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SHARED PARENTAL RESPONSIBILITY & CHILD SUPPORT

"Tips and traps for practitioners in advising new and existing clients about the 2 new regimes"

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INTRODUCTION

The introduction of new regimes directed at parenting orders and child support after 1 July 2006 represents new goals and challenges for Family Lawyers.

The community and our legal colleagues practicing in different jurisdictions, at times underestimate the complexities of the legal issues that confront family lawyers, well beyond the scope of the Family Law Act 1975. Family Lawyers are frequently dealing with legal conundrums that draw in corporations laws, laws of equity and trusts, criminal and property law. Moreover, family lawyers are providing advice in respect of parenting and the welfare of children that navigates the matrix of precedents as well as the dysfunctions of a family breakdown.

The "chalice" a family law client often carries, is the potential that early decisions about their children will impact on future proceedings. "If we got to Court…" is a harsh reality for your clients to consider when assessing proposals for children, especially when separation is often new and emotions are very raw.

The Government aims to provide more dispute resolution services as an alternative to court. The laws commenced on 1 July 2006 and the government has allocated many millions to a community education campaign that will run until 1 June 2010 to highlight the new family law system and it's focus on changing the culture of family separation. After 1 July 2007 parents must undertake dispute resolution before they can file an application to the court save in specific circumstances relating to child protective issues and family violence. The Government does not wish parties to view mediation as the "first step" before litigation but a better, more collaborative, alternative to deal with parenting decisions.

The new Shared Parental Responsibility Act ("the New Act) aims to guide practitioners, the court and litigants in relation to the conduct of children's matters including providing a two-tiered definition of factors that a court must take into account when defining a child's best interests. In providing such guidance, the government unabashedly goes beyond wishing to simply reflect community standards. The Attorney General's Department clearly states that the New Act is designed to "change the way people think about family breakdowns". In doing so the Government believes "it will improve outcomes for children by promoting shared or cooperative parenting".

The new child support regime is said to compliment the shared parental responsibility regime. The Ministerial Task force reviewing child support argues that there will be less conflict and more co-operative parenting if the child support reforms are introduced to reflect more accurately the true costs of children and balancing the incomes of first and second family needs equally.

However, what are the practicalities for family lawyers in advocating the principles enshrined in these new laws? For example, a group of families "miss out" in the new regime. Although laws directed at cultural consideration within families; including appreciation for those of Torres Strait Island or Aboriginal descent, are a welcome addition to our Family Law Act, there has been no response to the repeated call from various judgments of the Family Court for legislation to address the position of children within same sex parent families. The Government assumes that "family breakdown" is the end of a relationship between a father and a mother. What can you advise clients who have children raised in a same sex relationship?

The greatest challenge for practitioners is to advise your existing and new clients about the real impact of the new laws on their matters. Your task is further complicated by misconceptions that have been created by the media about the impact of the new laws. For example; "Equal time for Dads" has been a catch cry in the popular press reporting the new parenting reforms. Already I am assuming this audience has a basic knowledge of the new reforms sufficient to know that when your new client, a "devoted dad", steps into your office touting the "equal time article" triumphantly as a precedent for shared living arrangements; he will need to be re-educated about the complexities and practical reality of assessing an application for a shared living arrangement. This new client will need to be taken through the concept of shared parental responsibility and then the two-tiered system of primary and secondary considerations when assessing the best interest of his child. In addition, there are the historical attitudes of the Court to shared care which the new legislation does not address and which we as practitioners will still need to consider in providing complete advice.

This paper aims to highlight the substantive issues that practitioners may need to bring to the attention of their existing "pre-1 July 2006" clients and new "post 1 July 2006" clients that may alter from the advice you would have previously given prior to the new legislation.

Shared Parental Responsibility Act (the New Act)

1. ***Impact on advising existing clients with applications pending after 1 July 2006***

Changes to current parenting orders will only be made where the court is satisfied that there has been a significant change in circumstances. (ss 44 of the New Act is a re-statement of the law relating to a change in circumstances in *Rice v Asplund* (1979) FLC 90 725.)

Section 61DB outlines that if there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order. Section 61DB prevents the status quo factor from having an effect that defeats the equal shared parenting message of the New Act.

Parenting orders may be read as subject to a subsequent parenting plan whereby parenting plans may be a defence to a contravention application.

2. ***Impact on advising client with pre-existing orders, i.e. prior to 1 July 2006***

The amendments will apply only to parenting orders made after the commencement of the New Act. The new laws apply to any parenting orders made on or after 1 July 2006, regardless of when the application first went to court.

Thus, it would be prudent to write to clients and advise them that the laws have changed and invite them to revisit their affidavit material and the merits of their matter in the context of the new laws.

It is likely that orders will be made in the terms of the new terminology so an amended application allowing for the new language may be appropriate. (See Table A at page 4).

3. ***Impact on advising new client who have not issued an application for parenting orders.***

(i) Write to clients and advise them that the laws have changed and invite them to revisit the merits of their matter in the context of the new laws

- Section 12E obliges legal practitioners to give a person considering instituting proceedings documents containing information about non-court based family services and court's processes and services (12B) and also documents about reconciliation (12C) and Part VII proceedings (12D).

- According to s12E (4) and (5), where a legal practitioner has reasonable grounds to believe that the person has already been given documents with this information they do not have to comply with ss (1), (2) or (3) and if there is no reasonable possibility of reconciliation between the parties to a marriage, a legal practitioner does not have to comply with ss (2).

(ii) Introduce the New Terminology and the philosophy behind the new language used in the New Act. (See Table A below).

