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SEMINAR PAPER PALM COVE JULY 2008

“The Family Law Amendment (Shared Parental Responsibility) Act 2006

- The Impact on an Application for Relocation following Separation.
- The Likelihood of Mandatory Relocation by Court Order.”

In 2006, following years of agitation by Fathers' Groups, significant amendments were made to the Family Law Act. These were contained in the Family Law Amendment (Shared Parental Responsibility) Act 2006.

A Report commissioned by the Federal Government¹ set out the issues that were causing concern in certain sections of the community, particularly concerns of fathers, as to the manner in which applications in relation to parenting were being dealt with.

The Report commenced with the following words:

“For many years the community has been extremely concerned about the contact and residency issues following marriage and relationship breakdown and their experiences with the Family Court and the Child Support Agency. These have been critical issues brought to the daily agenda of members of parliament by their constituents...”

The 2006 amendments led to the perception amongst separated parents that those who wanted it, and could so organise their affairs, could share "substantially" (read "equally") in the care of their children following separation.

The explanatory memorandum to the legislation included the following²:

“The amendments in Schedule 1 recognise the need for a cooperative approach to parenting. The amendments promote the object of ensuring that children have a right to have a meaningful relationship with both their parents and that parents continue to share responsibility for their children after they separate. The amendments also reinforce the primary importance of the object of ensuring that children live in an environment where they are safe from violence or abuse.”

This seemingly positive approach was reflected in the unique mandatory requirement for parties to attend mediation (family dispute resolution) before commencing proceedings, except when issues of abuse or violence were raised.

The concept of sharing usually connotes equality of "access" to an object. In this instance there were no words, which suggested equal parenting time, either in the legislation, or the report which preceded it or otherwise, which qualified the words "to share responsibility".

The legislation commenced operation fully on 1 July 2006. The build-up in terms of parents' expectations was immense and given massive media coverage throughout Australia.

The purpose of this paper is to consider the impact the amendments have had on the Court's approach to parenting matters which has subsequently evolved over the last two years. In doing so this paper will explore the extent to which the amendments have changed the manner in which practitioners advise their clients, and the expectations of parents.

THE CHILDREN'S CASES PROGRAM

From about 2005, that is to say before the advent of the legislation under discussion, there had been a program in place in the Sydney and Parramatta Registries of the Family Court of Australia. This was known as the Children's Cases Program ("CCP"). The CCP required the consent of both parties and was focused

¹ The Hull Report published 2003, House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation*, December 2003.

² Explanatory Memorandum (House of Representatives) to Family Law Amendments (Shared Parental Responsibility) Bill 2005, p.1.

on what was referred to as a less adversarial approach to parenting matters. The unique aspect of the CCP was that at an early stage of proceedings, parties were allocated a Judge; and it was that Judge who would see the matter through to the end. This meant that the same Judge dealt with all facets of the matter, including the initial directions hearing, which included defining the scope of the issues to be addressed at the final hearing; interim applications; the appointment of experts and the like.

A number of "Hearings" then followed. The profession was, to say the least, surprised at what occurred which included:

1. Each party was sworn to give evidence on day one so that every subsequent statement was on oath.
2. There was a requirement by some Judges that each parent make a "speech" of up to ten (10) minutes at the commencement of the proceedings;
3. In effect the 'trial' started on day one, with opportunities for each parent's lawyers to cross-examine the other parent commencing that day.
4. Not only was each lawyer permitted to cross-examine a litigant but the Judge frequently asked potentially searching and difficult questions on each Court occasion with a view to defining and limiting the issues that were the subject of the litigation.

The unique – and worrying – aspect of this procedure is that in the context of a court room it has required ordinary litigants of perhaps humble and less than well educated origins or endowed with less than average ability to express themselves, to have to rise from their seat (some judges will allow them to sit) and make a statement as to what they "wanted" for their children. This meant that all statements and answers to questions made by the parties to the Judge in their opening remarks, then formed part of the overall evidence that a Judge would ultimately take into account at the hearing when making a judicial determination.

THE FAMILY CONSULTANT

Another unique aspect of the CCP included the participation by a counsellor (now known as the Family Consultant).

Suddenly, there were new matters to be taken into account, namely, the judge's ability to say: '*No I don't want to hear evidence on that topic*', and the ability of the Family Consultant to give opinions, which a Judge might not ignore.

It is in light of **Division 12A**, to which I later refer, that the role of Family Consultants has developed. They have a significant role in the **determination of proceedings** in that the Family Consultant meets with the parties, their children, the experts; and makes observations and enquiries, and prepares recommendations as to 'what is best' for the children.

The Children's Case Program has been effectively replaced by **Division 12A** of the Act, which sets out principles for conducting child-related proceedings and applies to all matters in relation to parenting. To see the way in which Judges approach matters under **Division 12A** refer to annexure "A" which sets out directions made by Justice Le Poer Trench in a matter on 7 April 2008.

How the Court must now deal with child related proceedings

Section 69ZN of the Family Law Act considers the manner in which the Court is to approach child-related proceedings. The provision is in the following terms:

- (1) *The [court](#) must give effect to the principles in this section:*
 - a. *in performing duties and exercising powers (whether under this Division or otherwise) in relation to [child-related proceedings](#); and*
 - b. *in making other decisions about the conduct of [child-related proceedings](#).*

(2) Regard is to be had to the principles in interpreting this Division.

Principle 1

(3) 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](#).

Principle 2

(4) The second principle is that the [court](#) is to actively direct, control and manage the conduct of the [proceedings](#).

Principle 3

(5) 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](#).

Principle 4

(6) 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.

Principle 5

(7) 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.

It was this last provision that saw the longstanding rules of evidence thrown out the window, and embodied in section 69ZT although the Court may also be persuaded to give only such weight (if any) as it thinks fit to evidence admitted on this basis. However, the Court may also be persuaded to apply some of the *Evidence Act* provisions where it is given a discretion to apply them if:

“(a) the court is satisfied that the circumstances are exceptional; an

(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”³

The Court's control over the conduct of the proceedings is encapsulated in Section 69ZX(2) giving it power to make directions and orders in these terms:

“69ZX(2) Without limiting subsection (1) or section 69ZR, the [court](#) may give directions or make orders:

(a) about the use of written submissions; or

³ Section 69ZT(3)

- (b) *about the length of written submissions; or*
- (c) *limiting the time for oral argument; or*
- (d) *limiting the time for the giving of evidence; or*
- (e) *that particular evidence is to be given orally; or*
- (f) *that particular evidence is to be given by affidavit; or*
- (g) *that evidence in relation to a particular matter not be presented by a party; or*
- (h) *that evidence of a particular kind not be presented by a party; or*
- (i) *limiting, or not allowing, cross-examination of a particular witness; or*
- (j) *limiting the number of witnesses who are to give evidence in the [proceedings](#).”*

THE LEGISLATIVE FRAMEWORK

Against the "loosening" of old procedures, the legislative framework sets out objects and principles to be applied.

This commenced, with Part VII of the Act (dealing with children), Section 60B which provided that the objects are:

"...to ensure that the best interests of children are met by:

- (1) *The objects of this Part are to ensure that the best [interests](#) of [children](#) are met by:*
 - (a) *ensuring that [children](#) have the benefit of both of their [parents](#) having a meaningful involvement in their lives, to the maximum extent consistent with the best [interests](#) of the [child](#); and*
 - (b) *protecting [children](#) from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or [family violence](#); and*
 - (c) *ensuring that [children](#) receive adequate and proper [parenting](#) to help them achieve their full potential; and*
 - (d) *ensuring that [parents](#) fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their [children](#).”*

The Act then proceeded to set out the principles "underlying these objects" (**except where it would be contrary to a child's best interests**) which were:

“Section 60B(2) The principles underlying these objects are that (except when it is or would be contrary to a [child's](#) best [interests](#)):

- (a) *[children](#) have the right to know and be cared for by both their [parents](#), regardless of whether their [parents](#) are married, separated, have never married or have never lived together; and*
- (b) *[children](#) have a right to spend time on a regular basis with, and communicate on a regular basis with, both their [parents](#) and other people significant to their care, welfare and development (such as grandparents and other relatives); and*
- (c) *[parents](#) jointly share duties and responsibilities concerning the care, welfare and development of their [children](#); and*
- (d) *[parents](#) should agree about the future [parenting](#) of their [children](#); and*

- (e) [children](#) have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).”

