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Shared Parenting and Grandparents in Australia

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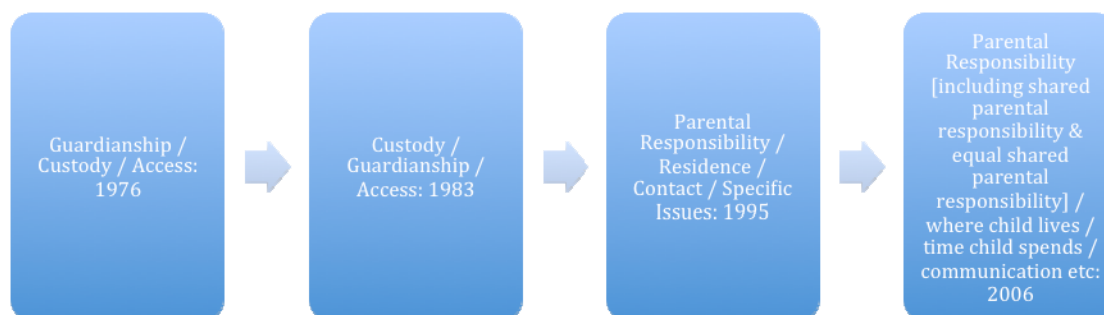
Shared Parenting and Grandparents

Geoff Wilson¹ and Helen Davison²

Introduction

Part VII of the *Family Law Act 1975* (Cth) ["FLA"] governs the making of parenting orders in relation to all children virtually irrespective of their origin and status of family.³ The Family Court of Australia, Federal Magistrates Court and other courts with jurisdiction under the FLA including State Magistrates Court or Local Courts have jurisdiction under the FLA to make parenting orders.

The concept of parenting orders in Australia has evolved since the commencement of the FLA on 6 January 1976 as follows:



1995 – Significant reform to parenting arrangements in Australia

The concept of parental responsibility was introduced in Australia through the *Family Law Reform Act 1995*.

Parental responsibility is defined as all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.⁴

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³ Section 4 FLA defines a child: "(a) in Part VII, includes an adopted child and a stillborn child; and (b) in Subdivision E of Division 6 of that Part, means a person who is under 18 (including a person who is an adopted child). Child: Subdivision D of Division 1 of Part VII affects the situations in which a child is a child of a person or is a child of a marriage or other relationship." See also ss 60F; 60H (children born as a result of artificial conception procedures). FLA applies to ex nuptial children as a result of the States and Territories referring its power to the Commonwealth.

⁴ Section 61B of the Family Law Act 1975 (Cth).

Rhodes, Graycar and Harrison⁵ found that cases decided prior to the *Reform Act* rarely featured a division of the child's time between its parents:

Before the introduction of the Reform Act, the most common form of order (both court-ordered and by consent) provided for sole custody to be vested in one parent (usually the mother), with the non-custodial parent having regular access to the child. The Family Court rarely made joint custody orders in contested proceedings. Cases such as Pagden⁶, H and H-K⁷, and Forck and Thomas⁸ established that such orders were not appropriate unless the parties' approaches to parenting were compatible, and there was a relationship of co-operation, good communication and mutual trust between the parents, factors that are generally absent in contested proceedings.

The *Reform Act* introduced new concepts of residence, contact and parental responsibility aimed at addressing the perception in contested parenting procedures that the child was a prize where the parents were winners and losers and by dint parents had a proprietary right in their children. The *Reform Act* reframed the line of enquiry in parenting proceedings from "the court must regard the child's welfare as the paramount consideration"⁹ to the court when making a parenting order must "regard the best interests of the child as the paramount consideration".¹⁰ The purpose of the shift was to harmonize the FLA with UNCROC.

The *Reform Act* introduced an objects section¹¹ (referred to below) detailing the objects of Part VII FLA and the principles underpinning the objects. There was conjecture as to whether the child's best interests gave way to the objects of the FLA including the object of the child having the right to know and be cared for by both parents.

The current version of the **objects and principles** under section 60B provides:

(a) Section 60B(1) of the Act states that the **objects** of the Act are to ensure that the best interests of the child are met by:

- (i) *ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and*
- (ii) *protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and*
- (iii) *ensuring that children receive adequate and proper parenting to help them achieve their full potential; and*
- (iv) *ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.*

(b) Section 60B(2) of the Act states that the **principles** underlying those objects are that (except when it would be contrary to a child's best interests):

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

⁵ "The Family Law Reform Act 1995: The First Three Years", report published by the Family Court of Australia and the University of Sydney, December 2000

⁶ (1991) FLC 92-231

⁷ (1990) FLC 92-128

⁸ (1993) FLC 93-372

⁹ s64(1)(a) FLA

¹⁰ s65E

¹¹ s60B FLA

- (iii) *children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and*
- (iii) *parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and*
- (iv) *parents should agree about the future parenting of their children; and*
- (v) *children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).*

3. An **additional object** of the Act is to give effect to the Convention on the Rights of the Child.¹²

The Full Court of the Family Court of Australia examined the nature and effect of the parenting regime introduced by the 1995 legislation and answered the concerns about the order of priority of the objects and best interests of the child, in *B and B: Family Law Reform Act 1995*.¹³

In particular the Full Court held:

The Full Court held that sections 60B(2) [objects] and 68F [list of matters the court must consider in deciding a parenting application] are subject to the child's best interest and "*all other considerations are subservient to that...a court which is determining issues under Part VII of the type which we have referred, starts from that essential premise and it remains the final determinant.*"

9.2 The Reform Act represents a major re-statement of the law relating to children who come within the ambit of the Family Law Act and over time it may have a significant impact upon the approach to those matters. In many ways it constitutes a recognition of the child-centred direction in which the Court has already moved. It is clear that many of the aims of the Reform Act are long-term, educative and normative. That is, they are directed towards changing the ethos where parents separate in the ways in which they think and act in their role as parents, in their approaches to resolving disputes about their children, in the ways in which lawyers act for the parents (and the children), in the approach by the Court in the adjudication of disputes and, more broadly, in the attitudes of society generally.

3.1 The Reform Act commenced on 11 June, 1996, the Bill having been passed with amendments in late November 1995. As the text of the Reform Act itself, together with the extrinsic material tendered on this appeal, namely, explanatory memoranda to the various Bills leading up to the Act and Parliamentary debates (see s. 15AB of the Acts Interpretation Act 1901 [C'wth]), makes clear the major objectives of the Reform Act were the replacement of Part VII of the Family Law Act 1975 with provisions which, inter alia, emphasised parental responsibilities rather than rights, removed the terms of guardianship, custody and access and replaced them with what were regarded as the more easily comprehensible terminology and concepts of residence and contact and which were to emphasise the importance of co-operative post separation parenting

¹² Section 60B(4) of the Family Law Act 1975 (Cth). The explanatory memorandum to the 2012 amendments (Family Law Amendment (Family Violence and other measures) Act provides: The purpose of this object is to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia's obligations under the Convention. The Convention may be considered as an interpretive aid to Part VII of the Act. To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into domestic law. Australia ratified the Convention in 1990 and, in doing so, committed to protecting and ensuring children's rights. The Convention contains the full range of human rights – civil, cultural, economic, political and social rights. These rights can be broadly grouped as protection rights, participation rights and survival and development rights. One of the main principles on which the Convention is based is the obligation to have regard to the best interests of the child as a primary consideration in decision-making. Part VII of the Act is based on this same principle; although the best interests of the child are elevated to 'paramount' status in several provisions. The reference to the Convention in section 60B does not adversely affect these provisions in Part VII or dilute the meaning of 'paramount consideration'. Nothing in the Convention prevents Australia enacting stronger protections for the rights of the child than the Convention itself prescribes.

¹³ (1997) 21 Fam LR 676; (1997) FLC 92-755 (Nicholson CJ, Fogarty & Lindenmayer JJ)

rather than the ownership and control of children, and enabled parents to enter into their own agreement about their responsibilities for their children by means of parenting plans which could be registered with the Court.

3.3 The origins of the new Part VII are to be found in a number of Australian and overseas developments, including the UK Children Act which commenced operation in October 1991. Another source appears to be the United Nations Convention on the Rights of the Child (UNCROC) which Australia ratified in December 1990 and which entered into force as a declared instrument under s.47(1) of the Human Rights and Equal Opportunity Commission Act 1986 on 13 January, 1993.

3.4 The extrinsic material referred to above indicates that the Convention was specifically referred to in the Family Law Reform Bill (No.2) 1994 in the equivalent of s.60B(2). In the second reading speech of the Minister in the House of Representatives on 8 November, 1994 (Hansard p.2759) the Minister stated:

"In December 1990 Australia ratified the UN Convention on the Rights of the Child. That convention contains a number of basic rights in the raising and development of children towards adulthood. The objects clause to the new part VII of this bill gives recognition to such rights by specifying a number of such rights that should be observed in any agreements or decisions concerning children."

The Full Court compared the Australian legislation to the *Children's Act* (UK):

3.27 There are many similarities as well as many differences between the Reform Act and the Children Act. In addition to the absence of the best interests principle (the welfare test is retained in the UK legislation) and the presence of a 'no order' principle in the Children Act, the differences can be listed briefly as follows:-

- parental responsibility under the Children Act varies according to whether the children concerned are nuptial or ex nuptial, whereas since the referral of powers in Australia in 1987 no distinction is made on the basis of parental marital status.*
- parental responsibility under the Children Act is able to be exercised by either parent independently of the other parent, while the Reform Act contains some ambiguity, which is referred in Section 9(b) of this judgment.*
- the Australian legislation is more obviously influenced by UNCROC.*
- The Children Act is significantly concerned with public law, most specifically child protection and the role played by local authorities, registered children's homes and voluntary organisations in caring for children. Its unification of the two areas of private and public law appears to provide a coherent and systematic view of child related law which is absent in this country despite the advantages which would be likely to be provided by cross-vesting and/or the referral of powers. The fusion of both systems would minimise risks to children and avoid the dangers of overlapping or lacunae in legislation and services. The absence of possibly competing and inconsistent State and Federal laws offers many advantages: see the discussion of this by the Full Court in *Re Z* (1996) FLC 92-694.*
- The English legislation contains no reference to parenting plans. However, in the Australian context this initiative, introduced by the Reform Act, has become somewhat hollow due to last minute amendments which require an elaborate procedure for the registration of those plans to allow them to be given the effect of consent orders. As a consequence, parenting plans have been largely ignored by practitioners and parents, and there are currently recommendations for the repeal of the registration provisions.*

3.28 The Reform Act employed a new form of drafting which is different from that found previously in the Family Law Act or related legislation. In an apparent effort to ensure that its philosophy is explicit, s.60B(1) is expressed to provide an object, and s.60B(2) sets out four principles underlying that object. Section 60B(2)(a) and (b) reflect articles from UNCROC, while s.60B(2)(c) and (d) provide what may be described as exhortations to those caring for children to act in a manner which is consistent with those children's best interests.

It was clear from both the comments of the Full Court and the stated objects of the *Family Law Reform Act 1995* that many of its aims are long term, educative and normative and directed towards changing the ethos where parents separate – in the ways in which they think and act in their roles as parents, in their approaches to resolving disputes

about their children, in the way lawyers act for the parents (and / or the children), in the approach by the courts in the adjudication of disputes and more broadly the attitudes of society generally.

Apart from the Full Court discussion in *B and B* above about UNCROC, a reconstituted Full Court comprising Nicholson CJ, Ellis and O’Ryan JJ in *B and B v Minister for Immigration and Indigenous Affairs*¹⁴ also discussed the relationship between UNCROC and the objects of Part VII of the FLA. What falls from these decisions is:

- *UNCROC itself has not become part of Australia’s domestic law;*
- *In interpreting the FLA it is right to assume that the legislature would have wished the law to be consistent with UNCROC; and*
- *Arguably, too, the courts could have regard to the Convention in exercising discretion, although any such principle would have limited practical application, at least in most cases, because the FLA now provides such detailed guidance that it is hard to see how resort to the Convention would be necessary, especially in the more common situations arising in litigation about children.*¹⁵

The 1995 legislation did not placate the interest groups who continued to lobby the Commonwealth Government for further reform. Further the Court’s implementation and interpretation of the legislation identified issues that led to the shared parenting legislation in 2006 (*Family Law Amendment (Shared Parental Responsibility) Act 2006*).

