

Sharing

The new parental responsibility

NEW SHARED PARENTING REQUIREMENTS OBLIGE PRACTITIONERS TO CONSIDER THEIR ADVICE TO CLIENTS APPLYING FOR ORDERS RELATING TO CHILDREN. BY SALLY NICHOLAS

the care

and child support regimes

The introduction of new regimes directed at parenting orders and child support from 1 July 2006 represents new goals and challenges for family lawyers. The *Family Law Amendment (Shared Parental Responsibility) Act 2006* introduced amendments to the *Family Law Act 1975* (Cth), the *Child Support Assessment Act 1989* (Cth) and related legislation. The federal government aims with this new family law system to change the culture of family separation by placing the focus on parents sharing responsibility for raising their children.

However, what are the practicalities for family lawyers in advocating the principles enshrined in these new laws? What advice should be given to clients about issues such as requirements for mandatory family dispute resolution, impact on existing or proposed parenting orders, negotiating shared parenting arrangements, potential restrictions on relocation, parenting issues for separating same-sex couples, or implications of the new child support regime?

This article aims to highlight the substantive issues that practitioners may need to bring to the attention of their existing (pre-1 July 2006) and new (post 1 July 2006) clients that may differ from the advice given prior to the new legislation.¹ Unless otherwise indicated, section references are to the *Family Law Act* as amended.

Shared parental responsibility

Orders made prior to 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.²

If there is an interim parenting order in relation to a child, the court must, in making a final parenting order, 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.

Applications pending after 1 July 2006

The amendments will apply only to parenting orders made after the commencement of the new Act. It would thus be prudent to amend applications using the new terminology.

New applications for parenting orders

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. Clients should be advised that the laws have changed

and invited to revisit the merits of their matter in the context of the new laws. Consider introductory pro-forma letters that list the new terminology and principles in s60CC in user friendly language.

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

Family dispute resolution

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 federal government does not wish parties to view mediation as the “first step” before litigation, but as a better, more collaborative alternative for dealing with parenting decisions.

If clients have not attended any form of mediation, encourage them, verbally and in writing, to do so 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.

Time spent with child

Assuming that in most cases parents will be entitled to equal shared responsibility, how do we assess whether “equal time” or “substantial and significant time” should follow, and what would be in the best interests of the child?

Practitioners need to familiarise themselves with the “primary and additional considerations” in the new Act. Section 60CC creates two tiers of considerations that the court must take into account in determining what is in the best interests of a child.

The primary considerations (s60CC(2)) 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.

Paragraph 50 of the Explanatory Memorandum notes that “there may be some instances where secondary consideration may outweigh primary considerations”. The example provided seems to indicate that three additional considerations could outweigh a primary consideration, in a case where violence, abuse or neglect does not feature.

The point of separating these 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 s60B.

If equal time is not appropriate, then practitioners should consider whether substantial and significant time is reasonably practicable and 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)) that reflect successful parenting arrangements, as discovered by Australian Institute of Family Studies research.³

What is a meaningful relationship? This will depend on the context of the case. Can a parent have a meaningful relationship with a child who is living interstate or overseas? (This issue is discussed further under “Relocation” below.)

Psychological studies may assist when assessing a child’s development and what constitutes a meaningful relationship. For example, an article by forensic expert psychologist Vincent Papaleo makes it clear that one of the fundamental factors to be taken into consideration is to “maximise the relationship with each parent by having as much contact as the child’s development allows”.⁴ Mr Papaleo encourages following age-appropriate considerations in promoting a meaningful relationship to minimise loss, maintain normal support and maximise the relationship with each parent. In *Shared Parenting* Jill Barrett and Michael Green focus on theories relating to attachment and deliver key messages to consider in collaborative parenting and living arrangements.⁵

Child abuse or family violence

The new Act states protecting children from risk of violence as 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. It follows that if there has been or is a risk of violence or abuse, the court is not obliged to consider spending equal time or substantial time with both parents.

In cases of violence or child abuse, or a risk of it, separating parents are not required to attend dispute resolution before taking a parenting matter to a court. Family lawyers 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 through delay in applying for a court order.

Section 4(1) defines family violence as “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”.

Some family violence orders are irrelevant. In ascertaining “best interests” under s60CC(3)(k), a court can now only take into account a family violence order that is a final order (whether ex parte, defended or undefended) or an interim order made after a contested hearing. You will need to advise a client that an uncontested interim or ex

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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.

The court's role in conducting child related proceedings

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 should be conducted without undue delay and with as little formality and legal technicality as possible.

Relocation

The introduction of the shared parenting laws will make 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, one of the primary considerations to consider under the new system.

The question to be considered is whether the shared parenting laws give primacy to a child having a meaningful relationship with both parents over the relocating parent's freedom to live where they desire. The impact of the new laws on a parent's right to move with a child will need to be tested in court; it may be that if the relocation is found to impact 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 that this becomes difficult with the statistically high levels of mobility within Australia for family reasons.⁶ The answer may depend on how, precisely, the Full Court of the Family Court determines that the new provisions inter-relate with s60CA (formerly s65E). On the face of the Act, as amended, one would argue 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 indicate against relocation.⁷

Hague Convention

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

Section 111B(4)(d) of the *Family Law Act* now 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.

Regulation 26(2) of the *Family Law (Child Abduction Convention) Regulations* 1986 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.

In advising clients who have a child with a person of international connections or where there are risks of flight, ensure that the client has a right of custody under s111B(4). 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.