The parenting principles begin to emerge at this point.

The Act then requires the Court to determine parenting proceedings in a particular manner.

Section 60CA is in these terms

“In deciding whether to make a particular [parenting order](#) in relation to a [child](#), a [court](#) must regard the best [interests](#) of the [child](#) as the paramount consideration.”

The legislation (section 60CC) then prescribes how this is to be achieved and requires certain matters:

“Determining [child](#)'s best [interests](#)

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

Primary considerations

(2) The primary considerations are:

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

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).⁴

This section picks up on the Report of the committee. But it goes further by adding in sub-section (3) what are termed "additional considerations":

(3) Additional considerations are:

- (a) any views expressed by the [child](#) and any factors (such as the [child](#)'s maturity or level of understanding) that the [court](#) thinks are relevant to the weight it should give to the [child](#)'s views;
- (b) the nature of the relationship of the [child](#) with:
- (i) each of the [child](#)'s [parents](#); and
- (ii) other persons (including any grandparent or other relative of the [child](#));
- (c) the willingness and ability of each of the [child](#)'s [parents](#) to facilitate, and encourage, a close and continuing relationship between the [child](#) and the other [parent](#);
- (d) the likely effect of any changes in the [child](#)'s circumstances, including the likely effect on the [child](#) of any separation from:

⁴ Section 60CC

- (i) either of his or her [parents](#); or
 - (ii) any other [child](#), or other person (including any grandparent or other relative of the [child](#)), with whom he or she has been living;
- (e) the practical difficulty and expense of a [child](#) spending time with and communicating with a [parent](#) and whether that difficulty or expense will substantially affect the [child's](#) right to maintain personal relations and direct contact with both [parents](#) on a regular basis;
- (f) the capacity of:
- (i) each of the [child's parents](#); and
 - (ii) any other person (including any grandparent or other relative of the [child](#));
to provide for the needs of the [child](#), including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the [child](#) and of either of the [child's parents](#), and any other characteristics of the [child](#) that the [court](#) thinks are relevant;
- (h) if the [child](#) is an [Aboriginal child](#) or a [Torres Strait Islander child](#):
- (i) the [child's](#) right to enjoy his or her Aboriginal or [Torres Strait Islander](#) culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed [parenting order](#) under this Part will have on that right;
- (i) the attitude to the [child](#), and to the responsibilities of [parenthood](#), demonstrated by each of the [child's parents](#);
- (j) any [family violence](#) involving the [child](#) or a [member](#) of the [child's](#) family;
- (k) any [family violence order](#) that applies to the [child](#) or a [member](#) of the [child's](#) family, if:
- (i) the order is a final order; or
 - (ii) the making of the order was contested by a person;
- (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further [proceedings](#) in relation to the [child](#);
- (m) any other fact or circumstance that the [court](#) thinks is relevant.”
- (4) Without limiting paragraphs (3)(c) and (i), the [court](#) must consider the extent to which each of the [child's parents](#) has fulfilled, or failed to fulfil, his or her responsibilities as a [parent](#) and, in particular, the extent to which each of the [child's parents](#):
- (a) has taken, or failed to take, the opportunity:

- (i) to participate in making decisions about major long-term issues in relation to the [child](#); and
 - (ii) to spend time with the [child](#); and
 - (iii) to communicate with the [child](#); and
- (b) has facilitated, or failed to facilitate, the other [parent](#):
- (i) participating in making decisions about major long-term issues in relation to the [child](#); and
 - (ii) spending time with the [child](#); and
 - (iii) communicating with the [child](#); and
- (c) has fulfilled, or failed to fulfil, the [parent](#)'s obligation to maintain the [child](#).

Then occurs the basis of the principle amendment in section 61C, which restates the basic legal position:

“(1) Each of the [parents](#) of a [child](#) who is not 18 has [parental responsibility](#) for the [child](#).

Note 1: This section [states](#) the legal position that prevails in relation to [parental responsibility](#) to the extent to which it is not displaced by a [parenting order made](#) by the [court](#). See subsection (3) of this section and subsection 61D(2) for the effect of a [parenting order](#).

Note 2: This section does not establish a presumption to be applied by the [court](#) when making a [parenting order](#). See section 61DA for the presumption that the [court](#) does apply when making a [parenting order](#).

Note 3: Under section 63C, the [parents](#) of a [child](#) may make a [parenting plan](#) that deals with the allocation of [parental responsibility](#) for the [child](#).

- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the [child](#)'s [parents](#). It is not affected, for example, by the [parents](#) becoming separated or by either or both of them marrying or re-marrying.
- (3) Subsection (1) has effect subject to any order of a [court](#) for the time being [in force](#) (whether or not [made](#) under [this Act](#) and whether [made](#) before or after the commencement of this section).

Note: Section 111CS may affect the attribution of [parental responsibility](#) for a [child](#).”

There are two important footnotes for the section:

“Note 1: This section [states](#) the legal position that prevails in relation to [parental responsibility](#) to the extent to which it is not displaced by a [parenting order made](#) by the [court](#). See subsection (3) of this section and subsection 61D(2) for the effect of a [parenting order](#).

Note 2: This section does not establish a presumption to be applied by the [court](#) when making a [parenting order](#). See section 61DA for the presumption that the [court](#) does apply when making a [parenting order](#).”

Section 61C(3) then provides that the presumption only has effect subject to any court order to the contrary.

Then section 61DA requires that the Court to apply the presumption of equal shared parental responsibility "when making parenting orders".

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

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of [parental responsibility](#) for a [child](#) as defined in section 61B. It does not provide for a presumption about the amount of time the [child](#) spends with each of the [parents](#) (this issue is [dealt with](#) in section 65DAA).

However the presumption is not to apply where there are reasonable grounds to believe that there has been abuse of a child or family violence (see 61DA(2)) and, importantly, the presumption may be rebutted:

- "(4) ...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](#)."

WHAT IS SUBSTANTIAL AND SIGNIFICANT TIME

Section 65D AA3

Deals with what could be taken to be substantial and significant time and mandates that this will only be taken to be the case if Section 65DAA3.

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

- (a) the time the [child](#) spends with the [parent](#) includes both:
- (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
- (b) the time the [child](#) spends with the [parent](#) allows the [parent](#) to be involved in:
- (i) the [child's](#) daily routine; and
 - (ii) occasions and events that are of particular significance to the [child](#); and
- (c) the time the [child](#) spends with the [parent](#) allows the [child](#) to be involved in occasions and events that are of special significance to the [parent](#).

DETERMINING REASONABLE PRACTICABILITY

The key subsection here is section 65DAA5 and it is worth setting it out together with its footnotes, in full.

"65DAA(5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a [child](#) to spend equal time, or substantial and significant time, with each of the [child's parents](#), the [court](#) must have regard to:

- (a) how far apart the [parents](#) live from each other; and

- (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- (d) the impact that an arrangement of that kind would have on the child; and
- (e) such other matters as the court considers relevant.

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

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

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

As will be seen from *Sampson & Hartnett*⁵ this is a very key provision.

It relates to the Court's decision, once it has come to a presumption that there should be equal shared parental responsibility, to then make a determination of whether there should be equal or substantial and significant time.