Federal Magistrate Judy Ryan (based in Parramatta) best encapsulates the mood in the following extract from her paper *Shared parenting – a dynamic law reform agenda*¹⁶:

When asked to speak about Australian shared parenting decisions I pondered whether any other issue excited as much controversy as this topic. I suspect not and postulate the reason for this is to be found in our ever changing society. Our increasing divorce rate, changing cultural and religious demographic, work place reforms and increase in same sex families has challenged traditional thinking about family life. It is no longer the case that a family unit is defined by a married male and female adult with children, families are multifaceted and a one size fits all approach to post separation parenting can cause great injustice and unhappiness, to adults and children. Recent studies on the issue of shared parenting challenge earlier social science theory concerning children’s responses and needs upon family breakdown. In this period of rapid social change parliaments and courts have needed to respond positively to changing community expectations. I agree with Justice Boland’s observation these days “court[s] are frequently asked to determine competing parenting applications where one party, usually the father, seeks an order for shared parenting.”

Headlines such as “Custody wars: put kids first” (Sydney Morning Herald 19 September 2005) have become commonplace. Professor Patrick Parkinson sees this “turbulence in relation to policy about post separation parenting, is largely the result of non-resident fathers wanting a greater level of involvement with their children.” In response to community interest Federal Parliament established a committee to explore whether the Family Law Act should be amended to include a presumption of shared parenting. In this context shared parenting meant equal time with both parents. The Committee Chairman, Peter Slipper MP, tabled the committee’s “Every Picture tells a story” report on 29 December 2003. The committee decided against recommending a presumption in favour of equal time. It tackled the issue by recommending a revamp of shared parental responsibility with, where possible, parties encouraged to consider equal sharing of their children’s care.....

Rather than focus on prescriptive legislative direction which dictates how children live their day to day lives, the government’s response to “Every picture tells a story” focuses on creating a legislative framework for positive involvement by both parents in their children’s lives. The government has responded favourably to the committee’s suggestion, “..that 50:50 shared residence (or physical custody) should be considered as a starting point for discussion and negotiation. The committee acknowledges that there is weight of professional opinion

¹⁴ [2003] 199 ALR 604; 30 FamLR 181; FLC 93-141; [2003] FamCA 451

¹⁵ Australian Family Law, Butterworths, [s.60B.15], p1284.1

¹⁶ Paper delivered to Queensland Law Society / fLPA Family Law Residential 1st October 2005

that stability in a primary home and routine is optimal for young children in particular. The objective is that in the majority of families parents would consider the appropriateness of a 50:50 arrangement in their particular circumstances taking into account the wishes of their child / children and that each parent should have an equal say as to where the children reside. In the end, how much time a child should spend with each parent after separation, should be a decision made, either by parents or by others on their behalf, in the best interests of the child / children concerned and on the basis of what arrangement works for the family.

2006: reframing the 1995 legislation to introduce shared parenting

The Government heralded its amendments to the FLA introduced in 2006 as:

These are the most significant reforms to the family law system in 30 years. The initiatives represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed – away from litigation and towards cooperative parenting solutions. The Government wants to change the way people think about family breakdowns, and to improve outcomes for children.

The Government is committed to giving separating parents the support they need to agree what is best for their children, rather than fighting in the courtroom. The Government is reforming the system to promote shared or cooperative parenting.

In the FCAC report (“Every picture tells a story”) the FCAC rejected the idea of 50:50 shared custody as a presumption in the Act. Rather, the FCAC concluded that “the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time.” The FCAC’s approach is reflected in the Shared Parenting Act. The new laws do not presume that an equal time arrangement is in the best interests of the child. The Government is not trying to force or impose joint custody. What is in the best interests of the child will depend on each individual case.¹⁷

Those sentiments have been echoed by the court where it has said it is loathed to intervene in parenting matters between parents. The court has at times opined about the futility of litigation and the parents responsibility in litigating parenting disputes. Federal Magistrate Tom Altobelli in *D & C*¹⁸ held:

This matter should have been resolved by the parents themselves. It is, of course, the role of this Court to determine those disputes that parents are unable to resolve themselves, even with the expert assistance they receive from their solicitors, barristers, and the family consultants and other professionals who have assisted them. Even though that may be the role of the Courts, it does not absolve parents from responsibility to put aside whatever conflict exists between them, and whatever mistrust one may have towards the other, and instead try to focus on finding a solution that is in the best interests of their child. Parents have the right to access this Court and invoke the Family Law Act to determine their disputes in relation to children, but that does not mean it is either the right thing, or the best thing to do for their children. As it turns out, there was ample evidence from which I can safely conclude that A is a very lucky girl who is much loved by both of her parents, each of whom I am sure will do everything within their capacity to parent A, and she will enjoy every opportunity that life has to offer which is somehow attributable to the love and care provided by her parents. Even though I am now comfortably able to reach that conclusion after hearing this case (and on the basis of the reasons I set out below), it still does not justify this litigation. This matter should have been resolved between the parents, with the assistance of their professional advisers. The hearing of this matter was a self-indulgent luxury as a result of the actions of either one or both parents. There were far more needy cases that needed to be heard. There were other children, far less lucky than A, whose case or cases could have been dealt with in the time that was used in this case.

The background to the 2006 Amendment Act is that prior to 2006, there seemed to be a default position that following separation, a child should live with their mother and spend time with their father every second weekend and half the school holidays (known as an 80:20 arrangement). Father groups lobbied the Australian government for the law to be

¹⁷ FLS National Seminar Series 2006, The New Family Law Parenting System Handbook

¹⁸ [2007] FMCAfam 392, [26/7/07] @ 10

changed to provide a presumption that it is in a child's best interest to spend equal time with both parents.¹⁹ The Government at the time established a committee to consider whether the Act needed reforming. In 2003, the Hull Committee Report (*Every Picture tells a story*) was delivered. The Report found that the 80:20 arrangement was inadequate, but rejected that a presumption for equal time should apply. Instead the report stated that the legislation should be amended to encourage parental involvement and co-parenting following separation, which eventually led to the presumption of equal shared parental responsibility.²⁰

Professor Richard Chislm has questioned the emphasis in the Report, and subsequently the Amendment Act, on parental responsibility when there was nothing to suggest that courts were making unfair orders removing one parent's powers to make decisions about the child, rather the key issue for the community was the view that the 80:20 default arrangement did not provide enough time between fathers and children.²¹

A platform of the Governments changes was the introduction of Family Relationship Centres and compulsory dispute resolution. Generally parties cannot present to court with a parenting dispute until they have undertaken Family Dispute Resolution Counselling (FDR) and obtained a certificate²² from an accredited FDR practitioner to present to court with their application.

As a consequence of the amendments made in 2006 Part VII of the FLA provides a complex pathway for determining parenting disputes in Australia. The Full Court of the Family Court of Australia in *Damiani & Damiani (No.2)*²³ carefully analysed the jigsaw puzzle within Part VII:

The issue that is raised requires consideration of aspects of the somewhat difficult legislative process map in Pt VII of the Family Law Act 1975 (Cth) (the "Act"). It is an issue of interpretation.

In that case, the trial judge's orders provided that the wife have sole parental responsibility for the child of the parties, C, who was born in August 2004, and provided that the wife consult with the husband in relation to the major long term issues affecting the child prior to any decision with respect to them being made. In 2005 the husband pleaded guilty to a charge of common assault in the Local Court. The victim of that assault was the wife. The trial judge recorded that the findings he had made in relation to the husband's violent and abusive conduct towards the wife resulted in the application of section 61DA(2), the effect of which was that the presumption of shared parental responsibility did not apply.

Parenting orders

Section 65D of the FLA gives the court power to "make such parenting orders as it thinks proper". It provides:

(1) In proceedings for a parenting order, the court may, subject to sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, make such parenting order as it thinks proper.

Note: Division 4 of Part XIII AA (International protection of children) may affect the jurisdiction of a court to make a parenting order.

Section 64C of the FLA provides:

"A parenting order in relation to a child may be made in favour of a parent of the child or some other person".

Section 61D of the FLA provides:

¹⁹ Chisholm, R., Reflections on the "Shared Parenting" Amendments of 2006, Lexis Nexis [June 2012].

²⁰ Ibid.

²¹ Ibid.

²² s60I FLA

²³ [2009] FamCAFC 215 [1 December 2009]

(1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

(a) expressly provided for in the order; or

(b) necessary to give effect to the order.

The significance of s 61D of the Act is that parenting orders do not confer parental responsibility or take away or diminish parental responsibility except as provided by the parenting order.

Section 64B of the Act sets out the meaning of parenting orders and related terms. It provides:

(2) A parenting order may deal with one or more of the following:

(a) the person or persons with whom a child is to live;

(b) the time a child is to spend with another person or other persons;

(c) the allocation of parental responsibility for a child;

(d) if 2 or more persons are to share parental responsibility for a child--the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;

(e) the communication a child is to have with another person or other persons;

(f) maintenance of a child;

(g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:

(i) a child to whom the order relates; or

(ii) the parties to the proceedings in which the order is made;

(h) the process to be used for resolving disputes about the terms or operation of the order;

(i) any aspect of the care, welfare or development of the child,

or any other aspect of parental responsibility for a child.

The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

Section 65DA of the Act provides:

(1) This section applies when a court makes a parenting order.

(2) It is the duty of the court to include in the order particulars of:

(a) the obligations that the order creates; and

(b) the consequences that may follow if a person contravenes the order.

In *B and B: Family Law Reform Act*, the Full Court when dealing with the difference between the old terminology and the new terminology for parenting orders as at 1995 stated:

9.38 This section and the subsequent sections of Div 5 emphasise one of the fundamental differences between the amendments introduced by the Reform Act and the previous legislation. Under the latter, the Court usually made a custody order in favour of one parent and an access order in favour of the other parent. The custody order carried with it not only residence but also powers in relation to the day-to-day care of the children. Now the structure of the Act is that the norm is residence and contact orders which deal only with the matters described above, leaving all other powers, authority and responsibilities in relation to children to be shared between the parents. If either parent desires to alter that position it is necessary for that person to apply for a specific issues order.

9.39 The aim of these provisions is twofold. Firstly, to underline the shared responsibilities of parents and to avoid, where it is unnecessary to do so, the apparent imbalance which was thought to arise from the custody/access regime. The changes are obviously far more than semantic. Residence is not custody by another name. It has a more constrained meaning, being limited to identifying the person or persons with whom a child is to live. In this it diverges from the English concept, in which authority to manage the child's daily life is conferred by reason of a residence order, which the other parent, even when in possession of an order for parental responsibility, cannot restrict.

9.40 Secondly, it gives the Court a wider range of orders which it may make so as to tailor its intervention to the requirements of the individual case.

9.41 In relation to s 64B, we should refer to one further matter. We have referred to a residence/contact regime. We agree with the submissions of the Attorney-General that it is open to the Court in an appropriate case to make a residence/residence order as the appropriate regime. Indeed there are many cases where such orders are desirable, reinforcing as they do the shared parenting responsibility concept contained in the new legislation. On the other hand, a residence/contact order should not be seen as a second best option. Rather, we think it should be used in circumstances where the contact is of relatively short duration, particularly where there is no overnight aspect.

Best interests of the child

Section 60CA of the Act provides that:

"In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

Section 60CC of the FLA sets out how a court determines what is in the best interests of a child and identifies the "primary" and "additional" considerations that a court "must consider", inter alia:

There are primary and additional factors that the court takes into account in determining what is in the best interests of a child. The court needs to apply greater weight to the primary considerations which are:

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and*
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.*

The additional considerations are:

- (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;*
- (b) the nature of the relationship of the child with:
 - (i) each of the child's parents; and**

- (ii) other persons (including any grandparent or other relative of the child);*
- (c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:*
 - (i) to participate in making decisions about major long-term issues in relation to the child; and*
 - (ii) to spend time with the child; and*
 - (iii) to communicate with the child;*
- (d) (ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;*
- (e) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:*
 - (i) either of his or her parents; or*
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;*
- (f) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;*
- (g) the capacity of:*
 - (i) each of the child's parents; and*
 - (ii) any other person (including any grandparent or other relative of the child);**to provide for the needs of the child, including emotional and intellectual needs;*
- (h) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;*
 - (i) if the child is an Aboriginal child or a Torres Strait Islander child:*
 - (A) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and*
 - (B) the likely impact any proposed parenting order under this Part will have on that right;*
 - (ii) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
 - (iii) any family violence involving the child or a member of the child's family;*
 - (iv) if a family violence order applies, or has applied, to the child or a member of the child's family--any relevant inferences that can be drawn from the order, taking into account the following:*
 - (A) the nature of the order;*
 - (B) the circumstances in which the order was made;*
 - (C) any evidence admitted in proceedings for the order;*

(D) any findings made by the court in, or in proceedings for, the order;

(E) any other relevant matter;

(v) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(vi) any other fact or circumstance that the court thinks is relevant.

