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IN THE BEST INTERESTS OF THE CHILDREN: A PERSEPCTIVE OF THE 2006 AMENDMENTS TO THE FAMILY LAW ACT

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Introduction

The recent reforms to the Part VII of the *Family Law Act 1975* (Cth) ("the Act"), introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* ("the Amendment Act"), were wide-ranging. Among the most significant of those reforms was the introduction of a presumption of equal shared parental responsibility.[1] The effect of the presumption is that, if a judge finds that it applies and is not rebutted, he or she is obliged to consider whether or not a child should spend equal time with both parents or, if not equal time, whether a child spend substantial and significant time with both parents.

Another important change was that made to the 'best interest' factors; factors that a court has regard to in deciding what order would be in the

[1] See *Family Law Act 1975* (Cth) s 61DA.

best interests of the child who is the subject of a parenting dispute.[2] These factors are now divided into two tiers – primary considerations (of which there are two) and additional considerations. Some further specific factors were also included in the Act.[3]

The two primary considerations are:

- The benefit to the child of having a meaningful relationship with both the child's parents; and
- The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.[4]

Prior to, during and after the enactment of amendments to Part VII of the Act, there was considerable debate in academic legal circles as to their likely effect on the way in which family courts would determine parenting disputes.[5] On the face of it, the amendments appear highly significant. However, **in the courtroom**, so far it seems that the outcomes in children's cases are not as different as some thought they would be.

The Chief Justice has instituted a system for recording outcomes in ways which will, in due course, permit the analysis and development of trends in the sorts of orders made. It is still too early for anything conclusive to be drawn from the information collected so far and the Court is still in the process of checking that the data collected is clean and reliable.

[2] These were previously contained in s 68F(2) of the Family Law Act and are now to be found in s 60CC.
[3] See ss 60CC(4), (4A), (5) and (6).
[4] *Family Law Act 1975* (Cth), s 60CC(2)
[5] These debates continue – see for example Patrick Parkinson, 'The Values of Parliament and the Best Interests of Children – A Response to Professor Chisholm' (2007) 21 *Australian Journal of Family Law* 213 and Richard Chisholm, 'A Brief Reply to Professor Parkinson' (2007) 21 *Australian Journal of Family Law* 229.

In another twelve months we should be starting to draw useful information from this pioneering data collection exercise.

There are five reasons for this seemingly counter-intuitive situation:

- The amendments did not interfere with the 'paramountcy principle'. The 'best interests of children' principle remains the overriding consideration for the Family Court and prevails over every other presumption to be applied or obligation imposed by the Act.[6]

- The legislature appears to have given greater prominence to the need to protect children from violence or abuse, or the risk of violence and abuse. The importance assigned to the protection of children is shown by its being an exception to the application of the presumption of equal shared parental responsibility. As always however the problem lies not in **acknowledging** the principle. It is in the **application** of the principle, especially in circumstances where the evidence is inadequate or hastily prepared.

- So far as the Family Court is concerned, we hear the most difficult and complex parenting disputes. As the Federal Magistrates Court has expanded, it has taken responsibility for the more run-of-the mill cases. The matters appearing before our judges are frequently and almost exclusively those involving the most intricate and difficult fact matrixes and the most intractable litigants. These cases are not those in which it would ordinarily be in a child's best interests to live equally with both parents.

[6] The 'paramountcy principle' is to be found in s 60CA of the Family Law Act 1975 (Cth) and its continued effect as the overriding obligation imposed on family courts confirmed in the Full Court decision of *Goode & Goode* (2006) FLC 93-286.

- In a specific area (relocation cases), although it is still very much a live debate, my view is that the ability of a parent to relocate with a child has not been affected in any meaningful way by the new obligations imposed on family courts, in particular the presumption of equal shared parental responsibility and that which follows from it.
- The less adversarial trial (LAT), the Family Court's new administrative (docket) arrangements and the Court's innovative Child Responsive Program have reduced the potential for misinformation by parties and manipulation by lawyers. They, separately and in combination, tend to focus attention on the **children** – as opposed to the parties – and enable the earlier identification of the most important elements of the evidence relating to the children's best interests.

