Michele Brooks, Barrister

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Family Law Amendment Act 2023:

NEW PARENTING ORDERS FRAMEWORK

& other changes to the FLA 1975
commencing 6 May 2024

28 May 2024

Michele Brooks, Barrister

Speaker: Michele Brooks BA, LLB

- Michele Brooks has been practising as a family lawyer since 1997 and as a **Family Law Barrister at the Victorian Bar** since 2006. Michele has around 28 years of experience and expertise in all areas of family law, litigation and alternative dispute resolution.
- Prior to coming to the Bar, Michele was a **solicitor and partner at Harwood Andrews Lawyers** based in Melbourne & Geelong. Michele worked as a family law solicitor for 10 years prior to being called to the Bar and thus has a keen understanding of issues faced by family law solicitors in day-to-day practice.
- Michele is a **Nationally Accredited Mediator** (NMAS) with a special interest in Alternative Dispute Resolution in family law. Michele is also a **Victorian Bar Accredited "Advanced Mediator"** (VBAM). She is frequently appointed as a court-ordered Mediator to assist parties in resolving their Family Law disputes. She is also regularly engaged by solicitors and their clients to mediate pre-action matters.
- Michele was recently recognised by her peers as one of the **"Best Lawyers in Australia" (2025 edition) for her work as a Family Law Barrister-Mediator**. Michele is also a qualified **Regulation 67B Arbitrator**.
- Michele is an **Adjunct Lecturer in the Applied Master of Laws (Family Law)** at College of Law having taught there since 2013. In this role she has mentored and assessed the work of hundreds of Master's students over the years. She remains an enthusiastic educator and mentor to many younger practitioners in the family law jurisdiction. Michele is an expert litigator, but equally passionate about using her expertise to assist parties resolve their disputes through **mediation** in a dignified and timely way, to avoid the stress and cost of unnecessarily prolonged litigation.
- Michele is also active in the community. She has volunteered at various **Community Legal Centres** over the years and has been a member of the **Relationships Australia (Victoria) "Family Law Experts Panel"** for over 25 years, which is a collaborative focus group of RAV Non-Lawyer Mediators and expert Family Lawyers.

Family Law Amendment Act 2023

Introduction

- Passage and Royal Assent in late 2023
- Significant provisions commenced on 6 May 2024
- Applies to all matters, except where final hearing has already commenced
- Significant changes for users of the family law system

Family Law Amendment Act 2023

Key Provisions that do NOT change

Family Law Act 1975 ("FLA")

s.60CA – child's **Best Interests remain paramount** consideration

S.61B – Meaning of **Parental Responsibility :** "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children"

s. 4(1) – Definition: **"Major Long-Term Issues"** (referred to herein as "MLT Issues")

s.61C - codified concept of "**Common Law" Parental Responsibility** – "Each parent has Parental Responsibility, subject to court orders"

s.61D (1) & (2) – **A parenting order does not diminish any aspect of Parental Responsibility,** except to the extent expressly provided for in a court order, or as necessary to give effect to the order.

ss.65C/65D – **Who may apply & Court's power** to make parenting orders

s.65G – Special conditions for making parenting orders in favour of a person who is **not a parent, grandparent or relative**

s.61F - Court's obligation to have regard to any **kinship obligations** and child-rearing practices - **Aboriginal or Torres Strait Islander culture**

Div 4 – **Parenting Plans** (save for any consequential amendments

Although see the **NOTE to s.63DA(2)** – Advisers still to inform the people that they could 'consider' the 'option' of the child spending 'equal time', or 'substantial and significant time', with each of them)

Div 11 – **Family Violence** (save for any consequential amendments)

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What's new?

Key Changes to FLA

Overview #1

Amendment Act Schedule 1: Parenting Framework

- **New s.60B** - **Amended Objects** of Part VII (Children) FLA
- **New s.60CC** – Simplified provisions as to how the court determines the **Best Interests of the Child**
- **New provisions in Div 2** – **Parental Responsibility:**
  - **Old s.61DA removed:** **Removal of the presumption of Equal Shared Parental Responsibility ("ESPR")**
  - **New S.61D(3)** – new wording provides for a parenting order to allocate responsibility for "**joint or sole decision-making in relation to all or specified Major Long-Term Issues**"

("MLT Issues")

  - **Updated s.61DAA** (in place of old s.65DAC) setting out the **effect of an order that provides for joint decision-making in relation to MLT Issues** in relation to a child (to consult and make a genuine effort to come to a joint decision)

Amendment Act: Schedule 1 (Cont'd)

Key Changes to FLA

Overview #2

- **s.65DAA removed** – **removal of requirement to consider "Equal Time" or "Substantial and Significant Time"** if an order for ESPR is made.

