

# **THE SHARED PARENTING LAWS – IS THERE A CASE FOR REFORM?**

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## Part 1 - Introduction

The views expressed in this paper are not formed as a result of my social science research. They draw heavily upon social science research of Professor Richard Chisholm, Dr Jennifer McIntosh, Federal Magistrate Dr Tom Altobelli and the Australian Institute of Family Studies. This paper is intended as an overview of the 2006 shared parenting laws, relevant leading cases, and the subsequent social science research forming the basis of my views as to how the parenting laws could be improved and of the processes to deal with parenting disputes. Hopefully my views expressed here will contribute to the debate about the need for further law reform.

I assume that those considering this paper are familiar with the history of changes to Part VII of the *Family Law Act* dealing with parenting matters, including the *Family Law Reform Act 1995*, and the December 2003 House of Representatives Standing Committee on Family and Community Affairs Report “*Every Picture Tells a Story*” leading to the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (“the 2006 Reform Act”).

The legislative change brought about by the 2006 Reform Act originated in 2003 when the former Attorney General, the Honourable Darryl Williams MP and the Minister for Children and Youth Affairs, the Honourable Larry Anthony MP referred to the House of Representatives Standing Committee of Family and Community Affairs the following terms of reference insofar as parenting laws were concerned:-

*Having regard to the Governments recent response to the Report of the Family Law Pathways Advisory Group, the committee should inquire into, report on and make recommendations for action:*

*(a) given that the best interests of the child are the paramount consideration:*

- *(i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and*
- *(ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.*

Not all of the recommendations set out in the report “*Every Picture Tells a Story*” were adopted in the 2006 Reform Act. However, the message was clear that by prescribing a new methodology to determine the best interests of the child<sup>1</sup>, wherein the methodology required a consideration of primary and additional considerations<sup>2</sup>, the expectation was that parents were to each have more participation in the parenting of their children, and the time children would spend between households post-separation would depart from the old perceived “80/20 formula”<sup>3</sup>. For judicial officers in the Family Law jurisdictions, the task of determining what parenting orders are in the best interest of the child became more complex.

The main focus of this paper is a critique of the new share parenting provisions contained in Part VII of the *Family Law Act*.

## Part 2 – 2006 Law Reforms

The 2006 Reform Act brought about new changes to the *Family Law Act*. Procedurally, a new s.60I was enacted making it compulsory for parties to participate in Family Dispute Resolution before applying for parenting order, with various exceptions. Simultaneously, the government of the day provided funding for the establishment of Family Relationship Centres, and a scheme for the registration of Family Dispute Resolution

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<sup>1</sup> Previously the best interest of a child being the paramount consideration was contained in s.65E of the Family Law Act now contained in s.65AA and s60CA

<sup>2</sup> Contained in the new s.60CC, replacing the old s.68F(2).

<sup>3</sup> Being a reference to the percentage of time split between the primary carer and non-resident parent.

Practitioners, all of whom would provide family dispute resolution services in parenting cases. The aim was for parties to avoid taking parenting disputes to Court as a first resort.

A new division 12A of the *Family Law Act* created new procedures for the resolution of any parenting matter under Part VII of the *Family Law Act*. The new procedures lead to what is known as the “Less Adversarial Trial” in Family Court proceedings. Interestingly, this did not apply to how parenting matters were heard in the Federal Magistrates Court.

A new s.60B was enacted setting out the objects and principles of Part VII of the *Family Law Act*. S.60B provides as follows:-

***Objects of Part and principles underlying it***

*(1) The objects of this Part are to ensure that the best interests of children are met by:*

*(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and*

*(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and*

*(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and*

*(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.*

*(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):*

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

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

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

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

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

*(3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:*

*(a) to maintain a connection with that culture; and*

*(b) to have the support, opportunity and encouragement necessary:*

*(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and*

*(ii) to develop a positive appreciation of that culture.*

It is clear from s.60B that the Government intended that parents would share the parenting of their children after separation.

The best interests of the child continue as the paramount consideration when a Court is making a parenting order. Previously it was contained in s.65E of the Act, but now appears in the new s.60CA as follows:-

***Child's best interests paramount consideration in making a parenting order***

*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.*

When considering what parenting order is in the child's best interests, the Court is required to have regard to the primary and additional considerations set out in new s.60CC of the *Family Law Act*<sup>4</sup>. Section 60CC provides as follows:-

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

*Determining child's best interests*

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

*Primary considerations*

*(2) The primary considerations are:*

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

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

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

*Additional considerations*

*(3) 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*

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<sup>4</sup> Replacing the old s.68F(2) of the Family Law Act.

- (ii) *other persons (including any grandparent or other relative of the child);*
- (c) *the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;*
- (d) *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;*
- (e) *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;*
- (f) *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;*
- (g) *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;*
- (h) *if the child is an Aboriginal child or a Torres Strait Islander child:*
- (i) *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*
- (ii) *the likely impact any proposed parenting order under this Part will have on that right;*
- (i) *the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
- (j) *any family violence involving the child or a member of the child's family;*
- (k) *any family violence order that applies to the child or a member of the child's family,*  
if:
- (i) *the order is a final order; or*
- (ii) *the making of the order was contested by a person;*
- (l) *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;*
- (m) *any other fact or circumstance that the court thinks is relevant.*

(4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

(a) has taken, or failed to take, the opportunity:

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

(ii) to spend time with the child; and

(iii) to communicate with the child; and

(b) has facilitated, or failed to facilitate, the other parent:

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

(ii) spending time with the child; and

(iii) communicating with the child; and

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

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

#### *Consent orders*

(5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

#### *Right to enjoy Aboriginal or Torres Strait Islander culture*

(6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

After considering the matters in s.60CC, a Court is required to apply a new presumption of equal shared parental responsibility, established by the new s.61DA as follows:-

#### ***Presumption of equal shared parental responsibility when making parenting orders***

*(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.*

The presumption of equal shared parental responsibility is rebuttable if there are reasonable grounds to believe a parent has engaged in abuse of a child, or family violence. Note that the presumption of equal shared parental responsibility only applies to “parents”, a term which is not defined in the *Family Law Act*. Rather, the legislation makes provision for presumptions of parentage applying in different circumstances. Additionally, it should be noted that the persons who have parental responsibility are each of the child’s parents<sup>5</sup>, subject to any parenting order allocating parental responsibility<sup>6</sup>.

If a Court is to make an order for equal shared parental responsibility, which it will do in the majority of cases, then the provisions of the new s.65DAA are invoked. It provides as follows:-

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

***Equal time***

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

*(a) consider whether the child spending equal time with each of the parents would be in the best 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.*

<sup>5</sup> As provided in s.61C

<sup>6</sup> S.61D makes provision for the allocation of parental responsibility.

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

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

*Substantial and significant time*

(2) *If:*

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

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

*the court must:*

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

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

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

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

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

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

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

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

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

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

(i) *the child's daily routine; and*

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

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

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

*Reasonable practicality*

(5) *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*
- (c) *the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and*
- (d) *the impact that an arrangement of that kind would have on the child; and*
- (e) *such other matters as the court considers relevant.*

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

- (a) *the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (paragraph 60CC(3)(c));*
- (b) *the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).*

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

Considering s.65DAA, it was clear the intention of parliament was that post separation parents would both have more involvement in the parenting of their children either by way of an equal time arrangement or by spending substantial and significant time with each parent. Orders for an equal time arrangement could be considered provided various requirements were met including:-

- (a) Considering whether an equal time arrangement would be in the child's best interest;
- (b) Considering whether the child spending equal time with each of the parents is reasonably practicable.

