



**SOME PRACTICAL IMPLICATIONS OF  
THE FAMILY LAW AMENDMENT  
*(Shared Parental Responsibility)*  
Act 2006**

*Presented by*

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# What Difference Will the Act Make in Practice

- ❖ Before clients come to see us
- ❖ Pre-action stage: before proceedings
- ❖ Resolution stage: after commencement
- ❖ Determination stage: trial and decision making
- ❖ Post-determination: supervision and enforcement

# Quick Background

- ❖ Political and social issues
- ❖ Deep concerns about parenting after separation
- ❖ Inadequate opportunity for both parents to have meaningful involvement in lives of their children
- ❖ Concerns about legal processes

# Stage One: Before Clients Come to See Us

- ❖ 65 Family Relationship Centres
- ❖ “First port of call to help families ... outside the Courts”
- ❖ Will *all* clients go or only some?

# Stage One

*(cont'd)*

- ❖ Incentives/disincentives to go?
- ❖ Parents who don't reach agreement will probably come to see a lawyer

# Stage One

*(cont'd)*

## ❖ What Happens at FRC?

- No legal representation
- Encouraged to get legal advice
- Consultation Paper: FRC's and Legal Profession
- Will clients come to see us before FRC?

# Stage One

*(cont'd)*

- ❖ Those parents who do reach agreement at or through the FRC
- ❖ Strong emphasis on parenting plans

# Stage One

*(cont'd)*

- ❖ s63C: an agreement in writing made between the parents
  - With whom a child is to live
  - Time spent with another person
  - Allocation of parental responsibility
  - Form of consultations about decisions
  - Communication
  - Process to resolve disputes
  - Process for changing the plan

# Stage One

*(cont'd)*

- ❖ Strong push for parenting plans to replace the consent order
- ❖ Duties on advisers to encourage use of parenting plans: s63DA
- ❖ Parenting plan can trump an earlier parenting order: s64D
- ❖ Parenting plan taken into account in contravention proceedings: ss70NEC, NGB and NJA

# Stage One

*(cont'd)*

- ❖ But: parenting plan creates no legal obligation
- ❖ Trend towards informalisation of parenting agreements reflecting a “no intervention policy”

# Stage One

(cont'd)

- ❖ Act sends strong shared parenting messages
- ❖ Messages not just for lawyers
- ❖ s60B(1)(c) “*that children have the benefit of both of their parents having a meaningful involvement in their lives*”: Object

# Stage One

*(cont'd)*

- ❖ s60B(2) principles underlying objects
- ❖ s60B(2)(a)(ii) “*children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents ...*”
- ❖ Parenting plan is the vehicle to facilitate agreements that reflect messages about shared parenting

# Stage One

*(cont'd)*

- ❖ s60CC – primary and additional considerations
- ❖ s60CC(2) (a) a primary consideration is “*the benefit to the child of having a meaningful relationship with both child’s parents*”

# Stage One

*(cont'd)*

- ❖ s60CC(2)(b) another primary consideration is need to protect child from harm, abuse, neglect or violence
- ❖ s60CC(3) additional considerations
  - (c) willingness and ability of parents to facilitate and encourage relationship between child and other parent.
  - (k) any family violence order that is final or was made after contest
- ❖ s60CC(4) participation in responsibilities of parenthood

# Stage One

*(cont'd)*

- ❖ Two-tiered structure
- ❖ Strong shared parenting messages
- ❖ But mixed messages that seem to focus as much on the parent as the child

# Stage One

*(cont'd)*

- ❖ Outcome of FRC involvement will be
  - Parenting plans
  - Incorporating shared parenting message
  - But which create no legal obligation
  
- ❖ Will we see less pre-filing Consent Orders?
  