In doing this a Court is to have regard to (a) how far apart the parents live; (b) their capacity to implement the arrangement sought; (c) their capacity to communicate; and (d) the impact the arrangement might have on the child.

It seems that the legislature has created an enormous difficulty for a Court in circumstances where the first thing that a Court apparently must do, so as to bring into play considerations as to equal or substantial and significant time, is to make a determination as to whether or not there should be equal shared parental responsibility. There is no assistance to the Court in Section 65DAA or otherwise in Division 6 as to how a Court is to come to a conclusion on this issue.

It is necessary to go back to Division 2 of Part 7 which deals with the concept of parental responsibility.

As has been noted, each parent has parental responsibility subject to that position being displaced by a Parenting Order made by the Court.

As has been seen, the Court is enjoined to apply a presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility.

⁵ 2007 FLC

Remember that the Court is required by both Section 60B and Section 60CA to ensure the best interests of the child is the paramountcy principle; and at first glance Section 61DA(1) requiring the Court to apply a presumption of equal shared responsibility could well be inconsistent with that principle.

Section 61DA(4) allows for the presumption to be rebutted "by evidence that satisfies the Court that it would **not** be in the best interests of a child for the child's parents to have equal shared parental responsibility".

It seems that there is a "cart before the horse" situation for a Judge endeavouring to determine this type of issue, particularly in the circumstances of a relocation (planned or actual).

Whilst section 65DAA serially sets out how the Court should look at a matter once equal parental responsibility has been decided upon, the same provisions as are contained in section 65DAA do not appear to apply to the rebutting of the presumption.

Obviously section 60CC will have a role to play in this issue but the problem is the apparent supremacy of the primary considerations over the additional considerations, although it may be conceded that they are not described as "secondary" considerations.

It seems that a Court must first look at whether or not there is a benefit to the child in having a meaningful relationship with, say, a parent who lives in a distant place but there is no guidance in the legislation under primary considerations as to how this benefit should be determined.

In the absence of such guidance the same one can only turn to the additional considerations. Apart from the usual areas such as:

- The child's views and maturity of which same are expressed;
- The nature of the child's relationship with each relevant parent and others;
- The ability of the child's parents effectively to co-operate;
- The effect on the child of separation from the child's present circumstances;

Consideration has to be given to the fifth criterion here, 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.

It could therefore be argued that if out of the above additional considerations, the first four matters appear to point to a relocation, the fifth point (the practical difficulty) should result in another preventing relocation. It is but one of a number of additional considerations but in the great majority of cases would probably be outweighed by the first four points.

We will now turn to consideration of how these issues have been dealt with by the Court in a number of recent decisions, and how academics, including retired Judges turned academic, view the situation.

GOODE AND GOODE

*Goode v Goode*⁶ was one of the first Full Court decisions that considered the nature, purpose and intent of the amendments.

In *Goode* the father had filed an application for interim orders. The father sought a shared care arrangement and equal parental responsibility. The mother sought orders that the children spend time with the father and essentially agreed with the father's application for equal parental responsibility. The mother did not agree with the interim arrangements the father contended for.

⁶ (2007) 36 Fam LR 422

The wife raised an allegation of domestic violence which was denied by the father. The Judge who determined the interim proceedings could not, on the untested evidence before him, make a finding about whether there had been family violence. Accordingly he determined that it was not appropriate to apply the presumption of equal shared parental responsibility. In doing so His Honour relied upon the discretion **not** to apply the presumption in interim proceedings, as provided under section 61DA(3). That section is in these terms:

“(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.”

In this case there was evidence that there was an arrangement in place between the parents, which had both involved with the children. His Honour found that

1. This arrangement was in place.
2. That it served the needs of the children.

He therefore made interim orders for the continuation of arrangements already in place, namely, that the mother was the primary carer and that the children “spend time” with the father.

The father appealed, and in so doing raised the following issues:

1. His Honour should not have found that Section 65DAA did not apply;
2. Failure to apply the longstanding authority of *Cowling v Cowling*;⁷
3. Failure to apply Part VII of the Act.

The appeal was allowed and the matter remitted for rehearing.

The Full Court made a number of observations:

1. As to the difference between parental responsibility and equal shared parental responsibility.
2. As to what should happen when the presumption of equal shared parental responsibility is to be applied
3. The juxta-position of the various sub-sections of section 65 DAA(1) suggested that the meaning of the expression 'consider' in section 65DAA was something different.
4. That the starting point was the application of the presumption that it is in the best interests of a child that the child's parents have equal shared parental responsibility⁸ and that this applied in relation to interim orders unless the court considered that it would not be appropriate. In this regard it was necessary for the Court to consider the circumstances in which section 61DA(3) should be evoked in interim proceedings.

The Full Court considered the (Revised) Explanatory Memorandum to the Bill, however the Full Court went on to express the view:

[55] "We think that the Act on its face makes this clear. First, there is no distinction drawn in s 61DA between interim and final proceedings. Second, s 61DA(3) specifically refers to interim proceedings in saying:

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.

⁷ (1998) 22 Fam LR 776

⁸ Section 61DA(1)

Third, s 61DB, which says:

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.

assumes the making of interim orders for equal shared parental responsibility or some other allocation of parental responsibility.

[56] In our view the Act makes it clear that when a parenting order is sought, whether it be an interim or final order, the starting point is the application of a presumption that it is in the best interests of the child that the child's parents have equal shared parental responsibility as expressed in s 61DA, subject to the qualifications in subs (2), (3) and (4).⁹ "

The Full Court ultimately found that the amendments to Part VII of the Act have the following effect:

1. Unless the Court makes an order changing the statutory conferral of Joint Parental Responsibility, Section 61C(1) provides that each of the child's parents has parental responsibility and (this) means all the duties, powers and authority which by law parents have in relation to children. Parental responsibility is not displaced except by order of the court or a parenting plan.
2. The making of a parenting order triggers the application of a presumption that it is in the best interests of the child for each of the child's parents to have equal shared parental responsibility... unless there are reasonable grounds to believe that a parent... (or other person) has engaged in abuse or..... family violence.
3. If the presumption is appropriate, it is to be applied in relation to **final or interim orders** unless, in the case of the making of an interim order, the Court considers it would not be appropriate to apply Sub Sections (1) and (3) of Section 61DA.
4. For the presumption to be rebutted the Court needs to be satisfied that the application of that presumption would conflict with the best interests of the child.
5. When the presumption is applied, the first thing the Court must do is to consider making an order if it is consistent with the best interests of the child and reasonably practicable for the child to spend equal time with each of the parents, if equal time is not in the interest of the child or reasonably practicable the Court must go on to consider making an order for substantial and significant time.
6. Where neither concept of equal time nor substantial or significant time delivers an outcome that promotes the child's best interests, then the issue is at large and to be determined in accordance with the child's best interests.
7. These are ascertained by consideration of the objects and principles in section 60B and the primary and additional considerations in section 60CC.
8. When the presumption is not applied the court is at large to consider what arrangements will best promote the child's best interests.
9. The child's best interests remain the overriding consideration.

Then the Full Court had to consider the extent to which *Cowling*¹⁰ continued to apply in interim parenting proceedings. The Court noted that that decision was handed down after the 1995 amendments and following the earlier well-known decisions of *Cilento*¹¹ and *Rainer*¹².

⁹ 36 Fam LR 422 at 438

¹⁰ (1998) FLC 92-801;

¹¹ (1980) 6 Fam LR 35; FLC 90-847

¹² (1982) 8 Fam LR 210; FLC 91-239 at 77,110–311

The Full Court then went on to determine how under the new legislation existing principles as laid down in those authorities ought to be applied in the present circumstances.