Reasonable practicability is defined in s.65DAA(5). It seems that the determination of reasonable practicability incorporates conclusions reached by the then Federal Magistrate Ryan in a decision of *H&H*<sup>7</sup> in relation to the conditions or circumstances required for an equal time arrangement. Her Honour said<sup>8</sup>:-

*47. Drawing then from the case law the factors that the court should particularly examine in cases where a party seeks orders that share a child's time equally between its parents (or others) include the following:*

- *The parties' capacity to communicate on matters relevant to the child's welfare.*
- *The physical proximity of the two households.*

<sup>7</sup> H&H (2003) FLC 93 -168

<sup>8</sup> At paragraphs 47 and 48

- *Are the homes sufficiently proximate that the child can maintain their friendships in both homes?*
- *The prior history of caring for the child. Have the parties demonstrated that they can implement a 50/50 living arrangement without undermining the child's adjustment?*
- *Whether the parties agree or disagree on matters relevant to the child's day to day life. For example, methods of discipline, attitudes to homework, health and dental care, diet and sleeping pattern.*
- *Where they disagree on these matters the likelihood that they would be able to reach a reasonable compromise.*
- *Do they share similar ambitions for the child? For example, religious adherence, cultural identity and extra-curricular activities.*
- *Can they address on a continuing basis the practical considerations that arise when a child lives in 2 homes? If the child leaves necessary school work or equipment at the other home will the parents readily rectify the problem?*
- *Whether or not the parties respect the other party as a parent.*
- *The child's wishes and the factors that influence those wishes.*
- *Where siblings live.*
- *The child's age.*

*48. This list is not exhaustive. It does no more than set out some usual elements that a court will consider to the extent that each may be relevant. It does not usurp the pivotal role of s.65E nor s.68F(2). Each factor fits comfortably within s.68F(2). Based on other courts experience these factors have be useful in deciding the suitability of a particular set of circumstances for a shared parenting arrangement.*

The view at the time the new provisions came into the effect was that s.65DAA sent out a message about shared parenting that former arrangements of children primarily living with one parent and spending alternate weekends and half school holidays with other was a thing of the past.

The provisions of s.65DAA(2) dealing with substantial and significant time includes elements that:-

1. Parents be involved in the child's daily routine and occasions and events that are of particular significance to the child; and
2. Allows the child to be involved in occasions and events of special significance to the parents.

How this was to be incorporated in parenting orders, let alone make them work, against the backdrop of conflict between parties was the challenge.

Under s.65DAA(3) the provisions include elements of substantial and significant time including:-

1. Days that fall on weekends and holidays;
2. Days that do not fall on weekends and holidays.

The effect of an order for shared parental responsibility, and how it is to be exercised, is dealt with in s.65DAC as follows:-

***Effect of parenting order that provides for shared parental responsibility***

*(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.*

s.65DAE deals with issues that are not major long term issues, and it provides:-

***No need to consult on issues that are not major long-term issues***

*(1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who:*

*(a) has parental responsibility for the child; or*

*(b) shares parental responsibility for the child with another person;*

*about decisions that are made in relation to the child during that time on issues that are not major-long term issues.*

*Note: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long-term issues.*

*(2) Subsection (1) applies subject to any provision to the contrary made by a parenting order.*

The new s.64B deals with the meaning of a “parenting order”, and replaced the old concepts of “residence” “contact” and “specific issues” with orders providing for with whom a child is to live, the time the child is to spend with another person, the allocation of parental responsibility for the child, and the communications that the child is to have with another person, amongst other matters. The power to make a parenting order is contained in s.65D.

However in terms of the methodology a Court is to apply to determine what parenting order will be in the best interest of the child, the key sections are s.60CC, s.61DA, and s.65DAA.

No doubt most practitioners have had experience of clients during initial consultations with misconceptions about what the shared parenting laws actually say. It appears there is an element in the community with a

perception that the shared parenting laws created a new right whereby each parent was to spend equal time with the children. Conversely most practitioners will have had experience of new clients proposing equal time arrangements in relation to their children without giving much thought as to how it is going to work with work and other commitments, or other factors such as the existence of conflict, poor communication or lack of cooperation, or the existence of family violence. The shared parenting laws seem to have generated a “my rights” focus amongst some in the community, rather than focussing on the needs of the child.

### Part 3 – Relevant Significant Case Authorities

The decision in *Goode and Goode*<sup>9</sup> sets out the pathway a Court must follow in relation to children’s matters. The case dealt with an application for interim parenting orders, and provided that under the new provisions of Part VII introduced by the 2006 Reform Act, the same legislative pathway must be followed in interim hearings, as in final hearings for parenting orders. In the judgment<sup>10</sup> with respect to the pathway that must be followed it was held:-

82. *In an interim case that would involve the following:*

- (a) *identifying the competing proposals of the parties;*
- (b) *identifying the issues in dispute in the interim hearing;*
- (c) *identifying any agreed or uncontested relevant facts;*
- (d) *considering the matters in s 60CC that are relevant and, if possible, making findings about them (in interim proceedings there may be little uncontested evidence to enable more than a limited consideration of these matters to take place);*
- (e) *deciding whether the presumption in s 61DA that equal shared parental responsibility is in the best interests of the child applies or does not apply because there are reasonable grounds to believe there has been abuse of the child or family violence or, in an interim matter, the Court does not consider it appropriate to apply the presumption;*
- (f) *if the presumption does apply, deciding whether it is rebutted because application of it would not be in the child’s best interests;*
- (g) *if the presumption applies and is not rebutted, considering making an order that the child spend equal time with the parents unless it is contrary to the child’s best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;*
- (h) *if equal time is found not to be in the child’s best interests, considering making an order that the child spend substantial and significant time as defined in s 65DAA(3) with the parents, unless contrary to the child’s best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;*
- (i) *if neither equal time nor substantial and significant time is considered to be in the best interests of the child, then making such orders in the discretion of the Court that are in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC;*
- (j) *if the presumption is not applied or is rebutted, then making such order as is in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC; and*
- (k) *even then the Court may need to consider equal time or substantial and significant time, especially if one of the parties has sought it or, even if neither has sought it, if the Court considers after affording procedural fairness to the parties it to be in the best interests of the child.*

The primary consideration contained in s.60CC(2)(a) of *the benefit to the child of having a meaningful relationship with both parents* was considered by the Full Court in *McCall & Clark*<sup>11</sup>:

<sup>9</sup> [2006] FLC 93-286

<sup>10</sup> At paragraph 82

<sup>11</sup> [2009] Fam CAFC 92, at paragraphs 117 – 122.

117. *Bennett J discussed the terminology in G & C [2006] FamCA 994 and said the enquiry was a “prospective” one which requires a court to evaluate the extent to which a meaningful or significant relationship with both parents is going to be of advantage a child.*

118. *It appears to us that there are three possible interpretations of s 60CC(2)(a):*

- *(a) one interpretation is that the legislation requires a court to consider the benefit to the child of having a meaningful relationship with both of the child’s parents by examination of evidence of the nature of the child’s relationship at the date of the hearing, to make findings based on that evidence, which findings will be reflected in the orders ultimately made (“the present relationship approach”);*
- *(b) a second interpretation is that the legislature intended that a court should assume that there is a benefit to all children in having a meaningful relationship with both of their parents (“the presumption approach”); and*
- *(c) the third interpretation is that the court should consider and weigh the evidence at the date of the hearing and determine how, if it is in a child’s best interests, orders can be framed to ensure the particular child has a meaningful relationship with both parents (“the prospective approach”).*

119. *We conclude that the preferred interpretation of benefit to a child of a meaningful relationship in s 60CC(2)(a) is “the prospective approach” although, depending upon factual circumstances, the present relationship approach may also be relevant. We note however that s 60CC(3)(b) requires a court to explore existing relationships between a child and his or her parents and other persons, including grandparents. If the interpretation we have set out in (a) above were exclusively applied, that interpretation would limit a court making appropriate orders in circumstances where a significant relationship had not been established between a child and a parent at the date of trial.*

