in the process of appealing at the time of hearing.

Expert Evidence

- Ordered to attend upon psychiatrist;
- Father refused to attend and maintained could not afford to pay the fee involved and disputed the need for attendance.

From the Bench



- Turning to s61DA the Court held (at paragraph 102):-
  - o *I commence with the presumption that an equal shared parental responsibility order is appropriate for the children, but that the presumption is clearly and firmly rebutted on the facts of this case*
- Relied upon the findings made in respect of Family Violence but also held that there are other significant factors identified which resulted in it not being in the best interests of these children for their parents to share equal responsibility for them;
- No level of communication;
- Continuing conflict;
- Total lack of trust;
- Held that there was no meaningful relationship between the Father and the children – all recent periods of time spent between the Father and the children were spent by him to develop issues and gather evidence.

#### Yanders & Jackin [2011] FMCAfam 57

Decision of FM Turner

#### Orders

- The Respondent Ms Jacklin have sole parental responsibility for the child (aged almost 6).

#### Facts

- Same sex relationship;
- Respondent Ms Jacklin conceived a child with Mr S, an acquaintance of hers
- Physical separation occurred in May or June, 2008 with Ms Jacklin asserting separation under the one roof much earlier, in October, 2006;
- Issues relating to the Applicant, Ms Yander's mental health including a failed suicide attempt;
- Ms Yander's sought shared parental responsibility and graduated time orders;
- Ms Jacklin sought an order for sole parental responsibility and that Ms Yander's spend no time with the child.
  - o Asserted that Ms Yander's did not have the right to have anything to do with the child and that the child would not benefit from any relationship with her.

### Expert Evidence

- Family Report prepared by Mr E
  - o *Setting aside the descriptors of parent, mother, friend and/or aunt, indications are that from mid-2005 until some time in 2009 Ms Yander's was a part of the child's relationship and/or care landscape, while Ms Jacklin was at the epicentre of the girl's relationship and care experience. Indications are that, to varying degrees, prior to 2009 Ms Jacklin included Ms Yanders in the child's care and relationship network and, from sometime in 2009 she adopted a stance to exclude her;*
  - o *The report is challenged on the matter of recommendations regarding sole or shared parental responsibility as it seems that Ms Jacklin has largely been the parent who has taken sole or primary responsibility for managing crucial aspects of the child's health, education, religious, family, friendship and relationship matters and that Ms Yanders has largely accepted and complied with this.*

### Comments from the Bench

- Held that as a threshold issue, the Court must determine whether Ms Yanders was entitled to bring an Application for parenting Orders.
  - o Held that the child was not a child of a de facto relationship given that the child was not a child of the parties nor was the child adopted by the parties;
  - o s60HB did not apply as it pertains to surrogacy;
  - o s60H(1) relating to artificial conception procedures;
    - Ms Yanders' asserted that as the pregnancy was planned with Mr S acting as a sperm donor only, the child was conceived through artificial insemination therefore making the child a child of she and Ms Jacklin;
    - Ms Jacklin said that the pregnancy was unplanned and accordingly was not a child of she and Ms Yanders.
  - o Court held that whether or not the pregnancy was planned the child was conceived naturally and therefore s60H(1) does not apply;
  - o Ms Yanders was held to be a person concerned with the care, welfare or development of the child pursuant to s65C(c) and accordingly entitled to make her Application
    - (Referring to Ms Jacklin's assertion that Ms Yander's was no more than an "Aunt" to the child) the Court held at paragraph 102 – *Whether as an*

*Aunt or something greater, it is evident that for the first three years of [X's] life, the Applicant was a constant presence for the child and developed a bond with the child;*

- Relied on the threshold test set out in KAM v MJR & Anor (1998) 24 Fam LR 656.
- As to parental responsibility the Court held:-
  - At para 111 – *The presumption.....does not apply as a finding has been made that the Applicant is not a parent for the purposes of the Act.*
- Relying however upon s64B(2) which provides that a parenting Order (having established Ms Yanders is entitled to apply for parenting Orders) can deal with the allocation of parental responsibility the Court entertained the application for shared parental responsibility, ultimately finding:-
  - At para 122 – *In addition to their being no evidence of any active role of the Applicant in the parental responsibility or decision making for the child in the past, it is unlikely with the complete lack of communication between the parties and the strong feelings of animosity demonstrated by the respondent towards the applicant during the trial, that there is little, if not, any chance of the parties having the ability to co-operate together in the future in respect to making decisions for [X];*
  - At para 123 - ... *I find that in this matter, where the respondent is so strongly opposed to the child spending any time with the applicant, and with her staunch views towards the applicant, that family dispute resolution would be of little assistance and that any order for shared parental responsibility is more than likely to lead to further Court proceedings;*
  - At para 124 – *I find therefore that it is not in the best interests of the child for an order to be made for the Applicant to have any shared parental responsibility with the respondent, and accordingly the applicant should retain sole parental responsibility.*

NB – the judgment is also a detailed analysis of the considerations when being asked to make a parenting order in favour of a non-biological parent and/or a person only concerned with the care welfare and development of a child

### 3. Relevance and impact of social science research

The issue of the use of research and academic writing by judicial officers has been the subject of comment by the Court recently, due to litigants feeling displaced upon reading a judgment in their matter which refers to such academia (and often in significant amounts).

The general consensus is that litigants feel that it is inappropriate for judicial officers to refer with such vigour to material which they did not seek the Court rely upon and often do not even know the content of.

These general concerns have been raised recently in the following cases:-

*Vance & Vance [2010] FamCAFC 250*

#### Facts

This was an Appeal by the Father against the Orders made by FM Altobelli which provided that, in broad terms, the children live with the mother and spend time with the father each alternate weekend from Friday after school until the commencement of school on Monday morning, and for time after school until 8.00 pm each Wednesday. Additionally, the orders provide for special occasions and holiday time with both parents. It was also ordered that the parents have equal shared responsibility for the children.

#### Grounds of Appeal

##### 1. Procedural Fairness

The Father asserted there was no procedural fairness as he wasn't put on notice about the use of academic materials which were ultimately referred to in the judgment at first instance.

This was notwithstanding the Trial Judge having set out in his reasons for judgment that the academic material was not evidence and only used by him for background purposes.

In commenting on this particular ground of appeal the Appeal Court noted:-

- there is likely to be a fine line between what material is used truly as background material or material which is relied upon;

- understandable that parties will not understand why material that they did not have any knowledge of finds its way into the judgment;
- whilst no appealable error is established, it may have been prudent to direct the parties' lawyers to the material and/or to provide copies to the parties at commencement of the hearing to enable them time to consider and discuss with their lawyers.

### Outcome

Appeal was dismissed.

### *Salvati & Donato [2010] FamCA 263*

### Facts

The trial judge had made reference to social science research which was not tendered by the parties.

Parties did not have the opportunity to make submissions on its content.

These circumstances did not give rise to a ground of Appeal however the Full Court made comment on the use of social science research in parenting cases and said as follows:-

- Quoting the trial judgment – This research is background to my judgment. It is not evidence – no judicial notice being taken – no findings of fact being made as a result of the material – assists in understanding the expert evidence – one also hopes that parents might learn from it.
- However despite this disclaimer the trial judge made the following comment in discussing the Orders he proposed:-
  - o “I appreciate that this is contrary to the research and recommendations of MacIntosh and Chisholm. However the facts of this case are unique....
- Referring to s144 of the Evidence Act 1995 (Cth) – Matters of Common Knowledge - the Full Court said that they did not consider the research and academic material the Federal Magistrate referred to could be considered to be common knowledge;
- Considered it inappropriate for the Federal Magistrate to refer to the journals and for them to inform his decision when they had not been tendered by either party or the ICL and

where the parties had not been given the opportunity to make submissions in relation to them.

McCall & Clark (2009) FLC 93-405

In this case the Full Court were discussing the use of social science research and academic material in circumstances whereby the Federal Magistrate did not have any expert evidence to rely upon.