TABLE A - NEW TERMINOLOGY TO APPLY IN DRAFTING PARENTING APPLICATIONS/AFFIDAVITS AND ADVISING CLIENTS:

TERMINOLOGY CHANGES	
Family Law Act *(Old)*	**Family Law (Shared Parental Responsibility) Act 2006 *(New)***
'residence'	'living with'
'contact'	'time spent with' and 'communicates with'
'child's wishes'	'child's views' (which will capture a child's perceptions and feelings without the child having to make a decision or express a 'wish')
'abuse', 'domestic violence' and 'partner violence'	'family violence'
'residence orders', 'contact orders' and 'specific issues orders'	'parenting orders'
Section 68F (best interest factors)	Section 60CC (best interest considerations)
'child representative'	'independent child's lawyer'
'court counsellor' and 'mediator'	'family consultant'
'counsellor', 'mediator' (working outside court system)	'family counsellor'
'welfare officer'	'family consultant' (for continuing service) and 'family counsellor' (for personal/interpersonal issues)
'primary dispute resolution'	Replaced with specific forms of intervention
'family and child mediation'	'family counselling' and 'family dispute resolution' (facilitative and advisory)
	'advisors' defined as: legal practitioners, family counselors, family dispute resolution practitioners and family consultants
	Section 65DAC 'equal shared parental responsibility' obliges a court to consider 'equal time' or 'substantial and significant time' (s65DAA)
	'major long term issues' means change of name,

	change to living arrangements, religion, education, health etc.
	'Relative' includes step-parents, siblings, half-siblings, grandparents, uncles, aunts, nephews, nieces and cousins
'Aboriginal peoples'	'Aboriginal child' means 'a child who is a descendent of the Aboriginal people of Australia
	'Aboriginal or Torres Strait Islander culture' means the culture of the Aboriginal and Torres Strait Islander community, which includes lifestyle and traditions of that community

(iii) Inform parents that they could consider entering into a parenting plan in relation to the child and must also inform them about where they can get further assistance to develop parenting plans (s63DA (1)).

- inform those making parenting plans that if equal time is reasonably practicable and in the best interest, they could consider an arrangement of that kind, otherwise they might consider substantial or significant time (s63DA(2)(a),(b)) and also information about responsibility (f);

- inform clients that s65DAB requires the court to have regard to the terms of most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interest of the child to do so (s63DA(2)(h)).

- No requirement for registration for independent legal advice;

- Not enforceable but could be taken into account as a reasonable excuse for a contravention application.

(iv) Family Dispute Resolution: If clients have not attended any form of mediation; encourage them to do so verbally and in writing before issuing proceedings.

- Provide clients with a list of Family Dispute Resolution Centres and Family Dispute Resolution Practitioners.

- Advise that as of 1 July 2007, it will be mandatory to have a certificate from a Family Dispute Resolution Practitioner before parenting proceedings can commence. Those certificates will say whether there has been a "genuine effort" to resolve the issues. No certificate is required where there is violence, or abuse, or urgency.

- Communications with a Family Dispute Resolution Practitioner are confidential and privileged.

(v) Consider introductory pro-forma letters that list the new terminology and principles in s60CC in user friendly language. There will be an increased onus on legal practitioners in terms of the information and advice required to be provided to a client and also the information to be provided to the court:

- The court must consider whether each parent has in the past fulfilled his or her responsibilities as a parent;

- The paramountcy principle survives;

- The new laws cannot be seen as a justification to amend existing orders.

- Residence and contact (nothings of custody and access) have been replaced with "living with", "spending time with" and "communicating with";

- There is a presumption that "equal shared parenting" is in the best interest of the child;

- An order for "equal shared parental responsibility" imposes and obligation on the court to consider ordering "equal time" or "substantial and significant time"

- An order for "shared parental responsibility" imposes on parents an obligation to consult on "long term issues";

- Long term issues are specifically defined to include change of name and changes to "living arrangements that make it significantly more difficult for the child to spend time with the parent";

- The court must consider whether each parent is likely to facilitate a "close relationship" between the child and the other parent.

(vi) Advising clients about the two-tiered system when considering "equal time" or "substantial and significant time".

Assuming that in most cases parent will be entitled to equal shared responsibility; how do we assess whether "equal time" should follow and be in the best interests of the children?

(a) Practitioners need to come to become articulate with the "primary and additional considerations" set out in section 60CC.

- Section 60CC creates two tiers of considerations that the court must take into account of in determining what is in the best interests of a child.

- The primary considerations are contained in subsection 60CC (2). They include the benefit to the child of having a meaningful relationship with both parents and the protection of the child from physical and psychological harm. The safety of the child is not intended to be subordinate to the child's meaningful relationship with both parents.

- At paragraph 50 of the Explanatory Memorandum it is noted that "there may be some instances where secondary consideration may outweigh primary considerations". The example provided by the Explanatory memorandums seems to indicate that three additional considerations could outweigh a primary consideration, in a case where violence, abuse or neglect do not feature.

- The point of separating these two factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the objects of Part VII of the Act which are set out in the new section 60B.

- If equal time is not appropriate, then practitioners should consider whether substantial and significant time is reasonably practicable an in the child's best interest. If these issues are not resolved, a court will determine parenting arrangements and will consider reasonable practicality based on various factors as listed in s65DAA(5) which reflect successful parenting arrangements as discovered by AIFS research. Lawyers should highlight the importance of a commitment by both parents to make parenting arrangement work and also the need for parents to create child-focused arrangements which centre on their child's activities, family friendly work practices, financial independence and parental competence. 1

(b) What is a meaningful relationship? This will depend on the context of the case. Can parents have a meaningful relationship with a child if they are separated from a child who is living interstate or overseas? In this regard I refer to the impact on relocation cases at page 10 of this paper.