Equal Shared Parental Responsibility

Before I examine those issues, let us first consider what "equal shared parental responsibility" means.

"Parental responsibility" is defined in s 61B of the Act as:

> *in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.*

This definition has been in the Act since 1995 and was not changed by the 2006 amendments. The term "equal shared" is not defined.

Section 61C provides that **each** parent of a child has parental responsibility for that child, subject to court orders.

Section 61D(1) provides some assistance perhaps. It states:

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

That is, a court can limit the **extent** of parental responsibility each parent has. A parent may only be given such responsibility as is appropriate for that child.

Section 65DAC provides that where an order is made sharing parental responsibility between two or more people and the exercise of that responsibility involves making major long-term decisions about the child, each of those people is required **to consult the other** about the decisions and to make a genuine effort to come to an agreement.

"Major long term issue" is defined in section 4 of the Act. It is the sharing of decision-making for children as it is related to issues about the care, welfare and development of children of a long-term nature, including (but not limited to):

- the child's education
- the child's religious and cultural upbringing
- the child's health
- the child's name

- changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

The **sharing** of parental responsibility triggers the application of section 65DAC. It is not necessary for parental responsibility to be shared **equally**.

The Full Court of the Family Court considered the effect of section 65DAC in the decision of *Goode & Goode*.[7] The Full Court said:

> *We therefore consider it clear that there is a difference between parental responsibility which exists as a result of s 61C and an order for shared parental responsibility, which has the effect set out in s 65DAC. In the former, the parties may still be together or may be separated. There will be no court order in effect and the parties will exercise the responsibility either independently or jointly. Once the Court has made an order allocating parental responsibility between two or more people, including an order for equal shared parental responsibility, the major decisions for the long-term care and welfare of children must be made jointly, unless the Court otherwise provides.*[8]

The presumption of equal shared parental responsibility in section 61DA should be considered in the light of the following:

[7] (2006) 93-286.
[8] Ibid at 80,894.

i) It does **not apply** if there are reasonable grounds to believe that a parent of a child, or a person who lives with a parent of a child, has engaged in family violence or child abuse.[9]

ii) It can be **rebutted** by evidence that it is not in the child's best interests for the presumption to apply.[10]

iii) It does not relate to the **time** that children will spend with a parent.[11]

iv) It does not mandate **how** parental responsibility is to be shared. That is, parents are not necessarily required to live in the same area. Parents will not necessarily be required to speak to each other, to be in the presence of each other, or to abandon protection orders or domestic violence orders.[12] It will not force a person to come into physical contact with the other.

Undoubtedly it is hard for parents to make decisions jointly if they are unable to communicate in some form. However, if reasonable communication is not possible, then it is unlikely that the presumption will be applied as it will either be a case involving allegations of violence or it will not be in the best interests of children.

[9] *Family Law Act 1975* (Cth), s 61DA(2).
[10] Ibid s 61DA(4).
[11] See note to *Family Law Act 1975* (Cth), s 61DA(1).
[12] See *Family Law Act 1975* (Cth), Part VII, Division 11, which concerns the interrelationship between family violence orders made in state courts and parenting orders made by courts exercising jurisdiction under the Family Law Act. See also s 60CG, which requires the court (under certain conditions) to ensure that any parenting order is consistent with any family violence order.

The Best Interests of Children

Any decision about parenting must always be made in the best interests of the child. The presumption of equal shared parental responsibility, the consideration of equal time or substantial and significant time, and any other parenting orders are all subject to the principle that the child's best interests are paramount. As is clear from section 60CA of the Act and, as the Full Court confirmed in *Goode*,[13] the best interests of the child remain the overriding consideration.

The determination of those best interests is now more directed by the Act.

The primary considerations are contained in section 60CC(2). This section directs the Court to consider the benefit of a child having a meaningful relationship with both parents and the need to protect children from harm caused by being subjected or exposed to violence or abuse. The resolution of these (in some cases contradictory) considerations depends on the evidence before the Court.

The Court is also directed to take account of additional considerations. These are in many ways similar to the matters formerly prescribed by what was then section 68F(2).