*The court is also to have regard to the terms of the most recent parenting plan (if any) that has been entered into between the child's parents if doing so would be in the best interests of the child.*²⁴

The above list of factors is the current factors the court takes into account and includes amendments made earlier this year.

Upon enactment of the 2006 legislation Professor Patrick Parkinson highlighted one of the major issues for practitioners and the courts would be how to interpret the two tiered process of decision making in section 60CC of the FLA.²⁵

Best interests and forum

In *B and B (Re Jurisdiction)*²⁶ the Full Court made clear that following the 1995 amendments, the paramountcy principle (re welfare of a child) no longer applies to choice of forum issues, inter alia:

17. The most significant aspect of the amendments was that Part VII of the Act containing provisions relating to children was repealed and remade. The new Part VII contains no section equivalent to the former section 64 which extended the paramountcy principle across all proceedings relating to the custody, guardianship, or welfare of or access to a child. Rather, the paramountcy principle is now expressed to apply in respect of particular types of orders referred to in particular sections.

*37. It is our view that as a result of the 1995 amendments the test is no longer that propounded by the High Court in *ZP v PS; Re PS; Ex parte ZP* [supra]. The test to be applied is the "clearly inappropriate forum" test. In determining, however, whether or not a forum is "clearly inappropriate" one of the matters to be taken into account is what is in the best interests of the children.*

38. The importance to be attached to what is in the children's best interests will vary according to the facts of the case. For instance, in the case of an abduction from a non-Hague Convention country, what is in the best interests of the children may be a very important consideration. In a case such as this, what is in the best interests of the children may be of little importance.

39. In general, therefore, it may be said that the best interests principle does not govern various procedural and jurisdictional matters that arise prior to and in the course of parenting proceedings but that the child's interests will normally be a relevant matter in exercising discretion on such matters and may, in many situations, be the most important matter.

In the subsequent decision of the Full Court in *EJK v TSL; sub nom Kwon and Lee*²⁷ found the principles enunciated at paragraphs 37, 38 and 39 of the judgment in *B v B* (see above) were made obiter dicta and were perhaps too widely stated for general application and required clarification. The Full Court held²⁸:

We consider the following principles can be distilled from authority:

²⁴ Section 65DAB of the Family Law Act.

²⁵ Paper "Decision –making about the best interests of the child: the impact of the two tiers"

²⁶ [2003] 31 FamLR 7; FLC 93-136; [2003] FamCA 105

²⁷ [2006] 202 FLR 240; 35 FamLR 559; FLC 93-287; [2006] FamCA 730

²⁸ Supra at paragraph 83

(i) where an Australian court's jurisdiction under the Act is properly invoked in respect of a family law matter, including an application for divorce, and an issue of competing fora arises, generally the principles to be applied in respect of an application for a stay or anti suit injunction are those applicable at common law;

(ii) in cases involving competing applications for differing types of relief arising from the breakdown of a marriage, or a de facto relationship (where the parties have children of that relationship), including some applications for parenting orders, it may be appropriate pursuant to the Court's inherent power to grant a stay or an anti suit injunction based on common law principles;

(iii) the granting of relief by way of a stay of proceedings is more likely to be appropriate in a case where the child or children, the subject matter of the litigation, are resident in the foreign forum, and there is no necessity to make any order other than a stay to determine the application before the Court;

(iv) in proceedings involving competing for when the child is in Australia and the Court's jurisdiction is regularly invoked, and it is necessary to make a parenting order for interim residence or an aspect of parental responsibility to provide effective relief, the principles relevant to the granting of a stay or an anti suit injunction are not the appropriate principles to be applied, and the Court must make such orders as are necessary with the child's best interests as its paramount consideration (s 60CA);

(v) if an order sought in addition to, or ancillary to, a stay is a parenting order it must be instituted under Part VII of the Act and determined in accordance with s 60CA;

(vi) in some circumstances, such as an abduction from a non Hague Convention country it may be appropriate for the matter to be dealt with by way of a speedy summary hearing and an order for the return of the child to the foreign jurisdiction. In making such summary order the Court will have regard to the child's best interests as its paramount consideration;

(vii) in cases, such as in (ii) above, where the Act does not proscribe a "best interests" requirement, the child's best interests will often be a significant and weighty matter to be taken into account; and

(viii) that litigation involving children is not strictly inter partes litigation, and the child's best interests will almost inevitably be a significant matter.

Equal shared parental responsibility

In *Damiani* during the appeal hearing the husband's counsel made submissions for joint parental responsibility. The Court held:

The first matter to note is the use of terminology in the husband's submission. It may seem somewhat pedantic for us to raise this matter, however, the words used in section 61DA are "equal shared parental responsibility". Nowhere in the Act are the words "Joint parental responsibility" used.

Section 61DA of the Act provides:

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

(2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

*(a) **abuse of the child** or another child who, at the time, was a member of the parent's family (or that other person's family); or*

*(b) **family violence.***

(3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

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

In Australian Family Law, it is said:²⁹

"The question arises what the presumption, when it applies, actually requires. If no order is made, the situation is governed by s 61C, under which each parent has parental responsibility. Although it is true that neither parent has any greater parental responsibility than the other, s 61C does not provide that parental responsibility is to be shared. In practice, there is a big difference between the situation under s 61C and the situation in which a court has made an order that parents have equal shared parental responsibility: in the latter case the parents will be under a legal obligation to consult, and to make joint decisions about major long term issues (see s 65DAC), and also the court, when considering making a parenting order, will be obliged to consider equal time, or substantial and significant time: see s 65DAA."

Professor Richard Chisholm has suggested that "the presumption, when it applies, probably requires an order to be made for the parents to have equal shared parental responsibility, since that is the only way to achieve what s 61DA envisages, namely that the parents "have equal shared parental responsibility for the child.""³⁰

The onus is upon the parent who wants to establish that the presumption should not apply to prove abuse or family violence.³¹ The definition of family violence was amended on 20 June 2012 to acts which are violent, threatening or other behaviour by a person that coerces or controls a family member, or causes the family member to be fearful.³² Examples provided by the Act include unreasonably withholding financial support and repeated derogatory taunts.

Interesting, the Hull Committee Report recommended that intractable conflict between parents also be included as an exception to equal shared parental responsibility, as naturally parents will struggle to make long terms decisions for their children when the conflict between them is severe, however this recommendation was not adopted by the Government.³³

The Act specifically states that the presumption relates solely to the allocation of parental responsibility for a child and not about the amount of time the child spends with his or her parents.³⁴ Despite this statement there has been misunderstanding in the community that the presumption of equal shared parental responsibility actually relates to a presumption that a child should spend equal time with both parents.

Equal Time

If the presumption of equal shared parental responsibility for a child is applicable or not rebutted and an order is made that the parents have equal shared parental responsibility for a child then s 65DAA of the FLA provides the 3 step regime for determining the level of time a child will spend with each of their parents. The first level is equal time.

²⁹ Australian Family Law, Vol 1, LexisNexis Butterworths [s 61DA.10]

³⁰ Australian Family Law [supra] at [s 61DA.10]

³¹ Section 61DA(4) of *the Family Law Act 1975* (Cth).

³² Section 4AB of *the Family Law Act 1975* (Cth).

³³ Chisholm, R., Reflections on the "Shared Parenting" Amendments of 2006 (June 2012).

³⁴ Section 61DA(1) of *the Family Law Act 1975* (Cth).

- (1) *If a parenting order provides (or is to provide) that a child's parents are to have **equal shared parental responsibility** for the child, the court must:*
- (a) *consider whether the child spending equal time with each of the parents would be in the **best interests of the child**; and*
 - (b) *consider whether the child spending equal time with each of the parents is **reasonably practicable**; and*
 - (c) *if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.*

The High Court of Australia in *MRR v GR*³⁵ dealt with an appeal from the Full Court of the family Court of Australia dismissing an appeal from orders made by Federal Magistrate Coker in the Federal Magistrates Court providing that the parties have equal shared parental responsibility for the child and the child spend equal time with each of the parents. The orders were made on the basis that (contrary to the mother's expressed wish) both parents would live in Mount Isa. The High Court of Australia in upholding the appeal found the following in relation to the operation of section 65DAA:

Section 65DAA(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 (par (a)) and the question whether it is reasonably practicable that the child spend equal time with each of them (par (b)). It is only where both questions are answered in the affirmative that consideration may be given, under par (c), to the making of an order. The words with which par (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. It is a matter upon which power is conditioned much as it is where a jurisdictional fact must be proved to exist[12]. If such a finding cannot be made, sub-ss (2)(a) and (b) require that the prospect of the child spending substantial and significant time with each parent then be considered. That sub-section follows the same structure as sub-s (1) and requires the same questions concerning the child's best interests and reasonable practicability to be answered in the context of the child spending substantial and significant time with each parent.....

Section 65DAA(1) is concerned with the reality of the situation of the parents and the child, not whether it is desirable that there be equal time spent by the child with each parent. The presumption in s 61DA(1) is not determinative of the questions arising under s 65DAA(1). Section 65DAA(1)(b) requires a practical assessment of whether equal time parenting is feasible.

The Full Court in *Barone*³⁶ stated that the High Court decision left no scope for the uncertainty in relation to the necessity for judicial officers to follow the "legislative pathway" created by section 65DAA of the FLA.

The best interests concept is referred to above.

Reasonable practicality is defined in section 65DAA(5) and provides:

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

- (a) *how far apart the parents live from each other; and*
- (b) *the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and*

³⁵ [2010] HCA 4 [3 March 2010]: [French CJ, Gummow, Hayne, Kiefel & Bell JJ]

³⁶ [2012] FamCAFC 108 [25 July 2012]; Bryant CJ, Coleman & May JJ

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

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

(e) such other matters as the court considers relevant

Substantial & significant time

Section 65DAA(2) provides for the second level of time:

If:

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

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

the court must:

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

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

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

Section 65DAA(3) defines what amounts to substantial and significant time:

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

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

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

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

(i) the child's daily routine; and

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

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

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

The third level of time if equal time and substantial time do not apply, is the time that is considered to be in the best interests of the child.

It is important to appreciate the function of the operation of the presumption:

"The section does not create any presumption in favour of orders for equal time, or substantial and significant time: it requires the court to "consider" them."³⁷

It is also observed at:

This lengthy section, inserted by the 2006 amending Act, applies only "If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child". In such circumstances, it guides the court in its determination of what is in the best interests of the child, those best interests being, by s 60CA, the "paramount consideration". In other circumstances, that is where there is no order that the parents have equal shared parental responsibility, s 65DAA has no application, and the court will deal with the matter on ordinary principles, having regard, especially, to ss 60CA, 60CC, and 60B."³⁸

Shared parental responsibility

Section 65DAC of the FLA provides:

(1) This section applies if, under a parenting order:

- (a) 2 or more persons are to share parental responsibility for a child; and*
- (b) the exercise of that parental responsibility involves making a decision about a major long-term issue in relation to the child.*

(2) The order is taken to require the decision to be made jointly by those persons.

Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).

(3) The order is taken to require each of those persons:

- (a) to consult the other person in relation to the decision to be made about that issue; and*
- (b) to make a genuine effort to come to a joint decision about that issue.*

(4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

Section 65DAC provides the scope of the exercise of shared parental responsibility:

"It specifies the obligations created by a parenting order for shared parental responsibility. In essence, the order requires the persons to make decisions about "major long-term issues" jointly (2); and also requires them to consult each other, and make a genuine effort to come to a joint decision (3). The persons will frequently be the child's parents, but not necessarily: where the order provides that other people have shared parental responsibility, s 65DAC will equally apply to them."³⁹

If the presumption of equal shared parental responsibility does not apply

In *Damiani* the Full Court made the following findings as to the operation of Part VII absent the application of the presumption of equal shared parental responsibility:

³⁷ Australian Family Law (supra) at [s 65DAA.10]

³⁸ [s 65DAA.1]

³⁹ Australian Family Law (supra) at [s 65DAC.1]

If the presumption of equal shared parental responsibility (s 61DA) does not apply either because it is inapplicable (s 61DA(2)), as in this case, or is rebutted (s 61DA(4)) and an order is not made that the parents are to have equal shared parental responsibility then it is not necessary to consider pursuant to s 65DAA of the Act orders for equal time, or substantial and significant time. However in dealing with the matter on ordinary principles, having regard to ss 60CA, 60CC and 60B a parenting order would ordinarily deal with the person or persons with whom a child is to live (s 64B(2)(a)) and the time a child is to spend with another person or other persons (s 64B(2)(b)). Thus although the presumption of equal shared parental responsibility does not apply a parenting order may yet provide that a child is to spend equal or substantial and significant time with each parent.