Psychological studies may assist us when assessing a child's development and what constitutes a meaningful relationship. For example, in the article written by forensic expert psychologist Vincent Papaleo "Developmental considerations, In contact &

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residence disputes", he makes it clear that one of the fundamental factors to be taken into consideration when considering [contact] arrangements for children is to "maximise the relationship with each parent by having as much contact as the child's development allows". Mr Papaleo encourages following age appropriate considerations in promoting a meaningful relationship in an age appropriate manner to minimize loss, maintain normal support and maximize the relationship with each parent as follows:

- 2 year old: thrives on predictability, consistency and routine. Plans should emphasise more frequent contact of less duration and as little disruption as possible to night time routine as children's ability to cope with stress is reduced;

- 3-5 year old: both parents should maintain as firm, clear and unambiguous limits as possible. Frequent but short stays are best but overnight stays can be tolerated. Consistency across both homes where discipline and routine are concerned is important;

- 6-12 year old: thrive on structure and routine, can tolerate long periods without excessive fear or anxiety. Children may be more demanding of knowledge about divorce. Shares residence may work, but a degree of consistency is required;

- 13-17 year old: young teenagers experience pain, guilt, anger and responsibility. Plans should focus upon which parent is able to sustain the parental role.

(vii) Child Abuse or Family violence

The New Act expressly states that protecting children from risk of violence is a primary principle (along with the rights of children to know their parents) when a court is considering the children's best interest.

- The presumption of shared parental responsibility does not apply if there has been violence or child abuse or there is a risk of it. In these circumstances, the court is not obliged to consider the parents' sharing responsibility. It follows that if there has been violence or abuse or there is risk of it, the court is not obliged to consider spending equal time or substantial time with both parents.

- In cases where there has been violence or child abuse, or there is a risk of it, separating parents are not required to attend dispute resolution before taking a parenting matter to a court.

- You should still provide such clients with information about the services and options (including alternatives to court actions) that may be available to them - as long as the

provision of this information does not lead to a risk of abuse or violence if there were to be a delay in apply gin for a court order.

There is a new definition of family violence.

- *Section 4(1) definition of family violence*: '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.'

- This new definition requires reasonableness like most state law domestic family violence provisions. The concern that has been raised by some commentary such as the Family Law Journal is that a literal interpretation would be that the violence needs to be associated with a recent immediate incident not historical incidents. However, the Attorney General's view in inserting this provision was that the reasonable test was the be judged in the "shoes of the complainant". One would assume that would include consideration of past or repeated acts of violence to put apprehension in the appropriate context.

- Some family violence orders are irrelevant. A family violence order is now only relevant if it is a final order (whether ex parte, defended or undefended) or it was contested (as an interim order). In ascertaining "best interests" under s 60CC(3)(k), a court cannot take into account a family violence order unless it is a final order or made after a contested hearing. You will need to advise a client that an uncontested interim or ex parte order is of no benefit in parenting proceedings. This could have the effect of exacerbating family violence litigation in the State Courts.

- Where the court is satisfied that a party has knowingly made a false allegation or a false denial in the proceedings, the court must order that party to pay some or all of the costs of the other party.

(viii) <u>The Court's role in Conducting Child Related Proceedings</u>

Section 69ZN outlines the principles for conducting child related proceedings and highlights that the court must consider the needs of the child concerned and the impact that the conduct of proceedings may have on the child. The proceedings must, as far as possible, be conducted in a way that will promote cooperative and child-focused parenting by parties and proceedings should be conducted without undue delay and with as little formality and legal technicality as possible.

The court must consider the needs of the child concerned and the impact that the conduct of proceedings may have on the child in determining the conduct of the proceedings

- The court must actively direct, control and manage the conduct of the proceedings

- The proceedings must be conducted in a way that will safeguard:

    - The child concerned against family violence, child abuse and child neglect; and
    - The parties to the proceedings against family violence

- The proceedings must, as far as possible, be conducted in a way that will promote cooperative and child-focused parenting by the parties

- The proceedings must be conducted without undue delay and with as little formality, and legal technicality and form, as possible

The court has duties and powers related to giving effect to the principles. These are set out in s 69ZQ. The court must:

- Decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily

- Decide the order in which the issues are to be decided

- Give directions or make orders about the timing of steps that are to be taken in the proceedings

- In deciding whether a particular step is to be taken, consider whether the likely benefits of taking the step justify the costs of taking it

- Make appropriate use of technology

- If the court considers it appropriate — encourage the parties to use family dispute resolution or family counselling

- Deal with as many aspects of the matter as it can on a single occasion

- Deal with the matter, where appropriate, without requiring the parties' physical attendance at court

(ix) Relocation

The provisions of the New Act will change the laws relating to relocation by the introduction of the Shared Parenting Laws making applications to relocate more difficult. A move interstate or overseas (as opposed to an intra –metropolitan move) would conflict with the new focus on a child having a meaningful relationship with both parents, being one of the primary considerations to consider under the new two-tiered system.

The leading cases on relocation refer to the importance of guiding legislation. (*Kirby J at paragraph 111 in AMS v AIF*[2]) "*each case depends on the application of the governing legislation which, in turn, is in turn , is in a constant state of amendment and re-expression*".

His Honour's next proposition is "*...unless legislation provides otherwise, no single factor is dipositive of decisions governing the residence of a child in the context of a proposed relocation*"

The question thus to be considered is whether the shared parenting laws give primary consideration to a child having a meaningful relationship with both parents over the relocating parent's freedom of movement to live where they desire. The impact of the new laws on a parents' right to move with a child will need to be tested in Court; however it may be that if it is found that the relocation impacts on the meaningful relation with the non-relocating parent and child, the relocation will fail.

The New Act encourages greater shared parenting after separation yet the practical reality is this becomes difficult when statistics indicate high levels of mobility within Australia for family reasons. [3]

The answer may depend on how precisely, the Full Court of the Family Court determines that the new provisions of the Act inter-relate with s60CA (formerly s65E). On the face of the Act, as amended, one would argues that if a relocation would result in one parent not having a meaningful involvement in the life of the relocating child and in the absence of evidence of violence, abuse or neglect, the weight of the statutory provisions indicating against relocation exceeds indicating for relocation.