Neither party tendered any such material.

The Federal Magistrate did not inform the parties that he could have recourse to such material.

The Full Court held that absent such evidence the Federal Magistrate could not have informed himself of such matters.

Had the Trial judge informed the parties of his intention, then reliance upon material such as this may have been admissible after giving appropriate notice under s144(4) of the Evidence Act.

This case was another international relocation case where the Full Court concluded that the basis on which the Federal Magistrate ultimately reached his decision showed that he had not given “any real consideration of the imperatives in s65DAA.

At paragraph 62 the Full Court concluded:

*“In our view, it is inevitable given the provisions of the legislation that the exercise to be undertaken will on its face involve dual consideration of some matters ...”*

Barclay & Orton [2009] FamCAFC 159

Reliance was placed on the matters raised in McCall & Clark above and Justice May observed:-

*It is entirely desirable that judges have the assistance of expert evidence but not appropriate, in my view, that a Federal Magistrate inform himself about some academic writings and not provide those writings to the parties nor allow other expert evidence to be called.*

As it was clear that the Federal Magistrate relied upon his own appreciation of expert evidence in making decision, the Appeal was allowed.

Justice Boland found that the lack of procedural fairness amounted to an appealable error.

Her Honour said:-

*Neither party had referred to the two specific articles the subject of complaint and the father was denied the opportunity to make submission on those articles. Mother's Counsel didn't provide the article to Dr T to enable his comment.*

The Federal Magistrate also sourced materials without reference to the parties.

If the material merely gave background to the Federal Magistrate's decision or was extraneous to her decision then notwithstanding a failure to provide to the parties there would be no appealable error.

Her Honour's reasons show that she took into account the author's opinions which were against the recommendations of the experts.

In the circumstances it was established that there was no procedural fairness to the Father who did not have the opportunity to address the material on which the Federal Magistrate relied and there was accordingly an appealable error.

The Court said:

*We do not consider that the research and articles to which the Federal Magistrate referred could be considered to be "common knowledge such as to fall within s144(1) of the Evidence Act 1995 (Cth)".*

#### 4. The Role of the Family Consultant

Tryon & Clutterbuck (2010) FLC 93-453

This appeal involves comment by the Full Court on the role of the family consultant or Court expert. The trial judge in a case involving paternity issues ordered that the mother and her new partner attend a family consultant for purposes of the preparation of a family report. On appeal the mother and her new partner sought to set aside the Order on the basis that they were precluded from having legal representation at the interviews for the s62G report although in their submission the

family consultant was performing discretionary functions “sometimes analogous to judicial work” and consequently the denial of legal representation was a denial of natural justice. The Full Court rejected the submission, expressing the view that the family consultant’s role pursuant to s62G is that of an expert preparing a written report in reliance of his or her expertise and the family consultant was not exercising discretion or carrying out a judicial function.

At paragraph 32, Their Honours said:

“We do not accept however that the family consultant exercises any “power” in preparing a report. Nor does the family consultant make “findings” in the sense that the term is applied to judicial determinations. Nor does it follow that the report of a family consultant “will lead” to findings by the Court in which the evidence of the family consultant is adduced with respect to the “rights, interests or legitimate expectations” of parties to the proceedings in that Court. They may have that result, or they may not. What impact, if any, the report of the family consultant has upon the exercise of a judge’s discretion will only be determined after its author has been cross-examined if the report is controversial, and all other relevant evidence considered. Clearly, the extent to which it emerges in the course of cross-examination of a family consultant that he or she has expressed opinions or recommendations in the absence of affording a party a fair opportunity to be heard is likely to reduce, or even destroy the weight which would otherwise be given such conclusions or recommendations”.

*Rice v Asplund* [1979] FLC 90-215

The issue of *Rice v Asplund* was considered by the Full Court in *Reid & Lynch* [2010] FamCAFC 184 where O’Ryan J considered at length the relevant authorities on the question of res judicata and *Rice & Asplund* and concluded that the Court ‘should not lightly entertain an application to discharge, vary, suspend or revive a final parenting judgment’ and must be satisfied of significant change in circumstance.

## Conclusion

Finally I would refer interested practitioners to the evaluation of the 2006 reforms carried out by the Australian Institute of Family Studies. The study contains some interesting statistics and conclusions about how the reforms have impacted on separating couples and their children. A copy of this evaluation is appended to this paper.



Dated: 11 March 2011

Michael John Emerson  
Emerson Family Law.

### Acknowledgement

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## **Parenting Orders with POP**

- 1) That all previous Orders and Parenting Plans be discharged.
- 2) That the following parenting orders shall apply for the children, **insert** unless the Mother and Father agree to alter all or some of them either temporarily or permanently.

### **Parental Responsibility**

- 3) That except as otherwise stated, the Father and the Mother are to have equal shared parental responsibility for the major long term issues of the children.
- 4) That the parents are to consult with each other about decisions to be made in the exercise of their equal shared parental responsibility and shall make a genuine effort to come to a joint decision. They are not, however, required to consult with each other about the daily care of the children. The types of decisions about which parents are required to inform and consult include but are not limited to changing the name of a child; relocating the residence of the child so that existing parenting arrangement become impracticable; changing the school of a child; a significant medical intervention for a child.

### **Exchange of Information**

- 5) That the Mother and Father shall:
  - a) keep the other parent informed at all times of their residential address and contact telephone number and to notify the other parent at least 7 days prior to relocating their residence beyond a 20 kilometre radius from where they currently reside;
  - b) keep the other parent informed of the names and addresses of any treating medical or other allied health practitioners who treat the children and authorise those practitioners to provide the other parent with information that they are lawfully able to provide about the children;

- c) inform the other parent as soon as reasonably practicable of any medical condition, significant health issue or significant illness suffered by the children and authorise any treating medical practitioner to release the children's medical information to the other parent.
- 6) That the parents authorise the schools or day care centres attended by the children to give each parent information about the children's educational progress and other related activities and supply them with copies of reports, photographs, certificates and awards obtained by the children (at that parent's cost).
- 7) That during the time the children are with either parent, that parent shall:
  - a) respect the privacy of the other parent and not question the children about the personal life of the other parent;
  - b) speak of the other parent respectfully;
  - c) not denigrate or insult the other parent in the presence or hearing of the children and use their best endeavours to ensure that others do not denigrate or insult the other parent in the hearing or presence of the children.

#### **Living Arrangements for the Children**

- 8) That the children shall live with the **Father/Mother** during school term:
  - a) each alternate week from after school Thursday until before school Monday to continue fortnightly thereafter until the commencement of any school holiday period;
  - b) each other week from after school Thursday until before school Friday;
  - c) this Order shall be suspended for the weekends during any school holiday period (which shall be deemed to include the first weekend after the school term ends and the weekend before school recommences) and to recommence on the weekend after

the school term recommences determined as if the sequence had not been — interrupted.