- ***NOTE***: *In the past, this provision was commonly misunderstood by members of the public and some litigants as creating create an unconditional right and/or automatic presumption in favour of a parent spending equal time with their child.*
  - *This was not the case.*
    - *In fact, there was only an obligation on the Court to consider equal/substantial time options in s.65DAA, if reasonably practicable and if in the best interests of a child; and*
    - *Moreover, mandatory consideration of these options was wholly contingent upon an order for Equal Shared Parental Responsibility having already been made (which was not always the case, despite there being a legislative presumption in favour of ESPR)*

Key Changes to FLA

Overview #3

Amendment Act: Schedule 1 (Cont'd)

- **S.60D and s.63DA** – changes to Adviser's obligations – simplified to:
  - update the relevant provisions
  - reflect the new wording in s.60CC and other changes; and
  - reiterate the paramountcy principle
- **Rice v Asplund - new s.65DAAA** – Reconsideration of Final Parenting Orders
  - Codification of the common law rule in ***Rice v Asplund*** (1979) FLC 90-725
  - Rule against reopening final parenting orders unless:
    - (a) 'Significant change of circumstances' since final parenting order was made; and
    - (b) Court satisfied, in all the circumstances, (taking into account the matters in (a) that it is in best interests of child for order to be reconsidered.

LET'S LOOK AT THE KEY CHANGES IN MORE DETAIL...

New s.60B – 2 Objects only:

(a) to ensure that the best interests of children are met, including by ensuring their safety

Previously the Act had 4 Objects to ensure best interests:

(a) Children having the benefit of both of their parents having a meaningful involvement
(b) Protection from harm
(c) Adequate & proper parenting
(d) Ensuring parents fulfil their caring duties /responsibilities

Previously the Act had 5 Underlying Principles:

(a) right to know and be cared for by both their parents
(b) right to spend time on a regular basis with, and communicate with both parents
(c) Parents jointly share duties and responsibilities for care/welfare
(d) Parents agree about future parenting
(e) Right to enjoy culture

(b) to give effect to the Convention on the Rights of the Child done at New York on 20/11/89

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New s.60CC – Best Interests of the Child

s.60CC(2) Unless orders are by consent, the court must consider the following 6 factors:

(a) Safety	What arrangements would **promote the safety** (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of: (i) the **child**; and (ii) each **person who has care of the child** (whether or not a person has parental responsibility for the child)
(b)Views	Any **views** expressed by the child
(c)Needs	The developmental, psychological, emotional and cultural **needs of the child**
(d)Capacity	The **capacity of each person** who has or is proposed to have **parental responsibility** for the child to provide for the child's developmental, psychological, emotional and cultural needs
(e)Relationships	The benefit to the child of being able to have a **relationship with the child's parents**, and **other** people who are significant to the child, where safe to do so
(f) Anything else relevant	**Anything else that is relevant** to the particular circumstances of the child

s.60CC (2A) – Safety factors

s.60CC(2A) – In considering "safety" under s.60CC(2)(a) the court must consider the following FV factors:

FV history

Toward child or carer

(a) any **history of family violence, abuse or neglect** involving the child or a person caring for the child (whether or not the person had parental responsibility for the child); and

FV Orders

Past & present

(b) any **family violence order** that applies or has applied to the child or a member of the child's family.

s.60CC (3) – Additional ATSIC factors

s.60CC(3) – if a child is an Aboriginal or Torres Strait Islander child, the court must consider the following factors, in addition to the 5 factors under s.60CC(2):

(a) the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary:

1. to connect with, and maintain their connection with, members of their family and with their community, , country and language; and
2. to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
3. to develop a positive appreciation of that culture; and

(b) the likely impact any proposed parenting order under this Part will have on that right.