The Court is required to assess, among other things:

- any views expressed by the child and any factors relevant to the weight the Court should give the child's views[14]
- the capacity of each parent to provide for the child's needs[15]

[13] (2006) 93-286 at 80,888-9.
[14] *Family Law Act 1975* (Cth), s 60CC(3)(a)

- the attitude of the parent towards the child and the responsibilities of parenthood[16]
- any family violence involving the child or a member of the child's family[17]
- whether any family violence order applies.[18]

The Court will be assisted in this task not only the by the evidence of the parties and their witnesses that the Court has directed be filed but also by its family consultants, who will have already worked with individual families during the pre-trial phase, by family reports (either prepared by family consultants or other experts) as ordered by the Court and by oral evidence from expert witnesses. Each case is different and thus the weight to be given to the different considerations under section 60CC will be different.

Meaningful Relationships

Whether or not it is in a child's best interests to maintain a meaningful relationship with both parents, and the circumstances through which that relationship can be enjoyed, will vary with each case. The Court will not make orders that require the involvement of both parents in a child's life where it is not, on balance of all relevant factors, in the child's best interest. Opinions about what factors are relevant in any particular case and which of those are the more important will vary – sometimes quite substantially – among the parents, their friends and advisers, and the

[15] Ibid s 60CC(2)(f)
[16] Ibid s 60CC(2)(i)
[17] Ibid s 60CC(2)(j)
[18] Ibid s 60CC(2)()

judge. If the right balance were easy to strike, the matter would not be before the Court.

Most separating couples do reach agreement. In fact even of those who actually enter the court system, only about 14 per cent in the past have required a hearing to be scheduled and, of those, only about half have actually needed a decision from the judge. In that context it is hardly surprising that those involved disagree about many things and that in the end at least one party and, in many cases both, are unsatisfied with the judge's determination.

In many cases in the past the judge will be concerned that the parents (either represented or not) have not provided all the credible evidence needed by the judge to make the best decision he or she could. In conjunction with the new Division 12A of the Act, which establishes principles for the conduct of child-related proceedings, the Court has moved to give the parties more direction at an earlier stage through the LAT process. This means that, as far as possible, the judge will help the parents or parties to know what evidence they **should** be bringing before the Court.

But even this is unlikely to make both parties feel that the process is satisfactory. To begin with, disputes about children are among the most emotionally demanding for any parents. The drive to fight for one's children is a primordial instinct and this is exacerbated when the other party is someone once loved but now somewhere on the spectrum between "not loved" and despised.

The process of determining disputes about children, both in its evolution and in the increasingly prescriptive directions from the legislature, has produced a system dependent upon the discretionary decision of judges. Judges must take into account an ever-growing list of factors, almost all of which are not capable of objective measurement and which, once determined, also have to be balanced with "decisions" about other factors, again without any particular guidance about which of those factors should be given more weight.

The legislature appears to have attempted to provide guidance about some of these matters in the Amendment Act. There is the presumption that there should be equal sharing of the parental responsibility. There is the identification of 'primary' as opposed to 'additional' considerations for determining what might constitute a child's best interests, and the alignment of the 'objects'[19] and 'primary considerations'. But as we have seen the presumption is hedged with qualifications and the primary considerations may well be in conflict with each other in some cases. All factors depend on the ability of the parties and their lawyers to adduce evidence to establish what is asserted.

Nor does the phrase "meaningful relationship" have a fixed, immutable meaning. The judgment in *Godfrey & Sanders*, an appeal from a federal magistrate in a relocation case, provides some guidance about what that particular Full Court thought at least. Justice Kay concluded that:

> *Even if the move results in a diminution of quality of the relationship, what the legislation aspires to*

[19] Ibid s 60B(1).

> *promote is a meaningful relationship, not an optimal relationship.*[20]

The cynic might remark in the context of the comments made above that it is extremely unlikely that very many of the disputes before the Family Court are capable of resulting in an **optimal** relationship**.** A relationship may be as meaningful as it is capable of being in all of the circumstances if it involves only very limited time with or communication with one of the parents. The legislation does not prescribe the importance of a child's having "as meaningful a relationship with each parent **as is practicable in all the circumstances.**" Nevertheless, for the reasons set out above, the concept of "meaningful relationship" is not absolute, notwithstanding the opinions of some parents who come to the Court because they have been unable to find solutions for themselves.