- 9) That otherwise, the children shall live with the **Mother/Father** during school term.
- 10) That the children shall live with their parents for school holiday periods as follows:
  - a) being the first half of the Autumn, Winter, Spring and Summer school holidays in even numbered years with the Father and in odd numbered years with the Mother; and
  - b) the second half of the Autumn, Winter, Spring and Summer school holidays in odd numbered years with the Father and in even numbered years with the Mother;
  - c) for the purpose of these Orders, the school holiday time shall commence:
    - i) when a parent's time falls in the first half of the holidays from after school on the day the school term finishes and conclude at 5.00pm on the day calculated to be half of the holidays;
    - ii) when a parent's time falls in the second half of the holidays from 5.00pm on the day calculated to represent half of the holidays when contact shall end at 9:00am on the day the school term recommences;
    - iii) school holidays shall be deemed to commence at close of school on the day the school term finishes and conclude at 9.00am on the day the children return to school and the number of nights in each school holiday period is to be used to calculate one half of the school holiday period and if there is an uneven number of nights the **Father/Mother** shall retain the additional night.
- 11) That notwithstanding any previous Orders, the children shall spend time with their parents on special occasions as follows:
  - a) for Christmas Day:

- i) from 5.00pm Christmas Eve until 2.00pm Christmas Day in even numbered years with their Father and in odd numbered years with their Mother; and
    - ii) from 2.00pm Christmas Day until 5.00pm Boxing Day in odd numbered years with their Father and in even numbered years with their Mother;
  - b) on the birthday of each child (with the parent they are not living with on the day) (including every child):
    - i) if a school day, from after school until 6.00pm;
    - ii) if a non-school day, from 1.00pm until 6.00pm;
    - iii) with that parent to be responsible to collect and return the children;
  - c) with their Father on the Father's Day weekend and in the event that that is a non contact weekend the father shall forgo the following weekend of contact;
  - d) with their Mother on the Mother's Day weekend and if that is a non-contact weekend, the mother shall forgo the following weekend of contact.
- 12) The children shall be permitted to communicate with their parents on the telephone at such times as a child reasonably requests and that parent shall facilitate the call.
- 13) A parent may telephone the children before 7pm but only on (**insert day (s)**) unless otherwise agreed and in relation to such communication each parent shall:
- a) ensure that the children are available to receive the telephone call;
  - b) arrange for the children to telephone the other parent on the following night if, for any unforeseen circumstance, the children miss the telephone call from that parent;
  - c) ensure that the children have privacy during the conversation.

#### **Collection and Delivery**

- 14) That except as otherwise ordered, the changeover point for the transition for the children between the households shall be **insert** and for that purpose:

- a) The parents may collect the children in person or by their nominee provided that the nominee is an adult who is known to the child and the other parent;
  - b) Each parent shall be punctual in attending the changeover and if there is to be a delay shall phone the other parent;
  - c) Unless otherwise agreed neither parents shall approach the other and shall remain near their cars so as to enable the children to move readily between the vehicles;
- 15) That each parent shall deliver and return the children's clothing, school supplies and belongings and the children's clothing shall be returned in a clean condition.
- 16) That the parents shall (when the children are in their care):
- 17) That the parents shall not (when the children are in their care):

#### **Travel Out of the Country**

- 18) That when the children are spending time with a parent during school holidays, that parent shall be at liberty, during their school holiday time, to take the children to **insert destination** and in relation to same:
- a) the travelling parent shall provide the other parent with a copy of their itinerary for the trip including but not limited to departure and return times and dates; a contact telephone number for the travelling parent and the children and the address at which they will predominantly be based (provided that they will not be required to provide details of every address at which the children will stay) at least 28 days prior to scheduled departure;
  - b) upon receipt of same the other parent shall forthwith release to the travelling parent the passports for the children;
  - c) the travelling parent shall then provide to the other parent a copy of the return air tickets for the children;

- d) during the trip the travelling parent shall arrange for the children to telephone the other parent on at least one (1) occasion in each week;
- 19) At all other times the passports of the children shall be held by **insert details** and shall be released to a parent only upon satisfaction of the custodian of the passports that both parents have agreed to their release to that parent or by order of a Court.

#### **Dispute Resolution**

- 20) That in the event that there is a dispute about the children or about the interpretation, implementation or enforcement of these orders, the parents before making any further application to a Court shall:
  - a) either attend counselling or mediation with an organisation recognised under the *Family Law Act 1975 (as amended)* or by the Commonwealth Attorney- General; or
  - b) participate in family dispute resolution with a Family Relationship Centre or a person authorised under s.10G of the *Family Law Act 1975 (as amended)*..

#### **Parenting Orders Programme**

- 21) That the parties shall undertake a Parenting Orders Programme.
- 22) That the parties, within seven (7) days of the date of service upon them of these Orders, contact the Parenting Orders Programme Co-ordinator (or nominee) for intake into the programme.
- 23) That the parties shall comply with any reasonable direction of the Programme Co-ordinator and in particular:
  - a. attend as requested for the purposes of assessment as to whether they are suitable for participation in the programme;
  - b. advise the Programme Co-ordinator of their contact telephone number and advise the Programme Co-ordinator of any change in that number;

- c. attend and participate in the programme as requested including attending referrals to treating health professionals as recommended by the Programme Co-ordinator (provided that either party may refuse at their election to participate in joint sessions);
- d. attend a Triple P parenting programme or equivalent parenting programme as nominated by the Programme Co-ordinator;
- e. attend an anger management counselling programme as nominated by the Programme Co-ordinator;
- f. attend such drug and alcohol programmes as may be nominated by the Programme Co-ordinator.
- g. That in the event that either party refuses or fails to attend the programme or any part thereof without reasonable excuse or refuses to accept a reasonable direction of the Programme Co-ordinator, then the matter may be relisted by either party on the giving of 24 hours notice.

23). That for the purposes of the programme:

- a. a copy of these orders will be sent to the Programme Co-ordinator;
- b. the parties shall supply to the Programme Co-ordinator a copy of any parenting orders or parenting plan;
- c. within seven (7) days, the parties should contact the Programme Co-ordinator on telephone to arrange an intake interview;
- d. the parties are at liberty to supply to the Programme Co-ordinator a copy of any reports that have been prepared in the course of any proceedings that resulted in the parenting orders;
- e. the Independent Children's Lawyer shall be at liberty to brief the Programme Co-ordinator with any relevant information considered to be in the interests of the children.





# The AIFS evaluation of the 2006 family law reforms

## A summary

by Kaspiew, Andrew Gray, Paul Wilson, Michelle Wilson, Kelly Handberg, and  
 the Australian Institute of Family Studies

In 2006, the Australian Government, through the Attorney-General's Department (AGD) and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), commissioned the Australian Institute of Family Studies (AIFS) to undertake an evaluation of the impact of the 2006 changes to the family law system: *Evaluation of the 2006 Family Law Reforms* (Kaspiew et al., 2009) (the Evaluation). This article provides a summary of the key findings of the Evaluation.

In 2006, a series of changes to the family law system were introduced. These included changes to the *Family Law Act 1975* (Cth)<sup>1</sup> and increased funding for new and expanded family relationships services, including the establishment of 65 Family Relationship Centres (FRCs) and a national advice line. The aim of the reforms was to bring about "generational change in family law" and a "cultural shift" in the management of separation, "away from litigation and towards cooperative parenting".<sup>2</sup>

The 2006 reforms were partly shaped by the recognition that although the focus must always be on the best interests of the child, many disputes over children following separation are driven by relationship problems rather than legal ones. These disputes are often better suited to community-based interventions that focus on how unresolved relationship

issues affect children and assist in reaching parenting agreements that meet the needs of children.

The changes to the family law system followed an inquiry by the House of Representatives Standing Committee on Family and Constitutional Affairs (2003), which recommended changes to the family relationship services system and the legislation. The committee's report, *Every Picture Tells a Story*, made recommendations that aimed to make the family law system "fairer and better for children". The 2006 changes reflected some, but not all, of the recommended changes.

The policy objectives of the 2006 changes to the family law system were to:

- help to build strong healthy relationships and prevent separation;
- encourage greater involvement by both parents in their children's lives after separation, and also protect children from violence and abuse;
- help separated parents agree on what is best for their children (rather than litigating), through the provision of useful information and advice, and effective dispute resolution services; and
- establish a highly visible entry point that operates as a doorway to other services and helps families to access these other services.<sup>3</sup>

The policy objectives outlined above encompassed a range of more specific goals. A set of indicators of the success or otherwise of the reforms in achieving these objectives was developed. These were translated into the following evaluation questions:

1. To what extent are the new and expanded relationship services meeting the needs of families?
  - a. What help-seeking patterns are apparent among families seeking relationship support?
  - b. How effective are the services in meeting the needs of their clients, from the perspective of staff and clients?
2. To what extent does family dispute resolution (FDR) assist parents to manage disputes over parenting arrangements?
3. How are parents exercising parental responsibility, including complying with obligations of financial support?
4. What arrangements are being made for children in separated families to spend time with each parent? Is there any evidence of change in this regard?
5. What arrangements are being made for children in separated families to spend time with grandparents? Is there any evidence of change in this regard?
6. To what extent are issues relating to family violence and child abuse taken into account in making arrangements regarding parenting responsibility and care time?
7. To what extent are children's needs and interests being taken into account when these parenting arrangements are being made?
8. How are the reforms introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (SPR Act 2006) working in practice?
9. Have the reforms had any unintended consequences—positive or negative?