120. *We reject the interpretation in sub-paragraph (b). In our view if the legislature intended to elevate the benefit to a child of a meaningful relationship to a presumption it would have said so in clear and unambiguous language.*

121. *In coming to our conclusions we accept as appropriate the interpretation of “meaningful relationship” set out by Brown J in Mazsorski. Consistently with our conclusions we also agree with the reasoning of Bennett J in G & C.*

122. *In reaching these conclusions, we also consider the legislation requires a court to focus on the benefit to the child of a meaningful or significant relationship. No doubt in the majority of cases there will be a positive benefit to a child of having a significant relationship with both parents, but there will also be some cases where there will be no positive benefit to be derived by a child by a court attempting to craft orders to foster a relationship with one parent if this would not be in the child’s best interests.*

What does the term “consider” mean in the context of s.65DAA? The Full Court said in *Korban & Korban*<sup>12</sup>:

*The consideration of best interests involves an assessment of all the evidence presented and the making of factual findings. Some of those findings about one parent will demonstrate positive attributes which will benefit a child, other findings will highlight deficiencies or factors which are not likely to promote a child’s best interests. It is on these factual findings that a judicial officer will assess whether equal time is in a child’s best interests. Having weighed such factors – both positive and negative – if a judicial officer determines the child’s interests are served by an equal time order and such an order is reasonably practicable, he or she will consider making such an order.*

At paragraph 86 of the judgement, the Full Court said:

*We do not read the guideline in paragraph 82(g) of Goode as suggesting s 65DAA(1) mandates that a court is to only make an order for equal time if there are no disqualifying factors or, put another way, a requirement to consider only factors contrary to a child’s best interests. Nor do we read the section or the guideline as imposing a negative test – to determine that equal time is not in a child’s best interests. The enquiry is a positive one, to ascertain whether equal time is in a child’s best interests. What we understand paragraph 82(g) to suggest is that a judicial officer will, on the basis of factual findings made under s 60CC, in his or her consideration under s 65DAA weigh up whether or not an*

<sup>12</sup> [2009] FamCAFC 143 at paragraph 85.

*equal time order is in the child's best interests and reasonably practicable, and consider making such an order.*

On 3 March 2010 the High Court handed down its decision in *MRR v GR*<sup>13</sup>. In respect of s.65DAA(1) the High Court held<sup>14</sup>:-

*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. 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.*

The court further said at paragraph 15:-

*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.*

Therefore the Court can only give consideration to the making of an Order that a child spends equal time with the parents<sup>15</sup> if the proceeding two questions contained in s.65DAA(1)(a) and (b) are answered in the affirmative.

#### **Part 4 – Social Science Reviews**

##### **“Shared Care and Children’s Best Interests in Conflicted Separation – a Cautionary Tale from the Current Research”**

Most specialist family lawyers will be aware of research undertaken by the Professor Richard Chisholm and Dr Jennifer McIntosh into shared care arrangements for children in cases of conflicting separation<sup>16</sup>, and summarised in the article “*Shared Care and Children’s Best Interests in Conflicted Separation – a Cautionary Tale from the Current Research*”. Whilst it was accepted that in general children benefit from maintaining good quality relationships with both parents, the study focused on the interests of children and families with ongoing parental conflict. They noted<sup>17</sup> the factors present in cases where families self selected into shared care arrangements as follows:-

*In a review of care and contact patterns across a representative cross sections of the Australian population, Smythe (2004), found that, at that time, shared care was “relatively rare”. It proved to be a viable arrangement for a small and distinct group of families, who self selected into shared care arrangements and who had the following relational and structural profile:-*

<sup>13</sup> [2010] HCA 4

<sup>14</sup> At paragraph 13

<sup>15</sup> Under s.65DAA(1)(c)

<sup>16</sup> Published in Australian Family Lawyer (2008) Volume 20, No. 1 3-16

<sup>17</sup> At page 3 the factors present in cases where families self selected into shared care arrangements.

- *Geographical proximity;*
- *The ability of parents to get along sufficiently well to develop a business like working relationship;*
- *Child focused arrangements (with children kept “out of the middle”, and with children’s activities forming an integral part of the way in which the parenting schedule is developed);*
- *A commitment by everyone to make shared care work;*
- *Family friendly work practices for both mothers and fathers;*
- *Financial comfort (particularly for women ;*
- *Shared confidence that the father is a competent parent.*

*Many separating parents who require Court or formal dispute resolution involvement to determine their contact and care arrangements unfortunately do not share these characteristics. As a result of the introduction of the Family Law Amendment (Shared Parental Responsibility) Act 2006, it has arguably become more important that professionals to identify family contexts that do not have the basic structural or relational requirements to make substantial shared care a viable developmental option for their children.*

The term “shared care” is used to describe an arrangement where a child spend 35% - 65% of nights with each parent, and “equal time” describes an arrangement where a child spends 48% - 52% of nights with each parent<sup>18</sup>.

Dr McIntosh subsequently directed a study entitled “*The Children Beyond Dispute*” research program, funded by the Australian Government Attorney’s General’s Department. The study examined the impact of the interventions on parental acrimony and parental alliance, and the emotional wellbeing of children. Dr McIntosh and Professor Chisholm reported<sup>19</sup> in their article as follows:-

*McIntosh and her colleagues identified all children across the two intervention groups who remained in the high risk mental health bracket one year after mediation. They examined multiple variables to see what core factors or combination of factors were most highly associated with their poor outcomes. Findings of regression modelling indicated that 6 variables were associated with children’s high and emotional distress scores:-*

1. *Fathers had low levels of formal education;*
2. *There was high, ongoing inter parental conflict;*
3. *Children’s overnight care was substantially shared;*
4. *Mother/child relationship was poor, as reported by mother and child;*
5. *There was high acrimony (psychological hostility) between parents; and*
6. *The child in question was under 10 years old.*

The second study was overtaken by the Family Court examining the outcomes for 77 parents and 111 children who had participated in the court’s Child Responsive Program pilot. Professor Chisholm and Dr McIntosh noted<sup>20</sup> as follows:-

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<sup>18</sup> Australian Institute of Family Studies Report – Evaluation of the 2006 family law reforms: Summary report, at page 9.

<sup>19</sup> At page 5 of the article “Shared Care and Children’s Best Interests in Conflicted Separation”.

<sup>20</sup> At page 5 of their article.

*The following five variables were most highly associated with children's poor mental health outcomes in this Family Court sample:-*

1. *The child was unhappy with their living and care arrangements;*
2. *The parent's relationship with the child had deteriorated post court;*
3. *The child lives in substantially shared care;*
4. *One parent held concerns about the child's safety with the other parent;*
5. *The parents remained in high conflict.*

*The first 3 variables independently predicted poor outcomes. Variables 4 and 5 added to the likelihood of poor outcomes when they co-occurred with any of the other factors. The emotional climate on which these Family Court children shared their lives between the parents is further illustrated by the following findings:-*

- *Importantly – and in contrast to the relatively low rates of shared time identified in non litigating samples (eg Smyth) – 28% of the children studied here entered court, and 46% left court, in a substantially shared care arrangement (5 nights per fortnight or more in the care of each parent).*
- *73% of the parents involved in shared care arrangements post court reported “almost never” cooperating with each other.*
- *39% of shared care parents reported “never” being able to protect their children from their conflict .*
- *In 4 of the shared cared cases in this study, parents reported “never” having contact of any kind with each other. The children in each of these families were responsible for conveying day to day messages between their parents, involving them directly in potentially unpleasant communications about them.*
- *70% of these orders were made by consent, either in the CRP or out of court settlement. 30% were judicially determined.*

*The data from this second study are concerning because they suggest that a significant proportion of these children emerge from Family Court proceedings with substantially shared care arrangements that impose psychological strain for the child.*

Professor Chisholm and Dr McIntosh observed<sup>21</sup>:

*Part of the developmental conundrum posed for young children of divorce is this: their attachment formation is likely to be poorly affected (or to become “disorganised” in theoretical terms) when that infant does not have a continuous experience of reliable care with either parent. Shared care arrangements that involve frequent moves from one parent to another can, inadvertently, bring about this experience. Frequent transitions of care and absences from each parent necessarily interrupt the infant's experience of care with each parent, especially their relationship with their primary carer when there has been one. This brings about potential development difficulties for infants, particularly those with parents who remain acrimonious and struggle to facilitate a smooth transition for the infant.*

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<sup>21</sup> At page 6 of their article.