Godfrey& Sanders shows that maintenance of a meaningful relationship does not necessarily prevail over other 'best interest' factors. In that case Justice Kay concluded that the federal magistrate:

> *…erred in concluding that the maintenance of that meaningful relationship, by continuing the contact at its present level, was necessarily more significant to the welfare of the children than allowing their primary caregiver to get on with her life as she chose and to endeavour to maximise the opportunities for the children to be adequately supported.*[21]

[20] [2007] FamCA 102 [36].
[21] Ibid [46].

As Patrick Parkinson opined:

> *A child will almost always benefit from a meaningful relationship with both parents in the absence of violence, abuse, or very high conflict. Where there is ongoing violence or intractable conflict, the interests of the child may best be served by restricting the contact with the non-resident parent or preventing it entirely. As a general rule, then, the primary considerations reflect the findings of a very large body of social science research on parenting after separation.*
>
> ***Having said this, courts cannot by order, create meaningful relationships between parents and children; they can only create or maintain the circumstances that make meaningful relationships possible*** (emphasis added). *In an individual case, the evidence may indicate that the child will not in fact benefit from such a relationship with both parents, or that such a benefit is incapable of realisation in the circumstances of the case.*[22]

Similarly, the Full Court in *Goode & Goode* was clear that although the reforms evince a legislative intention in favour of substantial involvement by both parents in their children's lives, that intention is subject to the need to protect children from harm and to the court's being satisfied that

[22] Patrick Parkinson, 'Decision-making about the best interests of the child: the impact of the two tiers" (2006) 20 AJFL 179, pp. 184-5.

any arrangements which enable parents to have that level of involvement in their children's life is both in the child's best interests and reasonably practicable.[23]

It is beyond argument that the **pathway** which is followed to arrive at a decision in contested parenting proceedings is different in many important respects from the one followed prior to 1 July 2006. However, the **destination** – namely that the orders made must be in the best interests of a child, **in all the circumstances** – remains the same.

Violence

The presumption of equal shared parental responsibility does not apply in cases of family violence or in cases of child abuse.[24] Family violence is defined in section 4 of the Act as:

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

This is a very wide definition of conduct that causes fear and deprivation and is about control and intimidation as well as physical acts of violence. The legislature decided, quite rightly in my view, that violence and child abuse is so serious that it is not appropriate for a presumption that parental decision-making be shared equally be applied.

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[23] (2006) 93-286 at 80,901.
[24] *Family Law Act 1975* (Cth), s 61DA(2).

Assessing the veracity of allegations of violence and abuse is one of the most difficult tasks that Family Court judges face. Almost always in such matters it is a case of the victim's word against the accused, with little (if any) corroborative evidence available to the Court. Yet it is essential that the court makes a careful, considered and detailed evaluation of the evidence available to it so as to make orders which best secure the safety of children and other family members.

The difficulties associated with this task were revealed by the Australian Institute of Family Studies' (AIFS) *Allegations of Violence and Child Abuse in Family Law Children's Proceedings* report.[25] The AIFS found that many of the allegations of violence made in children's proceedings in the Family Court and the Federal Magistrates Court were at the "severe" end of the spectrum; and yet a considerable number of allegations were accompanied by a **low level of specificity, low levels of corroborative evidence** and either denials or a complete absence of responses.

The issue of family violence, particularly as it affects children, has long been of concern to the Family Court. This has been evidenced in myriad ways, including the Court's development and implementation of its overarching **Family Violence Strategy** and the **Magellan program,** a national case management system for disputes involving serious allegations of physical or sexual abuse of children.

The AIFS report emphasises the importance of reliable evidence in making assessments as to the credibility of allegations and the level of risk of violence and/or abuse that a child may be exposed to if particular

[25] Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings*: *a pre-reform exploratory study*, Australian Institute of Family Studies, Commonwealth of Australia, 2007.

parenting arrangements are put in place. The study emphasises that without such evidence, the Court is unable to make positive findings about the allegations and therefore they cannot be given significant weight in the 'factual matrix'.