- ❖ In 2002/2003 financial year: 11,600

## Stage Two: Pre-Action Stage

- ❖ Clients have already been in an FRC?
- ❖ Clients may have problems with their non-legally binding parenting plan
- ❖ Lawyers may still be first port of call
- ❖ What do we do at this stage: advice, negotiation and drafting

# Stage Two

*(cont'd)*

- ❖ How will advice differ under the Act?
- ❖ s61DA creates presumption of equal shared parental responsibility
- ❖ Presumption does not apply where there is abuse or violence
- ❖ We're talking about equal shared parental responsibility – not time
- ❖ Severally yoked before separation: equally yoked if they come to court

# Stage Two

*(cont'd)*

- ❖ s61DB: Court on a final hearing must disregard the allocation of parental responsibility made in an interim order
- ❖ s65D power to make parenting orders is expressly subject to presumption of equal shared parental responsibility
- ❖ s65DAA shifts focus from parental responsibility to time

## Stage Two

*(cont'd)*

- ❖ s65DAA: *“Court must consider making an order to provide for the child to spend equal time or substantial and significant time with each of the parents”*
- ❖ Thus, where there is equal shared parental responsibility, there should be equal shared or substantial and significant time
- ❖ Consider – serious thought process

# Stage Two

*(cont'd)*

- ❖ Substantial and significant time includes both days that fall on weekends and holidays; and
- ❖ Time spent allows parent to be involved in child's daily routine and occasions and events of significance to the child; and
- ❖ Time spent with the parent allows the child to be involved in occasions of significance to the parent
- ❖ The end of the 'standard' contact order?

# Stage Two

*(cont'd)*

- ❖ What is reasonable practicability?
  - How far apart parents live
  - Capacity to implement these types of shared care arrangements
  - Impact on child
  - Other relevant matters
  
- ❖ s65DAA actually sets quite a low threshold

# Stage Two

*(cont'd)*

- ❖ s65DAC what is shared parental responsibility?
- ❖ Parents must consult the other about decisions
- ❖ Make a genuine effort to come to a joint decision in relation to major long-term issues
- ❖ Which includes education, religious and cultural upbringing, health, name and significant changes to child's living arrangements

# Stage Two

*(cont'd)*

- ❖ s65DAE – no need to consult on issues that are not major long-term issues
- ❖ s65E unchanged: best interests paramount
- ❖ No s65DAD
- ❖ Strong policy push towards greater post-separation shared parenting
- ❖ Reflect this in advice?

# Stage Two

*(cont'd)*

- ❖ But how will parents respond?
- ❖ How will negotiation change?
- ❖ Short term “spike” in disagreements?
- ❖ Statutory messages received in different ways
- ❖ New terminology makes it harder

# Stage Two

*(cont'd)*

- ❖ s64B: a parenting order deals with
  - person with whom a child is to live
  - time a child is to spend with another
  - allocation of parental responsibility
  - consultation
  - communication

# Stage Two

*(cont'd)*

- ❖ s64(b)(2)(g) steps to be taken before variation of an order to take into account changing needs or circumstances of a child or parties
- ❖ s64B(2)(h) “process to be used for resolving disputes about the terms or operation of the order”

# Stage Two

*(cont'd)*

- ❖ Matters covered by parenting orders seem to be broader and include process issues as well as substantive issues

# Stage Two

*(cont'd)*

- ❖ New terminology will be
  - *“living with”*
  - *“spending time with”*
  - *“having communication with”*
- ❖ A few more issues to negotiate about
- ❖ A few more drafting issues
- ❖ s64B(2)(d) “form of consultation ....”

# Stage Two

*(cont'd)*

- ❖ Mandatory pre-filing family dispute resolution: s60I
- ❖ Provided by a family dispute resolution practitioner ('FDR practitioner')
- ❖ Who are these? Will it include Family Lawyers?