The AIFS *Evaluation of the 2006 Family Law Reforms* was based on an extensive research program and provides a comprehensive evidence base on the operation of the family law system. The Evaluation included three main projects: the Legislation and Courts Project, the Service Provision Project and the Families Project. Each of these projects comprised a number of sub-studies, with 17 separate studies contributing to the Evaluation overall (see the text box at top right and Appendix for further information). The research design focused on examining the extent to which key aspects of the objectives underpinning the reforms had been achieved. The Evaluation involved the collection of data 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. It also involved the analysis of administrative data and court files. This article outlines the key research questions and findings from the Evaluation—references in parentheses throughout are to tables, figures and sections in the full Evaluation report. The full Evaluation report (Kaspiew et al., 2009) is available from the AIFS website <[www.aifs.gov.au](http://www.aifs.gov.au)>.

A point that transcends the specific evaluation questions and has implications for the findings across all of the evaluation questions arises from the new empirical

## Key studies referred to in this article

Legislation and Courts Project (LCP; see also Appendix)  
 Qualitative Study of Legal System Professionals 2008 (QSLSP 2008)  
 Family Lawyers Survey 2006 and 2008 (FLS 2006 and FLS 2008)  
 Quantitative Study of Family Court of Australia, Federal Magistrates Court and Family Court of Western Australia Files 2009 (QSCF 2009)  
 Service Provision Project (SPP; see also Appendix)  
 Qualitative Study of Family Relationship Services Program (FRSP) Staff 2008–09  
 Online Survey of FRSP Staff 2009  
 Survey of FRSP Clients 2009 (Survey of FRSP Clients 2009)  
 Families Project (see also Appendix)  
 General Population of Parents Survey 2006 (GPPS 2006)  
 General Population of Parents Survey 2009 (GPPS 2009)  
 Family Pathways: The Longitudinal Study of Separated Families (LSSF W1 2008)  
 Family Pathways: Looking Back Survey (LBS 2009)  
 Family Pathways: The Grandparents in Separated Families Study 2009 (GSFS 2009)

evidence from the Evaluation about the characteristics of separated families, particularly those who access services across the system. 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. For example, 26% of mothers and 18% of fathers reported experiencing physical hurt prior to separation, and 39% of mothers and 47% of fathers reported experiencing emotional abuse before, during and after separation (LSSF W1 2008; Table 2.2). Families with complex needs are the predominant clients both of post-separation services and the legal sector; however, there is also a proportion of families who do not engage with the system to any significant extent. While some of these families appear not to be characterised by any significant complexity in terms of family violence, mental health issues or substance abuse issues, there is a sub-group of non-users of the system for whom these issues are relevant.

### Evaluation question 1: To what extent are the new and expanded relationship services meeting the needs of families?

- a. What help-seeking patterns are apparent among families seeking relationship support?
- b. How effective are the services in meeting the needs of their clients, from the perspective of staff and clients?

There is evidence of fewer post-separation disputes being responded to primarily via the use of legal services and more being responded to primarily via the use of family relationship services. This suggests a cultural shift whereby a greater proportion of post-separation disputes over children are being seen and responded to primarily in relationship terms.

About half of the parents in non-separated families who had serious relationship problems used early intervention services to assist in resolving those problems (GPPS 2009; Table 3.13). There was less use of these services to support relationships by couples who had not faced serious problems (about 10%) (GPPS 2009; Table 3.12). Client satisfaction with early intervention services (funded as part of the federal Family Relationships Services Program) was high, with upwards of 88% of clients providing positive ratings for the "overall quality" of early intervention services. Favourable assessments for overall quality were made by 91% of Specialised Family Violence Service clients, 86% of Men and Family Relationships Services clients, 88% of counselling service clients and 95% of the Education and Skills Training service clients (Survey of FRSP Clients 2009; Table 3.28).

The AIFS Evaluation of the 2006 family law reforms was based on an extensive research program and provides a comprehensive evidence base on the operation of the family law system.

Overall, clients of post-separation services also provided favourable ratings. More than 70% of FRC and FDR clients said that the service treated everyone fairly (i.e., practitioners did not take sides) and more than half said that the services provided them with the help they needed (Survey of FRSP Clients 2009; Table 3.28). This rate can be considered to be quite high, given the strong emotions, high levels of conflict and lack of easy solutions that these matters often entail.

Family relationship service professionals generally rated their own capacity to assist clients as high (Online Survey of FRSP Staff 2009; Tables 3.21 & 3.22). They also spoke of considerable challenges associated with the complexity of many of the cases they are handling and of waiting times linked largely to resourcing and recruitment issues, especially in some of the FRCs.

Consistent with an important aim of the reforms, family relationship service professionals generally placed considerable emphasis on referrals to appropriate services. At the same time, ensuring that families are able to access the right services at the right time represents one important area where there is a need for ongoing improvement. Pathways through the system need to be more clearly defined and more widely understood. There is still evidence that some families with family violence and/or child abuse issues are on a roundabout between relationship services, lawyers, courts and state-based child protection and family violence systems. For example, compared with parents who did not report family violence, parents who reported family violence were much less likely to report that their parenting arrangements had been sorted out some 18 months after separation (LSSF W1 2008; Table 4.14) and were more likely to report using multiple services. While complex issues may take longer to resolve, resolutions that are delayed by unclear pathways or lack of adequate coordination between services, lawyers and courts have adverse implications for the wellbeing of children and other family members.

There is a need for more proactive engagement and coordination between family relationship service

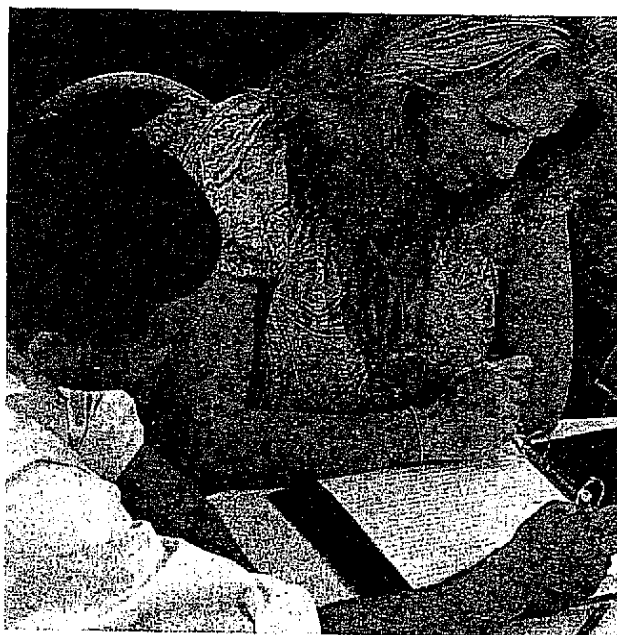
professionals and family lawyers and between family law system professionals and the courts. This need is especially important when dealing with complex cases.

## Evaluation question 2: To what extent does FDR assist parents to manage disputes over parenting arrangements?

The use of FDR post-reform was broadly meeting the objectives of requiring parents to attempt to resolve their disputes with the help of non-court dispute resolution processes and services.