Property cases

There has been no change to the sections of the *Family Law Act* relating to property save in respect of case guardians (Part 6.3 as r6.08). The following is by way of speculation.

Given the emphasis on family violence, judgments such as *Kenyon*⁸ and *Marando*⁹ (which both assess the impact of persistent family violence in property cases) may be revisited in light of the new laws. The Full Court decision of *Kenyon* commented on the impact of family violence in respect of s75(2) factors where the suffering caused by violence can have a tangible impact on future financial resources and needs. *Marando* was a single judgment which took into account the onerous nature of contributions (s79(4)) to the family as parent and homemaker made by a wife who was subjected to continuous family violence over a lengthy marriage.

How much of an adjustment will be made in property division on the basis of the children's living arrangements under the new regime? What percentage adjustment will be made if, aside from the issue of where children live, all other considerations in respect of contributions and s75(2) factors offset one another? Concepts such as shared responsibility and the encouragement of flexibility and fluidity of arrangements may dilute the impact of living arrangements on an overall property settlement. Although there is naturally a great degree of subjectivity on a case by case basis, perhaps the weight attributed by trial judges in assessing property, when all other factors are equal, will be negligible in the spirit of the new regime.

Families and children of same sex couples

There appears to be no legislative redress of the calls for change by Brown J in *Re Mark: an application relating to parental responsibilities*¹⁰ and Guest J in *Re Patrick (an application concerning contact)*.¹¹ The conundrum in existing case law remains.

Re Patrick

In determining this case Guest J called for legislative reform, stating (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 unrecognised. 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".

Guest J identified the need for enactment of state laws 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 suggested that s60(H) be amended to safeguard the interests of co-parents and known "sperm donors" in contested residency and parenting cases.

Guest J quoted the following statistics (at 651):

"Gay and lesbian families are a relatively newly recognised and, it seems, growing phenomenon in Australian society. While they represent a minority of families, surveys of lesbian women in NSW have found that approximately 20 per cent have children and over 40 per cent are considering having children in the future¹² . . .

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

The families considered by the new laws purely relate to the conservative nuclear family.

Re Mark

At issue in this case 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 had travelled to the United States to arrange a surrogacy 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 according to the surrogacy agreement. Mr X was listed as the child's father on his birth certificate, with Ms S listed as the child's mother. Under the surrogacy agreement Mr and Ms S agreed to relinquish all their rights as parents of the child. This agreement is not legally recognised in Australia.

Brown J 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. Disagreeing with Guest J's reasoning in *Re Patrick* that the definition of "parent" is dependent on state legislation recognising the parental role of sperm donors, Brown J determined that the definition of "parent" within the Act is broad. She suggested it was open to find Mr X a parent, but refrained from doing so.

Brown J noted that the realities of Mark's life indicated that Mr X was his parent. She granted a parenting order on the basis of Mr X's role as a person concerned with Mark's

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care, welfare and development. She made orders that both men be responsible for the long-term welfare of the child.

The reluctance of Brown J 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. Brown J was of the view that, given its social and legal complexity, it was inappropriate for the matter to be the subject of judicial development. Like Guest J, she also recommended that this area of law be reconsidered by the legislature. The new regime fails the judiciary in their call for assistance.

Child support regime

Changes to the child support regime are based on Australian research on the cost of children, and are intended to better reflect community values and balance the best interests of parents and children. The new child support formula aims to reflect the true costs of raising children and to take into account the incomes of both parents and the importance of balancing first and second family needs. 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.¹³

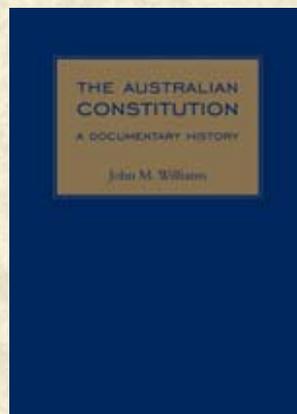
There is helpful and practical discussion of the new regime on the Department of Family and Community Services website (www.facs.gov.au), including access to the ministerial report which investigated and developed the changes. Updates and fact sheets will be regularly appearing on this website, and on the Child Support Agency website www.csa.gov.au. ●

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1. The complete version of this article is available on the Nicholes Family Lawyers website: www.nicholeslaw.com.au.
2. Section 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.
3. Bruce Smyth (ed) (2004), "Parent-child Contact and Post-separation Parenting Arrangements", Research Report no. 9, Australian Institute of Family Studies.
4. Vincent Papaleo, "Developmental considerations in contact and residence disputes", paper presented at Victoria Legal Aid Conference, Melbourne, 3 December 2004.
5. "Popular myths" in *Shared Parenting*, 2006, Finch Publishing, Sydney, pp31-45.
6. *The New Family Law Parenting System*, Family Law Council Handbook, p89.
7. A comprehensive review of the law in July 2005, "An update on domestic and international relocation cases" can be found at www.nicholeslaw.com.au.
8. (1997) FLC 92-757.
9. (1997) FLC 92-754.
10. (2003) FLC 93-173.
11. (2002) FLC 93-096.
12. Sources quoted by Guest J were: V Barbeler, *The Young Lesbian Report: A study of attitudes and behaviours of adolescent lesbians today*, Twenty Ten Association, Sydney, 1992; *Lesbians on the Loose*, 1995 Readership Survey, vol 7(3), p9.
13. Grant Reithmuller, *The 2006 Child Support Amendments*, 2005, CCH Limited.

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