... if the presumption of equal shared parental responsibility does not apply because it is inapplicable, as in this case, then a parenting order may be made that deals with the allocation of parental responsibility for a child (s 64B(2)(c)). And it may be that it was resolved that it was in the best interests of a child that the parents have shared parental responsibility.In fact an order could provide that the parents have equal shared parental responsibility.

However we are of the view that in circumstances where the presumption of equal shared parental responsibility did not apply because of abuse or family violence, as in this case, it may be a very unusual case where it was in the best interests of a child that an order be made that the parents have equal shared parental responsibility.

.....This is self evident because if the presumption is rebutted it is because the Court was satisfied that "it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child".

Such findings are supported by other earlier decisions of the court in *Goode and Goode*⁴⁰, *Chappell and Chappell*⁴¹, *Robertson and Sento*⁴² (The subsection does not say that, if there are reasonable grounds to believe one of the nominated circumstances exists, equal shared parental responsibility, qualified or unqualified, shall not be ordered, but merely that the presumption does not apply [at all].), *Cole & Chapman*⁴³

2012 where shared parenting is heading in Australia

Federal Magistrate Ryan reviewed a number of shared residence cases determined in the Federal Magistrates Court and observed the frequency in which longstanding equal / shared residence applications were trialed before one of the parents claimed the arrangements were chaotic and the children are unable to cope. I observe anecdotally that this is my experience in practice. The parents before any legal intervention, and in circumstances where the parents' relationship is highly conflicted and / or there is poor parental communication enter many shared parenting arrangements. Sometimes the arrangements were struck during mediation with Relationship Centres due to the imbalance of power in the relationship or simply on the basis of *urban myths* bounding about the requirements of the legislation. Further there remained a strategic measure taken in financial disputes (property settlement and child support) by some non-primary carers to maximize time spent with the child to minimize the impact on their financial burden. Parents were driven to making arrangements based on agendas far removed from the concept of the best interests of the child.

The shared parenting legislation has both its opponents and proponents. It took Arthur Freeman throwing his 4 year old daughter Darcey Freeman off the West Gate bridge in Melbourne on 29 January 2009 to refocus the discussion and galvanise politicians to seek further review of the parenting legislation, leading to further amendments to the FLA particularly directed to the definition of "violence" as it impacts on parenting orders. Arthur Freeman and his estranged

⁴⁰ [2006] FamCA 1346; (2006) FLC 93-286

⁴¹ (2008) FLC 93-382

⁴² [2009] FamCAFC 49

⁴³ [2009] FamCA 650

wife had resolved their financial matters and parenting arrangements in the Federal Magistrates Court 2 days prior to the incident.⁴⁴

The Government made further amendments to Part VII of the FLA including to the best interests checklist in section 60CC referred to above in its current incarnation. The definition of family violence⁴⁵ was revamped as discussed above and there was a focus on family violence throughout Part VII. The Act introduced obligations on advisers⁴⁶ as follows:

(1) If an adviser gives advice or assistance to a person about matters concerning a child and this Part, the adviser must:

(a) inform the person that the person should regard the best interests of the child as the paramount consideration; and

(b) encourage the person to act on the basis that the child's best interests are best met:

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

(ii) by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(iii) in applying the considerations set out in subparagraphs (i) and (ii)—by giving greater weight to the consideration set out in subparagraph (ii).

(2) In this section:

adviser means a person who is:

(a) a legal practitioner; or

(b) a family counsellor; or

(c) a family dispute resolution practitioner; or

(d) a family consultant.

The explanatory memorandum for the amendments states:

The Family Violence Bill responds to reports received by the Government into the 2006 family law reforms and how the family law system deals with family violence. The reports indicate that the Act fails to adequately protect children and other family members from family violence and child abuse.

The safety of children is of critical importance and the Government takes the issue of addressing and responding to family violence and child abuse very seriously. The family law system must prioritise the safety of children to ensure the best interests of children are met. The Family Violence Bill sends a clear message that family violence and child abuse are unacceptable.

These amendments address issues of significant community concern by strengthening the role of family courts, advisers and parents in preventing harm to children while continuing to support the concepts of shared parental responsibility and shared care, where this is safe for children.

⁴⁴ "Mum learned of Darcey's West Gate Bridge death after news report", The Age, 16/3/2011

⁴⁵ Section 4AB

⁴⁶ Section 60D

The Family Violence Bill retains the substance of the shared parenting laws introduced in the Family Law Amendment (Shared Responsibility) Act 2006 (Cth) and continues to promote a child's right to a meaningful relationship with both parents where this is safe for the child.

New subsection 4AB(1) defines 'family violence' as violent, threatening or any other type of behaviour that coerces or controls a family member or which causes the family member to be fearful. Behaviour that fits within the general characterisation set out in the definition will be captured. The definition is intended to cover a wide range of behaviour including assault, sexual assault or other sexually abusive behaviour, stalking, emotional and psychological abuse, and economic abuse. The definition encompasses patterns of family violence and single violent events.

New subsection 4AB(2) provides a non-exhaustive list of examples that fit within the definition of 'family violence'. The examples recognise the wider range of behaviour experienced by victims of family violence. The inclusion of examples will not exclude any behaviour that is within the general characterisation set out in subsection 4AB(1). For example, threats of suicide and self-harm are not mentioned in the definition or examples of 'family violence', but will be captured by the definition where the threat is intended to coerce, control or cause a family member to be fearful.

On 20 June 2012 the Government repealed certain provisions from the above section known as the "friendly parent provisions".⁴⁷ The previous section 60CC(3)(c) stated that the court had to consider the 'willingness and ability' of a parent to facilitate a relationship with the other parent in determining the best interests of the child. This led to parents being refused primary care as a result of raising allegations of abuse or family violence which could not be substantiated on the basis that this showed that they were not willing to facilitate a relationship with the other parent. It also led to a number of parents being advised not to raise real risks of abuse and family violence due to these provisions.

In concluding, a good summary of the current law regarding shared parenting in Australia comes from Chief Justice Thackray of the Family Court of Western Australia:

"In enacting the 2006 amendments, Parliament has provided more guidance to the Court about the matters to be taken into account in discharging its fundamental task of establishing what is in the best interests of children. It has also directed the Court to consider certain possible outcomes before determining the outcome that best suits the needs of the individual children who are the subject of the proceedings. Had Parliament wanted to go further, it could have done so. Instead, it left the ultimate determination to the Judge hearing each case on its unique merits. To borrow the phrase of the Full Court in B & B, the Act still contemplates individual justice. Accordingly, my objective is to ensure I treat the best interests of [T] and [C] as the paramount consideration – i.e. what is best for them will be the final determinant."⁴⁸

The reality of equal shared parental responsibility

Research has shown that shared parental responsibility works well when there is an ability to communicate, child-focussed arrangements, a commitment to make the arrangement work, geographical proximity, flexible work arrangements, financial security (especially for women) and shared confidence in the other person's parenting abilities.⁴⁹ Unfortunately these factors are not often present in matters which end up in court for final determination.

⁴⁷ The explanatory memorandum provided: The AIFS Evaluation of the 2006 Family Law Reforms and the Family Law Council report to the Attorney-General, Improving responses to family violence in the family law system, noted the impact this provision had in discouraging disclosures of family violence and child abuse. These reports indicate that parties were not disclosing concerns of family violence and child abuse for fear of being found to be an 'unfriendly parent'. The repeal of paragraph 60CC(3)(c) is intended to remove this disincentive and enable all relevant information to be put before the courts for consideration in making parenting orders. Removal of the 'friendly parent' provision will not prevent the court from considering a range of matters relevant to the care, welfare and development of the child such as a parent's attitude to the responsibilities of parenthood. The repeal of paragraph 60CC(3)(c) is intended to remove this disincentive and enable all relevant information to be put before the courts for consideration in making parenting orders. Removal of the 'friendly parent' provision will not prevent the court from considering a range of matters relevant to the care, welfare and development of the child such as a parent's attitude to the responsibilities of parenthood.

⁴⁸ M and M [2007] FCWA 47, [18].

⁴⁹ McIntosh, J. and Chisolm, R., Shared care and children's best interests in conflicted separation: A cautionary tale from current research, (2007-8) 20 Australian Family Lawyer 3.

Therefore while the principle of shared parental responsibility may be appropriate for most parents, quite often it is not appropriate for the parents who end up in the courts due to the high levels of conflict and other complex issues.

The Deputy Chief Justice of the Family Court the Honourable John Faulks has stated:

"A judge cannot reasonably impose equal shared parental responsibility on parents that are unwilling or unable to make it work. That does not preclude the possibility of the child spending time with a parent without allocating or sharing parental responsibility, again, if that time would be in the child's best interests.

*The Legislature cannot make laws to make people co-operate; judges cannot make orders to change human relationships."*⁵⁰

Professor Patrick Parkinson was recently quoted saying that the legislation tried to create families where in some cases they never existed. He gave the example where a child is born as a result of a one night stand and then orders are made for equal shared responsibility. In that scenario he argued that sole parental responsibility might be more appropriate given the parents have never been a family.⁵¹

Researcher, Christina Sadowski, interviewed Australian children aged 8 to 12 on their experiences of security and contentment in shared care living arrangements. The report defined shared care as a child spending 35% to 65% of nights with both parents. The report found:

"Whilst shared care presents an opportunity for positive relationships with both parents, children do not experience their parents as interchangeable just because they spend equal amounts of time with them."

"Parental attunement, responsiveness and co-operation underpinned the child's experience of security."

Children felt most secure when they could communicate with the parent they were not spending time with without being made to feel guilty or that they were "disrupting the balance of equality."

"Parental focus on rigidly maintaining equal time arrangements at the expense of the child's needs can severely compromise a child's capacity to feel secure and content in shared care".

Parents' reports should not be considered true indicators of the child's experience or outcomes.

"Conflictual parenting relationships after separation, and even disengaged forms of co-parenting, are unlikely to provide the degree of co-operation a child requires to feel securely shared."⁵²

In an ideal world where both parents are child focused and engage in effective co-parenting behaviours and as such are suitable candidates to be the equal carers of their children then a shared parenting routine will be the best outcome for the children all other things being equal. Sadly the reality is that such is more the exception than the norm due to the commitments of one of the parents or disempowering factors or high levels of conflict and enmity between the parties and poor communication.

The prominence of attachment theory⁵³ and the anecdotal evidence of a failure of shared parenting / equal time regimes has caused us to pause, question and reconsider the merits of the current system and appropriateness of shared parenting. It is not the panacea for all parenting disputes. The judiciary is sounding warning bells and expressing frustration at inappropriate arrangements being entered that clearly are not in the best interests of the child. In her paper "*Parenting arrangements for the 0-4 year age group*"⁵⁴ Federal Magistrate Sexton (Sydney):

⁵⁰ Faulks, J., In the best interests of the children, [13-15 April 2008].

⁵¹ Akerman, P., Family law expert Patrick Parkinson calls for legislation change, The Australian (26 July 2012).

⁵² Karvelas, P., Shared care not the key for kids, The Australian, (25 July 2012).

⁵³ See for example Special issue on Attachment, separation and Divorce: Forging Coherent Understandings for Family Law; Family Court Review, published by AFCC, July 2011

⁵⁴ Paper delivered to conference in Hanoi, Vietnam, 13-15 September 2011

In addition to decisions required from the Bench, there are parenting arrangements agreed between parties which the court is asked to approve. I'm now at the end of my 7th year as a Federal Magistrate, and it has been 5 years since the amendments to Part VII of the Family Law Act 1975 were introduced. I am troubled by the number of cases I see in which young children have been the subject of parenting agreements or orders, which seem to me, from my reading and discussions with experts in this area, to be inappropriate for their developmental stage and their particular circumstances: agreements or orders which are likely to cause avoidable (and sometimes irreparable) damage to that child. ...