It is of course not the role of the Family Court to **investigate** allegations of violence and/or abuse as opposed to assessing evidence put before the Court. The responsibility for investigation lies with State and Territory governments. However, the amendments to the Act impose specific obligations on courts, including the Family Court, to identify, at an early stage, matters in which issues or allegations of violence or abuse are raised and make appropriate orders about the collection of evidence and the protection of parties and children.[26]

Parties who raise issues of violence and/or abuse in children's cases are required to file a *Notice of Child Abuse or Family Violence* and a supporting affidavit. In the Family Court, as soon as the notice is filed the matter is referred to a Duty Registrar who decides where it should be listed and what orders should be made procedurally to ensure that relevant evidence will be before the Court. These could include orders for the preparation of an expert report, the appointment of an Independent Children's Lawyer or the intervention of a State welfare agency. Urgent cases requiring interim orders, such as protective injunctions, go directly before a judicial officer.

Since 1 July 2006, the Court can also make orders for a State or Territory agency to provide information and documents to the Court relating to

[26] *Family Law Act 1975* (Cth), s 60K.

child abuse or family violence.[27] These documents can include notifications of suspected violence or abuse of a child and any reports of assessments or investigations into a notification. The Family Court, together with the Federal Magistrates Court, has undertaken nation-wide consultation with State authorities and developed protocols for the production of these reports.

The issue-based focus of the Less Adversarial Trial and the greater control exercised by the trial judge over the conduct of proceedings, including the evidence to be relied upon, enables the Family Court to bring a more structured and purposive approach to its consideration of allegations of violence and abuse. The Child Responsive Program, which the Court is introducing across Australia, similarly refines the issues in dispute in a supportive environment where early disclosure of dysfunctional behaviour is encouraged.

Better securing the physical safety of litigants who have experienced violence is also a priority area of activity for the Family Court. All members of the Family Court's non-judicial staff have received dedicated training in assisting clients whose safety may be at risk. This training has been augmented by the screening and risk assessment pilot, which was successfully tested and evaluated in 2005-06. The screening and risk assessment process has now been introduced on a national basis.

Where the Court forms the view that it is appropriate for a child to spend time with a parent against whom allegations of violence or abuse have been made, it can order that any interactions between the parent and the child be supervised by a professional child supervision agency or a

[27] Ibid s 69ZW.

trusted third party. Family consultants can also be required to supervise or assist compliance with parenting orders.[28]

Ordinarily, however such provisions should only operate temporarily but as with all matters relating to children the Court must assess what would be in the child's best interests and this will turn on the circumstances proved in each case. What may be appropriate for a short time while investigations are completed or evidence gathered for determination by the Court may be inimical to the child's interests if prolonged.

It is always the best interests of the child which are of concern. No matter how fair or unfair some precautions may seem to the parents the Court's ultimate duty is towards the child. That is not to suggest that a court can or should behave arbitrarily. Almost always the proper application of the principles of natural justice will also satisfy the securing of the child's best interests. However the most exquisitely difficult situations involve allegations which are at the point when an order is sought, either inadequately proved or incapable of resolution at that point because of time constraints.

For example, urgent applications may only be able to be assessed on the papers filed because the judge does not have the time in his or her docket to provide the more substantive investigation required. In such cases the judge must balance risk and all the other factors relating to the child's best interests using only the inadequate and hastily prepared material available. This is not intended as a criticism of lawyers and their clients. However, in urgent situations it is not always possible to assemble admissible and relevant evidence quickly. This deficit does not relieve

[28] Ibid, s 65L.

the judge of his or her responsibility to make the order which best satisfies the provisions of the Act in the circumstances. What it does do is to make that task very difficult.

Rebuttal of Presumption of Equal Shared Parental Responsibility

Many of the cases which come to the family Court are unlikely to be those in which the appropriate circumstances exist for the parents to share parental responsibility equally. In such cases it will be rare for the presumption to remain unanswered by evidence. The difficulties and inappropriateness of some parents sharing parental responsibility for their children, let alone sharing substantial amounts of time with their children, have been evaluated in a preliminary way by McIntosh and Chisholm.[29] The cases that come for final determination **by the Family Court** are often those where the parents' communication is minimal, the relationship is characterised by distrust or cases where one parent lives a significant distance away from the other (or wants to).