Finally the Full Court asked and answered the question "*how should interim proceedings be conducted*". It was noted that in making interim decisions a Court will often be faced with conflicting (and therefore unresolved) issues and notwithstanding this, in an interim case, following the legislative pathway would involve:

1. Identifying the competing proposals
2. Identifying the issues in dispute.
3. Identifying any agreed or uncontested relevant effects.
4. Considering the Section 60CC matters which are relevant and if possible making findings about them.
5. Determining whether the presumption that equal shared parental responsibility (61DA) is in the best interest of the child either applies or does not apply because of the reasonable grounds to believe that there has been abuse or family violence or (in an interim matter) the court does not consider to apply the presumption.
6. If the presumption does apply whether it is rebutted because it would not be in the child's best interest to apply.
7. If the presumption applies and is not rebutted considering making an order that the child spend equal time with the parents unless it is contrary the child's best interests as a result of a consideration of one or more of the matters in section 60CC, or is otherwise impracticable.
8. If equal time is found not to be in a child's best interests and the Court should consider making an order that the child **spend substantial and significant time as provided in Section 65DAA (3) with the parents unless to do so would be contrary of the child's best interests.**
9. If neither equal time nor substantial and significant time is considered to be in the best interests of the child then making such orders in the discretion of the court that are in the child's best interests.

PROCEEDINGS FOR FINAL ORDERS

SAMPSON AND HARNETT

The way the Court is obliged to approach Final Orders was laid down in *Sampson & Hartnett*¹³. At first instance Moore J made the following findings:

1. *"[the mother] has not demonstrated an appreciation of [the father's] role in the children's lives... there is no particular basis upon which it can be said that her outlook is likely to change in the future. If her demonstrable lack of support in this area were to continue in the future there is the spectre of the children becoming alienated from their father..."*¹⁴
2. *...that the children should have the opportunity to spend considerable time in [their father's] care and that he should have the opportunity to take a proper role **in their day to day lives and their upbringing.***
3. *By the same token, their mother is obviously of central importance to them and it is essential they continue to have the opportunity to spend time in her care and that she take a proper role **in their daily lives and upbringing...***

¹³ [2007] Fam CA 202 (14 February 2007)

¹⁴

4. *Unfortunately, with [the father] living in Sydney and the [the mother] in Geelong, this presents practical problems...*

At around the same time, namely on 7 June 2007 O’Ryan J in the matter of *Bullivant and Jevtovic*¹⁵ made the following findings in a not dissimilar dispute, which involved the relocation of one of the parties with child or children, namely;

1. *“I am of the view that the Mother has not demonstrated a willingness and ability to facilitate and encourage, a close and continuing relationship between the child and the father. In this context I am of the view that the Mother has failed to fulfil her responsibilities as a parent. I am also of the view that the Mother has failed to provide the Father with the opportunity to participate in making decisions about major long-term issues in relation to the child and to spend time with the child and to communicate with the child”*
2. *I am of the view that there will continue to be difficulties if the Mother continues to reside in Kempsey and the Father continues to reside in Wollongong. If the child continues to reside in Kempsey with the Mother....I am satisfied that there will be little opportunity for the child to have a meaningful relationship with both parents and this is not in the best interests of the child. As well, there are risks for the child having regard to the nature of her relationship with the Mother.*
3. *If both parents were living in Wollongong and the child lived with the Mother then there is an opportunity for the child to have a meaningful relationship with both parents and as well, the risks for the child having regard to the nature of her relationship with the Mother would be lessened.”¹⁶*

The approach of Moore J and that of O’Ryan resulted in different orders. Each of these decisions is of significance in relation to relocation attempts. It has been suggested that as a result of the new legislation, relocation is more difficult than it ever was.

Moore J’s orders made on 21 March 2007 are set out in Annexure “B” to the paper. However of particular significance was order 17 which provided:

17. ***The children’s residence is to be established in Sydney no later than 1 May 2007.***
(They had then been living in Geelong for years.)

Her Honour then set out in the orders that followed a carefully crafted increase in the time the children would spend with the father, culminating in a shared care arrangement when the eldest child commenced school in 2009, some 21 months later.

O’Ryan J’s orders in *Bullivant* were in these terms so far as is relevant:

1. *The Mother and Father have equal shared parental responsibility for the child of their relationship born on October 1995.*
2.
3.
4. ***If the Mother does not relocate to the Wollongong area on or before 16 July 2007 then as from 16 July 2007 the child live with the Father.***
5. *If the child lives with the Father pursuant to Order 4 hereof then on the basis that the Mother continues to reside in Kempsey, the child live with the Mother:*
 - 5.1 *For one half of each school holiday period.*

For two weekends during each school term as agreed between the parties.

¹⁵ FCofA 7 June 2007, O’Ryan J, unreported

¹⁶ IBID, paragraph 145 - 148

6. *If the Mother does relocate to the Wollongong area on or before 16 July 2007 then as from 16 July 2007 the child lives with the Father:*

6.1 *During 2007 for two hours on the first to fourth Saturdays after 16 July 2007.*

6.2 *During 2007 for four hours on the fifth to eighth Saturdays or other agreed day.*

6.3 *During 2007 for nine hours on the ninth to twelfth Saturdays or other agreed day if the Father's roster does not permit.*

Appeals were filed in respect of each of these matters.

In *Sampson* the following grounds were relied upon by the Mother:

"1. Upon

1.1 The learned Trial Judge making a factual finding that each of the parties will remain in different cities for reasons not capable of criticism; and

1.2 The learned Trial Judge appreciating the nature of the competing applications;-

2.2.1 failed to provide reasons for formulating the Orders she did having regard to there being a progression, moving from substantial and significant to equal time;

2.2.2 failed to have regard to and articulate those matters specifically referred to in Section 65DAA(5);

2.2.3 failed to follow and articulate the natural progression of matters to be considered conjunctively being Sections 60B; 60C; 60CC and 65DAA, having regard to her findings of fact.

2. That the real of effect of Order 17 was to:

2.1 ...[abandoned]

2.2 Alternatively if not beyond the Court's power, the learned Trial Judge failed to articulate the basis upon which it was the Wife who should relocate (as opposed to the husband) in circumstances where;

2.2.1 the wife was adjudged to be the appropriate carer for the children for 20 out of 28 nights for the foreseeable future.

2.2.2 The wife had resided in Geelong since separation;

2.2.3 Geelong is the only home known to [B] for all of his life."

In *Bullivant* the following grounds were relied upon:

1. *"That His Honour erred in ordering that if the mother did not relocate to Wollongong by 16 July 2007 that the child would live with the father, in circumstances where the father is an airline pilot on a rotating roster and the evidence was that he was only off work and available to care for the child 11 days per month.*

2. *That His Honour failed to take into account or gave insufficient weight to the fact that the father's support people live in a different city from him and that there was no evidence that they were available to care for the child in all or any particular periods when the father would be at work.*

3. *That His Honour erred in ordering that the child live with the father if the mother did not return to Wollongong by 16 July in circumstances where there was insufficient evidence as to the arrangements which the father could make to care for the child if that were occur.*

4. *That His Honour failed to take into account the effect on the child of the prospect of living with several carers, if she were to live with her father, when she had always lived primarily with her mother for the whole of her life.*
5. *That His Honour failed to give sufficient reasons for a finding that the father was able to provide for the needs of the child.*
6. *That His Honour erred in ordering that the child live with the father if the mother did not return to Wollongong by 16 July in circumstances where, if the mother did return to Wollongong, His Honour's orders provided for the father to have very graduated contact in accordance with Order 7 of His Honour's orders.*
7. *His Honour erred in ordering that effectively the mother be required to give up her employment and return to Wollongong in circumstances where he ought to have taken into account the effect of her having to do so upon the mother and accordingly the flow on effect upon the child.*
8. *That His Honour erred in ordering that the child live with the father if the mother did not return to Wollongong by 16 July in circumstances where His Honour gave insufficient weight to the difficult relationship between the child and the father and as to how this might be able to be overcome."*

BULLIVANT

It will be obvious that in *Bullivant*, which is yet to be heard and determined, the issue is very much a narrow one.