Case Law on Relocation prior to the New Act

If you wish a more comprehensive review of the law on relocation please feel free to downloads an article I wrote in July 2005, "An update on domestic and international relocation cases" ; which you can find on my firm's website www.nicholeslaw.com.au.

The High Court has considered two relocation cases in the last six years: *AMS v AIF* (1999) 199 CR 160 *("AMS')* and *U v U* (2002) FLC 93-112 *(U and U)*. *AMS* challenged a prior long-standing

[2] (1999) 199 CLR 160
[3] *Family Law Council Handbook, The New Family Law Parenting System at 89*

approach where Courts would first identify the primary caregiver and then if the preferred caregiver was the parent requesting to move, the Court placed the onus on that requesting parent to show compelling reasons as to why the Court should allow relocation.[4]

The leading judgment of Kirby J in *AMS* concluded that the trial judge had erred by requiring "compelling reasons" for the proposed move. Kirby J highlighted that relocation cases require courts to balance conflicting interests [5] including; the disproportionate effect of such decisions on women and parents born overseas [6], the implications of an approach that requires parents to show "compelling reasons for a move, the nature of the best interest principle [7] and how failing to properly address a party's proposal can lead the Court to adopt an approach that unfairly advantages a party to the proceedings[8].

After *AMS* the Full court of the Family Court in *A v A: Relocation approach (2000) FLC (93-035) (" A v A")* endorsed the appropriate course to adopt in relocation cases as a proper evaluation of competing proposals of each parent. The Full Court provided an analysis of the relevant issues to be weighed and set out in detail the correct way to approach relocation cases.

After the second High Court case *U v U*; the law became less clear. The majority in *U v U* failed to consider some of the most pressing concerns raised by Kirby J in *AMS* nor the issues that need to be evaluated in relocation cases as identified by *A v A*. The majority in *U v U* relied on the broad discretion of the Family Law Act to make decisions in the best interest of the child as the overriding principle. [9] Although the majority of Justices Gummow and Callinan noted that *"the Family Court is obliged to give careful consideration to the proposed arrangements of the parties"*; [10] the High Court majority failed to deliver any guiding principles on what it means to evaluate a proposal and omitted to consider all the alternatives open to the non-residential parent based on the evidence at hand. Critics of *U v U*, argue that the majority delved back to the compelling reason argument that was rejected in *AMS*, which can result in discriminatory treatment of a residential parent.

Kirby J and Gaudron J dissented strongly in *U v U*. In a paper delivered at the International Association of Youth and Family Law Judges and Magistrates[11]; Justice Kirby expressed his disappointment that U v U did not result in clarification of the appropriate approach in these cases in a way that would disadvantage those who seek to relocate: His Honour commented *"I am*

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[4] See Young L. *"Will Primary resident parents be as free to move as custodian parents were?"* 1996 11 (3) Australian Family Lawyer 31 and Young L, *"B v B Family Law Reform Act 1995, Relocating the Rhetoric of Rights"*, (1997) 21 Melbourne University Law Review 722.

[5] *AMS v AIF* (1999) 199 CR 160 at paragraph 112
[6] loc. cit. at paragraph 140
[7] loc. cit at paragraph 193
[8] loc. cit at paragraph 194
[9] *U v U* (2002) FLC 93-112 at paragraph 81
[10] loc. cit at paragraph 80
[11] Justice Michael Kirby, *"Children and Family Law – Paramount interests and Human Rights"*, XVI World Congress 2002, Melbourne October 2002 at 25

disappointed by the particular outcome in this case for a woman who has said publicly that she felt trapped and enslaved by the decision[12]*, and who I believe had a strong case for relocation".*

A review of some of recent Full Court decisions post U v U 13 reveals support and reliance upon the rulings in AMS and AvA. The Full Court refers to U v U; but clearly exercises discretion taking into the concerns raised by the minority judgments in respect of gender and the freedom of movement of a primary carer. The Court looks to the evidence relating to possible alternative proposals other than restricting itself to those proposals placed in submissions when exercising the broad discretion to make ultimately a decision in the best interests of the children.

I have summarized the main points raised by the by the review of the relocation case law and added some thoughts where relevant about the impact of the New Act on those main points. These annotations are asterisked and in bold.

- The court can make orders with respect to relocation that are outside the scope of the specific proposals put forward by the parties (as long as they arise out of pleadings and oral evidence).

- The court has raised awareness that consideration ought to be given to the non-resident parent moving in order to facilitate frequent and regular contact with the child.

  *** If courts adopt this dissenting views of Gaudron & Kirby JJ, then this may be the saving grace of parties wishing to relocate ; however the FC decision of U v U did not take that factor into account.**

- Proposals should be examined in detail. If there is to be a focus it should be true and preferred proposals of the parties.

  ***the focus of the competing proposals will be on maintain the meaningful relationship with the child.**

  ***The obligation of the court to firstly consider equal and then substantial time will possibly place increased pressure on the court to make orders that result in the child living near both parents, wherever possible. Section 65DAE(e), will be an additional pressure. The court's approach to relocation in A and A: *Relocation Approach* (2000) FLC ¶93-035 is likely to be reviewed. –**

  ***Given that there are more "anti-relocation" sections than "pro-relocation" sections in the New Act, relocation has apparently been made more difficult given that shared parenting becomes harder the greater the distance between parents. It appears that if the non-relocating parent did not have a close relationship with the child and**

[12] Leonie Lamont *"Custody ties that bind"*, The Sydney Morning Herald (Sydney, 3 July 2002)
[13] This paper refers to the judgments in *DS (Full Court) 30 Fam LR 91, KB & TC [2005] FamCA458-08/06/05 and W v W [2005] FamCA 446-06/06/2005*

according to s60CC(4) did not take the opportunity to spend time with and communicate with their child prior to the application being made, the relocating parent would have a stronger case, unless the relocating parent actively discourages such a relationship.[14]

- Findings should be detailed and specific and should consider both the short and long term effects for the child

  ***in weighing up the primary and secondary considerations and the age appropriate contact arrangements following the reasoning of experts such as Vince Papaleo – it may be that a meaningful relationship can be fostered from a distance when the children are older and the relocating party has a history of being a co-operative parent.**

- Relocation cases are gendered matters. Query whether *U v U* represents a systemic discrimination against women. Stereotypes and assumptions need to be eroded so that the differences between men and women can be properly taken into account and women are treated fairly and equally. Where a mother who is the resident parent wishes to relocate with a child and where the courts consider it the child would benefit from frequent contact with both parents, equal consideration should be given to a proposal that the father in order to maintain frequent contact relocate with the mother and child.