The Family Court at the direction of the Chief Justice has begun to record the outcomes of its orders, including the arrangements either ordered by the Court or consented to by the parents. It is too early to evaluate the effect that the new legislation is having on the sorts of orders Family Court judges are making but a preliminary assessment suggests that there are more orders being made which share either parental responsibility or time or both. In many cases of course the time spent with one parent will be significantly less than one half.

[29] Jennifer McIntosh and Richard Chisholm, 'Shared care and children's best interests in conflicted separation. A cautionary tale from current research', (2007-8) 20 *Australian Family Lawyer* 3.

The presumption of equal shared parental responsibility may work well in cases where informed parents willingly agree and co-operate for that result. These cases are unlikely to end up in the Family Court for final determination. The circumstances that contribute to effective shared parental responsibility are those that have the characteristics identified by McIntosh and Chisholm, such as the ability to communicate, child-focussed arrangements, a commitment from everyone to making arrangements work, geographical proximity, flexible work arrangements, financial security (especially for women) and shared confidence in each parent's ability to physically and emotional care for their child or children.[30]

A judge cannot reasonably impose equal shared parental responsibility on parents that are unwilling or unable to make it work. That does not preclude the possibility of the child spending time with a parent without allocating or sharing parental responsibility, again, if that time would be in the child's best interests. **The Legislature cannot make laws to make people co-operate; judges cannot make orders to change human relationships.**

Equal Time and Substantial and Significant Time

It appears from our preliminary data that in most cases that come before the Family Court on a contested basis and proceed to judgment, equal shared parental responsibility is not ordered. As such, the Court is not statutorily obligated to go on to consider equal time or substantial and significant time.[31] However, that is not the end of the matter. Irrespective

[30] Ibid p. 1.
[31] *Family Law Act 1975* (Cth), s 65DAA(1) and (2).

of the presumption, a party may seek an order for equal time or for significant and substantial time or such an arrangement could also be recommended by the appointed independent children's lawyer, which would oblige the Court to consider it. Indeed, the Court may itself, independent of the parties' positions, consider whether equal time or substantial and significant time would be in the best interests of the child (although the parties would be given a right to make submissions). The court may make an 'equal time' or 'substantial and significant time' order after consideration of all the evidence pertaining to the various section 60CC considerations. This may (and usually does) involve the evaluation of evidence from expert witnesses.

Relocation

I have heard it suggested that a likely effect of the shared parenting laws is to make it more difficult for parents to relocate with their children, especially where a parent is seeking to move a long distance away.

This argument is advanced on the basis of a confluence between the legislature's emphasis on children maintaining a meaningful relationship with both parents, many of the 'additional' section 60CC factors (in particular the practical difficulty and expense of a child spending time with a parent), and consideration of section 60CC(4), which takes into account the extent to which both parents have fulfilled or failed to fulfil their responsibilities as parents.

There are some matters which might be said without detracting from the reality that each case must be considered on its own terms and evidence

and ultimately any decision made must be in the best interests of the child or children with all the difficulties and circularity that brings.

First, as I mentioned earlier, it appears that equal shared parental responsibility and equal time or substantial and significant time are less likely to be ordered in contested proceedings before the Family Court. Where the Court declines to make such orders, those considerations will not impact on the relocation proposal and the decision whether or not to permit a parent to relocate will be made on the basis of the 'best interests' test, having regard to the objects of the Act, the principles underlying those objects and section 60CC factors.

The most significant potential obstacle for relocation is the concept of meaningful relationships. This I have explored previously and will mean something different to each child. It may be possible for a child and a parent to be able to have a "meaningful" relationship across distance, or it may not be. There may or may not have been a particularly meaningful relationship between the child and one parent post-separation or the relationship may have been destructive for the child and is unlikely to improve over time. It may be that the benefits of relocation are more pertinent to the child's best interests than the benefit of a meaningful relationship.