# Stage Two

*(cont'd)*

- ❖ What is family dispute resolution?
  - “a process in which the FDR practitioner helps people to resolve some or all of their disputes with each other”
- ❖ Old terminology gone
- ❖ Compulsory pre-filing family DR
- ❖ Until 01.07.2007 – pre-action procedures apply to all children’s matters, even in FMC

# Stage Two

*(cont'd)*

- ❖ After 01.07.2007 “*court ... must not hear an application for a Part VII order unless ...files in court a certificate by a family dispute resolution practitioner*”
- ❖ What must be certified?
  - Attendance at family DR in relation to issues and genuine effort to settle
  - Non-attendance of other party
  - Attendance but no genuine effort

# Stage Two

*(cont'd)*

## ❖ Exceptions?

- consent orders
- abuse and violence
- contravention
- order made within last six months

# Stage Two

*(cont'd)*

## ❖ What is ‘family violence’?

- conduct actual or threatened by a person towards a member of the persons family that causes “reasonable” fear or apprehension
- objective test: “reasonable”
- what if not towards a member of persons family

# Stage Two

*(cont'd)*

- ❖ Relationship between parenting orders and family violence orders?
  - s68Q – a family violence order inconsistent with a later Family Law act order is invalid to extent of inconsistency
  - s68R – a later family violence order may revive, vary, discharge or suspend an earlier FLA order provided the court has before it material not before the court that made the FLA order

## Stage Three: Pre-Trial Period

- ❖ Most important change is use of family and consultants to assist/advise with Court's decision-making
- ❖ Family and consultants replaces Court mediator/counsellor
- ❖ But all communications are admissible: s11C

# Stage Three

*(cont'd)*

- ❖ Court's own counselling service becomes exclusively reportable
- ❖ No real changes to the reporting process
- ❖ Child representative becomes the independent child's lawyer

# Stage Four: Conducting Child-Related Hearings

- ❖ The Children's Cases Programme provisions
- ❖ s692M – all proceedings under Part VII are child-related proceedings
- ❖ No consent needed to be bound by these provisions, unless proceedings are outside Part VII

# Stage Four

*(cont'd)*

- ❖ s692N principles for conducting child-related proceedings
  1. Consider the needs and concerns of the children
  2. Court is to actively direct, control and manage proceedings
  3. Proceedings to promote co-operative and child-focussed parenting
  4. Proceedings without undue delay, little formality and little legal technicality and form

# Stage Four

*(cont'd)*

- ❖ Summary: child-focussed proceedings that are robustly managed by the Court and are meant to be informal and less adversarial
- ❖ s692Q general duties to give effect to the principles
  - decide which issues can be dealt with summarily
  - decide order in which issues are to be decided
  - directions/orders about timing of steps

# Stage Four

*(cont'd)*

- consider benefit/cost of steps
  - use technology
  - use family DR or family counselling
  - deal with as much as possible on a single occasion
- ❖ Court as the interventionist manager of the child-related dispute – not the passive adjudicator

# Stage Four

*(cont'd)*

- ❖ s692R – Court power to make determinations, findings and orders at any stage of proceedings
- ❖ s692T – rules of evidence do not apply unless Court decides they do
- ❖ Rules of evidence only to apply in exceptional circumstances

# Stage Four

*(cont'd)*

- ❖ s692X – Court’s general duties/powers re evidence
- ❖ Extensive powers to give directions about:
  - What evidence is to be given
  - Who is to give evidence in relation to issues
  - How evidence is to be given
  - Limit/control expert evidence
  - Ask questions/seek information/produce evidence
  - Length of submissions/oral argument/cross-examination

# Stage Five: Enforcement

- ❖ Division 13A – non compliance replaced
- ❖ Old terminology abolished
- ❖ Stream-lining of provisions

# Stage Five

*(cont'd)*

- ❖ Broad framework
  - Contravention alleged – not established
  - Contravention established – reasonable excuses
  - Contravention established – no reasonable excuses – less serious
  - Contravention established – no reasonable excuses – more serious
- ❖ Court power to vary parenting orders at any time
- ❖ Court must regard a later parenting plan

# Stage Five

*(cont'd)*

- ❖ Reasonable excuse same, in substance
- ❖ Costs sanctions: s70NCB et seq. as a deterrent to frivolous applications
- ❖ Broader powers across the board

# Substantial and Significant time

Decision of O’Ryan J in *Kominos & Kominos*, unreported, SYF 3339 of 2003,  
25 July 2006

# The Objects of Part VII

- (a) Ensuring that children have the benefit of both of their parents having a meaningful relationship with them;
- (b) protecting children from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence;
- (c) ensuring children receive adequate and proper parenting;  
and
- (d) ensuring that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.