  ***the focus will be away from a parties' freedom to move but on a child having a meaningful relationship with both parents.**

- The court should look to other jurisdictions with similar legislation. International comity should be emphasized in international relocation cases. At the fourth World Congress on Family Law and Children's rights which took place in Cape Town - South Africa in 2005 a resolution was agreed upon by the participating nations (over 60 countries were represented by delegates) as follows:

  "24 to create a frame work to make uniform standards to determine what is in the child's best interests (as opposed to forum selection) in international relocation cases."

  ***this new presumption will set us aside from other countries whose jurisdictions are persuasive not binding if we were to developing a uniform standard of dealing with these cases.**

- Adduce expert evidence in respect of the impact on the child to a resident parent social status, economic situation, standard of accommodation, emotional state and employment and personal life in Australia vis a vis say India. The criticism that this evidence was not given appropriate

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weight or consideration may not be ignored in the future if the evidence and pleadings are detailed in the material and supported by an expert opinion.

***this would include the age appropriate analysis referred to at page 7 above.**

(x) Families and children of same sex couples

There appears to be no legislative redress of the call for change by Justice Sally Brown in Re Mark [An Application Relating to Parental Responsibilities (2003) FLC 93-173] and Justice Guest in Re Patrick [An Application Concerning Contact) (2002) FLC 93-096]. The conundrum in existing case law remains.

Re: Patrick

In determining this case Justice Guest called for legislative reform he stated at 653 "It is time that the legislature considered some of the matters raised, including the nature of parenthood, the meaning of family, and the role of the law in regulating arrangements within the gay and lesbian community. The child at the centre of this dispute is part of a new and rapidly increasing generation of children being conceived and raised by gay and lesbian parents. However, under the current legislative regime, Patrick's biological and social reality remains unrecognized. Whilst the legislature may face unique challenges in drafting reform that acknowledges and protects children such as Patrick and the family units to which they belong, this is not a reason for inaction."

Justice Guest considered section 68F(1) of the Act, which outlines factors to consider when determining the best interests of the child. This section has now been overtaken by 60CC. He found that the child had a loving relationship with the mother and co parent as his primary carer and found that the child was familiar with his father and had developed a relationship with him. He further determined that all parties had the capacity to care for Patrick. He found that the mother and co parent had an obligation to facilitate contact with the father.

Justice Guest found that the father was not a parent as defined pursuant to the Act despite the fact that the child bore his genetic blue print. He determined that section 60H(3) of the Act provides that a child born of a sperm donor is to be regarded as the child of the biological father and the biological father as parent only if there is specific State law which expressly confers that status on a sperm donor. There are no prescribed laws in any state or territory to that effect. The father in this case therefore fell outside the scope of the definition of parent pursuant to the Act.

Justice Guest found that the mother and co parent were Patrick's parents. However, Justice Guest found that given the father's active role in the child's life, he should be considered a “person interested” in the welfare of the child. He was therefore entitled to have certain parental responsibilities conferred upon him, including regular contact with the child.

Justice Guest identified the need for State laws to be enacted to make available to lesbian women and their known donors a well regulated artificial insemination scheme with all the medical safeguards available to heterosexual couples. He further suggests that section 60(H) be amended to safeguard the interests of co parents and known "sperm donors" in contested residency and parenting cases.

At page 651, Justice Guest quoted the following statistics…"Gay and lesbian families are a relatively newly recognized, and it seems a growing phenomena in Australian society. While they represent a minority of families, surveys of lesbian women in NSW have found that approximately 20% have children and over 40% are considering having children in the future: see V Barbeler "The Young Lesbian Report: A Study of Attitudes and Behaviours of Adolscent Lesbians today." Twenty Ten Association , Sydney 1992; Lesbians on the Loose, 1995 Readership Survey, vol 7(3), p9.

Although gay and lesbian families are increasing they cannot be homogenized into one group for they may take many forms. Children conceived via artificial insemination may have only 2 mothers, others such as Patrick may have 2 mothers and a father, and others may have 2 mothers and two fathers. Within each of these family forms there may be a variety of involvement in the child's life.

Re Mark

At issue in *Re Mark; An Application Relating to Parental Responsibilities* was who should have responsibility for the care, welfare and development of Mark, a one year old child born in the United States. The applicants, Mr X and Mr Y, were a gay couple who travelled to the United States to arrange a surrogate agreement with Mr and Ms S. In 1992 Ms S gave birth to Mark, who was conceived from a donor egg from an anonymous donor and the sperm of Mr X pursuant to the surrogate agreement. Mr X was listed as the child's father on his birth certificate with Ms S as the child's mother. Pursuant to the surrogacy agreement Ms S and her husband Mr S agreed to relinquish all their rights as parents of the child. This agreement is not legally recognised in Australia.