*It is well documented that conflict between parents has an adverse impact on their ability to parent sensitively, and inter-parental conflict brings a higher likelihood of harsh styles discipline and diminished emotional responses, which are parenting behaviours associated ultimately with the child's emotional insecurity and social withdrawal.*

The conclusions drawn from the studies “*Children beyond Dispute*” and the Family Court’s study of the Child Responsive Program Pilot are clear that shared care arrangements in cases of inter-parental conflict places children at risk of emotional insecurity and social withdrawal, and places their development at risk. In addition, Professor Chisholm and Dr McIntosh warn to be cautious about recommendations of substantially shared care for children under the age of 4, apart from issues of high conflict, during which time children form their primary attachments, an important developmental phase of their life.

Turning to the guidelines for determining the child’s best interest contained in s.60CC, Professor Chisholm and Dr McIntosh note<sup>22</sup> that s.60CC(1) requires a Court to consider the matters in subsections (2) and (3). Subsection (2) provides that “the primary considerations” are:

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

In addition they note subsection (3) makes provision for the “additional considerations” largely replicating the old section 68F(2) factors .

Having regard to the primary considerations, they questioned how the Court will determine whether a particular parent – child relationship is “meaningful”<sup>23</sup>, or the significance of the word “benefit” in paragraph (a) of s.60CC(2). In addition they questioned how much weight the Courts will give to “primary considerations” over “additional considerations”. Professor Chisholm and Dr McIntosh note<sup>24</sup>:

*For advisors and legal practitioners, as well as for the decision makers, it is important to take into account what social science can tell us about what will benefit children, particularly what constitutes a developmentally meaningful relationship with their parents: s.60CC. The enhanced role of the family consultant in the new “less adversarial” process is a strong indicator that social science is seen as important. The new guidelines, although more prescriptive than the old, still focus on the child's best interest and the new concepts are consistent with the use of social science.*

*...The data reported here suggest, however, that a group of children are liable to slip through the safety net of considerations designed to ensure that the children do in fact benefit from shared parenting. The finding sound a strong cautionary note about applying the new presumptions to cases characterised by ongoing high conflict between parents. We have shown how, in living between and within the climates of ongoing dispute and emotional preoccupation, the mental health “benefits” of substantially shared care accrued by children are questionable.*

*By implication, then, the “safety net” of consideration through which we filter “the best interests” questions attached to the shared physical care needs to be more tightly woven. The task is to sensibly guide ourselves through the socio-legal and often highly emotive contexts that surround the issue, in that developmentally appropriate decisions can be made in each case.*

*The research outlined here suggests that substantially shared care arrangements may entail risks for children's healthy emotional development in families that have the following specific factor, especially in combination:-*

<sup>22</sup> At page 9 of their article.

<sup>23</sup> This has been considered by the Full Court in McCall & Clark [2009] FamCAFC 92.

<sup>24</sup> At page 11 of their article.

**Parent factors**

- *Low levels of maturity and insight;*
- *Parents poor capacity for emotional availability to the child;*
- *Ongoing, high level conflicts;*
- *Ongoing significant psychological acrimony between parents;*
- *Child is seen to be at risk in the care of one parent.*

**Child factors**

- *Under 10 years of age;*
- *The child is not happy with a shared arrangement ;*
- *The child experiences a parent to be poorly available to them.*

They later conclude<sup>25</sup>:

*When considering “the benefit to the child of meaningful relationship with both parents”, considerable weight should be given to the need of the child for care and contact arrangements that protect them from parental dynamics otherwise likely to erode their developmental security. Here, the capacity of parents for “passive cooperation” and the containment of acrimony prove to be central benchmarks.*

Given the developmental needs of children, and their emotional wellbeing in cases of high inter-parental conflict, do the primary and additional considerations contained in s.60CC provide for sufficient weight to be given to these factors? Does there need to be some tightening up of s.65DAA(1):-

1. When considering whether the child spending equal time with each of the parents would be in the best interest of the child – should it explicitly have regard to the age, the developmental needs of the children, and effect upon the children of inter-parental conflict?
2. When considering whether the child spending equal time with each of the parents is reasonably practicable – when considering reasonable practicability in subsection (5), should that subsection explicitly have regard to the age and developmental needs of the children, and the effect upon the children of inter parental conflict?

**“How to Differentiate, Identify and Deal with Family Violence in Family Law Matters”**

The issue of family violence was examined by Dr Tom Altobelli, Federal Magistrate in his paper “*How to Differentiate, Identify and Deal with Family Violence in Family Law Matters*”<sup>26</sup>. His paper examined the findings at a conference, in February 2007, known as the Wingspread Conference, and some of the research associated with it and its implications in family law. His paper draws upon a considerable body of social science research into family violence and its impact upon children.

It was noted that research undertaken at the Australian Institute of Family Studies found that over half the cases sampled in the Family Court of Australia and Federal Magistrates Court of Australia contained allegations of adult family violence and/or child abuse. He also noted the poor level of evidentiary material to either support or respond to allegations of family violence in Court proceedings. At page 2 of his paper he noted:-

*There was very little evidentiary material to support allegations, high non response rates to allegations, and generally low levels of detail in either the allegations or responses.....The report*

<sup>25</sup> At page 11 at page 11 of their article.

<sup>26</sup> Presented by NSW Young Lawyers on 21 April 2010

*observes that the scarcity of supporting evidentiary material suggests that legal advice and legal decision making may often be taking place in context of widespread factual uncertainty.*

The relevance of family law violence in determining parenting arrangements was discussed in an article by Jaffe, Johnston, Crooks and Bala, namely “*Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*”<sup>27</sup>. Their main findings<sup>28</sup> are summarised as follows:-

- *Spousal abuse does not necessarily end with separation – in the majority of cases family violence diminishes upon separation but not always so, especially where the violence can be categorised as abusive controlling violence where there is a risk that the intensity and lethality of violence actually escalates.*
- *In extreme cases, family violence after separation is lethal, especially in the case of the more abusive relationships.*
- *Perpetrators of family violence are more likely to be deficient if not abusive as parents.*
- *Individuals who have a pattern of abuse of their partners and those who commonly resolve conflicts using physical force are poor role models for their children.*
- *Abusive partners are likely to undermine the victims parenting role.*
- *Diminished parenting capacities among victims of family violence often occurs – preoccupation with the demands of their abuser, a conflict ridden marriage or a traumatic separation and the parents are physically and emotional exhausted, inconsistently available, overly dependent upon, or unable to protect their children from the abuser.*
- *Victims behaviour under the stress of the abusive relationship and during the aftermath of a stressful separation should not inappropriately prejudice the residential or access decision.*
- *Victims abusive relationships may need time to re-establish their competence of parents and opportunity to learn how to nurture and appropriately protect themselves and their children.*

Dr Altobelli noted<sup>29</sup>:-

*...All the factors referred to above explain the long and dark shadow that family violence potentially casts on post separation parenting arrangements...In serious cases children suffer from behavioural, cognitive and emotional problems including aggression, conduct disorder, delinquency, truancy, school failure, anger, depression, anxiety, low self esteem, poor social skills, peer rejection, problem with authority figures and parents, and the inability to empathise with others.*

*But what is especially important to note is that the Ver Steegh, Jaffee and Johnston, and Kelly and Johnson all assert the central importance of differentiating among families experiencing family violence.....it is not necessarily the case that all the factors catalogued and discussed above will arise in all or even some of the cases. It all depends on the type of family violence and the family context itself.*

<sup>27</sup> (2008) 46 Family Court Review 500

<sup>28</sup> Jaffe Johnston et al at pages 501-504

<sup>29</sup> At page 10 of his paper.