The Appellant mother, almost having to concede that it was open to O'Ryan J to make the orders which he did, has to argue that because of the way in which the trial was conducted, there was no or insufficient evidence as to the father's ability to care for the child, or his arrangements to care for the child if the default event occurred.

SAMPSON

In *Sampson* the Full Court had a much more difficult task. There was the need to consider and resolve a number of matters, which ought to be taken into account in the determination of issues of this nature.

Obviously and essentially this occurs as the result of the acceptance of the opportunity for the greater involvement in the child's life that the non-primary carer parent will need to have under the law.

In other words it can clearly be argued that whereas in the past the '*best interests of the child*' would determine the matter irrespective of other issues, now, in determining what is in the best interests of the child, the Court must first look at the issue of parental responsibility, and then it will flow from there. In particular, the Court is required to have regard to Section 65DAA which requires the Court to consider a child spending equal time or substantial time with each parent in certain circumstances.

Section 65DAA(1) is in the following terms:

1. If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:
 - a. consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
 - b. consider whether the child spending equal time with each of the parents is reasonably practicable; and
 - c. if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

In assessing Section 65DAA the essential issue in *Bullivant* and *Sampson* was the order, which required effectively the mother to relocate, or otherwise lose the primary responsibility and care for the child/children.

In determining the issues involved the Full Court in *Sampson* (Bryant CJ and **Warnick** J took it upon themselves to consider something that hadn't been particularly an issue but which nevertheless is of significance, namely whether there was power in the Court to in effect order a parent to relocate by ordering that parent, who wishes to act as the primary parent, not to change the location of a child.¹⁷

Their Honours noted that in *B & B*¹⁸ the High Court considered that there was power to make an order that may have the indirect effect of restricting the movement of the contact parent but emphasised that in the High Court the argument had not been so much on the existence of power within the Family Law Act but **'the application of Section 92 of the Constitution'** The Full Court held in *Sampson*¹⁹:

In our view, there is nothing in the authorities that establishes that there is no power within the [Family Law Act](#) to directly restrain a parent from relocation or to directly require relocation. To the contrary, while there has been no decision expressly on point, there are some statements that support the existence of such a power."

In coming to their final conclusion their Honours (Bryant CJ and **Warnick** J) had some regard to what was said in *AMS*²⁰ by Hayne J and Callinan J, namely, that [s 92](#) of The [Constitution](#)

*"did not operate to strike down ... orders of a court, but rather the legislative provisions which purport to support or authorise them to the extent necessary to ensure that infringing activities or orders will not be permissible..."*²¹

The proposition was refined in *U and U*. where Gummow and Callinan JJ said:²²

"But the court is not, on any view, bound by the proposals of the parties. The court has to look to the matters stated in s 68F and elsewhere in the [Family Law Act](#) in coming to a decision about the residence of a child, and the objective is always to achieve the child's best interests."

Hayne J went on to say²³:

In these circumstances, it would be quite wrong to treat the decision that is to be made as confined to a choice between whatever may be the particular "proposals" that the parents may make for the residence of, and contact with, the child. So to confine the inquiry would, in this case, have required the Family Court to ignore admittedly relevant evidence that was led about what the mother would do if it were decided that the child should live in Australia rather than India. More fundamentally, it would confine the court's inquiry to what the parents suggested would be in the best interests of the child, regardless of whether those suggestions were informed, even wholly dictated, by the selfish interests of one or other of the parents. To confine the inquiry in this way would, therefore, disobey the fundamental requirement of the Act that the court regard the best interests of the child as paramount. Those interests may, or may not, coincide with what one or both of the parents put forward to the Family Court as appropriate arrangements for residence and contact."

It is easy to understand how such remarks might be made by a Judge in the High Court, but it is surely made without regard to the fact that there is in most cases appointed an Independent Children's Legal Representative ("ICL"), whose task, if properly carried out, would ensure that appropriate proposals were put forward.

Of particular interest is that in *Sampson* the only advocate who sought the order that was ultimately made was the ICL.

¹⁷ *Sampson*, Page 82,008-009

¹⁸ 1997 FLC92-755

¹⁹ *Sampson* and Harnett at paragraph 33

²⁰ (1999) FLC 92-852

* Chisolm (ep cit)

²¹ (1999) FLC 92-852 at paragraph 274.

²² at p 89,089

²³ (at pp 89,102 to 89,103):

The father had simply sought that the child reside with him (underlying that was the proposition that he would continue to live in his mansion in Sydney). The mother sought that she should continue to have the primary care of the children whilst they resided with her in her extremely modest abode in Geelong, Victoria.

The father did not seek an order that the mother relocate or that the children relocate other than to the extent that this would have been required had the order that the father have primary care of the children be made.

In any event the High Court had clearly enunciated the proposition that the court is not bound by the proposals of the parties.

Bryant CJ and **Warnick** J then said, in effect that the Court couldn't manufacture an alternative proposal with respect to residence when there was no existing proposal. But, (if there were competing proposals), they said:

*"In our view it was as early as this point in her Honour's reasons for judgment that her Honour fell into error. It was essential that her Honour give consideration to how the best interests of the children could be advanced in this case. **This did not confine her Honour to the competing proposals of the parties.**"*

"Her Honour needed at least to turn her mind to whether alternate arrangements could be made to those being put forward by each of the parties that would meet all the criteria needed to determine what was best for these children. (emphasis added)"²⁴

Significantly their Honours went on say:

*The prospect of ordering a parent to relocate and in effect "parent" in a situation not of that parent's choosing, legitimately gives rise to concerns, particularly in respect of enforcement. What if the parent, in response to such an order, simply hands the child to the other parent, perhaps in circumstances such as in the instant case, where for whatever reason, there is not a well-established relationship between the child and the other parent? Will the primary parent be punished? The fact that such vexing questions arise does not mean that the power does not exist and may be rightly exercised at times. Enforcement is discretionary and may be rare in the situation exemplified. On the other hand, enforcement may be appropriate if a primary parent ordered to relocate, simply did not do so.*²⁵

In summary, the facts were simply that the mother relocated to Geelong from Sydney immediately following separation in September 2004. At the time she relocated she was pregnant with the parties' second child. At the hearing before the trial judge in 2006 (which took place for 14 days over the months of May, September, October and December) the children had lived with the mother as their primary carer in Geelong. Judgment was delivered in March 2007 - 2 1/2 years later.

Of significant and practical importance in this case was the fact that the father made somewhat herculean efforts to have contact with the children by travelling to Geelong every second or third weekend to be with them and to accommodate them in a motel so long as he was able to have overnight contact.

In coming to her decision Her Honour found:

"The period since separation has been fraught with conflict and continual litigation either related to the children or to property and financial matters"

But notwithstanding such findings Her Honour held that it was essential that both parents be involved in the day to day lives of the children, and that after an increasing period of contact between the children and the father, the care of the children be shared equally. As set out earlier, Her Honour put in place a carefully drafted incremental approach to increasing the time the children spent with the father, so that by the time the eldest child commenced school, a week-about arrangement would be in place. Of particular importance are Her Honour's findings at paragraph 91 of her Judgement:

²⁴ Sampson & Hartnett (No. 10) [2007] FamCA 1365 (22 November 2007)

²⁵ Sampson & Hartnett (No. 10) [2007] FamCA 1365 (22 November 2007) at paragraph 59

“Certainly a continuation of the current circumstances would provide for the children continuity and stability of place and people and that is desirable. It would also provide a supportive environment for Ms [Sampson] and her feelings about that is a weighty consideration. Were she compelled to return to Sydney, virtually by the terms of orders, it could be predicted that she would be quite unhappy and resent the imposition of such arrangements. Given that the children would spend significant time with her on either proposal in the scenario presented by the children’s lawyer or by Mr [Hartnett], account has to be taken of the impact, however indirectly, her unhappiness would have on her functioning as a parent. That is also an important consideration to be weighed in the balance.”