Removal of the presumption of Equal Shared Parental Responsibility ("ESPR") (old s.61DA removed)

- **New S.61D(3)**

  "A parenting order that deals with the allocation of responsibility for making decisions about major long-term issues in relation to the child (see subsection 64B(3)) may provide for ***joint*** *or* ***sole decision-making*** *in relation to all or specified major* ***long-term issues****."*

No longer any specific guidance or presumption as to the allocation of Parental Responsibility:

- The court no longer has to presume (or work out if the presumption does not apply and/or is rebutted) that it is in the best interests of the child for the child's parents to be required to make joint decisions in relation to major long-term issues.
- The Court has discretion to allocation parental responsibility in such manner as it considers appropriate having regard to the child's best interests

s.61B (unchanged) – recap on the meaning of "PARENTAL RESPONSIBILITY"

Section 61B Definition remains unchanged:

DUTIES → **POWERS**

Exists irrespective of parental relationship status

AUTHORITY ← **RESPONSIBILITIES**

BY LAW

Includes old concept of Guardianship

Overlaps with old concept of Custody

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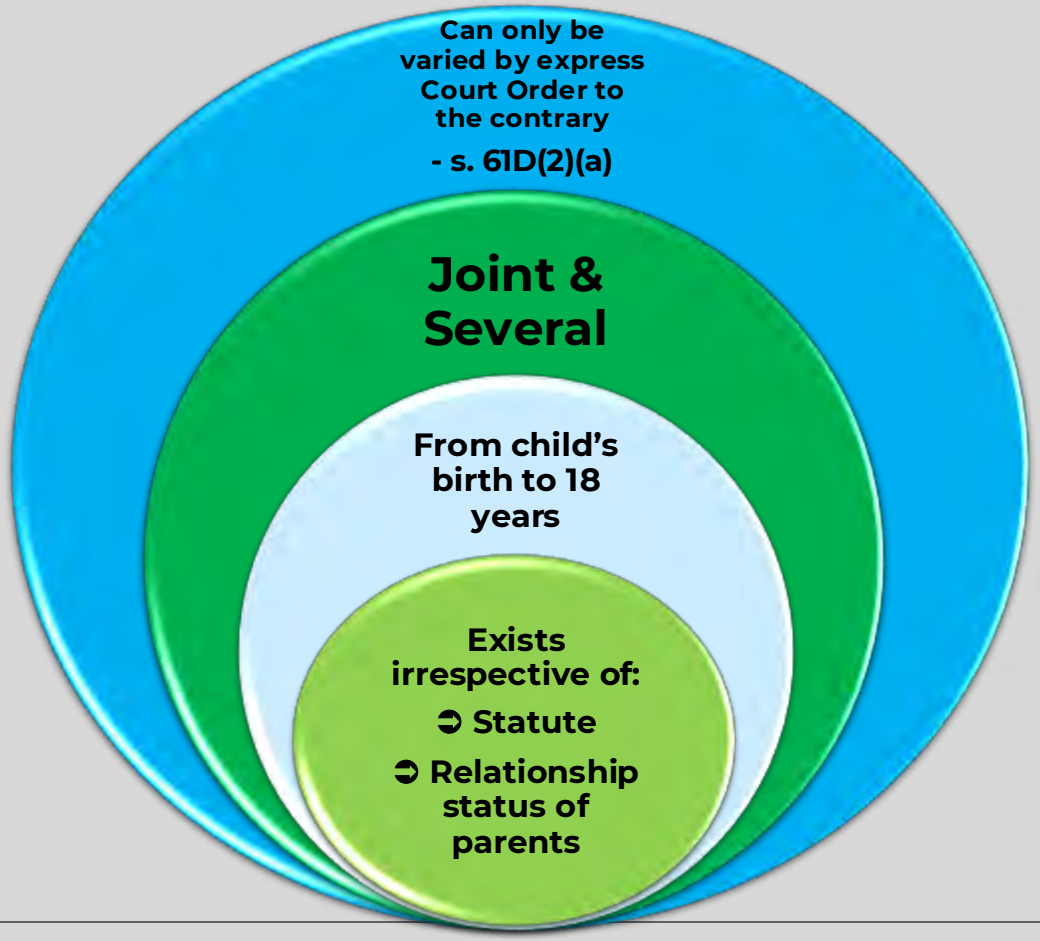
s. 61C (unchanged)
Re-cap on characteristics of "Common Law" Parental Responsibility

Common law concept

Applies to all parents and can only be varied by court order (i.e. can be varied by making of statutory parental responsibility orders)



Codified by s.61C

"Statutory" Parental Responsibility (unchanged)
s.64B – Re-cap on court's power to make parenting orders

What types of "Parental Responsibility" orders can a Court make under s.64B?

s. 64 B Parenting Orders can....

s.64B(2)(c)
Allocate Parental Responsibility

s.64B(2)(d)
Direct how persons sharing Parental Responsibility will consult and make decisions

s.64B(2)(i)
Deal with any other aspect of Parental Responsibility for the child

s.64B(2)
Allocate Parental Responsibility to parents and/or non parents such as grandparents or other relatives

Allocation of Parental Responsibility under (2)(c) may include decision-making responsibility about MAJOR LONG-TERM ISSUES (defined in s4(1)

s.4(1) - Recap of MLT Issues definition: Which Major Long-Term Issues does an order for Parental Responsibility cover?