Dr Altobelli noted that the Wingspread Conference identified 5 central sets of issues which were discussed and reported on:

1. Differentiation among families experiencing family violence.
2. Screening and triage;
3. Participation by families in processes and services;
4. Appropriate outcome for children;
5. Family court roles and resources

On the topic of differentiation among families experiencing family violence, the warning was that family violence should not be approached in the same manner in every case. One of the problems with dealing with family violence in the family law jurisdictions is that allegations and denials are frequent and the evidence in support inconsistent. It is often identified by evidence of physical violence, whereas family violence exists in many different forms. For the decision makers, putting the evidence of family violence into context is critical as the failure to do so undermines the quality of the decision making. The consequences might include endangering victims in children and impeding post separation parenting relationships.<sup>30</sup>

Dr Altobelli noted<sup>31</sup> that the Wingspread Conference identified four types of family violence as follows:-

- Coercive controlling violence;
- Violent resistance
- Situational couple violence
- Separation instigated violence

### **Coercive Controlling Violence**

Coercive controlling violence is an ongoing pattern of the use of threat, force, emotional abuse, and other coercive means to dominate one partner and induce fear, submission and compliance in the other.<sup>32</sup>

Although coercive controlling violence may not necessarily involve physical violence, the psychological impact may lead to deficiency in the parenting on the part of the victim. The presentation of coercive controlling violence will not be easy for the practitioner as it will not involve clearly identifiable incidents, but rather the accumulative effect of ongoing, and often subtle behaviours. The existence of and the effect of coercive controlling violence ought to be identified and assessed by an appropriate expert in family law proceedings.

### **Violent Resistance**

This occurs when the party uses violence to defend themselves in response to abuse from a partner. The risk for the person engaging in violent resistance is that if it is in response to coercive controlling violence then it may lead to more serious injury for the person resisting.

### **Situational Couple Violence**

This is often referred to as conflict instigated violence and is the most common type of physical violence in the general population. It arises out of situations or arguments between partners. However the violence and the emotional abuse is not accompanied by a pattern of controlling and intimidating or stalking behaviours.

### **Separation Instigated Violence**

This occurs where there is no prior history of violence and the acts of violence are unexpected and uncharacteristic. It is often an isolated act in reaction to stress during separation.

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<sup>30</sup> Summarising Dr Altobelli's views at page 13 of his paper.

<sup>31</sup> At page 14 of his paper

<sup>32</sup> Noted by Dr Altobelli at page 14 of his paper.

It is necessary to differentiate between the different types of violence as inaccurate differentiation may result in either the endangering of victims and their children or unnecessarily restricting parental contact with children. Therefore the need to differentiate between the different forms of violence is essential to enable judicial officers to determine parenting arrangements which are child focused and protect victims and their children.<sup>33</sup>

Who identifies the existence of and type of family violence? How is it identified? Lawyers, mediators, child consultants working at Family Relationship Centres or with Family Dispute Resolution Practitioners, and court appointed experts all have a role in identifying and differentiating various forms of violence in parenting cases. How it is identified is not an easy task for a number of reasons, including that violence may involve subtle acts over a long period of time having serious consequences. Some parties may not wish to disclose family violence for various reasons including shame, cultural reasons, or mistaken belief that it is normal behaviour. Another difficulty is that often perpetrators may deny the existence of or responsibility for family violence, or seek to minimise the allegations or their consequences.

Dr Altobelli examined<sup>34</sup> whether the *Family Law Act* differentiates family violence.

The definition of “family violence” is contained in s.4(1) of the *Family Law Act* as follows:-

*"family violence" means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.*

*Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.*

The definition of family violence does not take into account issues such as potency, pattern and primary perpetrator. Dr Altobelli expressed the view<sup>35</sup> that the *Family Law Act* does not differentiate family violence. The use of the expression in s.60CC(3)(j) & (k), s.60CF, s.60I, s.60J, s.60K referring to family violence is as having clearly stated consequences.

The presumption of equal shared parental responsibility in s.61DA does not apply in circumstances as set out in subsection 2 as follows:-

*(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.*

So there is potential that a Court may not apply a presumption of equal shared parental responsibility, for instance, where situational couple violence has occurred involving isolated incidents. The consequence may be that where the presumption of equal shared parental responsibility does not apply, then the legislative pathway in s.65DAA will not apply where it may be appropriate to do so. Conversely where coercive controlling violence has occurred throughout the relationship and has been identified, but not its potency, then when applying the definition of family violence there is a risk that a conclusion may be drawn then it does not constitute family violence and the presumption of equal shared parental responsibility may inappropriately be applied. If the definition of family violence took into account the type of family violence, and s.60CC required

<sup>33</sup> Summarising Dr Altobelli at page 19 of his paper.

<sup>34</sup> At pages 42 to 44 of his paper

<sup>35</sup> At page 43 of his paper.

an examination of the potency and impact of the family violence, then it may provide better guidance to the Court when making a determination of the best interests of the child.

### **“An Evaluation of the 2006 Family Law Reforms: Summary Report”**

In December 2009 the Australian Institute of Family Studies released a report entitled “*An Evaluation of the 2006 Family Law Reforms: Summary Report*”.

Although the Report posed 11 key evaluation questions, for the purpose of this paper the following are of assistance:-

#### **Question 4**

To what extent does FDR assist parents to manage disputes over parenting arrangements?

#### **Question 5**

How are parents exercising parental responsibility, including complying with obligations of financial support?

#### **Question 6**

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

#### **Question 8**

To what extent are issues relating to family violence and child abuse taken into account in making arrangements regarding parenting responsibility and care time?

#### **Question 9**

To what extent are children’s needs and interests being taken into account when these parenting arrangements are being made?

#### **Question 10**

How are the reforms introduced by the SPR Act 2006 working in practice?

#### **Question 11**

Have the reforms had any unintended consequences – positive or negative?

The evaluation drew upon data and studies from a wide variety of sources including parents, grandparents, family relationship service professionals, professionals from the legal and court sector, court data and government program data.

Some of the evaluation findings include the following:-

1. Although the family law system deals with parties covering the entire cross section of society, separated parents have on average a low level of education and are more likely to have a preschool aged child when they separate than parents who stay together<sup>36</sup>.
2. About two thirds of separated mothers and just over a half of separated fathers indicated that their child’s other parent had emotionally abused them before or during the separation. One in four mothers and one in six fathers said that the other parent had hurt them physically prior to separation, and among those who

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<sup>36</sup> Report at page 6.

reported such experiences, most indicated that their children had seen or heard some of the abuse or violence.<sup>37</sup>