Her Honour Justice Brown found that Mr Y was clearly not a parent of the child, but rather was a person concerned with Mark's care, welfare and development. Her Honour Justice Brown disagreed with Justice Guest's reasoning in Re Patrick that the definition of 'parent' is dependent on State legislation recognising the parental role of sperm donors. She determined that the definition of 'parent' within the Act is broad. Although Her Honour suggested it was open to her to find Mr X a parent she refrained from doing so. She did this on the basis that the case before her was uncontested and she did not hear any arguments opposing such a finding. In circumstances when

determining that Mr X was the parents of the child could impact on the rights of sperm donors in general she elected not to make such a finding.
Her Honour Justice Brown noted that the realities of Mark's life indicated that Mr X was his parent. Her Honour granted a parenting order on the basis of Mr X's role as a person concerned with Mark's care, welfare and development. She made orders that both men be responsible for the long term welfare of the child.

The reluctance of Her Honour Justice Brown to find that Mr X was a 'parent' of Mark under the Family Law Act appears to have been influenced by the impact that such a finding would have on sperm donors and people involved in artificial conception procedures, and the responsibilities or entitlements that could be imposed on them as a result. Her Honour Justice Brown was of the view that given the social and legal complexity of the matter, it was inappropriate for it to be the subject of judicial development. Like Justice Guest, she also recommended that this area of law be reconsidered by the legislature.

(xi) Hague Convention

The amendments reflect changes in child related terminology and dispute resolution provisions made by recent reform

- Para 111B(4)(d) provides that subject to any court order in force, a person with whom a child is to spend time or communicate under a parenting order, should be regarded as having a right of access to the child
- Sub-regulation 26(2) states that a family consultant may include in addition to the matters required to be included in the report, any other matter that relates to the care, welfare or development of the child

S111B(4) For the purposes of the Convention:

(a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of the court for the time being in force; and

(b) subject to any order of a court for the time being in force, a person who has a parenting order in relation to a child that is to any extent:
(i) a residence order; or
(ii) a specific issue order, under which the person is responsible for the day-to-day or long-term care, welfare and development of the child;

should be regarded as having rights of custody in respect of the child; and

(c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and

(d) subject to any order of a court for the time being in force, a person who has a contact order in relation to a child should be regarded as having a right of access to the child.

In advising clients who have a child with a person of international connections or there are risks of flight, ensure that your client has a right of custody under s 111B (4), noting that a mere order to spend time with or communicate will not amount to a right of custody to seek the return of a wrongfully removed or retained child.

(xii) Media Responses to Changes and Advising Clients

The Shared Parenting Council of Australia released a statement to the media heralding the new laws as 'the most significant re-write of the Family Law Bill in living memory' and declared that 'this is a fabulous result for families as the court now must consider maximizing the sharing of time so that children retained family life and their precious primary bonds with both mum and dad'.[15] Statements such as these may be misleading to parents contemplating separation as they suggest that equal time will be ordered as a matter of course

In the Age on Sun 2 July an Article titled "New law pain for divorced fathers" recognizes the misconception of many fathers about the changes to the law. The article written by Jill Stark (see Attachment A) claimed that "solicitors are being flooded with calls from fathers who think they will be granted joint custody under the legislation, which was enacted yesterday. Many are devastated to discover the law does not guarantee equal access...".

The reaction of the media to the new Shared Parenting Act will certainly influence the conceptions, and perhaps misconceptions, of those involved in Family Law cases.

"Warning: parents now more likely to flee with kids" heralded, The Sunday Age on 9 July 2006 (Attachment B). In being pressed for possible practical ramifications for international child abduction cases by the Age journalist, the writer advised that relocation may be more difficult due to the New Act, and, in that context, when advised of the difficulties, some parties may be more inclined to employ self-help. Although the journalist refers to the general context of the writer's statement later, in the article, the content was not as modified as the view the writer had provided. The complete context may have prejudiced the "eye catching" headline to a story.

Child Support Regime

Changes to the Child Support Regime are based on Australian research on the cost of children and better reflects community values towards shared parents and balances the best interests of parents and children. The new child support formula aims to reflect the true costs of raising children and be aware of the incomes of both parents and the importance of balancing first and second family needs

[15] Shared Parenting Council of Australia: Media Release, Senate Vote Herald New Dawn in Family Law

equally. The new system will be fairer, more transparent for both parents and more focused on the needs and costs of children. It will also be better integrated with the family law and income support systems. This is expected to reduce conflict between parents about parenting arrangements, encourage shared parental responsibility and ensure child support is paid in full and on time.[16]

Impact on advising existing clients

The new Child Support formula will affect almost all separated parents currently involved in the current Child Support Scheme. Other changes will affect only some parents. From mid 2006 the Child Support Agency will increase its actions against parents who failed to support their children. Further, from 2007 parents will be able to have child support decisions reviewed by the Social Security Appeals Tribunal and for many parents this will mean not having to resort to the courts when a dispute occurs and therefore costs and time are saved.

Looking towards July 2008, under the proposed changes, the amount of child support will differ depending on several factors such as both parents' income, how many children they have and their age(s), whether they have a second family, and the amount of time they have care of their children. The changes might also make applications to have a change of assessment of their child support liability simpler and clearer for parents. When payments are not being made as required the new Scheme will allow the resident parent to pursue court enforcement of the debt while the Child Support Agency continues ongoing collection.

Impact on advising new clients

Under the new regime there will be an increase in the minimum child support payment from $260 per year to approximately $320 and the cap on income will be lowered therefore some high income earners will pay less under the new regime. New clients should be advised that changes to child support obligations will not impact the financial resources available to children as only the distribution of the resources between the child's two homes will only be affected.

The new Child Support Scheme will introduce a fairer assessment of parents' capacity to earn income and will calculate child support payments based on the actual costs of children using the combined income of both parents. Both parents' contributions to the cost of their children through care and contact will be recognized and rewarded. Also, the new regime will enable non-resident parents to spend a greater percentage of their payments directly on their children.

From 2007 when payments are not being made as required the new Scheme will allow the resident parent to pursue court enforcement of the debt while the Child Support Agency continues ongoing collection. Also, while a Court is examining a case, the new Scheme gives courts increased powers

[16] Grant Riethmuller, The 2006 Child Support Amendments

to make temporary arrangements about Child Support. The new regime will also give separating parents more time to make parenting arrangements before their family tax benefit payments are affected by extending the time from 28 days to 13 weeks for parents to take action to obtain child support payments. This will better assist separating parents in reaching agreement on parenting arrangements and might also promote reconciliation.