About two-fifths of parents who used FDR reached agreement and did not proceed to court (LSSF W1 2008; section 5.3.3). Almost a third did not reach agreement and did not have a certificate issued (under s60I(8) of the *SPR Act 2006*, family dispute resolution practitioners may issue these certificates to indicate that one or both parties has attempted to resolve a matter through FDR). However, most of these parents reported going on to sort things out mainly via discussions between themselves. About one-fifth were given certificates from a registered family dispute practitioner that permitted them to access the court system. Most of these parents mainly used courts and lawyers and approximately a year after separation most had neither resolved matters nor had decisions made.

Family Relationship Centres have also become a first point of contact for a significant number of parents whose capacity to mediate is severely compromised by fear and abuse, and there is evidence that FDR is occurring in some of these cases (Survey of FRSP Clients 2009; Tables 5.8 & 10.3), even though matters where there are concerns about family violence or child abuse are exceptions to the requirement to attend FDR (*SPR Act 2006*, s60I(9)). This may reflect an inadequate understanding of the exceptions



About half of the parents in non-separated families who had serious relationship problems used early intervention services to assist in resolving those problems.

to FDR by those making referrals. At the same time, the complexities of this process need to be acknowledged. There are decisions that need to be made on a case-by-case basis, including decisions about who is best placed to make a judgment concerning whether there are grounds for an exception and the extent to which professionals should respect the wishes of those who qualify as an "exception" but nonetheless opt for FDR.

Clearer inter-professional communication (between FDR professionals, lawyers and courts) will not provide prescriptive answers to such questions but would assist in developing strategies to ensure that there is a more effective process of sifting out matters that should proceed as quickly as possible into the court system. Progress on this front, however, also requires earlier access to courts and greater confidence on the part of lawyers and service professionals that clients will not get "lost in the family law system".

### Evaluation question 3: How are parents exercising parental responsibility, including complying with obligations of financial support?

In lay terms, parental responsibility has a number of dimensions, including care time, decision-making about issues affecting the child, and financial support for the child. Shared decision-making is most likely to occur where there is shared care time.

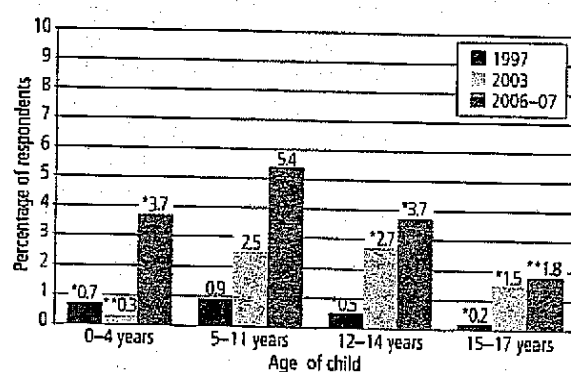
Shared decision-making was much less common among parents who reported a history of family violence or had ongoing safety concerns for their children (LSSF W1 2008; section 8.1.3). Nonetheless, the exercise of shared decision-making was reported by a substantial proportion of parents with a history of violence. For example, shared decision-making about the child's education was reported by 25% of fathers and 15% of mothers who said that their child's other parent had hurt them physically and whose child was in a care arrangement involving most or all nights with the mother. Where a history of physical hurt was reported and the child was in a shared care arrangement, 54% of fathers and 42% of mothers reported shared decision-making over education.

In contrast to the systematic variation in decision-making practices reported by parents with different care-time arrangements, legal orders concerning parental responsibility demonstrated a strong trend, pre-dating the reforms, for decision-making power to be allocated to both parents. Prior to the reforms, court orders provided for shared parental responsibility in 76% of cases, compared with 87% after the reforms (QSCF 2009; Table 8.2). Generally, fathers' compliance with their child support liability did not vary according to care-time arrangements. The only exception is that fathers who never saw their child were less likely to comply with their child support obligations. (LSSF W1 2008; Figures 8.17 & 8.18). Father payers with equal care time and those who never saw their child were more inclined to believe that child support payments were unfair, compared to father payers with other care-time arrangements (LSSF W1 2008; Figure 8.23). Child support compliance among fathers and mothers was higher where there was shared decision-making compared to where one parent had all of the decision-making responsibilities (LSSF W1 2008; Figure 8.19).

### Evaluation question 4: What arrangements are being made for children in separated families to spend time with each parent? Is there any evidence of change in this regard?

Although only a minority of children were in shared care-time arrangements, the proportion of children with these arrangements has increased; a trend that appears to pre-date the reforms. In the LSSF W1 2008, 16% of focus children were in shared care arrangements (applying a definition based on a 35–65% night split between parents). A near equal time split (48–52% of nights) applied to 7% of children, with another 8% spending more time with their mother than their father and 1% spending more time with their father than their mother (LSSF W1 2008; section 6.5.1). Incremental increases in shared care are part of a longer term trend in Australia and internationally. Australian Bureau of Statistics data show increases in shared care arrangements across age groups between 1997 and 2006–07 (Figure 1 below). Shared care for children in the 5–11 year age group rose from 1% in 1997 to 5% in 2006–07. Increases were less marked for children in other age groups, although estimates for these age groups should be used with caution due to small sample sizes. In relation to 12–14 year olds, for example, less than 1% of children were in shared care arrangements in 1997, compared with 3.7% in 2006–07.

Judicially determined orders for shared care time increased post-reform, as did shared care time in cases where parents reached agreement by consent. Data from the QSCF 2009 show that orders for shared care in matters decided by judges (again applying a definition based on a 35–65% night split) rose from 2% prior to the reforms to 13% after the reforms (Table 6.8). A less significant increase was evident among cases in which the parties reached agreement, with a pre-reform proportion of 10% compared with 15% post reform (Table 6.9).



Notes: Omitted from analysis are data for children who lived with grandparents or guardians and for those whose overnights stays were not stated. \* These estimates had a relative standard error of 25% to 50% and should be used with caution. \*\* These estimates have a relative standard error greater than 50% and are considered to be too unreliable for general use.

Source: ABS FCS 1997 and 2003, ABS FCTS 2006–07

Figure 1 Proportion of children in different age groups who experienced equal care-time arrangements, by age of child, 1997, 2003 and 2006–07

The majority of parents with shared care-time arrangements thought that the parenting arrangements were working well both for parents and the child (LSSF W1 2008; Figure 7.21). While, on average, parents with shared care time had better quality inter-parental relationships, violence and dysfunctional behaviours were present for some. For example, 16% of mothers and 10% of fathers with shared care (more nights with mother) reported relationships with "lots of conflict", and 8.4% of mothers and 3.5% of fathers with such arrangements reported relationships that were fearful (LSSF W1 2008; Figures 7.27 & 7.28).

Generally, shared care time did not appear to have a negative impact on the wellbeing of children. Irrespective of care-time arrangements, mothers and fathers who expressed safety concerns described their child's wellbeing less favourably than those who did not hold such concerns (LSSF W1 2008; section 11.3.2). However, the reports of mothers suggest that the negative impact of safety concerns on children's wellbeing is exacerbated where they experience shared care-time arrangements (LSSF W1 2008; Figure 11.11 & 11.12).

**Evaluation question 5: What arrangements are being made for children in separated families to spend time with grandparents? Is there any evidence of change in this regard?**

Just more than half of the parents who separated after the 2006 changes to the family law system felt that time with grandparents had been taken into account when developing parenting arrangements, and just over half the grandparents confirmed this view. Parents who separated prior to the 2006 changes to the family law system were less likely to recall having taken into account grandparents when developing parenting arrangements (LSSF W1 2008; LBS 2009; Figure 12.12).

Nevertheless, the reports of both parents and grandparents suggest that relationships between children and their paternal grandparents often become more distant when the child lives mostly with the mother (reflecting the most common care-time arrangement) (GPPS 2006; GPPS 2009; Figures 12.7 & 12.8). The parents in most families in the studies would have separated before the reforms were introduced. The level of impact of the reforms on the evolution of grandparent-grandchild relationships is an important area for future research.