Somehow, the introduction of the 2006 amendments, despite a continuation of the best interests principle, has created an expectation in many in the community, both within and without the broad family law system, that when the presumption in favour of equal shared parental responsibility applies, an outcome of equal time or substantial and significant time will follow, without careful regard to the age of the child/children, the quality of parenting, or that child's particular circumstances. From the recent Australian Institute of Family Studies ("AIFS") evaluation of the 2006 reforms⁶, we know that the proportion of children with separated parents who experience shared care arrangements (i.e 5 or more nights a fortnight) increased after the July 2006 changes were introduced and that the increase is especially marked among families whose disputes were finalised through judicial determination. We know from that study⁷ that a significant proportion of both fathers and mothers in the 2009 survey believed that spending approximately half the time with each parent can be appropriate, even for children under 3 years of age. ...

This misunderstanding in the community about what the legislation really says has also led to some primary care givers entering into agreements, (doing deals), for fear of getting a worse result for their child in a Court, even when that caregiver believes or knows that that child is unlikely to be able to emotionally manage what they've agreed to. On many occasions, when I have had concerns about the appropriateness of consent terms for a child under 4, and have checked the view of the primary carer directly in the Court room, I have been told the party, (usually the mother) doesn't think it will work, but has signed the terms, either to relieve pressure from the other side, to get out of the Court system, to avoid any accusation of not being a parent who facilitates time, or to ensure the Court is not given the opportunity to make it even worse for the child, as the party may have been warned. .

In the 2 case examples I have given you, the parties made arrangements according to their wishes and needs, not according to the needs of the child. This was despite the parties probably being well motivated and believing they were doing the right thing. Parents need to adapt themselves around these young children, not the children around the wishes or needs of the parents. ...

Interestingly, in the AIFS evaluation legal sector professionals viewed that 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. Further, legal sector professionals said that the legislative framework did not adequately facilitate making arrangements that were developmentally appropriate for children.

As judicial officers and as practitioners, we can be under a lot of pressure to focus on the wishes of one or other parent, give a bit to him, and a bit to her, make it "fairish" for the parents, even to go some way towards ensuring a meaningful relationship with both parents as directed by the Act. We can therefore easily make orders or seek orders for arrangements which do not take into account the special needs of this young age group. In my view, we need to go further than just rubber stamping an agreement between parents, to ensure the decision is child, rather than parent focused. That will mean ensuring that attachment issues and that child's particular circumstances have been properly taken into account – in exactly the same way as we must have regard to the impact of family violence when crafting orders. ...

We should take heed of Cashmore and Parkinson when they say:

In this difficult area, there is no room for decision-making that is driven by a concern for parental rights or fairness between parents. ... it may often not be possible to devise post separation parenting arrangements that are optimal for young children, but at least, we should aim as far as possible, to protect vulnerable young children from paying the price for adult notions of justice.

Remain focussed on the needs of the child. A colleague of mine told me of how the focus in a case before her changed remarkably when she asked to see a photo of the child, and sometimes I now ask for a photo. Hand the

photo around to the lawyers, and to the parties, and remind everyone that this case is about this child in the photograph and that it is on this child that we must focus our attention.

Parenting proceedings generally and the role of the court

In many instances contested parenting proceedings present a difficult balancing exercise for the court guided by the above legislative framework. The following statement of the Full Court in *White*⁵⁵ remains apt today:

Many custody [cum residence now parenting orders providing the person with whom a child is to live with] cases are extremely difficult to decide. There may be 2 excellent sets of competing proposals put before the Court. There may be 2 sets of proposals that are each fraught with risk and difficulty. Sometimes, in the words of Bell J. as approved by the Full Court in Robbins and Deer (29 November 1994, unreported), it is a feather on the scales of justice" that tips the balance."

The Honourable Justice Jordan made the following practical comments about parenting and the task of the court in making parenting orders in *Butterfield v Rojahn*⁵⁶:

However, as in all other cases, the overwhelming consideration when the court is burdened with the quite intrusive task of telling grown people what they can and cannot do, is that the Court must approach the matter from the point of view of the child's needs and best interests.

Whilst the very notion of a Court being in a position to dictate terms to somebody in the Wife's case might appear somewhat repugnant, the reality of the situation is that these types of burdens and limitations are imposed upon all people who chose to become parents. The community has an expectation of parents. Children are entitled to have an expectation of parents. If people elect to have children, it carries with it responsibilities. It carries with it limitations. Many, if not most parents are not, in real terms, free to exercise all of the options of adults without children. We all have imposed upon financial limitations as a result of the need to educate and care for our children. We are all not able to exercise some career choices, some travel choices, some lifestyle choices because we have decided to have children.

In this case, the parties had a child, and from that moment on, their lives were not going to be their own. In this case the parents have different perceptions about the future. They are not in agreement and my unpleasant task is to try and make a decision for them.

Grandparents

The current state of play: Grandparent's interaction with their grandchildren in Australia

Recent research in Australia found that around one half of grandparents spend time with their grandchildren at least once a week and just under three-quarters spend time with them at least once per month. This may be due to the fact that Australia has among the lowest public expenditure on early childhood services across OECD nations (OECD, 2008) and therefore Australian parents heavily rely on grandparents for childcare⁵⁷

While many grandparents provide temporary childcare for grandchildren, some have primary care of their grandchildren. The reasons grandchildren come to live with their grandparents are varied, but often include a parent's drug or alcohol abuse, incarceration, relationship breakdown, mental or physical illness, or death.

Options available for grandparents to spend time with their grandchildren:

(a) Informal arrangements;

⁵⁵ [1995-1996] 20 FamLR 37

⁵⁶ Unreported judgement delivered on 13/11/1997

⁵⁷ Horsfall and Dempsey (2011) Grandmothers and grandfathers looking after grandchildren: Recent Australian research. Family Relationships Quarterly, 18, 10-12.

(b) Kinship care arrangements; and

(c) Parenting orders from the Family Court of Australia or the Federal Magistrates Court of Australia.

These options are explained in more detail below.

Informal arrangements

Most grandparents and parents have informal arrangements about the care of grandchildren by grandparents and these differ from family to family. This may include after school care to living with grandparents for a period.

Kinship care arrangements

Where neither parent is willing or able to care for their child, a child may be placed into kinship care for a short or long term period through a State welfare authority, such as the Department of Child Safety in Queensland or the Department of Human Services in Victoria. Kinship care is similar to foster care but is provided by a person who is a relative, such a grandparent, a close friend, or is a member of the child's community. The process to become a kinship carer includes a household safety study, completing various applications forms and interviews.

Kinship care assists children to maintain connections with their family, often in difficult times, and is less disruptive than being placed with a foster carer. Kinship carers are entitled to a variety of support systems including access to local support groups, crisis response, financial support, home visits and training. Kinship carers receive a fortnightly allowance, which is a contribution toward the costs of caring for the child placed with them. A kinship carer is also entitled to a Kinship Carer card which provides them with a number of discounts including medical costs.

The downside for kinship carers and children is that the level of decision-making for kinship carers is considerably restricted. Various medical (immunisations, blood tests & transfusions, medical & surgical procedures etc.), educational (enrolment in new schools, day excursions involving high risk activity, school camps etc.) and legal (surname change, marriage under the age of 18, overseas travel etc.) decisions can only be made by Welfare Authorities. For this reason, some grandparents may prefer to apply for parenting orders which gives them greater freedom to make decisions for the grandchildren in their care, particularly where they have long term care of their grandchildren.

Parenting Orders

The Law in Australia

Grandparents have featured in many reported cases⁵⁸ about parenting orders with varying degrees of success over the years, of course based on considerations of the paramountcy principle and best interests of the child. As the honourable Justice Murphy observed: the cases suggest that intervention by grandparents is unusual and confined to those cases which, by their unusual circumstances see grandparents fulfilling roles which parental absence (such as death of a parent and incarceration), illness or dysfunction.⁵⁹ In other instances the grandparent is disenfranchised and seeks orders to continue a role in their grandchild's life. As Professor Richard Chisholm has said "*normally, it is appropriate for the grandparent to become a party only where the grandparent is opposing everybody else....grandparents will have*

⁵⁸ For instance: Smith and Swain [1978] FLC 90-400, Stevens v Lee [1991] FLC 92-201, Rice v Miller [1993] FLC 92-415, Bright & Bright v Bright & Mackley [1995] FLC 92-570, McMillan v Jackson [1995] FLC 92-610, Re David [1997] FLC 92-776, Filek and Cameron and Cameron No SA 18 of 1998 Full court (Nicholson CJ, Finn and Moore JJ) 26/8/98, unreported, Davies v French [2001] FamCA 382, Michalos v Theakos No EA 113 of 2002, Full Court (Kay, Waddy & May JJ) 7/7/03, unreported, N & L-S [2004] FMCAfam 436, O & C [2005] FMCAfam 200, Potts & Bims [2007] FamCA 394, West & West [2007] FamCA 546, Dennett & Norman [2007] FamCA 57, Jacks and Sampson [2008] FLC 93-387, Connor & Bourke [2008] FMCAfam 69, Carlson and others v Bowden [2008] 40 FamLR 327, Church v Overton and Another [2008] 40 FamLR, Watson & Watson & Ors [2009] FMCAfam 1292, Aldridge & Keaton [2009] FLC 93-421, Simpson & Brockman [2010] FamCAFC 37, Sokolov & Roy and Anor [2011] FamCA 531, Ridley & Whittle [2011] FMCAfam 985, Rodeo & Pryor and Anor [2011] FamCAFC 180, Norse & Howie [2011] FamCA 699, Meighan & Gain and Ors [2012] FamCA 27, Jordan & Callaghan & Ors [2012] FamCA 147, Schroeder & Raleigh & Anor [2012] FMCAfam 834 (3/8/12)

⁵⁹ Paper "Non-parent residence and contact issues: dealing effectively with applications", delivered to LexisNexis Queensland Family Law Master Class Brisbane 10/2/2004 by Peter Murphy

*reasonable prospects of success only when they are opposing everyone else and there are cogent, child focused reasons referenced to section 68F(2) for doing so”.*⁶⁰

The courts in Australia have shared the legislature’s expressed view about the importance of grandparents for children. For instance in *Bright & Bright v Bright & Mackley*⁶¹ the late honourable Justice Trevaud stated:

We live in a society in which the term “the nuclear family”, which means father and mother and the children, is well understood. The community seems to accept that all that is needed for the proper upbringing and development of a child is to be part of a nuclear family. If that were the common perception that is not one which I share....

It is very important to children’s proper upbringing and development that they have contact with a much wider family than merely the parents of the relevant child. It is very important for a child to understand that he or she is part of a wider family, that he or she has grandparents on both sides, uncles, aunts and cousins, so that the child grows up feeling part of an extended and supportive family.

The Family Law Amendment (Shared Parental Responsibility) Act 2006 (the Amendment Act) amended the FLA in 2006 to directly refer to grandparents in recognition of the increased number of applications for parenting orders sought by grandparents.⁶²

To ensure that grandparents remain a part of their grandchildren’s lives, the family law reforms will see the role of grandparents taken into consideration when a marriage breaks down and ensure grandparents’ interests are taken into account by the courts. However, the amendments remain focused on the rights of the child, not the rights of grandparents.⁶³

However, despite the Amendment Act inserting several direct references to grandparents, the law on grandparents has changed very little as prior to the Amendment Act there were numerous cases which dealt with applications by persons who were not biologically related to a child but were people significant to the care, welfare and development of a child.⁶⁴ For some time prior to 2000, grandparents had standing to apply to court for parenting orders if they qualified as “any other person concerned with the care, welfare or development of the child.” The *Family Law Amendment Act 2000* made the first specific reference in section 65C to grandparents may apply for a parenting order.

Under Section 65C of the Act a parenting order in relation to a child may be applied for by:

- (a) either or both of child’s parents; or
- (b) the child; or
- (c) a grandparent of a child; or
- (d) any other person concerned with the care, welfare or development of a child.

Further, section 60B(2)(b) of the Act states that one of the principles underlying the objects of the Act is that “children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives)”. In *Church v Overton and Another*⁶⁵ Benjamin J said in relation to this clause:

“On the literal reading of s 60B if the particular grandparent is not significant to the child’s care, welfare and development it seems the child has no statutorily enshrined right to spend time with them on a regular basis.

⁶⁰ Article, “Older People and the Law” Reform, Issue 81, 2002 page 56

⁶¹ [1995] FLC 92-570 @ 81,6157-8

⁶² Jackson, N., Rights of grandparents in child matters, Television Education Network Pty Ltd, 2009.

⁶³ National Seminar Series 2006: The New Family Law Parenting System Handbook, p28

⁶⁴ Sampson & Jacks [2008] FamCA 176, per O’Ryan J [32].

⁶⁵ [2009] 40 Fam LR.