After the final stage of change in 2008 departure from the usual administration rules may occur where a parent does not take clear work opportunities because they are unwilling to work or do not want to affect the child support assessment. The formula will also accommodate children in other families by treating them as dependants when child support liability is being calculated and the new regime will also take account of the fact that older children are more expensive. To assist re-establishment, parent's income from second and overtime jobs will be excluded from their child support income for the first 3 years after separation.

The new regime will provide better legal protection for parents wishing to make long or short term agreements and there will also be greater flexibility for parents to make an agreement for a lump sum payment. Child support will no longer be a complex obstacle to parents attempting to reconcile as the new scheme will simplify the process and allow payments to be suspended when parents reconcile and allowing the assessment to be reinstated without a new application if reconciliation fails.[17]

A three stage reform package

Your existing and new clients will need to be advised that there is a three stage reform. Package commencing with Stage 1 in July 2006, Stage 2 in July 2007 and Stage 3 in July 2008.

There is helpful and practical discussion of the new reforms on the Department of Family and Community Services website www.facs.gov.au including access to the Ministerial Report which investigated and developed the changes. Updates will be regularly appearing on this website and the child support agency website www.csa.gov.au . The Facts Sheets are re-produced below:

Stage One – Changes to the Scheme from July 2006

Changes to the Child Support Scheme are being introduced in three stages commencing from 1 July 2006, 1 January 2007 and 1 July 2008. In Stage One, from July 2006, the Government will:

Increase minimum payments

[17] Factsheet: Reforming Australia's Child Support Scheme

The current $5 per week minimum payment will be increased to just over $6 per week and be indexed yearly to the Consumer Price Index (CPI), ensuring the minimum child support payments keep pace with inflation.

Recognise and reward non-resident parents on income support who have contact with their children

Currently parents who have the care of their children for at least 30 per cent of the time receives a higher 'with child' rate of Newstart and related payments (Newstart Mature Age, Sickness Allowance and Youth Allowance). This is an additional $16.50 per week. To encourage contact between low income parents and their children this provision will be broadened to parents who have care of their children for at least one night per week (14 per cent of care).

Introduce fairer assessment of the capacity of parents to earn income

Parents can be required to pay additional child support (or be entitled to receive less) if the Child Support Agency determines they have a higher capacity to earn. Under the current scheme this can occur even when there have been legitimate changes to their circumstances. For example, a payer may need to work less because of new caring responsibilities or they may have lost their job, however they may still be required to pay child support on their previous income. This change will limit the circumstances under which a parent's income for child support assessment purposes can be increased. Additional guidance will also be provided for decision makers to improve consistency and clarity of decisions.

Reduce maximum payments

Australian research on the costs of children shows that non-resident parents on high incomes pay Child Support in excess of the cost of their children under the current formula. The new Child Support formula to be implemented from 1 July 2008 will bring payments into line with the costs of children. In the interim, the amount of income above which no additional child support is payable will be reduced from $139,347 to $104,702. High income earners will still pay substantial amounts of Child Support. For example a non-resident parent with earnings of greater than the new cap with a low level of contact with his or her two children (both under 12 years) will still pay around $24,600 per annum in child support.

Enable non-resident parents to spend a greater percentage of their payments directly on their children

Currently, a non-resident parent can direct up to 25% of their child support to pay for specific items essential for their children such as school fees or essential medical costs. Increasing this to 30%

will improve the balance between resident parents having enough money available and the wishes of non-resident parents to have their say about how child support payments are spent.

Do more to ensure child support is paid in full and on time

Currently only around half of all non-resident parents make their child support payment in full and on time. The Child Support Agency will increase its existing activities that target 'serious avoiders' and debtors. The Child Support Agency will increase its use of court action to recover outstanding amounts. As well, the number of parents investigated for deliberately understating their income will be increased and action will be taken to ensure that parents lodge tax returns.

Improved support for separating families

A range of new and expanded services are being funded by the Government to help parents agree on arrangements for their children after separation, including Child Support matters. Parents will be able to access information, professional advice and support through services such as the new Family Relationship Centres, the Family Relationship Advice Line and other expanded services.

For example, the Child Support Agency now provides a secure internet service for CSA customers. CSAOnline enables parents to:

- access and send information to the Agency 24 hours a day, 7 days a week
- view and update personal CSA details
- view and print selected CSA letters
- advise the Agency of any change in care arrangements for children
- advise the Agency of any information that might affect their estimate
- complete a general communication form to get in touch with CSA
- check out all the latest information, products, and news available from CSA through the home page.

Clients receive an acknowledgement of the information they have sent and the date it was sent to CSA Online. The information provided by clients will automatically update the CSA computer or alert Agency staff to follow up on the information received.

Employers can use the service to:

- provide child support deduction information online rather than by post, fax or email

- view previous pay date details sent to the Agency and use this as a record of the information provided

- advise CSA about any variance and the reason for differences between the scheduled deduction and the actual amount deducted

Employers receive dated electronic confirmation of the information sent.

Improve service delivery by the Child Support Agency

There will also be improvement to the way in which the Child Support Agency does business. A more customer-focused approach will include improved training, increased staffing, and more intensive case management for difficult cases.

Stage Two – Changes to the Scheme from January 2007

Changes to the Child Support Scheme are being introduced in three stages commencing from July 2006, January 2007 and July 2008.

In Stage Two commencing January 2007 the Government will introduce:

Independent review of Child Support Agency decisions

Currently parents who are unhappy with Child Support Agency decisions can only appeal them to the courts. This is expensive and time consuming. The Government will expand the role of the Social Security Appeals Tribunal to include review of Child Support Agency decisions. This will improve the consistency and transparency of decisions and will provide a mechanism of review that is inexpensive, fair, informal and quick.