3. Half of the mothers and around one third of the fathers said that mental health problems and/or misuse of alcohol, other drugs or other addictions, were issues in their family before separation.<sup>38</sup>
4. About two thirds of parents who separated after the 2006 changes used family relationship services after separating. Services are predominantly being used by parents who had significant relationship issues, such as family violence, mental health problems or drug and alcohol misuse issues than separated parents who did not use the services. Family Dispute Resolution Services also mainly deal with cases involving high levels of complexity and high levels of conflict. A significant minority of cases referred to FDR involved serious family violence or the risk of abuse to the child and were assessed by the service providers to be inappropriate for FDR. Of the issues examined, clients of relationship centres and Family Dispute Resolution mostly provided positive assessments of their service's provision of assistance in negotiating with the other parent post separation. Conversely these clients were less inclined to rate positively the ability of these services to provide them with the help they needed. Service professionals rated the capacity of their organisation to deliver relevant services as being generally high and they were overall confident about their capacity to work with different family types. However, language and cultural issues were perceived to be a problem by a considerable number of staff. On balance the evidence is of fewer post separation disputes being responded to primarily via the use of legal services and more being responded to primarily via the use of Family Relationship Services.<sup>39</sup>
5. In the evaluation, the term "shared care time" is used to refer to the situation in which a child spends 35% to 65% of nights with each parent and "equal care time" as the situation in which a child spends 48% to 52% of nights with each parent. 81% of parents with a child under 18 years old agreed to a continuing involvement of each parent following separation as beneficial for the children. This compared to 77% in 2006. Most parents in the 2009 survey believed that spending approximately half time with each parent can be appropriate, even for children under 3 years of age. The proportion of children with separated parents experiencing shared care time arrangements increased after the 2006 amendments were introduced. However the increasing prevalence of shared care time arrangements began well before the reforms were introduced and appears to be a part of an international trend. The overall incidence of shared care time has increased, however such an arrangement is experienced by only a minority of children. Such arrangements were experienced by:
  - 8% of children under 3 years old;
  - 20% of children aged 3 to 4 years;
  - 26% of children aged 5 to 11 years;
  - 20% of children aged 12 to 14 years;
  - 11% of children aged 15 to 17 years.

Most children spent most or all nights with their mother, with one third spending all nights with their mother. Of the children who never stayed overnight with their father, two thirds saw their father during the day and the other third did not see him at all.<sup>40</sup>
6. Fathers who never saw their child were less likely than those with day time only care to live within 20km or a 30 minute drive from the child's mother. These fathers were also more likely than those with day time only care to have re-partnered.

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<sup>37</sup> Report at page 6

<sup>38</sup> Report at page 6

<sup>39</sup> Report at page 7

<sup>40</sup> Report at pages 9 & 10

Parents whose child never saw his or her father were less likely than those whose child experienced day time only care with the father to indicate that parenting arrangements had been sorted out, and where arrangements had been sorted out, those whose child never saw the father were less likely to indicate that this had been achieved mainly through the discussions with the other parent.

Parents whose child never saw the father reported less frequent communication with the other parent, were more likely to describe the inter-parental relationship as highly conflictual or fearful, and were less likely to view it as friendly or cooperative. Both the fathers and mothers in these families were more likely than those in families in which the child saw the father during the day time only, to report that they had been physically hurt by the other person.

Concerns about their personal safety or the safety of their child relating to contact issues were more likely to be expressed by mothers and fathers whose child never saw the father, than by those whose child saw the father during the day time only. Parents (especially mothers) of children who never saw their father, were also more likely than parents of children who saw the father during the day time only to indicate that before separation there had been mental health problems, concerns about the misuse of alcohol and other drugs and concerns about addictions such as gambling.<sup>41</sup>

7. Decision making practices reported by parents was varied considerably. Legal orders concerning parental responsibility demonstrate a strong trend, predating the reforms, for legal decision making power to be allocated to both parents. There is no evidence of significant changes to the extent to which orders for shared parental responsibility are made. Orders made by judicial determination are more likely to allocate the decision making power to one or other parent than those made by consent. Cases in which the decision making power have been removed from one parent commonly included concerns about family violence and child abuse.<sup>42</sup>
8. The principle that parents should share responsibility for their children after separation had strong support from parents, family relationships service professionals and family law system professionals. However many of the professionals involved in relationship services and the legal system believed that problems arise from the way in which the concept of shared parental responsibility is expressed in the legislation.

The presumption of equal shared parental responsibility is not applicable where there “are reasonable grounds to believe” there has been family violence or child abuse. In addition the courts have the discretion not to apply the presumption in interim proceedings<sup>43</sup> and it is rebuttable where evidence is used to show its application would not be in a child’s best interest.<sup>44</sup> However the paramount issue remains the best interests of the child a judge has a discretion to make orders they determine would be in the best interests of the child after considering the facts of the case.

Anecdotally many professionals in the family law system believe that many parents, in particular fathers, believe the 2006 amendments created an entitlement to equal care which has led to an increased difficulty in working with parents to achieve child focused arrangements.<sup>45</sup>

Many in the legal system indicated that the equal time entitlement attitude amongst some fathers is difficult to shift and that many thought that negotiations and litigation over parenting arrangements had become more focused on parent’s rights rather than children’s needs. Lawyers believe that post reform

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<sup>41</sup> Report at page 10.

<sup>42</sup> Report at page 11.

<sup>43</sup> Per s.61DA(3)

<sup>44</sup> Per s.61DA(4)

<sup>45</sup> Report at page 12.

more children are in more shared care time arrangements in circumstances of high conflict than before the reforms.<sup>46</sup>

9. There is strong evidence that the quality of the children's relationships with their parents is important to child outcomes. Exposure to inter-parental relationships characterised by high levels of acrimonious conflict, by fear, safety concerns, or physical harm, clearly jeopardised children's wellbeing. However, while the development and maintenance of a close relationship requires spending time together, the existing literature suggests that "more time" does not necessarily equate with better outcomes for children.

Concerns have been raised as to whether shared care time arrangements exacerbate any negative impacts of parental separation on children's wellbeing if their parents are locked in a high level of conflict or have a history of violence. Concerns have also been raised about whether substantial (shared) cared time arrangements are detrimental to the developmental needs of very young children.<sup>47</sup>

10. Some Federal Magistrates were perceived to be more inclined to adopt a literal interpretation of the 2006 amendments meaning that some outcomes may not have sufficiently taken into account the needs of children, particularly those in the younger age group. There is also concern that time pressures inhibited the effect of scrutiny of allegations of family violence and child abuse.<sup>48</sup>
11. The amendments to Part VII of the *Family Law Act* are seen to have produced a legislative pathway that is complex and convoluted and not easily understandable by parents and some system professionals. Some judges indicated that judgments are taking longer to write because of an increased number of provisions to consider. Lawyers said advice giving is more difficult and time consuming with parents finding it more difficult to comprehend and cases longer to prepare. The legislative pathway that must be followed in making decisions requires judicial officers to apply numerous provisions, including s.60CC(2), s.60CC(3), s.60DA, s.65DAA, to the facts and this complexity is considered by many professionals to obscure the primacy of the "best interests"<sup>49</sup> principle, particularly in arrangements by negotiation.

The application of the presumption in interim hearings on the basis of little evidence is also seen as problematic. A key post reform judgment, which outlines an eleven step process to be followed in applying the legislation<sup>50</sup> even on an interim basis, underlines a complexity in applying the legislation<sup>51</sup>.

The conclusions reached in relation to the key evaluation questions examined are set out below:-

**Question 4 - To what extent does FDR assist parents to manage disputes over parenting arrangements.**

The use of Family Dispute Resolution Post Reform was broadly meeting the objective of requiring parents to attempt to resolve their disputes with the help of non court resolution processes and services<sup>52</sup>.

**Question 5 - How are parents exercising parental responsibility, including complying with obligations of financial support.**

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<sup>46</sup> Report at page 13.

<sup>47</sup> Report at page 15.

<sup>48</sup> Report at page 18.

<sup>49</sup> S.60CA

<sup>50</sup> Goode & Goode (2006) FAM CA 1346

<sup>51</sup> Report at page 20.

<sup>52</sup> Report page 21.

Shared care decision making was most likely to occur where there is shared care time. Shared decision making was much less common among parents who reported a history of family violence or ongoing concerns for the safety of their children.

Legal orders concerning parental responsibility demonstrated a strong trend predating reforms, for decision making power to be allocated to both parents<sup>53</sup>.