Given the paramountcy of the child's best interests, however, regular time might be ordered. Reading the totality of the amendments in the context of the explanatory memorandum it is clear that the legislature was endeavouring to acknowledge the importance of grandparents and other relatives in the lives of children."

Other references to grandparents in the Act include under section 60CC which is the section which sets out what factors should be considered by the court in determining the child's best interest. The sections that refer to grandparents are:

- (a) Section 60CC(3)(b)(ii): In determining the best interest of a child, the court is to consider the nature of relationship of the child with other person, including grandparents.*
- (b) Section 60CC(3)(d)(ii): In determining the best interest of a child, the court is to consider the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from any grandparent, with whom he or she has been living.*
- (c) Section 60CC(3)(f)(i): In determining the best interest of a child, the court is to consider the capacity of any other person, including any grandparent, to provide for the needs the child, including emotional and intellectual needs.*

All other 13 considerations do not directly refer to grandparents or non-parent and some specifically only refer to parents. For example, one of the primary consideration is the benefit to the child of having a meaningful relationship with both of the child's parents.⁶⁶ Courts have interpreted the legislation to mean that where one of the parties is a grandparent or other non-parent the court can only consider the sections which do not refer to parents and in particular the catchall section 60CC(3)(m) which states any other fact or circumstance that the court thinks is relevant.⁶⁷

Can grandparents be granted orders for parental responsibilities and equal or substantial and significant time?

Absent a court order, grandparents have no responsibilities or "rights" or duties to their grandchildren. Absent court order the parents each have parental responsibility of their children, however grandparents do not.

While the Amendment Act has inserted many references to grandparents the most significant changes to the Act, being the presumption of equal shared parental responsibility (section 61DA) and where the presumption applies the mandatory requirement to consider equal or substantial and significant time (section 65C), only refer to parents. There has been much discussion by judicial officers in cases about whether these sections also apply to non-parents. Questions have been raised about whether there was a legislative oversight by limiting these sections just to parent.⁶⁸ Finn J commented in *Mulvany & Lane* that given the detailed provisions of Part VII as a result of the Amendment Act that it was "unfortunate" that the legislation did not give clearer indication about the weight to be attached to non-parents.

The Full Court recently addressed these issues in *Donnell v Dovey* [2010] FamCAFC 15. In *Henderson & Chopke*⁶⁹, the honourable Justice Kent summarises the principle in *Donnell* as follows:

I consider that, by reference to Donnell's Case, the following propositions emerge (referenced to the relevant paragraphs of the Full Court judgment) as to the manner in which Part VII applies in such cases:

The "overarching" provision of Part VII is s 60CA, which provides:

"In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

⁶⁶ Section 60CC(2)(a) of the Family Law Act.

⁶⁷ *Mulvany & Lane* [2009] FamCAFC 76; *Potts & Bims and Ors* [2007] FamCA 394 per Moore J and *Donnell & Dovey* [2010] FamCAFC 15.

⁶⁸ *Souter & Maegher* [2007] FamCa 18, per Cronin J.

⁶⁹ [2011] FamCA 631 (8/8/11)

It contains no distinction between parents and non-parents, so the child's best interests remain the paramount consideration regardless of the biological (or other) connection of the child to the parties to the proceedings. [79] and [80].

"Parent", when used in Part VII, means a biological or adopted parent, and does not include a person who stands in loco parentis to a child. [90] to [93] (excluded from this are cases involving children born as a result of artificial conception procedures discussed in Aldridge v Keaton (supra) at [16] to [22]; and, possibly, the application of s 61F of the Act with respect to persons treated as a parent by Aboriginal or Torres Strait Islander customs where s 61F applies)

"Parental responsibility", defined by s 61B to mean, "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children," vests only in "parents" of a child absent an Order of the Court or a parenting plan (s 61C). [83].

Parenting orders, defined by s 64B, including Orders for "parental responsibility" may be made in favour of non-parents as well as parents. (ss 64B(2) and 65(c)). [82]. An Order can be made for a non-parent to have parental responsibility or to share that responsibility with another person who may or may not be a parent. [83].

The presumption as to the equal allocation of parental responsibility provided for in s 61DA and the considerations of equal time or substantial and significant time mandated by s 65DAA are not prescribed as part of the reasoning process to the "best interests" conclusion in proceedings between a parent and a non-parent. [86], [121] and [122].

There are distinctions between a parent and non-parent by reference to ss 60D(1) and (2), which set out the objects of Part VII and the principles underlying those objectives, respectively. [76]. The objects expressed in s 60B(1)(a), (c) and (d) specifically refer only to "parents" (or parenting), as do the principles expressed in s 60B(2)(a), (c) and (d). [121] and [122].

Section 60CC, which sets out the "primary considerations" and the "additional considerations" to which the Court must have regard in determining "best interests" maintains clear distinctions between a parent and a non-parent. [94]. It follows that:

Any consideration of the benefit to the child of having a meaningful relationship with the non-parent is not a primary consideration within the meaning of s 60CC(2)(a) because it refers to "both of the child's parents". [100] and [101]. (and for the same reason where, as here, one parent has died, s 60CC(2)(a) has no application [119]).

The additional consideration in s 60CC(3)(c), "the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent", does not apply to proceedings between a parent and non-parent.

Notwithstanding i) and ii) above; in a particular case the maintenance of a meaningful relationship with a non-parent may be an important consideration in determining "best interests" [101]; and in a case involving a non-parent (who may have played and seeks to play a significant role in the child's life) it is essential to address that person's willingness and ability to facilitate the relationship between the child and the child's parent. [97]. Consideration of those matters proceeds pursuant to s 60CC(3)(m), which mandates that the Court consider "any other fact or circumstance that the court thinks is relevant".

The additional considerations in ss 60CC(3)(b) (practical difficulty of spending time and communicating) and (i) (demonstrated attitude to the child and to the responsibilities of parenthood) likewise do not apply, but if the facts of the case raise them as issues, they can be addressed under paragraph (f) (capacity to provide for needs) or paragraph (m) as referred to above.

This issue was also considered by the honourable Justice Murphy in *Calson and Others v Bowden (2008) 40 Fam LR 327* in relation to whether the presumption of equal shared parental responsibility in section 61DA of the Act applied to non-parents. His Honour said that the presumption applies only as between parents as the section refers only to "parents". However, His Honour considered section 64B(2)(d) of the Act which contemplated the courts making parenting orders for two or more persons having shared parental responsibility for a child along with section 65C which states that grandparent and any other person concerned with the care, welfare or development of the child have standing to make

an application for a parenting order. On that basis His Honour held that the court could make an order for a non-parent to have sole or shared parental responsibility. His Honour went on to conclude at paragraph 182 that it would be presumed that parents have equal shared responsibility of their children to the exclusion of a non-parent unless rebutted by a non-parent by reference to the exclusions in section 61DA(2) or (4) of the Act, ie because of abuse, family violence or because it is not in the best interest of the child.

Likewise, Section 65DAA of the Act which refers to the courts considering whether the child should spend equal time or substantial and significant time with each of the parents would be in the best interests of the child does not apply to non-parents. The section also does not apply where an order has been made for equal shared parental responsibility between a parent and a non-parent.⁷⁰ However, this does not mean that the court cannot consider orders for equal time or substantial and significant time with non-parents where it is in a child's best interest.

For instance an example of the application of the court's approach to the best interests principles to overcome lacunae created by parts of the legislation that refer only to parents, refer to *Simpson & Brockman*:

In Potts and Bims [2007] FamCA 394 at [8] Moore J discussed the statutory provisions in the context of a case involving both of the parents and the maternal grandparents. Her Honour concluded that to the extent the matters in ss 60CC(2) and (3) might be relevant, they could only be considered by reference to those factors that do not refer to parents, and in particular the catch-all provision of s 60CC(3)(m). We repeat below what Moore J said on this point:

The provisions about children's arrangements are to be found in Part VII of the Family Law Act 1975. The concept of best interests of the child is at the heart of it and that is designated to be the paramount consideration in making any parenting order. Some Part VII provisions refer to 'parent/s' which, given the word's ordinary meaning and in the absence of an expanded definition or some other descriptor such as 'party', means a number of sections do not apply when assessing 'best interests' in proceedings that are not between parents but between a parent and a non-parent [eg. relative]. Section 60B(1) and (2) set out the objects of Part VII and the principles underlying them. However, a number are expressed to apply to 'parent/s' and so are excluded in proceedings of the latter kind. For example, paragraphs 60B(1)(a), (c), and (d) fall away and what remains is paragraph (b); namely, the object of protecting children from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence. Similarly, paragraphs 60B(2) (a), (c) and (d) fall away as underlying principles and there remains paragraph (b); namely, '[except when it would be contrary to a child's best interests]' children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development [such as grandparents and other relatives]'. With objects and underlying principles as a guide, the determination of what is in a child's best interests requires the court to consider both 'primary considerations' and 'additional considerations' set out in s 60CC. But again the use by the legislature of the word 'parent/s' in a number of those considerations operates to exclude those factors in proceedings between a parent and non-parent. Falling within that group is the primary consideration in paragraph 60CC(2)(a) and the additional considerations at paragraph (c), (e), and (i). However, that does not mean those considerations are to be ignored if the facts of the case raise them as issues because they can be addressed under other considerations such as paragraph (f) [capacity to provide for needs] or, if nowhere else, under paragraph (m) [any other fact or circumstance relevant]. On that same analysis, the presumption of equal shared parental responsibility imposed by s61DA and, if it applies and the order is to provide for equal shared parental responsibility, consideration of the child/ren spending equal time or substantial and significant time, as set out more particularly in s65DAA, are not prescribed pathways in the reasoning process towards a best interests conclusion in proceedings between a parent and non-parent. Nonetheless, the particular applications may make it necessary to address those outcomes in any event.

Therefore, although grandparents do not enjoy the statutory presumption of equal shared parental responsibility or the mandatory consideration of equal or substantial and significant time, the case law confirms that grandparents can still

⁷⁰ Donnell & Dovey [2010] FamCAFC 15.

be granted orders for parental responsibility and equal or substantial and significant time if it is found to be in a child's best interest or where there is abuse or family violence by one or both the parents.

Do parents have greater rights than grandparents?

The reference only to parents in some of the key sections of the Act have led courts to consider whether parents have greater rights than grandparents when it comes to applying for parenting orders or whether a presumption exists that it is better for children to live with their parents rather than grandparents or other non-parents.

Indeed well before the 2006 amendments to the FLA the court had found there was no preference or presumption that favoured natural parents over non biological parents, grandparents or other persons.⁷¹

In *Hodak* The honourable Justice Lindenmayer held:

In my opinion, it is incorrect in a custody dispute as between a natural parent and a non-parent, to state that the role of the natural parent is to be "preferred" or to have recourse to a "presumption" that the welfare of a child will be best served by an order in favour of a natural parent.

In an early decision of the High Court of Australia about the FLA, the honourable Justice Stephen said⁷²:

Even in a community of unchanging social conditions, hard and fast rules or presumptions, based only upon matters of common but not invariable experience, provide a poor basis for the assessment of human behavior compared with detailed investigation of the individuals in question. In times of rapid social change their inadequacy will be the greater...

The Full Court in *Davies v French* held that the authorities dealing with parental preference not be misunderstood. Parenthood per se is not determinative in any case but parenthood per se is important in every case:

There is a clear need in each case to understand the ramifications of applying the factor of parenthood. The factor may have little weight if the child has no relationship whatsoever with the parent. It may be of little significance where the parent poses a real risk to the child's welfare. It may also be a decisive factor in cases where other factors overwhelmingly outweigh it, but it may be very significant in a dispute between a capable parent and a more capable grandparent...

Federal Magistrate Altobelli answered this question very succinctly in *Connor & Bourke & Anor*⁷³ where His Honour said:

"40. It is, however, highly unlikely that there is a legislative policy that favours natural parents over others such as grandparents. The Full Court of the Family Court has consistently rejected the notion that there is a presumption in favour of a parent as opposed to a non-parent, or that the 2006 amendments have changed the law in this regard: *Hodak v Newman* [1993] FamCA 83; *Rice v Miller* [1993] FamCA 87; *Dennett & Norman* [2007] FamCA 57 [13 February 2007]. That is not to say, however, that it is not a factor to be taken into account. The Full Court in *Dennett & Norman* referred, with seeming approval, to the following passage from *D & F* (unreported) [2001] FamCA 382:

"56. There is a clear need in each case to understand the ramifications of applying the factor of parenthood. The factor may have little weight if the child has had no relationship whatsoever with the parent. It may be of little significance where the parent poses a real risk to the child's welfare. It may also not be a decisive factor in cases where other factors overwhelmingly outweigh it, but it may be very significant in a dispute between a capable parent and a more capable grandparent, and determinative in a dispute between a capable parent and an outstanding neighbour, foster parent, sibling or other person with a proper interest in caring for the child."