There appeared to be a growing awareness among both family relationship service staff and family lawyers of the potential value and importance to children of taking into account grandparents when developing parenting arrangements. While grandparents were seen, in most cases, to have the potential to contribute much to the wellbeing of children, there was also an appreciation by family relationship service professionals of the complexity of many extended family situations (Qualitative Study of FRSP Staff 2008–09; section 12.7.2). This was associated with recognition that, in some cases, too great a focus on grandparents when developing parenting arrangements might be counter-productive.

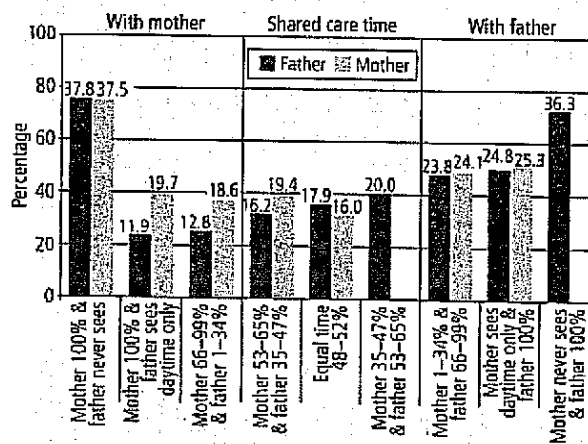
The overall picture, however, is of grandparents being very important in the lives of many children and their families, with some evidence that the legislation has contributed to reinforcing this message. Clearly, grandparents can also be

an important resource when families are struggling during separation and at other times. But as complexities increase, dispute resolution and decision-making in cases involving grandparents are likely to prove to be more difficult and time-consuming.

**Evaluation question 6: To what extent are issues relating to family violence and child abuse taken into account in making arrangements regarding parenting responsibility and care time?**<sup>4</sup>

For a substantial proportion of separated parents, issues relating to violence, safety concerns, mental health, and alcohol and drug misuse are relevant. The evaluation provides evidence that the family law system has some way to go in being able to respond effectively to these issues. However, there is also evidence of the 2006 changes having improved the way in which the system is identifying families where there are concerns about family violence and child abuse. In particular, systematic attempts to screen such families in the family relationship service sector and in some parts of the legal sector appear to have improved identification of such issues.

Families where violence had occurred, however, were no less likely to have shared care-time arrangements than those where violence had not occurred (LSSF W1 2008; Figures 7.29 & 7.30). Similarly, families where safety concerns were reported were no less likely to have shared care-time arrangements than families without safety concerns (16–20% of families with shared care time had safety concerns). Safety concerns were also evident in similar proportions of families with arrangements involving children spending most nights with the mothers and having daytime-only contact with the father (LSSF W1 2008; Figure 7.31 [see Figure 2 below]). 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 (Kaspiew et al., 2009, pp. 232–233).



Source: LSSF W1 2008

**Figure 2** Safety concerns associated with ongoing contact, by care-time arrangements, fathers and mothers, 2008





Mothers and fathers who reported safety concerns tended to provide less favourable evaluations of their child's wellbeing compared to other parents (LSSF W1 2008; section 11.3.2). This was apparent for parents with all care-time arrangements, including the most common arrangement, where the child lives mainly with mother. But the poorer reported outcomes for children whose mothers expressed safety concerns were considerably more marked for those children who were in shared care-time arrangements.

There is also 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 (Survey of FRSP Clients 2009; Table 10.3).

Significant concerns were expressed by substantial minorities of lawyers and family relationship service professionals who expressed the view that the system had scope for improvement in achieving an effective response to family violence and child abuse (FLS 2008; Online Survey of FRSP Staff 2009; e.g., Figure 10.3). Some problems referred to were evident before the reforms, such as difficulties arising from a lack of understanding among professionals, including lawyers and decision-makers, about family violence and the way in which it affects children and parents (FLS 2008; QSLSP 2008; section 10.4.1). While the legislation (*SPR Act*) sought to place more emphasis on the importance of identifying concerns

about family violence and child abuse (e.g., s60B(1)(b); 60CC(2)(b)), other aspects of the legislation were seen to contribute to a reticence among some lawyers and their clients about raising such concerns; for example, s117AB, which obligates courts to make a costs order against a party found to have "knowingly made a false allegation or statement" in proceedings, and s60CC(3)(c), which requires courts to consider the extent to which a parent has facilitated the other parent's relationship with the child.

The link between safety concerns and poorer child wellbeing outcomes, especially where there was a shared care-time arrangement, underlines the need to make changes to practice models in the family relationship services and legal sectors. In particular, these sectors need to have a more explicit focus on effectively identifying families where concerns about child or parental safety need to inform decisions about care-time arrangements.

These findings point to 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. Protocols for working constructively and effectively with state-based

Relationships between children and their paternal grandparents often become more distant when the child lives mostly with the mother.

systems and services (such as child protection systems) also need further work. Clearly, however, the progress that continues to be made on improved screening practices will go only part of the way towards assisting victims of violence and abuse.

**Evaluation question 7: To what extent are children's needs and interests being taken into account when parenting arrangements are being made?**

This question is central to the objectives of the reforms and therefore a number of the evaluation questions are relevant to assessing the extent to which children's needs and interests are being taken into account. Particularly relevant is the question of the extent to which issues relating to family violence and child abuse are taken into account when making arrangements regarding parenting responsibility and care time.

This is an area where the evaluation evidence points to some encouraging developments, but also highlights some difficulties. Many parents are using the relationship services available and there is evidence from clients and service professionals that this is resulting in arrangements that are more focused on the needs of children than in the past. Nonetheless, in a proportion of cases this is not occurring as well as it could.

There is evidence that many parents misconstrue equal shared parental responsibility as allowing for "equal" shared care time (FLS 2008; QSLSP 2008; Qualitative Study of FRSP Staff 2008–09; section 9.3). In cases in which equal or shared care time would be inappropriate, 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 (discussed further below).

The SPR Act 2006 introduced Division 12A of Part VII—Principles for conducting child related proceedings—which was supported by new case management practices in the Family Court of Western Australia (FCoWA) and the Family Court of Australia (FCoA). The court that handles most children's matters, the Federal Magistrates' Court (FMC) had largely retained its own case management regime based on the "docket" system.

**Evaluation question 8: How are the reforms introduced by the SPR Act 2006 working in practice?**

The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals (LSSF W1 2008; FLS 2008; Figures 6.1, 6.2 & 9.1). However, many parents and some professionals do not understand the distinction between shared parental responsibility and shared care time, or the rebuttable (or non-applicable) presumption of shared parental responsibility (FLS 2006; QSLSP 2008; section 9.2). A common misunderstanding is that shared parental responsibility allows for "equal" shared care time, and that if there is shared parental responsibility, then a court will order shared care time. This misunderstanding is due, at least in part, to the way in which the link between equal shared parental responsibility and care time is expressed in the legislation. This confusion has resulted in disillusionment among some fathers, who find

that the law does not provide for 50–50 "custody". This in turn can make it challenging to achieve child-focused arrangements in cases in which an equal or shared care-time arrangement is not practical or not appropriate. Legal sector professionals in particular indicated that in their view the legislative changes had promoted a focus on parents' rights rather than children's needs, obscuring to some extent the primacy of the "best interests" principle (s60CA). Further, they indicated that, in their view, the legislative framework did not adequately facilitate making arrangements that were developmentally appropriate for children.

However, the changes have also encouraged more creativity in making arrangements, either by negotiation or litigation, that involve fathers in children's everyday routines, as well as special activities. Advice-giving practices consistent with the informal "80–20" rule (i.e., what was seen as the typical arrangement where the child spends 80% of the time with the mother and 20% of the time with the father post-separation) have declined markedly since the reforms (FLS 2006 & 2009; section 9.4.2). For example, lawyers indicated that advice that "mothers who have had major child care responsibilities would normally obtain residence of their children" was given much less frequently in 2008 than in 2006: pre-reform, 82% of participants in the FLS 2006 said they gave this advice almost always or often, compared with 44% in 2006. Similarly, advice indicating that a normal contact pattern was "alternate weekends and half school holidays" was given much less frequently after the reforms: pre-reform, 26% of the FLS 2006 sample said they "rarely or never" gave such advice, compared with 64% in 2008.