Their Honours in the Full Court, in assessing Her Honour’s Reasons for Judgment, then had to come to terms with the central question, which they posed as follows:

“Whether all findings necessary to support the orders, particularly findings about the probability and practical ability of the mother relocating to Sydney were made.”

Essentially the decision of the Trial Judge was eventually overturned because the Trial Judge failed to consider whether the time to be spent with each parent under her Orders was *“reasonably practicable”*.²⁶ In particular Her Honour’s Reasons for Judgment failed to address the issues set out in Section 65 DAA(5). Their Honours then went on to consider whether a parent has already moved or has planned to move and where:²⁷

“settled arrangements in the new location will be in place or arranged... in circumstances in which existing orders for arrangements for the other parent to spend time with the children will be ineffective, there will usually be arrangements in the original location for the practicalities of life, such as accommodation, schooling and employment is relevant which can be readily identified”.

The Full Court held that Her Honour failed to look at those issues and to identify them. Their Honours noted that Her Honour had concluded without challenge that both parents ought to be involved in the children’s day-to-day lives, however, *“this would only be possible if both lived in the same area”*. Neither parent offered to move.

Whilst not conceding that this was the true effect of Her Honour’s orders (although it clearly was) Their Honours agreed that it was an extreme case, which *“required an unusually stringent enquiry”*.

Their Honours remitted the matter for a rehearing to the Trial Judge.

It is a matter of sad comment that the Trial Judge had made adverse findings as to credit against the wife, who accordingly found it necessary to spend yet further funds on an application to have Her Honour disqualify herself from a further hearing, which her Honour duly did.

In a concurring judgement, Kay J offered a number of comments and concluded (which summarises the position nicely):

1. That before making an order that the children spend either an equal or substantial time with each of their parents, the court must consider whether such an order is reasonably practicable.
2. Subsection 5 of Section 65 DAA specifically sets out matters that the court must have regard to in determining the reasonable practicability.
3. The first of these matters is how far the parents live from each other.
4. Second is the parents’ current and future capacity to implement an arrangement to enable the children to spend equal substantial or significant time with a parent.

²⁶ “See Section 65DAA (1) (B) and Section 2(d).

²⁷ At paragraph 74 of their Judgment

5. It was also incumbent on the Trial Judge to give proper consideration to the parent's current and future capacity to communicate with each other and to resolve difficulties that might arise-it being noted that Her Honour had made findings about the difficult attitudes between the parties.

Of particular importance is what His Honour said at paragraph 119:

" The second matter required to be given consideration is the parents' current and future capacity to implement an arrangement that would enable the children to spend equal or substantial and significant time. The finding of the trial judge in this case was that the effect of the litigation would be to leave the mother with no money. Precisely how it was expected that she would be able to establish housing somewhere in Sydney in sufficient proximity to wherever the father was going to establish his housing (the location of which was not yet apparent given the sale of the former matrimonial home), so as to enable an equal shared or substantial and significant time arrangement to be put into place, was never alluded to by the trial judge."

His Honour concurred with the majority that the legislative requirement under section 65DAA(5) is mandatory; the obligation of the trial judge is to pay regard to those matters. In this regard His Honour held:

"In my view the trial judge is also obliged to explain the manner in which she has regard to those matters where she intends to make orders which are not on their face, immediately capable of implementation. The trial judge needs to explain why it is that she is of the view that they are capable of being implemented.

In my view the dilemma in this case is to sculpt orders to meet the realities of the case. Those realities are that the father wants to live in Sydney and the mother wants to live in Geelong and each is free to do so. What needs to be achieved, is an order that in the circumstances maximises the opportunities for the children to develop a relationship with both of their parents. It requires a choice of which parent is to be the primary caregiver, that is, with which parent the children are to live, and then a choice of what opportunities should be provided to the other parent to have the children spend time with them."²⁸

Essentially, to consider the error in *Sampson*, and the problems which need to be addressed in similar cases, one simply needs to revisit subsection(5) of Section 65DAA, which provides in effect that the Court **must** have regard to:

- (a) how far apart the parents live from each other; and
- (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents;
- (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- (d) the impact that an arrangement of that kind would have on the child; and
- (e) such other matters as the court considers relevant.

Kay J in supporting the decision of the Chief Justice and **Warnick** J had regard to a number of American authorities²⁹.

It is of interest to set out the events following the Full Court's Judgement in *Sampson* to truly understand the impact the new amendments have had on the Court's approach to dealing with parenting matters.

The Full Court's Judgement on 22 November 2007, which allowed the appeal, effectively set aside the orders made by Moore J, meant that as a result of the Full Court's Judgement there were no orders in place in relation to the time the children should spend with either parent.

As a result of this, on 19 December 2007 the matter came before Judicial Registrar Loughnan who made orders in terms of those sought by the father, which in summary saw to the two children aged 3 and 4 living with the father in Sydney for a 7 day period and with the mother in Geelong for a 7 day period. The copy of the orders made by the Judicial Registrar are annexure "D" to this paper.

²⁸ Paragraph 135 - 136

²⁹ Washington state (1997) California (1990) Montana (1998)

Following the making of these Orders the mother filed an application for a review of the Judicial Registrar's decision. The matter came before Justice Watts and Judgement was delivered on 23 January 2008 dismissing the mother's application.

In coming to the decision His Honour considered the Provisions of Section 60CC as he was required to do having regard to the findings in *Goode and Goode*.

His Honour then turned to the provision of Section 65DAA which His Honour was obliged to do having regard to the fact that the parents had consented to an order for joint parental responsibility.

How did he get over this having regard to Kay J's remarks? He did so on the basis that this was only an interim application and the orders would be in force for a short duration.

THE ACADEMIC AND THE JUDGE

In his excellent article "Making it Work"³⁰ the retired Family Court Judge former academic and current academic Professor Richard Chisholm after reviewing the Hull Report and the explanatory memorandum, referred to the conclusions reached in the report which were to this effect:

1. *"The committee was of the view that "shared parenting and shared physical care have not become a reality for the vast majority of separated families" and then "... whilst legislation cannot make people behave reasonably or be good parents, it can provide them with a template within which to develop their own approaches to their parenting responsibilities. And finally:*

"The committee believes that shared parental responsibility needs to become standard ... this can be achieved at least in part by making specific adjustments to legislation".

2. *The committee believed that flexibility was more important and that a "preferred starting point" would be the appropriate approach.*
3. *The committee then posed the question "Is changing the Family Law Act enough?" and the committee concluded that legislative change should be "accompanied by community and professional education".*

Chisholm then reviewed what he referred to as "the perceived problem of inadequate parental involvement and its causes" and noted the possibility of "law related factors" that where courts were reluctant to make orders for anything other than 80:20 properly split outcomes.

Chisholm then outlined a method adopted by himself when a judge as to the mechanics of "*judicial decision making in relocation cases*".

He notes that the legislation does not impose shared parental responsibility on parents but only that "each parent" has it.

Chisholm then notes the conclusions of the whole committee that separated parents when they wish to "reframe their lives and put distressing experiences behind them makes them a particularly mobile population" and that the committee had said³¹ "*shared parental responsibility will necessarily constrain the ability of separated parents to move freely. Moving interstate, overseas **or even across to another side of the city** is an important decision in the life of the child as well as the parents and should be decided jointly ... Whilst the best interests of the child remains paramount **it is not the sole consideration**".*

The conclusion:³²

"The committee believes truly shared parental responsibility will inevitably mean that relocation of one parent, whether the primary carer or the other parent should be less of an option."