I also wish to emphasise that before a court can make an order that a child spend equal time with a parent, or substantial and significant time, the court must be satisfied such an order is in the child's best interests **and**

reasonably practicable.[32] The term 'reasonably practicable' is defined in section 65DAA(5) of the Act. It requires the Court to have regard to:

- how far apart the parents live from each other
- the parents' current and future capacity to impellent an arrangement for the child to spend equal time or substantial and significant time with both parents
- the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing such an arrangement, and
- the impact that an arrangement of that kind would have on the child.

The recent Full Court decision in *Sampson & Hartnett (No 10)*,[33] whereby an appeal was allowed on the basis the trial judge failed to consider the reasonable practicability of arrangements she then went on to order, demonstrates that 'reasonable practicability' is an important part of the deductive process judges must follow.

Where a parent is seeking to relocate with a child and the court applies the presumption of equal shared parental responsibility, or where the party opposing the relocation is seeking a substantially shared living arrangement, the court must be satisfied of the **practicability** of such an arrangement before making the order sought.

Although some of the new provisions (such as those mentioned above) may seem to set relocation cases apart, there is no special category of

[32] Ibid s 65DAA(1)(b), (c); s 65DAA(2)(d), (e).
[33] [2007] FamCA 1365.

'relocation cases'. The abiding criterion is "the best interests of the child" and although relocation complicates the consideration of what is best for the child it does not require or indeed allow for a different approach by judges.

The second point is that equal shared parental responsibility may be able to be exercised across distance. If communication and cooperation between the parents is sufficient to conduct a 'business-like' relationship, it may be that an order for equal shared parental responsibility is possible.

Thirdly, the best interest factors in section 60CC are carefully considered by the Court and as such if relocation is in a child's best interests, that is what will be ordered. This is the same position as before the amendments to the Act.

The Less Adversarial Trial

Among the changes made to children's law by the Amendment Act was the introduction of Division 12A. This Division contains principles for the conduct of less adversarial proceedings in children's cases. The Family Court of Australia gives effect to Division 12A through the Less Adversarial Trial (LAT) process. As Professor Chisholm observed in a recent article, the words "less adversarial" refer to court proceedings that depart in significant ways from the distinctive, traditional common-law model of court proceedings.[34]

One of the benefits of LAT is that the judge is actively involved in running the case, including refining the issues in dispute and directing the

[34] Richard Chisholm, 'Less Adversarial Proceedings in Children's Cases', (2007) 77 *Family Matters* 28.

evidence to be filed. Additionally, many of the rules of evidence (such as the hearsay rule) do not apply unless the Court forms the view that special circumstances exist that warrants their application. This is frequently the case where the matters in issue may require a determination that one party has committed a criminal act or other serious allegations are made and the interests of justice and fairness require a more traditional approach to some parts of the evidence.

The benefit is proving to be substantial even in complex cases. By taking control away from the lawyers and speaking directly with the parties, judges are often able to get a perception of the relationship between the parents, the aspirations the parents have for the children and what the matters **really** in dispute may be.

Conclusion

In summary, while the legislature has injected more direction into the process of making orders about children, the basic and overarching principle of the best interests of the child prevails. Each case must be considered on its on merits and all relevant evidence must be evaluated. The fact that some parents have their disputes determined in the Family Court will probably indicate that the process of finding facts, evaluating factors and balancing these matters to arrive at a conclusion will regularly give rise to disagreement about the outcome from one, if not both, parents.

Perhaps what is of more concern for the future are those who bargain in the shadow of the law. The Court and, to some extent the legislature, cannot know if agreements reached outside the court system have been

arrived at with knowledge and understanding of what the law is. Sadly, the more prescriptive the law, the less the average citizen may appreciate and understand it and perversely the more likely it is that parties may make decisions contrary to the intention of the legislature because of the inaccessibility of the law.

That having been said, the objectives and the principles of the new legislation are unimpeachable for those who are able to cooperate, communicate and collaborate without fear and who are able to put the interests of their children ahead of their own interests following the breakdown of a relationship. The Family Court will continue to find ways to work with parents and the legislature in the best interests of the children but will do so recognising that every child is an individual and every case is different.