In an indication of the impact of the measures designed to reduce reliance on legal mechanisms to resolve disputes, total court filings in children's matters have declined by 22%; and a pre-reform trend for filings to increase in the FMC, with a corresponding decrease in the FCoA, has gathered pace (QSCF 2009; section 13.2).

Legal sector professionals had concerns arising from the parallel operation of the FMC and FCoA, including the application of inconsistent legal and procedural approaches and concerns about whether the right cases are being heard in the most appropriate forum (FLS 2006; QSLSP 2008; section 14.1). The FCoA, the FMC and the FCoWA have each adopted a different approach to the implementation of Division 12A of Part VII (FLS 2006; QSLSP 2008; section 13.1). FMC processes have changed little (although this court is perceived to have an active case management approach pre-dating the reforms) and the FCoA and FCoWA have implemented models with some similarities, including limits on the filing of affidavits and roles for family consultants that are based on pre-trial family assessments and involvement throughout the proceedings where necessary. Excluding WA, the more child-focused process available in the FCoA is only applied to a small proportion of children's matters, with the majority of such cases being dealt with under the FMC's more traditional adversarial procedures.

While family consultants and most judges believed the FCoA's model is an improvement, particularly in the area of child focus, lawyers' views were divided, with many expressing hesitancy in endorsing the changes (QSLSP 2008; FLS 2006; FLS 2008; section 14.3). Concerns include

a lack of resources in the FCoA leading to delays, more protracted and drawn-out processes, and inconsistencies in judicial approaches to case management. Similar concerns were evident to a lesser extent about the WA model. It appears that while these models have significant advantages, some fine-tuning is required. This is an area where the Evaluation provided only a partial picture, as these issues were considered as part of a much larger set of evaluation questions.

The new substantive parenting provisions introduced into Part VII of the *FLA* by the *SPR Act 2006* tended to be seen by lawyers and judicial officers to be complex and cumbersome to apply in advice-giving and decision-making practice (QSLSP 2008; FLS 2006; section 15.1). Because of the complexity of key provisions, and the number of provisions that have to be considered or explained, judgment-writing and advice-giving have become more difficult and protracted. There is concern that legislation that should be comprehensible to its users—parents—has become more difficult to understand, even for some professionals.

**Evaluation question 9: Have the reforms had any unintended consequences—positive or negative?**

The majority of parents in shared care-time arrangements reported that the reforms worked well for them and for their children. But up to one-fifth of separating parents

had safety concerns that were linked to parenting arrangements; and the data on child wellbeing from the LSSF W1 2008 show that shared care time in cases where there are safety concerns expressed by mothers correlates with poorer outcomes for children (Figures 11.11 & 11.12).

Similarly, the majority of parents who attempted FDR reported that it worked well. Most had sorted out their arrangements and most had not seen lawyers or used the court as their primary dispute resolution pathway. But many FDR clients had concerns about violence, abuse, safety, mental health or substance misuse. Some of these parents appeared to attempt FDR where the level of their concerns was such that they were unlikely to be able to represent their own needs or their children's needs adequately. It is also important to recognise that FDR can be appropriate in some circumstances in which violence has occurred (section 5.3.2).

Further unintended consequences are also evident. A majority of lawyers perceived that the reforms have favoured fathers over mothers (FLS 2006; FLS 2008; Figure 9.8) and parents over children (FLS 2006; FLS 2008; Figure 9.9). There was concern among a range of family law system professionals that mothers have been disadvantaged in a number of ways, including in relation to negotiations over property settlements (FLS 2008; QSLSP 2008; section 9.6.2). There was an indication from lawyers that there may have been a reduction in the average property



The majority of parents who attempted FDR reported that it worked well. Most had sorted out their arrangements and most had not seen lawyers or used the court as their primary dispute resolution pathway.



settlements allocated to mothers. 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 some parents sought to negotiate (FLS 2006; QSLSP 2008; Qualitative Study of FRSP Staff 2008–09; section 9.6). The extent to which these concerns are generally pertinent to separated parents is uncertain. The evaluation indicates that a majority of parents are able to sort out their post-separation parenting arrangements quickly and expeditiously; however, there is also a proportion whose post-separation arrangements appear to have been informed by a “bargaining” rather than “agreeing” dynamic. For these parents, it appears the reforms have contributed to a shift in the bargaining dynamics. This is an area where further research is required.

Many separated families are affected by issues such as family violence, safety concerns, mental health problems and substance misuse issues, and these families are the predominant users of the service and legal sectors.

## Conclusion

The evaluation evidence indicates that the 2006 reforms to the family law system have had a positive impact in some areas and have had a less positive impact in others. Overall, there has been more use of relationship services, a decline in filings in the courts in children’s cases, and some evidence of a shift away from an automatic recourse to legal solutions in response to post-separation relationship difficulties.

A significant proportion of separated parents are able to sort out their post-separation arrangements with minimal engagement with the formal system. There is also evidence that FDR is assisting parents to work out their parenting arrangements.

A central point, however, is that many separated families are affected by issues such as family violence, safety concerns, mental health problems and substance misuse issues, and these families are the predominant users of the service and legal sectors. In relation to these families, resolution of post-separation disputes presents some complex issues for the family law system as whole, and the evaluation has identified ongoing challenges in this area. In particular, professional practices and understandings in relation to identifying matters where FDR should not be attempted require continuing development. This is an area where collaboration between relationship service professionals, family law system professionals and courts needs to be facilitated so that shared understandings about the types of matters that are not suitable for FDR can be developed and so that other options can be better facilitated.

Beyond effective screening, possible ways forward include:

- continued development of protocols for the sharing of information within the family relationship service sector and between the sector and other critical areas, such as child protection;

- development of protocols for cooperation between family relationship service professionals and independent children’s lawyers;
- development of protocols for cooperation between family relationship service professionals and lawyers acting as advocates for individual parents;
- a considerably improved capacity in courts to solicit or provide high-quality assessments that will assist them to make safe, timely and child-focused decisions, especially at the interim stage; and
- consideration of whether (and, if so, how) information already gained via sometimes extensive screening procedures within the family relationship service sector can be used by judicial officers or by those providing court assessments to assist in the process of judicial determination.

While communication in relation to privileged and confidential disclosures made during assessment and FDR processes raises some complex questions, investigation of how such communication could potentially occur may be an avenue for achieving greater coordination and ensuring expeditious handling of these matters. Currently, much relevant information may be collected by family relationship service professionals in screening and assessment processes, but this information is not transmissible between professionals in this sector and professionals in the legal sector, or between other agencies and services responsible for providing assistance. Effectively, families who move from one part of the system to the other often have to start all over again. For families already under stress as a result of family violence, safety concerns and other complex issues, this may delay resolution and compound disadvantages.

Effective responses to families where complex issues exist mean ensuring such families have access to appropriate services to not only resolve their parenting issues but also deal with the wider issues affecting the family. Such responses involve identifying concerns and assisting parents to use the dispute resolution mechanism that is most appropriate for their circumstances.

Effective responses should ensure that the parenting arrangements put in place for children in families with complex issues are appropriate to the children’s needs and do not put their short- or long-term wellbeing at risk. Further examination of the needs and trajectories of families who are unsuitable for FDR would assist in identifying the measures required to assist these families (to some extent, LSSF W2 2009 [forthcoming] may assist with this). A key question is the extent to which such families then access the legal/court system and whether there are barriers or impediments (e.g., financial or personal) to them doing so.

The evidence of poorer wellbeing for children where there are safety concerns—across the range of parenting arrangements, but particularly acutely in shared care-time arrangements—highlights the importance of identifying families where safety concerns are pertinent and assisting them in making arrangements that promote the wellbeing of their children.