⁷¹ *Hodak and Hodak v Newman* [1993]FLC 92-421, 17 FamLR 1, *Rice v Miller* [1993] FLC 92-415, 16FamLR 970; *Evelyn* [1998] FamCA55, *Davies v French* [2001] FamCA 382

⁷² *Gronow and Gronow* [1979] 144 CLR 513

⁷³ [2008] FMCAfam 69 [21 December 2007].

In *Aldridge v Keaton* the court held that the FLA does not establish a hierarchy of applicants for parenting orders.

In short, parents do not have greater rights than non-parents in family law proceedings and no presumption exists that it is better for children to be cared for by their parents. However, the parent-child relationship will be given greater weight particularly where a good relationship exists.

Hague Convention cases

Grandparents may feature in Hague applications (as has been the case in the series of the ongoing *Garning* case).

The deep attachment of children to their grandparents is a factor to be accounted for in determining whether the children have settled into a new environment.⁷⁴ However a deep attachment alone is not a sufficient reason to prevent a child being returned to the home state.⁷⁵

The evidence of grandparents may be a factor to be considered when determining whether a child has the appropriate level of maturity objects to return to their habitual residence.⁷⁶

Recent cases

The honourable Justice Strickland recently provided a wrap up of recent decisions of the Family Court including cases with grandparents and third parties. Attached to this paper is a copy of pp 6-13 of the paper containing the case notes.

We set out below some further case studies.

Case examples: Intact families where the grandparent has no relationship with the grandchildren – *Church v Overton and Another* (2009) 40 Fam LR

In this case the maternal grandfather brought three separate applications to spend time and communicate with the children of his three adult daughters. He sought an order that he be entitled to send cards, letters and presents to the children on their birthdays and at Christmas, that he speak with them by phone once a month and spend time with them for two hours, four times a year and that he be kept informed of their addresses and be sent a photograph of the children every second year.

The family had been involved in family litigation in one form or another for almost a decade. All applications were heard simultaneously. An independent children's lawyer was also appointed. Two of the daughters were in relationships while the third daughter had separated from her children's father.

The three adult daughters opposed all but the most limited communication between their children and their father. The daughters claimed that their father was a spiteful person who was using the proceedings to hurt them through their children and that his contact with the grandchildren would be personally distressing to them and their family. In addition, they argued that as parents of the children each of them should decide with whom their children should have a relationship with. The daughters also submitted that it would not be in their children's best interests to see or hear from their grandfather.

Justice Benjamin provided a comprehensive summary of the law relating to grandparents and also considered the international covenant on civil and political rights which has been ratified by Australia. His Honour referred to case law from the United States in relation to the role of parents and fundamental liberty interests of parents and the case of *Re C*

⁷⁴ Director General, Department of Community Services and Apostolakis (1996) FLC 92-71; Director General, Department of Families, Youth and Community Care and Moore (1999) FLC 92-841 and Townsend and Director General, Department of Families, Youth and Community Care (1999) FLC 92-842

⁷⁵ Director General, Department of Community Services and Crowe (1996) FLC 92-717

⁷⁶ De Lewinski and Department of Community Services (1997) FLC 92-737

(contact: grandfather) [2004] NIFam 5 (6 February 2004) from the United Kingdom. After considering these cases His Honour held that the US and UK each have rights legislation whereas Australia does not have a comprehensive rights legislation. His Honour said that courts needed to be aware of these differences when referring to case laws from other jurisdictions. His Honour also said it was likely that jurisprudence between States with rights legislation and those without will diverge.

In relation to the grandfather's case his Honour agreed with the submissions of the independent children's lawyer that the grandfather failed the test of convincing the court he is a significant person to the care, welfare and development of any of the children and that it was not in the best interests of the children to spend time with the grandfather when the parents were clearly deeply opposed.

Orders were made by consent to allow the grandfather to send three letters per child per year to a post office box paid for by the grandfather and that the letters would give the children when they asked about the grandfather. However, Justice Benjamin stated that even if orders had not been made by consent His Honour would not have allowed the grandfather's application for the reasons given above.

Case example: Intact families where the grandparent had good relationship with the grandchildren – Oldfield and Anor and Oldfield and Anor [2012] FMCA FMA 22

In this case, the paternal grandparents sought an order to spend time with and communicate with their two grandchildren. The parents of the grandchildren were still married and living together with their two children. The parents previously enjoyed an involved relationship with the father's parents, as did the grandchildren. However, there had been a breakdown in the relationship between the grandmother and the mother following the birth of the parents' second child. This was due to a perception by the mother that the grandmother favoured the older son more than the younger son. The relationship between the parents and the paternal grandparents became so toxic that the grandparents posted a sign on their front fence which stated "[the father] is not welcome here".

In deciding the matter, Federal Magistrate Coker held that he was bound to consider:

Firstly, section 43(1) of the Act which states that in exercise of its jurisdiction the Family Court must have regard to a number of factors including the need to preserve and protect both the institution of marriage and the family unit; and

Secondly, sections 60B and 60CC of the Act to determine what was in the best interests of the children.

His Honour relied on the following facts in deciding the case:

- (a)* That this case was distinguishable from other cases where the parents had made inappropriate lifestyle choices in the past or approached their parental responsibilities inadequately or inappropriately. His Honour said here the matter revolved around the breakdown in the relationship between the parents and the grandparents and that the parents had in the past approached their parental responsibilities appropriately;
- (b)* that the parents' decision had been aimed at protecting the children from the stress resulting from the conflict between the parents and the grandparents;
- (c)* that the Court had an obligation to ensure that the orders it made did not result in undue friction between the mother's and the father's marriage or would do anything to lead to the breakdown of the family unit;
- (d)* the parents, in particular the father, were genuine about their concerns for the children and the impact having time with the grandparents may have on them because of the conflict; and
- (e)* that there was a possibility of a future relationship between the grandparents and grandchildren.

His Honour held that the decision about whether the children are to spend time with their grandparents must be made by the parents in exercise of their parental responsibility and dismissed the grandparents' application.



Case example: Separated family where the grandmother is the primary carer – Ridley and Whittle and Anor [2011] FMCAFAM 985

In this case an application was brought by the maternal grandmother who had been the primary carer of a seven year old child since she was around 10 months old to seek orders that the child live with her in accordance with the status quo. The father and the paternal grandmother opposed the application and sought orders that the child live with them. The mother did not take part in the proceedings. The mother had a historical and continuing drug addiction and had moved in and out of her mother's home and had delegated her responsibility for the care of the child to her mother. The father consented to this arrangement. The father had been unemployed for a significant period and was currently living with his parents. To complicate the matter further the mother and the father were first cousins and the two families were also divergent in their religious beliefs with the maternal grandparents being Muslim and paternal grandparents being devout Christians. The father conceded that the maternal grandmother had done an amazing job in caring for his daughter.

The significant issue was whether the father had sufficient maturity to undertake the task of caring for his daughter. While the Federal Magistrate considered that there was no onus on the father to show what had changed to bring him to this conclusion, His Honour held that the Court must consider the impact on a change to the child's settled resident arrangement.

His Honour held on balance that he was not satisfied that the child's best interests were served by the father assuming the role of primary parent. His Honour stated that the father ran a case on being "ready" however little had changed except that the child was older. The Court held that the child was still young and the capacity of a parent, particularly a sole parent, remains an important consideration. The child was ordered to continue living with the maternal grandmother and spend time with her father. Both the maternal grandmother and the father were given equal share parental responsibility for the child.

Conclusion

Grandparents who find themselves for whatever reason needing to care for their grandchildren in Australia can do so through informal arrangements, kinship care arrangements or by applying to the court for parenting orders. However, it is only through a parenting order for parental responsibility and time that grandparents will have substantial legal rights to parent and make decisions for their grandchildren to the same extent as biological parents.

Although the Parliament amended the Act in 2006 to make specific references to grandparents, the amendments have not increased the rights grandparents previously had as the presumption about equal shared parental responsibility and right to be considered for an order for equal or substantial and significant time do not apply to grandparents. In saying that, courts can still order parental responsibility to a grandparent and orders for equal or substantial and significant time if it is a child's best interest. Further, there is no presumption that it is better for a child to be cared for by their biological parent rather than a non-parent, such as a grandparent. Rather, despite the confusing drafting of the legislation, case law demonstrates that courts have continued to do their best to simply consider what is in the best interest of a child under the relevant provisions of the Act in determining a contest between a grandparent and parent.

Parenting – cases with grandparents and third parties: Summary of cases prepared by Strickland J

Rodeo & Pryor and Anor [2011] FamCAFC 180

This was an appeal by the maternal grandmother against orders made by Waddy J on 23 October 2009 providing for both parents and the maternal grandmother to have shared parental responsibility for the three children the subject of the proceedings, except in relation to the school/s attended by the children in which regard the father was to have sole responsibility. The orders also provided, inter alia, for the children to live with the father and spend time on some weekends and during school holidays with the mother and maternal grandmother.

On appeal the maternal grandmother sought orders, inter alia, for the parties to have equal shared parental responsibility and for the children to live with her and spend time with both parents. The father opposed the maternal grandmother's appeal and sought to maintain the trial judge's orders. The mother did not take part in the appeal hearing.

The Full Court determined that the trial judge gave appropriate weight to the considerations found to be relevant, including the father's recent history of illicit drug use, the maternal grandmother's concerns about the father's capacity to care for the children, the father's dependency on the paternal grandmother to assist him with the future care of the children, the views expressed by the children, the impact upon the eldest child of being separated from the maternal grandmother, and the opinion evidence of the family consultant that the father would limit the children's contact with the mother and maternal grandmother.

Of particular note, the maternal grandmother argued that by italicising the word "parent" in the reasons without explanation and reference to authority, the trial judge revealed an "impermissible preference for the proposals of the father over those of the maternal grandmother". The maternal grandmother's concerns arose out of the following paragraphs of the reasons, where his Honour said:

53. The family consultant's opinion was that the children need stability, together with a responsible and effective parent (my emphasis) that could meet their emotional attachment and developmental needs.

54. The children, he said, need to live together in the least harmful and most stable environment with a parent who can facilitate the children to spend more time with the other family members.

Whichever parent, the children will need the support of the grandparents.

The Full Court found that the above paragraphs did "no more or less than record the preferred options cited by the family consultant and his recommendations". Whilst the trial judge ultimately preferred the proposal of a parent over that of a grandparent, the Full Court determined his Honour did not put too much weight on the word "parent". In particular, their Honours found that the trial judge correctly identified the three competing applications, referred to the maternal grandmother when considering the s 60CC considerations that refer only to parents (namely ss (2)(a), (3)(c), (e) and (i)), and referred to the maternal grandmother in his consideration of the "parents" taking part in long term decisions about the children. In concluding on this ground the Full Court stated at paragraph 74:

... It should perhaps be recorded that, as the trial judge demonstrated and as this Court has previously held, the Act does not establish a hierarchy of applicants for parenting orders. See Aldridge & Keaton (2009) FLC 93- 421.

Norse & Howie [2011] FamCA 699

This was an unusual and complex parenting case with the proceedings spanning almost ten years. The parties to the proceedings before Strickland J were the father, the mother and the maternal grandmother; the mother and the grandmother are Aboriginal Australians. The child the subject of the proceedings was born in 1999 and had been diagnosed with a reactive attachment disorder and a moderate intellectual disability with delayed language development.

At the time of the hearing, the child was living with the father, his wife and their child, with the father taking on the role of homemaker and carer whilst his wife worked and financially supported the family. The subject child was in Special School Year 5 and continuing to receive counselling, speech therapy and tutoring. The maternal grandmother lived with

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her husband on a hobby farm in regional Victoria, with her husband working three days per week and the grandmother working part-time and receiving a part-pension. The grandmother was also involved with the Aboriginal community in the local town and was doing voluntary work.

Notably, the maternal grandmother relied heavily on ss 60CC(3)(h) and the child's right to enjoy his Aboriginal culture as a basis for the child spending time with her. It was the grandmother's proposal that the child needed to learn and experience his Aboriginal heritage, culture and language, and that the only way this could be achieved was by the child spending time with the maternal grandmother and travelling with her to the homelands of the relevant Aboriginal community.