## S60B(2)

- (b) Children have a right to spend time on a regular basis with, and communicate on a regular basis with, both parents; and
- (c) Parents jointly share duties and responsibilities concerning the care, welfare and development of their children

# 60CC(2)

The primary considerations are:

- (a) The benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.<sup>2</sup>

# 60CC(3)

## Additional considerations are:

- (a) Any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
- (b) the nature of the relationship of the child with:
  - (i) Each of the child's parents; and
  - (ii) Other persons (including any grandparent or other relative of the child):

## 60CC(3)

- (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
- (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
  - (i) either of his or her parents; or
  - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

## 60CC(3)

- (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (f) the capacity of:
  - (i) either of his or her parents; or
  - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

to provide for the needs of the child, including emotional and intellectual needs.

# S61DA

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

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

# S61DA

- (2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
- (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
  - (b) family violence.

# S61DA

- (3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.
- (4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

# Long Term Issues

S4 (1) “Major long term decisions, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

- (a) The child’s education (both current and future); and
- (b) the child’s religious and cultural upbringing; and

# Long Term Issues

- (c) the child's health; and
- (d) the child's name; and
- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

# Equal Time

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

- (a) Consider whether the child spending equal time with each of the parents would be in the best interests of the child; and

# Equal Time

- (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
- (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

# Substantial and Significant Time

If:

- (a) A parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and
- (b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and

# Substantial and Significant Time

The court must:

- (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
- (d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
- (e) If it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

## 65DAA(3)

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

- (a) the time the child spends with the parent includes both:
  - (i) days that fall on weekends and holidays; and
  - (ii) days that do not fall on weekends or holidays; and

## 65DAA(3)

- (b) the time the child spends with the parent allows the parent to be involved in:
  - (i) the child's daily routine; and
  - (ii) occasions and events that are of particular significance to the child; and
  
- (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

# Reasonable Practicality

- (a) How far apart the parents live from each other; and
- (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

# Reasonable Practicality

- (d) the impact that an arrangement of that kind would have on the child; and
- (e) such other matters as the court considers relevant.

# The meaning of “Consider”

Ticker v. Chapman:

*“The minister must personally consider the report and any representations attached to it. The meaning of ‘consider’ used as a transitive verb referring to the consideration of some thing is given in the Oxford English Dictionary, 2<sup>nd</sup> ed. As ‘to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of.’ Consideration of a document such as a representation or a submission (there is little, if any, difference between the two for these purposes) involves an active intellectual process directed at that representation or submission.” [emphasis added]*

# The meaning of “Consider”

Burdett J:

*“What is it to ‘consider’ material such as a report or representations? In my opinion, the minister is required to apply his own mind to the issues raised by these documents. To do that, he must obtain an understanding of the facts and circumstances set out in them, and of the contentions they urge based on those facts and circumstances.” [emphasis added]*

# The meaning of “Consider”

Eiffel J said at 495:

*“To ‘consider’ is a word having a definite meaning in the judicial context ... It requires that the minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them.”*

### 3. Interim Orders

*“The starting point of the presumption about parental responsibility, and the reasoning path that flows from its application or exclusion, has no place in the legislation up to 1 July and the guidelines Cowling established take no account of either the presumption or the consequences of its application.”*

### 3. Interim Orders

*“The mandatory application of the presumption to interim decisions (unless not “appropriate”) and the consequential reasoning path alone, without any of the other changes, mean the Cowling guidelines have now no continuing relevance as presently discussed.”*

### 3. Interim Orders

*“In the meantime, I take the view that the presumption of equal shared parental responsibility must be the starting point, consideration must then be given to whether it is not appropriate to apply it, there has to be some evaluation of the best interests factors in section 60CC (.....) and if the presumption is not excluded the conclusion must have made its way through the possible outcomes discussed in section 65DAA.”*

# Principles for conducting child-related proceedings

The first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.