This evaluation has highlighted the complex and varied issues faced by separating parents and their children and the diverse range of services required in order to ensure the best possible outcomes for children. Ultimately, while

there are many perspectives within the family law system, and many conflicting needs, it is important to maintain the primacy of focusing on the best interests of children and protecting all family members from harm.

## Endnotes

- 1 The Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (SPR Act 2006) amended the Family Law Act 1975 (Cth) (FLA 1975). As this report is oriented toward a broad audience rather than a specifically legal one, references to provisions introduced by the SPR Act will be preceded by "SPR Act", for the sake of simplicity and clarity. Technically, of course, such provisions are FLA provisions.
- 2 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p. 1.
- 3 For further details, see the 2007 Evaluation Framework, reproduced in the full evaluation report (Kaspiew et al., 2009).
- 4 A detailed summary of the AIFS Evaluation findings on family violence and child abuse appeared in Kaspiew R., Gray, M., Weston, R., Moloney, L., Hand, K., and Qu L. (2010). Family violence: Key findings from the AIFS Evaluation of the 2006 Family Law Reforms. *Family Matters*, 85, 38.

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*Family Law Act 1975* (Cth)

*Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)

*Explanatory Memorandum to the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth)

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## Appendix

### The Legislation and Courts Project

The LCP was designed to gather data on the impact that the legislative changes have had on: (a) advice-giving practices; (b) negotiation and bargaining among those who sought the advice and assistance of lawyers; (c) how the main new legislative provisions were applied in court decisions; and (d) how court filings were affected by the reforms. A further priority was to examine what, if any, unintended consequences may have arisen as a result of the changes.

The LCP encompassed five components:

1. the Qualitative Study of Legal System Professionals (QSLSP) 2008;
2. the Family Lawyers Surveys (FLS) 2006 and 2008;
3. analysis of FCoA, FMC and FCoWA judgments, 2006-09;
4. analysis of FCoA, FMC and FCoWA court files, pre- and post-1 July 2006; and
5. analysis of FCoA, FMC and FCoWA administrative data, 2004-05 to 2007-08.

#### Qualitative Study of Legal System Professionals 2008

The QSLSP 2008 involved interviews and focus groups with family law system professionals in order to gather

data on professionals' experiences of the reforms. A total of 184 professionals participated in interviews and/or focus groups between April and October 2008. In order to gain insights from as many angles on the legal system and court process as possible, participants were drawn from the following professional groupings: FCoA judges; federal magistrates; FCoWA judges and magistrates; FCoA registrars; family consultants operating in the FMC, FCoA and FCoWA; barristers; and solicitors from private practice, legal aid and community legal centres.

#### The Family Lawyers Surveys

The purpose of the FLS 2006 was to provide baseline (pre-reform data) about lawyer practices and attitudes at the time of the implementation of the reforms. The FLS 2008 substantially repeated and extended the FLS 2006, thereby allowing pre- and post-reform shifts to be gauged. The FLS 2008 allowed important insights from the QSLSP 2008 to be tested in a quantitative format.

The two surveys were conducted online, with the first taking place in mid-2006 and the second from mid-November 2008 to early February 2009. Both samples were recruited with the assistance of the Family Law Section of the Law Council of Australia. The first comprised 367 participants. The second comprised 319 participants.

## FCoA, FMC and FCoWA court files

The aim of this component was to gather systematic quantitative data from court files (FCoA, FMC and FCoWA). Part 1 involved the collection of data from matters initiated and finalised after the reforms (total of 985 files), including matters finalised by consent (752 files) and judicial determination (233 files) in the FCoWA and the Melbourne, Sydney and Brisbane registries of the FMC and the FCoA. Part 2 involved the collection of data from matters initiated and finalised prior to the reforms (739 files: 188 judicial determination files and 551 consent files) in the FCoWA and the Melbourne Registry of the FCoA and the FMC.

## The Service Provision Project

This part of the evaluation provided information on the operation and effectiveness of the delivery of family relationship services, including the Family Relationships Advice Line (FRAL), FRCs, and early intervention and post-separation services that were funded as part of the reform package. Information on services was obtained from service providers and clients.

The services included in the evaluation can be categorised as early intervention services (EIS) or post-separation services (PSS). The early intervention services are: Specialised Family Violence Services, Men and Family Relationships Services, family relationship counselling, Mensline, and Family Relationship Education and Skills Training. The post-separation services are: FRCs, FDR, Children's Contact Services, the Parenting Orders Program, FRAL, and the Telephone Dispute Resolution Service (TDRS; a component of FRAL).

The components of the Service Provision Project were: the Qualitative Study of FRSP Staff; the Online Survey of FRSP Staff; the Survey of FRSP Clients; and analyses of administrative program data (FRSP Online, FRAL, TDRS and Mensline).

### Qualitative Study of FRSP Staff

This component of the SPP collected information via in-depth interviews with managers and staff of family relationship services funded under the new and expanded service delivery system. The purpose of this aspect of the evaluation was to evaluate the roll-out of the new and expanded services. It also helped to identify any other issues that needed to be explored by other components of the evaluation.

Two data collections were undertaken. The first was undertaken between August 2007 and April 2008 and the second took place from February to November 2009. These studies provide information about the extent to which changes have occurred in the operation and performance of the service sector during the roll-out period.

The Qualitative Study of FRSP Staff 2007-08 involved interviews with organisational Chief Executive Officers, managers and staff (137 participants in 57 interviews) from the first 15 FRCs, 8 early intervention services, 8 post-separation services, Mensline and FRAL. The Qualitative Study of FRSP Staff 2008-09 involved interviews with managers and staff from all of these services, with the addition of staff from a further 10 FRCs, a further 10 post-separation services and the TDRS.

## The Families Project

The Families Project comprised a number of studies of families (both cross-sectional and longitudinal):

- the General Population of Parents Survey 2006 and 2009;
- Family Pathways: The Longitudinal Study of Separated Families Wave 1 2008 and Wave 2 2009;
- Family Pathways: Looking Back Survey 2009; and
- Family Pathways: The Grandparents in Separated Families Study 2009.

This series of individual studies included surveys of parents in general and of parents who had experienced separation. Other components focused on grandparents with a grandchild living in a separated family. Together, this suite of studies sought to understand how changes to the family law system and changes to the Child Support Scheme affected the lives of families, particularly separated parents and their children.

### Family Pathways: The Longitudinal Study of Separated Families

The LSSF is a national study of 10,000 parents (with at least one child less than 18 years old) who separated after the introduction of the reforms in July 2006. The study involves the collection of data from the same group of parents over time. These parents had: (a) separated from the child's other parent between July 2006 and September 2008; (b) registered with the Child Support Agency (CSA) in 2007; and (c) were still separated from the other parent at the time of the first survey. Where the separated couple had more than one child together who was less than 18 years old at the time of the survey, most of the child-related questions that were asked focused on only one of these children (here called the "focus child").

The LSSF W1 2008 took place between August and October 2008, up to 26 months after the time of parental separation. The final overall response rate for LSSF W1 2008 was 60.2%. An equal gender split was achieved. The majority of participants were aged between 25 and 44 years (74%) and were born in Australia (83%).

### Family Pathways: Looking Back Survey

The LBS 2009 is a national study of 2,000 parents with at least one child under 18 years old, who separated from their partner between January 2004 and June 2005, prior to the introduction of the reforms. The study involved a one-off interview with parents who were registered with the CSA in 2007.

Parents were interviewed for this study between March and May 2009; 3.7 to 5.2 years after separation. The final overall response rate was 69% and an almost equal gender split was achieved. The majority of participants were aged between 25 and 44 years (72%) and were born in Australia (83%).

The cross-sectional study design provided a snapshot of the reflections of separated parents about what life was like for them during and after separating in the pre-reform period and about the pathways they followed.