Major Long-Term Issues

(Non-exhaustive list)

- Education (current & future)
- Religious & cultural
- Health
- Name
- Changes to living arrangements making "time with" significantly more difficult (eg. Relocation)

Defined in s.4(1) FLA (unchanged)

Day to Day Issues

(i.e. Decisions that are not Major Long-Term Issues)

- Clothing & Food
- Routines & daily activities
- Re-partnering
- *<u>UNLESS</u> due to circumstances such issues overlap with or become major long-term issues **EG.** food may be a major health issue if a child has a medical condition requiring a special diet **EG**. new relationship might involve Relocation .*

Not defined in FLA
No need for parents to consult about these issues

New s.61DAA - what is the effect of an order for joint Parental Responsibility? (old s.65DAC removed)

New s.61DAA - sets out the **effect of an order** providing for **joint decision-making** in relation to MLT Issues in relation to a child:

"(1) If a parenting order provides for joint decision-making by persons in relation to all or specified MLT-issues in relation to a child, then, except to the extent the order otherwise specifies, the order is taken to require each of the persons:

(a) To consult each other person in relation to each such decision; and

(b) To make a genuine effort to come to a joint decision.

(2) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

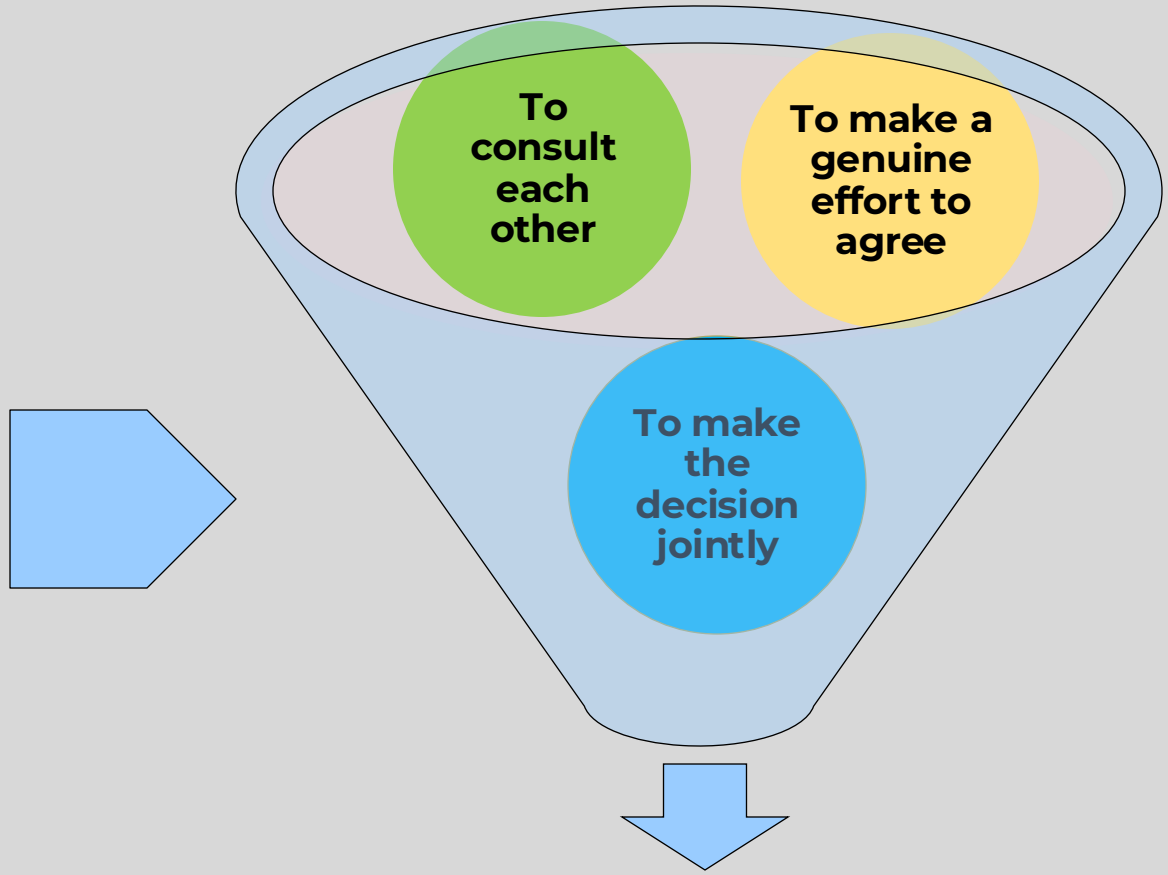
(see diagram next page)