³⁰ Australian Journal of Family Law

³¹ 2.47

³² 2.48

Chisholm then describes his own judicial decision making process and presents a hypothetical case in which he adopts two scenarios, one under the old legislation and the other under the new legislation.

In a very compelling article in Volume 21, No.3 (November 2007) of the Australian Journal of Family Law, Professor Patrick Parkinson makes a response. After noting his indebtedness to Professor Chisholm he describes the hypothetical relocation case which Chisholm dealt with in his article.

Parkinson notes that Chisholm believes that he (Chisholm) would have decided the hypothetical fact situation in the same way whether before or after the amending legislation, and that this is because Chisholm gave greater scope to the paramountcy principle.

The hypothetical case was one in which the mother, the primary carer of a 4 year old, sought to relocate to her homeland - England. It was suggested that the relocation would have various benefits for the child - enhanced wellbeing of mother - increased involvement with mother's extended family - improved material circumstances - relief from frequent exposure to conflict between parents.

Chisholm assumed that before the amendments a judge having "carefully and impeccably" taken into account all necessary factors had come to the conclusion that it would be in the child's best interests to allow the relocation.

Chisholm then postulated that the identical case coming before the same judge after the 2006 amendments and wondered whether the outcome could be different.

Chisholm found that there were at least two possible answers and gave two different hypothetical judgments.

Parkinson considers the judgments in his "response" and comments "that the trial judge's personal view of what is best for the child trumps all other considerations whether primary or additional".

Parkinson argues that in Professor Chisholm's preferred judgment i.e. the first judgment allowing the relocation, "the trial judge's assessment of the benefits to the child of the relocation are based on considerations **that are not to be found in the legislation at all.**" He adds "Professor Chisholm's hypothetical judge places the highest value on matters that the Parliament has not seen fit to include as considerations at all". On the other hand Professor Chisholm's second judgment in which the relocation is rejected is a decision in which "the reasoning is impeccable in terms of the constitutional order in Australia".

Importantly Parkinson concludes "*if Parliament gave the courts no instruction other than to make the decision that, in the trial judge's personal opinion, and on the basis of the evidence, is in the best interests of the child, then this hypothetical judge would never need to make a decision which is in any way in conflict with his or her own values and beliefs*". He goes on to note that as Parliament has chosen to express objects and principles and to stipulate that some considerations are of more importance than others in determining the best interests of the child, the judge must make the decision having regard to the objects, principles and considerations laid down by Parliament.

It is therefore important to set out in full the terms of Chisholm's second judgment:

"The second case is identical. But this time I cannot approach the matter in the same way, by giving such weight to the various matters as is appropriate in the particular circumstances. Parliament has now given much more explicit direction in s 60B about the objects of Pt VII, and, in s 60CC, has elevated two considerations above all the others. Since there is no violence or abuse in this case, only one of those 'primary' factors is relevant, namely the benefit to the child of having a meaningful relationship with both of the child's parents. I cannot now give to the factors that I relied on before a higher priority than that factor. Acceding to the mother's proposal to relocate with the children would be directly contrary to promoting the meaningful involvement of both parents."

The hypothetical judge goes on to be saddened by the need to make a decision which he considers is not in the child's best interests but notes that:

"That evaluation must now be based on giving increased importance to the benefit to the child of having a meaningful relationship with both of the child's parents."

Parkinson in dealing with the paramountcy principles says this³³:

"Nothing in the Family Law Act suggests that the best interests of the child are at large. Section 60CC begins: 'in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).' These subsections contain the primary and additional considerations. There is not a hierarchy of considerations in which the paramount consideration (the best interests of the child) trumps the primary considerations which trump the additional considerations. There is certainly an expression of priority between primary and additional considerations, but there are, together, a means by which the trial judge is to reach a reasoned decision on what is in the best interests of the child. They are not subordinate to 'the best interests of the child'. This is the fundamental error that the hypothetical trial judge makes in the first decision.

The best interests of the child are paramount over other considerations not related to the best interests of the child. These include the rights and interests of the parents and extended family, including a parents right to freedom of movement."

But Chisholm then had the last word in a further article.³⁴ He concedes that it would be wrong for a judge to ignore Parliament's guidelines in reliance upon the paramountcy principle, but he also argues that it would be equally incorrect to so construct the judgment that referred to the legislative guidelines "only in order to pretend and he concluded.³⁵

"The problem posed for judges by the new provisions is essentially, ... to what extent and exactly how, the new language about 'primary' and 'additional' considerations affects the reasoning process and the outcomes."

RELOCATIONS REVIEWED

In a compelling article in the May 2008 edition of the *Australian Journal of Family Law*³⁶ Professor Parkinson reviews relocation decisions which have been made since the amendments.

After reviewing more than 50 decisions Professor Parkinson laments³⁷ that there is "No authoritative and general guidance from a Full Bench of the Full Court on how the 2006 legislation should be applied to determine the outcomes of relocation cases".

Professor Parkinson notes that various appeals to which he refers "have been determined on as narrow a basis as possible, dealing only with the issues raised by the appeal to the extent necessary to do so". He refers to a number of decisions³⁸.

I commend Professor Parkinson's article to practitioners. He deals with research on the effects on children of relocation; he addresses the issues of the burden of travel³⁹; he addresses the issue of the costs of spending time with the other parent if relocation is allowed⁴⁰; the influence of the views of children on the outcome⁴¹; whether the existence of new partners can make a relocation reasonable⁴² and he finally appeals to lawyers to advise parties in relation to the necessary "reality check" which ought to occur as early as practicable, and before disputes such as this get out of hand.

³³ *The Australian Journal of Family Law*, Volume 21, No. 3, (November 2007), p. 226

³⁴ *The Australian Journal of Family Law*, Volume 21, No. 3, (November 2007), p.231

³⁵ *ibid* p. 229

³⁶ *The Australian Journal of Family Law*, Volume 22, No. 1,

³⁷ *ibid* p. 54

³⁸ *Bale and Jenkins* [2007] FamCA 809; *Taylor and Barker* (2007) Fam LR 461; FLC 93-345; *Sampson and Hartnett* (No 10) FLC 93-350; [2007] FamCA 1365; *Lamereaux and Noiro*t [2008] FamCAFC 22. See also *Goldrick and Goldrick* [2007] FamCA 1260.

³⁹ *Ibid* T46

⁴⁰ *Ibid* T47

⁴¹ *Ibid* T49

⁴² *Ibid* T51

Conclusion

Whilst it is always difficult to lay down general rules and principles in children's cases it does seem that the major considerations and the most practical considerations are to be found in section 65DAA, but not to forget section 60 CC; and that what the practitioner has to do is carefully work through each of the various subsections and test their applicability to the competing proposals made. I am also of the view that what the court does is to consider these proposals but then ultimately focus on whether joint parental responsibility is appropriate, and then to proceed to consider the issue of equal or substantial time. What happened in *Sampson* and *Hartnett* after the Full Court's decision on the appeal was an appalling indictment of the system and the inability of courts to properly determine different issues such as this.

- Moore J disqualified herself from the re-hearing;
- orders were made by JR Loughnan on 17 December, 2007 ordering week- about – and this involved the children travelling by air each week between Geelong and Sydney and spending time with each parent.
- a review was heard on 15 January 2008 – dismissed by Watts J – (who maintained the week-about arrangement) Then it was referred to Justice Le Poer Trench.
- Justice Le Poer Trench has now referred the matter back to the Full Court for them to determine the scope of the issues that are to be addressed on the re-hearing.