**Question 6 - What arrangements are being made for children in separated families to spend time with each parent? Is there any evidence of change in this regard?**

Although only a minority of children had shared care time, the proportion of children with these arrangements has increased. This is part of a longer term trend in Australia and internationally. Generally, shared care time did not appear to have a negative impact on the wellbeing of the children. Irrespective of care time arrangements, parents who expressed safety concerns describe their children's wellbeing favourably than those who did not hold such concerns. However, mothers reported the negative impact of safety concerns on children's wellbeing is exacerbated where they experience shared care time arrangements<sup>54</sup>.

**Question 8 - To what extent are issues relating to family violence and child abuse taken into account in making arrangements regarding shared parental responsibility and cared time.**

For a substantial proportion of separated parents, issues concerning violence, safety concerns, mental health and alcohol and drugs misuse are relevant. The evaluation provides evidence the family law system has some way to go in being able to respond effectively to these issues.

Families where violence had occurred were no less likely to have shared care time arrangements than those where violence had not occurred.

Parents who reported safety concerns tended to provide less favourable evaluations of their child's wellbeing compared with other parents.

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

The majority of lawyers and a large proportion of family relationship service professionals expressed the view the system had some scope for improvement in achieving an effective response to family violence and child abuse.

The link between safety concerns and poorer child wellbeing outcomes, especially where there was a shared care time arrangements, underlines the need to make changes to practice models in the family relationship services and legal sectors<sup>55</sup>.

**Question 9 - To what extent are children's needs and interests been taken into account when parenting arrangements are being made?**

There is evidence that parents using relationships services available is resulting in arrangements that are more focused on the needs of the children than in the past. However, in a proportion of cases this is not occurring as well as it could<sup>56</sup>.

**Question 10 - How are the reforms introduced by the STR Act 2006 working in practice?**

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<sup>53</sup> Report page 21.

<sup>54</sup> Report page 22.

<sup>55</sup> Report pages 22 – 23.

<sup>56</sup> Report page 23.

The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals. However, many parents do not understand the distinction between shared parental responsibility and shared care time or the rebuttable presumption of shared parental responsibility. The misunderstanding is due, in part, to the way in which the link between equal shared parental responsibility and care time is expressed in the legislation. Legal professionals indicated that in their view legislative changes promoted a focus on parent's rights rather than children's needs.

However the changes have also encouraged more creativity in making arrangements, either by negotiation, or litigation, that involves fathers in their children's everyday routines.

There was concern in the legal profession about the inconsistent legal and procedural approaches between the Family Court and Federal Magistrates Court, and concerns about whether the right cases are being heard in the appropriate forum. The more child focussed process available in the Family Court is only applied to a small proportion of cases, with the majority of such cases being heard in the Federal Magistrates Court under its more traditional adversarial procedures<sup>57</sup>.

### **Question 11 - Have the reforms had any unintended consequences – positive or negative?**

The majority of parents in shared care time arrangements reported reforms work well for them and for their children. However, up to a fifth of separating parents had safety concerns that were linked to parenting arrangements, and shared care time in cases where there are safety concerns correlate with poorer outcomes for children.

The majority of parents who participated in FDR reported it worked well.

The evaluation indicates a majority of parents are able to sort out their post-separation arrangements quickly and expeditiously; however there is also a proportion whose post-separation arrangements appear to be informed by a "bargaining" rather than "agreeing" dynamic<sup>58</sup>.

### **Part 5 – Conclusions**

*Goode & Goode*<sup>59</sup> set out the pathway that must be followed in relation to all decisions in children's matters after the 2006 reforms. This involves an eleven step process which the AIFS report criticised as being complex and convoluted. The High Court decision of *MRR vs GR*<sup>60</sup> clarifies how s.65DAA(1) is to be applied before the Court may give consideration to making an order for a child to spend equal time with each of the parents. *McCall & Clark*<sup>61</sup> provided an interpretation of the benefit to the child of having a "meaningful relationship" with a parent as a primary consideration, where after weighing the evidence if it is determined to be in a child's best interests, framing orders which would ensure a child has a meaningful relationship with both parents.

The weight of the social science research indicates that following cases are not candidates for equal time arrangements:-

1. High levels of inter-parental conflict;
2. Very young children forming their primary attachments;
3. Cases involving some types of family violence.

Whilst the majority consensus is that children benefit from both parents having a greater involvement in the parenting of their children, and spending more time with them, the evidence points to an international trend towards the sharing of time between parents as having occurred prior to the 2006 reforms.

<sup>57</sup> Report page 24.

<sup>58</sup> Report pages 24 – 25.

<sup>59</sup> (2006) FLC 93-286

<sup>60</sup> [2010] HCA 4

<sup>61</sup> [2009] FamCAFC 92.

Given the factors necessary to be in existence before an equal time arrangement is likely to benefit a child, the social science research seems to indicate that the cases where such arrangements would have been implemented will be those of the parents own choosing not requiring a judicial intervention. Generally the parenting cases which require a final judicial determination, where the parties have been unable to reach their own agreement, will be the more difficult complex cases involving factors such as conflict, violence and abuse which would preclude them from being candidates for an equal time arrangement. It is curious then if the presumption of equal shared parental responsibility is applied, under s.61DA, that the next step requires a Court to consider making an order that the child spend equal time with the parents, unless it is contrary to the child's best interests as a result of the considerations of the factors in s.60CC, or impracticable. If the Court is given adequate evidence of continuing inter parental conflict, family violence or abuse then the court should not be making a consideration of equal time arrangements. Yet those are the types of cases likely to end up before a Court for a final judicial determination.

The potential danger is for cases to slip through where there is ongoing parental conflict, abuse or family violence, or young children forming their primary attachments, which would otherwise preclude them from being candidates for an equal time arrangement, and for various reasons the Court not being presented with adequate evidence of these factors. Otherwise, Part VII does not provide the Court with guidance on how to apply the legislative pathway where a case involves issues of violence or abuse, ongoing inter-parental conflict or issues concerning a child's development.

**Does s.60CC, adequately deal with a consideration of a child's developmental stages and needs, continuing inter-parental conflict, or differentiating the different types of violence?**

First an examination of a child's developmental needs. s.60CC(3)(g) provides as an additional consideration *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 relevant.* Otherwise in subsection (m), *any other factual circumstance that the Court thinks is relevant.* Perhaps these two subsections can be relied upon when considering the age of the child and his/her stage of development and needs, although it is not explicit.

Inter-parental conflict does not get an express mention in s.60CC, although it could be argued that it could be a consideration under s.60CC(3)(j), (k) and (m). However, none of those subsections make specific reference to inter-parental conflict as a consideration, nor of its impact upon a child.

Family violence is a primary consideration under s.60CC(2)(b) *as the need to protect the child from physical and psychological harm from being subjected to, or exposed to, abuse, neglect, or family violence.* It is otherwise an additional consideration in s.60CC(3)(j) referring to *any family violence involving the child or a member of the child's family.* The definition of family violence contained in s.4 does not differentiate between the different types of violence, and the impact that they have against the victim or to children. Therefore the reference to family violence in s.60CC gives the Court little guidance in how to deal with the issue as there is no requirement to make any finding of or assess the type of family violence or the impact that it will have on a party being a parent or the child. Perhaps the definition of family violence in s.4 ought to specifically refer to the different types of family violence and s.60CC(3)(j) could be amended to include a consideration of the impact of the family violence on the child or a member of the child's family.

Similarly, perhaps a new subsection to s.60CC(3) could be inserted to include a consideration of the impact of ongoing inter-parental conflict on the child or a member of the child's family.