However, there was evidence that the father had been involving the child in Aboriginal events and activities with Aboriginal friends and that he was prepared to do whatever was necessary for the child to learn about and experience his heritage, culture and language, tempered by what was feasible given the child's disabilities. The expert psychologist, Mr F, spoke with a direct descendant of the relevant Aboriginal community about the matters relating to the child, the maternal grandmother and their culture. From that discussion Mr F concluded it was not essential for the maternal grandmother to be the one to teach the child about his culture, as it could be done by any member of the relevant Aboriginal community authorised by the elders to pass on such information. However, both expert psychologists had concerns about the impact of the child's disabilities on his ability to learn about his heritage, culture and language and the maternal grandmother's apparent lack of appreciation of that fact. The expert psychologist, Mr P, was of the view that there was a "likelihood of psychological damage occurring to [the child] as a consequence of the maternal grandmother placing undue pressure on him to master his cultural responsibilities".

As the maternal grandmother was not a parent within the meaning of the Act, when considering the relevant s 60CC matters his Honour utilised ss (3)(m) to address the factors that might bear upon the best interests of the child in relation to the maternal grandmother. In particular, the trial judge noted that at the time of the hearing there was no relationship in existence between the child and the maternal grandmother and there was no evidence indicating the child wished to spend time or communicate with his grandmother. The grandmother was not accepting of the child's need for expert assistance and had had a number of run ins with his therapist who had tried to involve her in that therapy. The trial judge was critical of her behaviour and attitude not only in this regard but towards the father who she had no time for. Unless and until the grandmother changed her behaviour and attitude towards the child, the father and those treating the child, the trial judge determined it was unlikely a relationship would be resurrected.

It was the expert evidence that the maternal grandmother had little insight into the specific needs of the child and did not have the capacity to meet his physical, emotional and intellectual needs. The trial judge also found the maternal grandmother had failed to protect the child in the past when there had been violence and abuse between the mother and her partners, and that there was still a risk the child would be exposed to violence and abuse if he spent time with the grandmother. Furthermore, there was a real concern that the child would suffer psychological damage if he spent time with or communicated with the maternal grandmother, at least while he was undergoing therapy and counselling. Thus, the trial judge ultimately concluded it was not of benefit to the child to have a relationship with the maternal grandmother, and her application was dismissed.

Meighan & Gain and Ors [2012] FamCA 27

This was a case before Cleary J where there were competing applications for the child, who was born in 2007, to live with the mother, the father and the maternal grandmother. The paternal grandmother supported her son's case but also sought to spend regular time with the child. The mother had a history of amphetamine use and suffered from a psychotic illness, and the father had a history of drug and alcohol abuse and had been assaulted as a consequence of his association with criminals.

At the time of trial the child's primary attachment was to the maternal grandmother with whom he had been living. It was noted that the child's relationship with his mother was "disrupted" and "uncertain" because the mother's attitude fluctuated with her mental illness and she had previously exposed the child to episodes of verbal aggression and physical abuse. The child's relationship with his father was "well established" as the father had visited the child almost every day until late 2008, although he only saw the child on three occasions between September 2008 and April 2009, and then did not see the child for many months. Upon the father's application to spend time with the child, orders were made in both the Federal Magistrates Court in December 2009 and the Family Court in August 2010 removing supervision and increasing the time the child spent with the father.

It was the recommendation of the single expert (a child and family psychiatrist) that subject to certain conditions in relation to the father's continued abstinence from drugs and stable mental health, there could be a week about arrangement between the father and the maternal grandmother by 2013. Whilst the trial judge was satisfied the requisite conditions had been met, her Honour was not satisfied a week about arrangement was in the child's best interests. The trial judge found the father had developed the capacity to meet the child's needs but that the maternal grandmother had "largely met" the child's needs and made every effort to protect the child from the mother's conduct. In relation to the mother, there was evidence of her non-compliance with mental health treatment due to her lack of insight into her illness, as well as her incapacity to care for the child when she was unwell and the resulting risk to the child during those times.

Thus, her Honour determined the presumption of equal shared parental responsibility was rebutted as a result of the mother's ill health, but determined it was in the child's best interests for the maternal grandmother to have shared parental responsibility with the father and for the child to spend gradually increasing amounts of time with the father. The orders also restrained the maternal grandmother from allowing the mother to live in any residence where the child was spending time, so long as the mother was non-compliant with her medication or was consuming illicit substances. Lastly, the orders provided for the child to spend time with mother at the sole discretion of the maternal grandmother and for the child to spend time with the paternal grandmother at the sole discretion of the father.

Kent & Kent and Anor [2012] FamCA 103

This was a matter before Stevenson J concerning two children with the same mother and different fathers, the father of the elder child having died in 2004 and the father of the younger child suffering from paranoid schizophrenia.

Since June 2009 the children had been in the care of the maternal aunt. The mother sought orders for sole parental responsibility and for the children to live with her, with the eldest child to spend time with the maternal aunt and the youngest child to spend supervised time with her father. The Independent Children's Lawyer ("ICL") proposed that the maternal aunt have sole parental responsibility and the paternal grandmother of the younger child be joined as a party to the proceedings, with orders to be made for the younger child to spend time with the paternal grandmother. The father and the paternal grandmother consented to the orders proposed by the ICL on the basis that the father be allowed to spend time with his daughter under the paternal grandmother's supervision. The maternal aunt also agreed in principle with the ICL's proposal, although she sought a reorganisation of time.

This was a case where the mother had a past history of alcoholism, drug use, post traumatic stress disorder, bipolar disorder, multiple instances of sexual assault, and a pattern of involvement in violent relationships. At the time of trial there was an apprehended violence order against the mother for the protection of the maternal aunt and the two children. Whilst the mother had a paid carer (her adult daughter from a previous relationship), the evidence was that the mother had not attended her mental health service since February 2011, at which time she was assessed as "not engaging effectively in therapy". The trial judge considered the mother may well have been progressing but there was no expert evidence as to her current psychiatric condition and thus, her Honour had "very real concerns" as to the mother's capacity to meet the needs of the children.

On the evidence the trial judge found the father's psychiatric condition was well controlled and that he understood the need to have professional input and take his medication regularly. It was also noted that the maternal aunt had been criticised for her failure to facilitate an ongoing relationship between children and the mother and youngest child and her father, although she had initiated contact between eldest child and her paternal family.

Given the substantial level of conflict between the mother and maternal aunt the trial judge determined it was "virtually impossible" to contemplate shared parental responsibility and thus, concluded the "only viable outcome" was for the maternal aunt to have sole parental responsibility for both children and for the children to continue to live with her. Whilst the trial judge was of the view that the children needed to have a "clear perception as to their parentage and place in both their maternal and paternal families", her Honour determined a change in primary residence would deprive the children of the security and stability they had living with the maternal aunt and her family.

Jordan & Callaghan and Ors [2012] FamCA 147

These parenting proceedings before Cleary J related to two children with the same mother, Ms Jordan and different fathers, Mr A being the father of the eight year child C and Mr Callaghan being the father of the four year old child T. Both children lived with their mother until August 2010 when a Federal Magistrate made interim orders for the children

to be taken into the care of the Department for Family & Community Services ("the Department") and the children were subsequently placed with T's paternal grandparents, Mr and Ms P. In August 2011 the children were removed by the Department and placed into foster care.

To summarise the competing applications were:

1. The mother sought orders for shared parental responsibility between herself and the Department for C and T and for both children to live with her.
2. C's father sought an order for C to live with him, or in the alternative with C's paternal grandmother
3. T's father sought orders that both children be returned to live with his parents and his two other daughters.
4. C's paternal grandmother sought orders for C to live with her, with his care to be shared between herself and C's paternal aunt.
5. T's paternal grandmother sought orders that both children return to live with her, her husband the T's two half-sisters.
6. The Department sought orders for the children to remain in the Department's care and in their current foster care placements.
7. The ICL sought orders for limited shared parental responsibility between the Department and Mr and Ms P, and for the children to return to live with Mr and Ms P.

The trial judge found the mother had a history of drinking alcohol to excess and forming relationships with violent men who had drug and alcohol issues. Her Honour inferred from the mother's evidence that she had "developed some insight into a pattern of violence, aggravated by her dependence on alcohol" but was still inclined to exonerate herself of responsibility for her role in the removal of her children. Her Honour concluded the mother was "an affectionate and attentive mother while sober, but loses child focus when she is affected by alcohol, or aroused by conflict".

The trial judge found T's father, Mr Callaghan, had a pattern of drinking heavily, acting impulsively and being violent and aggressive on occasion. Her Honour also found inconsistencies in his proposals for T to live with him and formed the impression that he "quickly gave whatever answer he thought would be most helpful to him". The trial judge found C's father, Mr A, was a regular user of marijuana, who had difficulty in creating a stable home environment. However, her Honour noted C's placement with Mr and Ms P worked well for Mr A as he cooperated with the family to arrange to spend time with C. Whilst there was some history of violence between the mother and Mr A, the evidence was that the father did not show his violent side when C was in his care. Ultimately, her Honour assessed the risk associated with C and his father spending unsupervised time together was not unacceptable and that the benefit to C was significant.

As to the grandparents, the trial judge accepted Mr & Ms P had made every effort to assist and protect T and C and that they were shocked and grieved when the children were removed from their care in August 2011. It was also noted that Mr and Ms P had care of Mr Callaghan's two daughters from a previous relationship. Her Honour was of the view that if orders were made for the children to be in the care of Mr and Ms P, they would comply with the orders and do their best to protect the relationships between the children and their fathers. In relation to C's paternal grandmother, Ms S, the trial judge noted Ms S had been a victim of "savage domestic violence at the hand of her de facto husband" and was a regular user of cannabis for over 26 years before giving up in 1998. In relation to Ms S's proposal, the trial judge considered the history of conflict between C's father and his sister meant confrontation was "a realistic possibility" and further noted that Ms Z already had sole care of her three young children, all of whom had been exposed to domestic violence.

However, as Ms S focused on spending time with all of her seven grandchildren and wanted to include C in that time, her Honour proposed to order that C spend one weekend per month with his paternal grandmother.

It was the evidence of the former family consultant, Ms TL, that at the time of the first family report in April 2009 she had some concerns about C being "closed and withdrawn" and not strongly connected with his family. Ms TL assessed both C's mother and father to have deficits in their capacity as parents and did not consider C's maternal or paternal

grandmothers to be viable care options as they had “deficiencies of insight”. Thus, Ms TL recommended C be removed into care of the Department.

It was the evidence of the Department’s caseworker, Ms MB, that her primary concern from the outset was the presence of Mr Callaghan in the home of Mr and Ms P, who did not see the harm he had caused the children. However, the trial judge was of the view that, whilst Mr and Ms P did tend to underrate the significance of their son’s conduct, they did not underrate the significance of the children’s exposure to violence. Her Honour determined the Department’s concern about Mr Callaghan’s presence in the home was not communicated to Mr and Ms P, because her Honour considered if it had have been communicated the grandparents would have asked their son to leave.

Furthermore, the trial judge found there were three factors which operated in the Department’s removal of the children from Mr and Ms P’s home in August 2011, namely:

- a belief held by various Department officers that it had been a mistake to place the children with Mr and Ms P in August 2010;
- recommendations made by the single expert in June 2011 that the children should go into a long term foster placement; and
- the difficulty in managing the behaviour and expectations of all the family members involved in spending time with the children.

The June 2011 report relied upon by the Department was prepared by the Court appointed single expert, Dr L, with the assistance of Ms NR. The ultimate recommendation of the report was that parental responsibility should remain with the Department in the absence of appropriate Kincare placements; that the Department should search for appropriate long term foster care; and that the children should remain at Mr and Ms P’s until an appropriate placement could be found. Unfortunately, Dr L was not briefed on various matters, including the fact Mr Callaghan’s two daughters had been living with Mr and Ms P for four years. Her Honour also found no evidence for Dr L’s beliefs that Mr and Ms P desired for C to leave the family and that T had regressed in their care. The trial judge determined it would have been a more appropriate course to relist the matter before moving the children into foster care. Her Honour also noted that when Mr and Ms P sought an internal review of the Department’s decision to remove the children without notice, no explanation was given as to why the Department’s own guidelines were disregarded. The trial judge was ultimately of the view there were “too many second-hand conclusions and insufficient direct inquiry before this most significant step was taken”.

Conclusion

In concluding, the trial judge acknowledged that her proposed orders for the children to return to living with Mr and Ms P would cause further change in circumstance for the children, however, it had the benefit of reuniting the children with T’s sisters and enable each child to see members of their extended family.

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