I should note that Professor Parkinson in his article states: *"equally it would be wrong for lawyers to think that the legislation requires them to disregard difficulties or to pressure a client to accept a shared parenting arrangement in circumstances where it is not likely to benefit the children"*. However, as a practitioner dealing with the amendments, you are left with no choice but to advise the primary carer (most often the mother) of the dangers in relocating without the Court's approval and being ordered to return, and the difficulties to be faced in such cases in seeking an order permitting relocation in the first place.

Having regard to the impracticability test, it would seem to be a good argument in relation to an attempt to restrain a relocation, to submit that to permit the relocation would be to impose a significant burden on the litigant who sought shared parenting later on, given the delays which will inevitably occur in bringing the case on for final hearing.

Practitioners should therefore be extremely vigilant as to the prospects of a relocation as whilst judges may order an immediate return of a child if a move has already taken place upon separation, one cannot always guarantee such an outcome, particularly given the rejection in *Goode* of *Cowling*, which played down the impact of the arrangements in place at the time of the commencement of proceedings.

Michael Paul

July 3, 2008

ANNEXURE "A"

Identification of the Issues in dispute

1. The nature of the parties' relationship and the ability and capacity of the parents to implement a shared care arrangement.
2. Current and future methods of communications between the parties.
3. Father's proposal of supervision whilst they are in his care.
4. Children's ability and capacity to cope with a shared parenting arrangements now and into the future.

Directions made by Justice Le Poer Trench

1. I request Ms B (the Family Consultant) consult with Z's speech pathologist for the purpose of:
 - a. Ascertaining the current position concerning Z's speech;
 - b. The duration of therapy;
 - c. The requirement of family support to reinforce the speech therapy;
 - d. The importance or otherwise of Z's parents being involved in the treatment plan; and
 - e. Any recommendations to support Z's speech therapy in the event of Z spending equal time with both parents.

Further directions:

1. I direct that the wife file and service an affidavit addressing only the topics specified by me; and an affidavit by her mother E B focusing on the issue of communication.
2. I direct that the husband file and serve an affidavit addressing only the topics specified by me and an affidavit by F V (his new partner) addressing:
 1. Her relationship with the children;
 2. Her ability to assist in the care of the children; and
 3. The nature and future of her relationship with the father.

ANNEXURE "B"

SAMPSON AND HARNETT

Parenting orders

15. The parents are to have equal shared parental responsibility for their children: a daughter born in April 2003 and a son born in November 2004.
16. The children are to live with their parents at times designated by these orders.
17. The children's residence is to be established in Sydney no later than 1 May 2007.
18. The children are to spend time with each parent as follows
 - a. *spending the relocation of the children's residence to Sydney by 1 May 2007:*
 - i. in accordance with the current interim orders save that both children are to spend the time designated by those orders from 9am Saturdays until 5pm Sundays on an unsupervised basis;
 - b. *after the relocation of the children's residence to Sydney by 1 May 2007 until 31 October 2007 in four weekly cycles:*
 - i. with their father in weeks 1 and 3 from 5pm Friday to 5pm Sunday
 - ii. with their father in week 2 and 4 from 5pm Tuesday to 5pm Thursday;
 - iii. with their mother at all other times.
 - c. *from 1 November 2007 until 31 January 2008 in four weekly cycles:*
 - i. with their father in weeks 1 and 3 from 9am Friday to 5pm Sunday;
 - ii. with their father in weeks 2 and 4 from 9am Tuesday to 5pm Thursday.
 - iii. with their mother at all other times
 - d. *from 1 February 2008 until 31 July 2008*

A. *during school terms as gazetted in New South Wales in four weekly cycles*

- i. with their father in weeks 1 and 3 from 9am Friday to 5pm Sunday;
- ii. (b) with their father in weeks 2 and 4 from 9am Tuesday to 5pm Thursday
- iii. with their mother at all other times

B. *during school holiday periods as gazetted in New South Wales:*

- iv. with their father for one half of the school holidays following terms 1, 2;
- v. with their mother for one half of the school holidays following terms 1, 2;
- e. *from 1 August 2008 to 31 January 2009*

A. *during school terms as gazetted in New South Wales in four weekly cycles:*

- i. with their father in weeks 1 and 3 from 9am Friday to 9am Monday;
- ii. with their father in weeks 2 and 4 from 9am Tuesday to 9am Friday;
- iii. with their mother at all other times.

B. *during school holiday periods as gazetted in New South Wales;*

- iv. with their father for one half of the school holidays following term 3;
- v. with their mother for one half of the school holidays following term 3;
- vi. with each parent for alternating periods of one (1) week in the school holidays at the end of term 4 in 2008.
- f. *from 1 February 2009*

A. *during school terms as gazetted in New South Wales*

- i. with their father in week 1 from 5pm Sunday until 5pm the following Sunday and every alternate week thereafter;
- ii. with their mother in week 2 from 5pm Sunday until 5pm the following Sunday and every alternate week thereafter.

B. during school holidays as gazetted in New South Wales

- iii. with their father for one half of each school holiday period at times to be agreed and failing agreement for the first half in even numbered years and the second half in odd numbered years;
- iv. with their mother for one half of each school holiday period at times to be agreed and failing agreement for the second half in even numbered years and the first half in odd numbered years.

From the date of these orders:

- g. with each parent on special occasions such as children's birthdays, a parent's birthday, or special family celebrations at times to be agreed and failing agreement for three (3) hours with the parent with whom they are not living on that day;
- h. Mother's Day and Father's Day each year and to the extent necessary these orders are suspended to enable the children to spend that day with the relevant parent.

Notice of obligations

19. Pursuant to s.65DA(2) and s.62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these order.

Name

20. The children referred to in these orders are to be known by the surname of the father and the mother is restrained from causing either child to be known by any other surname.

ANNEXURE "C"

Orders made by Judicial Registrar Loughnan on 19 December 2007

1. That pending further Order the husband and wife have equal shared parental responsibility for the children S E Harnett ("S") and T J Harnett ("T").
2. That S and T ("the children") live with the father from 5:00pm 21 December 2007 until 5:00pm 25 December 2007 and in respect of this Order:-
 - 2.1. The mother shall deliver the children to Avalon Airport at 4:45pm on 21 December for the children to travel on Jetstar JQ620 from Avalon Airport to Sydney;
 - 2.2. That the father shall collect the children from Avalon Airport on 21 December and travel with them to Sydney;
 - 2.3. That the father shall return the children to Avalon Airport on Jetstar JQ623 departing Sydney at 5:40pm on 25 December 2007.
3. That pending further Order the children live with the father on an alternate seven (7) day weekly basis the first period commencing 5:00pm 4 January, 2008 concluding 5:00pm 11 January 2008, and fortnightly thereafter and with the wife during the other weeks.
4. For the purpose of Order 3 the father shall collect and return the children from Avalon Airport for the first weekly period each month and the father shall be responsible for the costs of such travel. It is the intention that the children will travel on the Jetstar Flight leaving Avalon Airport at 5:45pm and return to Avalon Airport departing Sydney on the 5:40pm flight.
5. For the purpose of Order 3 the mother shall deliver the children to Sydney Airport on the second weekly occasion each month, the first period to be 18 January, 2008 to 25 January, 2008 inclusive with the mother to be responsible for the costs of such travel subject to Order 6.
6. In respect of the children's travel pursuant to Order 5 the father shall obtain further loan monies to pay the cost of such transport which shall be added to the monies payable by the wife to the husband under Order 3(iv) of the Orders of this Court dated 21 March, 2007.
7. That the mother be restrained from enrolling and/or commencing S in any school without the prior written consent from the father.
8. That the matter be adjourned for Final Orders in accordance with the directions of the Full Court of the Family Court of Australia.