If s.60CC more clearly gives the Court guidance to require a consideration of the age, stage of development and the developmental needs of a child, any inter-parental conflict and the impact that it has on the child or a member of a child's family, and a consideration of the type of family violence and its impact on the child or a member of the child's family, then if such factors do exist in any particular case it should preclude a consideration of whether the child spending equal time with each of the parent would be in the child's best interest, as in s.65DAA(1)(a). It is therefore questionable whether there should be a legislative requirement for

a consideration of an equal time arrangement at all, and that such a consideration should only arise if orders for an equal time arrangement are sought by either of the parties. Otherwise, in the absence of issues such as the age and stage of development of a child, inter-parental conflict and family violence, why does the starting point need to be a consideration of an equal time arrangement? Wouldn't a child's best interests be better served by an examination of the specific child's needs as the starting point, taking into account all of the S.60CC factors? The conclusion is that there is a compelling argument to repeal s.65DAA(1) and s.65DAA(2) (b).

The consensus of social science seems to indicate that subject to the child's stage of development and needs, and high levels of inter-parental conflict and depending upon the type of family violence, the child spending substantial and significant time with each of the parents is a beneficial outcome for children. If the consideration of a child spending equal time with each of parents is removed, then we will be left with a consideration of whether a child spending substantial and significant time with each of the parents would be in the best interests of the child where the parenting order provides that a child's parents are to have equal shared parental responsibility for the child.

As for s.65DAA(5) if subsections (1) and (2)(b) are repealed, then subsection (5) ought to be amended to apply only if the Court is asked to make an order for equal time, or when considering whether the child is to spend a substantial and significant time with each of the parents is reasonably practicable.

The current legislative pathway also sits uncomfortably in cases where parentage is an issue, specifically where a child is conceived by way of an artificial conception procedure and the presumption of parentage under s.60H applies.

Where a child is conceived by way of an artificial conception procedure, s.60H(1) provides that if a child is born to a woman as a result of an artificial conception procedure, then the child is hers and also that of her married or de facto partner or other intended parent who may have consented to the carrying out of the procedure. The presumption of parentage will apply to lesbian couples, giving a presumption of parentage to the non biological parent provided the parents were in a de facto relationship at the time of conception, and the non biological parent consented to the procedure. This issue arose in the case of *Keaton and Aldridge*<sup>62</sup>. In the first instance hearing before Federal Magistrate Pascoe, the Applicant was the former partner of the mother of the child. It was argued on the part of the Applicant that she was a parent of the child given the presumption of parentage under s.60H(1) applying to her. For the Respondent Mother, it was argued that the Applicant was not a parent as the parties were not in a de facto relationship at the time the child was conceived by way of an artificial conception procedure.

The Court had to make a finding whether there was in fact a de facto relationship applying the definition contained in s.4AA of the *Family Law Act*. A finding that the Applicant was a parent would have resulted in the Court having to apply the pathway as set out in *Goode & Goode*, giving consideration to all of the s.60CC factors (noting that some are expressed to apply to the child's parents including the primary consideration in s.60CC(2)(a) and various other additional considerations under s.60CC(3)). The court would then be required to consider whether the presumption of equal shared parental responsibility in s.61DA applies or does not apply because of reasonable grounds to believe that a parent has engaged in child abuse or family violence, and then consider whether the child spending equal time with each of the parents will be in the child's best interest and so forth. If a Court made a finding that the Applicant was not in a de facto relationship at the time of conception, then the presumption of parentage would not apply, and then presumption of equal shared responsibility in s.61DA would not apply as it only applies to the child's parents. The Court would then not be required to consider whether equal or substantial and significant time, as set out in s.65DAA, would be in the child's best interest.

As it turned out in *Keaton and Aldridge*, the Court made a finding that the parties were not in a de facto relationship at the time of conception, and therefore the legislative pathway in *Goode & Goode* did not apply. It is submitted that the Court could easily have justified a finding in that case that the parties were in a de facto

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<sup>62</sup> [2009] FMCAfam 92

relationship, and that the respondent was a parent. It is also submitted that if there was a finding the applicant was a parent, then the result in that case would probably have been quite different, yet the needs of the child are no different regardless of the finding of the Court as to whether the parties were in a de facto relationship.

If changes are made to the legislative pathway contained in the *Family Law Act*, in particular requiring a Court to specifically give consideration to a child's stage of development and needs, and the impact of ongoing inter-parental conflict, and identifying the various types of family violence and their impact, the issue is then how are these matters best identified as issues in any particular case and how is evidence of it best presented? Issues concerning the stages of a child's development and needs, the impact of ongoing inter parental conflict, identifying the type of family violence and its impact on the children and the parties will require expert evidence of a social science nature.

Where family violence and/or continuing inter-parental conflict are issues, obviously lawyers have a role to take very detailed and specific instructions about these factors and carefully present it in evidence with a view to putting it into context, thus enabling a Court to assess the impact that it is having on one of the parties and the child/children. There will be a significant role for child consultants when writing family reports about the impact of these issues, plus experts when writing experts reports.

Where ongoing inter-parental conflict and family violence are issues in a case, it is preferable that these be identified as early as possible. Mediators and child consultants in the mediation process have a role to play during the screening process in intake for mediation. If the matter is excluded from mediation because of family violence or conflict between the parties, the parties will be issued with a s.60I certificate. If the parties are legally represented, given the confidentiality of the mediation process outside court proceedings it is of little assistance to the parties' lawyers trying to obtain an understanding of the level of conflict or family violence or type of family violence and the impact that it is having. Clients are not always forthcoming about family violence or ongoing inter-parental conflict for various reasons, particularly if you are acting on behalf of the alleged perpetrator. It would be of benefit to the lawyers involved if they were able to have a frank discussion about what is really going on in the parties' relationship with the mediator and/or child consultant, however this is a barrier.

It can become a difficulty if Court proceedings have commenced, including an application for interim orders, where inter-parental conflict and/or family violence is an issue in the case. There is potential that a Court may make an order which either places a child at risk or is contrary to the child's best interest without adequate evidence to undertake an appropriate assessment of the nature and impact of the inter-parental conflict and family violence.

It is submitted there needs to be more resources made available within the Family Law system to identify and deal with issues concerning stages of development and needs of children, and identifying and dealing with the impacts of inter-parental conflict and family violence. The establishment of Family Relationship Centres, and requiring the parties to participate in alternative dispute resolution prior to commencing Court proceedings, is a good start as it gives parties access to professionals who can provide advice about matters such as the stages of development and needs of children, and identify where inter-parental conflict and family violence has occurred. However, it is submitted that access to other resources perhaps in partnership with them, including Family Relationship Centres, the family law jurisdictions, and the legal profession would be desirable. This may perhaps include access to family therapy and mental health services. This is not a new idea and has previously been referred to as an Integrated Family Court.

The current process in the Family Court of having a Case Assessment Conference as the initial court event and the court's Child Responsive Program could be expanded to identify what issues are present in any particular case whether they be in relation to child development, ongoing conflict or family violence, and determine whether access to other services may be of assistance in resolving parenting issues. Such an expansion of what the Family Court would actually do and forming partnerships with other service providers will of course be at an additional cost.

Although the processes in the Family Court including the Child Responsive Programme and Less Adversarial Trials is more child focussed, the processes at interim hearings in the Family Court and in the Federal Magistrates Court in general are adversarial and rely heavily upon the parties' lawyers to bring to the attention of the Court, and adequately address in evidence, issues of child development, inter-parental conflict and family violence. This is not always achieved.

Lawyers need to be more vigilant early in parenting matters to the existence of child development issues, inter-parental conflict and family violence, and seek expert evidence to adequately address these issues in order that a Court may properly assess its impact when crafting parenting orders, if a matter cannot be resolved through ADR processes.

As for the evolution of a more integrated family law system, the allocation of funding for the establishment and continued operation of Family Relationship Centres was a positive start and the allocation of further funding for Family Relationship Centres to establish partnerships with community legal centres for the provision of legal advice to its clients is also encouraging. Hopefully this trend for the expansion of the provision of services will continue.

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