Improving the relationship between the Child Support Scheme and the courts

The new Scheme will simplify the relationship between the courts and the new Child Support Scheme, making the process easier and more responsive to parents' needs. This will happen in three ways:

- Access to court enforcement by parents: At present a resident parent cannot enforce payment of a Child Support debt through the court system while the Child Support Agency is collecting the ongoing child support payment. The new Scheme will allow the resident parent to pursue court enforcement of the debt while the Child Support Agency continues ongoing collection.

- Powers of courts determining child support matters: The courts presently have limited powers when seeking information currently available to the Child Support Agency. Under the new

Scheme, a court hearing an application for enforcement of child support will have the same powers as the Child Support Agency to obtain information in relation to either parent.

- Powers of case management: Courts currently have limited powers to make staying orders. This means that debts and penalties can build up even when a court is examining the case. Under the new Scheme courts will have increased powers to make temporary arrangements about Child Support.

Giving separating parents more time to work out their parenting arrangements before their family payments are affected

Currently a resident parent is allowed 28 days in which to take action to obtain child support payments from their former partner before their Family Tax Benefit payments are affected. This timeframe can cause conflict between separating parents, undermining their ability to reach agreement on parenting arrangements or even to reconcile. This time limit will be extended from 28 days to 13 weeks.

Stage Three – Changes to the Scheme from July 2008

In Stage Three commencing July 2008 the Government will introduce:

A new formula for calculating child support

The new formula is based on new Australian research on the costs of children, better reflects community values around shared parenting, and better balances the best interests of parents and children. The formula will treat both parents' incomes and living costs more equally and take account of the fact that older children cost more. It will also ensure that children from first and second families will be treated more equally.

Ensuring a minimum payment for all children

Non-resident parents who pay child support to two or more families will have to pay the minimum payment of around $6 per week to each family, rather than dividing it between them. Parents who deliberately minimise their income to avoid paying child support (payers who claim to have very low incomes, but actually have higher real incomes or resources) will have to pay $20 per child per week, unless they can prove their incomes are in fact very low.

New treatment of second jobs and overtime to help with re-establishment

For the first three years after separation parents will be able to have income from second jobs and overtime excluded from child support calculations, when the extra money that they are earning is used to help with re-establishment costs.

Step-children without other support

Parents who have financial responsibility for a step-child (because no other person can provide support for them) will now be able to have the child treated as a dependant when their child support liability is being calculated for their first family.

New 'Change of Assessment' rules

The current 'change of assessment' processes and rules for parents are confusing and are not widely understood. Under the changes being introduced the rules under which a parent can apply to have a 'change of assessment' of their child support liability will be made simpler and clearer to all parents.

Changes to agreements for Child Support and lump sums payments

The new Child Support Scheme will improve the process for parents wishing to make agreements. There will be better legal protection for parents who want to make long-term agreements and it will be easier to make shorter term agreements.

In addition, there will be increased flexibility for parents wishing to make an agreement for a lump sum amount (for instance, parents who wish to transfer ownership of the family home instead of making regular cash payments).

Parents who want to reconcile

Currently, if parents reconcile and then separate again the processes for child support liability are overly complex and may be an obstacle to parents who wish to reconcile.

The new Child Support Scheme will simplify the process and parents will be able to suspend child support payments for a period of six months when they get back together. If the reconciliation fails, the resident parent can reinstate the assessment without having to make a new application, further reducing conflict between parents.

Will the new changes in child support laws mean an increase in applications to vary child support agreements?

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2. Existing Clients with pre-existing orders; i.e. pre 1 July 2006: pp 2 - 3
3. Existing Clients with pending applications for parenting orders filed pre 1 July 2006: p3
4. Existing Clients who have not issued parenting orders: pg 3-18

(i) To write to clients and advise them that the laws have changed and invite them to revisit the merits of their matter in the context of the new laws: p3

(ii) Introduce the New Terminology and the philosophy behind the new language used in the New Act. See Table A at page 4: pg 4-5

(iii) Consider introductory pro-forma letters that list the new terminology and principles in s60CC in user friendly language: pg 5

(iv) If they have not attended any form of mediation; encourage them to do so verbally and in writing before issuing proceedings: pg 5

(v) Advise that as of 1 July 2007, it will be mandatory to have a certificate from a Family Dispute Resolution Practitioner before parenting proceedings can commence. Those certificates will say whether there has been a "genuine effort" to resolve the issues. No certificate is required where there is violence, or abuse, or urgency: pg 5

(vi) Advising clients about the two-tiered system when considering "equal time" or "substantial or significant time": pp 6-8

Assuming that in most cases parent will be entitled toe qual shared responsibility; how do we assess whether "equal time" should follow and be in the best interests of the children?

- Practitioners need to come to grips with the "Primary and Additional Considerations" set out in section 60CC;
- Section 60CC creates two-tiers of considerations that the court must take into account of in determining what is in the best interests of a child;
- The primary considerations are contained in subsection 60CC (2). They include the benefit to the child of having a meaningful relationship with both parents and the protection of the child from physical and psychological harm. The safety of the child is not intended to be subordinate to the child's meaningful relationship with both parents;
- What is a meaningful relationship? This will depend on the context of the case. Can parents have a meaningful relationship with a child if they are separated from a child who is living interstate or overseas? In this regard I refer to the impact on relocation cases at page 7 of this paper.

(vii) Child Abuse or Family Violence: pp 8-9
(viii) The Court's role in conducting Child Related Proceedings: pp 19 - 10
(ix) Relocation: pp 10 - 14

(x) Families and Children of Same Sex Couples pg 15-17

(xi) Hague Convention: pg 17

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(xiii) Child Support Regime: pp 18 - 26

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- Stage 2
- Stage 3

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