# Principles for conducting child-related proceedings

The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.

# Principles for conducting child-related proceedings

The third principle is that the proceedings are to be conducted in a way that will safeguard:

- (a) the child concerned against family violence, child abuse and child neglect; and
- (b) the parties to the proceedings against family violence.

# Principles for conducting child-related proceedings

The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

# Principles for conducting child-related proceedings

The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

# Principles for conducting child-related proceedings

## The Court will:

- (a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and
- (b) decide the order in which the issues are to be decided; and
- (c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and

# Principles for conducting child-related proceedings

- (d) 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; and
- (e) make appropriate use of technology; and
- (f) if the court considers it appropriate – encourage the parties to use family dispute resolution or family counselling; and

# Principles for conducting child-related proceedings

- (g) deal with as many aspects of the matter as it can on a single occasion; and
- (h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

# Principles for conducting child-related proceedings

The Court may do any or all of the following:

- (a) make a finding of fact in relation to the proceedings;
- (b) determine a matter arising out of the proceedings'
- (c) make an order in relation to an issue arising out of the proceedings.

The Judge is not required to disqualify himself or herself from a further hearing of the proceedings.

# S9ZT

The rules of evidence not to apply unless  
court so orders

# S69ZT

- (1) These provisions of the Evidence Act 1995 do not apply to child-related proceedings:
  - (a) divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;  
Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 s about improper questions.

# S69ZT

- (b) parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections)
- (c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

# S69ZT

- (2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act 1995 not applying because of subsection (1).

# S69ZT

The Rules of Evidence will only be applied if:


- (a) the court is satisfied that the circumstances are exceptional; and
- (b) the court has taken into account (in addition to any other matters the court thinks relevant):
  - (i) the importance of the evidence in the proceedings; and
  - (ii) the nature of the subject matter of the proceedings; and
  - (iii) the probative value of the evidence; and
  - (iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

# 69ZV Evidence of Children

- (2) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay.
- (3) The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2).

- (i) S65D, presumption of equal shared parental responsibility;
- (ii) S60CA best interests of the child are paramount;
- (iii) the primary considerations in section 60CC(2) and the additional considerations in section 60CC(3);
- (iv) 60CC(4) the extent to which each parent has fulfilled his or her parental responsibilities;
- (v) 60CG any order made must be consistent with any family violence orders;

- (vi) the court must also have regard to the objects of Part VII and the principles expressed in section 60B(2);
- (vii) when applying the presumption that its in the best interests of the child for the parents to have “equal shared parental responsibility” meaning “responsibility” not “time”;
- (viii) the presumption does not apply in certain circumstances;
- (ix) if the presumption does not apply or is rebutted, the court must then consider what order relating to parental responsibility, if any, would be in the child’s best interests;

- 
- (x) if the court is satisfied that the presumption of equal shared parental responsibility does apply, then by section 65DAA (1) the court has to consider whether it would be in the best interests of the child and reasonably practicable for the child to spend equal time with each parent and if both conditions are satisfied, then consider making an order for the child to spend equal time with each parent

- (xi) if the court is satisfied that the presumption of equal shared parental responsibility applies, but an order for equal time should not be made, the court has to consider whether it would be in the best interests of the child and reasonably practicable, for the child to spend substantial and significant time with each parent;
- (xii) it follows that the court does not have to consider the matters in section 65DAA if the presumption of equal shared parental responsibility does not apply or is rebutted.

# What the orders look like – question what is the terminology?

Fortunately for practitioners, although there are substantive changes in the law set out in the new Part VII, the terminology used within that Part is not significantly different to that in which we have experience.

- ❖ Desirability (or otherwise) of seeking orders for “equal shared parental responsibility”
- ❖ The sole responsibility unchanged
- ❖ A child should be expressed to “live with” a parent as appropriate

# What the orders look like – question what is the terminology?

- ❖ The form of specific issues orders has not changed
- ❖ It may be appropriate to consider an order that the orders are to be subject to any parenting plans subsequently agreed between the parties



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