NOTE:

- **New s.61CA** – now encourages all parents – even those who do not have court orders - to consult each other about MLT issues, having regard to best interests of the child as the paramount consideration, **if safe to do so**.
- This is of course aspirational (non-mandatory) as it applies when there are no orders.

s. 61DAA - Joint Parental Responsibility - Obligations

"If a parenting order provides for joint decision-making by persons in relation to all or specified major long-term issues in relation to a child, then, except to the extent the order otherwise specifies, the order is taken to require each of the persons":



IF NO AGREEMENT, PARTIES MUST APPLY TO COURT

Suggested wording for new Parental Responsibility orders

- *"The parties have joint responsibility for decision-making in relation to major long-term issues for the child"*

OR

- *"The [Applicant] have sole responsibility for decision-making in relation to [insert specific MLT issue here, e.g. all health and medical issues] for the child " and the Applicant and Respondent otherwise have joint responsibility for decision-making in relation to all other major long-term issues for the child"*

- If parties cannot agree, decisions about Parental Responsibility – including whether it is joint / sole (or in relation to all / only specified MLT issues) – this will now be at the discretion of the Court (no presumptions apply).
- The discretion is exercised based on an assessment by the court as to what is in the best interests of the child (and the new s.60B Objects and new s.60CC factors are to be applied when making that assessment)

When will the court allocate sole parental responsibility for decisions about MLT Issues?

The court's allocation of parental responsibility under its s.64B parenting orders power is based on the child's best interests.
The court will look at the s.60B Objects, the new s.60CC(2) "best interest" factors (including mandatory consideration of s.60CC(2A) safety factors as applicable) and any additional ATSIC child factors under s.60CC(3) if applicable.

The court will invariably continue to look at factors which are likely to go against parties being able to fulfil their obligations to consult with each other and come to joint decisions, before allocating joint decision-making power for major long-term issues in respect of a child, such as:

- Intractable conflict
- Distance / impracticality
- Absence / not likely to be spending time with the child
- Medical conditions where decisions need to be made without delay
- Urgency for any other reason
- Radically different views about lifestyle, food, religion, education
- Parties are unable to agree on a school
- Necessity or desirability of issuing a passport for child /changing a child's name
- Immunisation disputes
- Relocation disputes which make it harder for a parent to spent time / remain involved

Parental Responsibility – MLT Issues - any exceptions?

Are there any exceptions?

Yes – parental responsibility does not cover certain decisions about major long-term issues such as health issues or special medical procedures. For various public policy and other reasons these fall outside the scope of the definition of parental responsibility, e.g.:

- Child sterilisation
- Child major surgery
- Child sex reassignment
- Child bone marrow donation

There are also certain decisions that are so irreversible or so grave that parties (whether or not separated) may decide to apply to court for permission or a declaration authorising them to authorise certain medical treatment of a child

When does Parental Responsibility cease?

- **Upon a child attaining the age of 18 - section 61C(1)**

- At common law, parental responsibility ends **upon a child marrying** below the age of 18.

  - ***NOTE***: *Under **section 61B** "parental responsibility" means "the duties, powers, responsibilities and authority which, by law, parents have in relation to a child". The words "by law" here probably import the common law rule on the effect of marriage by a minor, which is that it ceases on marriage.*

S. 61E - Generally, **upon a child being adopted** (unless the adopting parent is a 'prescribed adopting parent' - usually a relative - and leave was not granted under s.60G of the Act.

- Some particular power and authority within the scope of parental responsibility may cease upon the **child acquiring sufficient maturity and understanding** to make a decision on particular matters for themselves:
  - *Secretary, Department of Health and Community Services* v *JWB and SMB ("**Marion's case**")* (1992) FLC 92-293 AND ***Re: Jamie*** (2013) FLC 93-547.

- When **parties themselves terminate** parental responsibility through parenting plan /by a court order.

- Parental responsibility vesting in one parent ceases upon the **death of that parent** and all residual parental responsibility vests in the other parent, unless there is a court order to the contrary.

S.65DAA repealed

Removal of requirement to consider "Equal Time" or "Substantial and Significant Time" if ESPR order made:

- **s.65DAA removed** – **removal of requirement to consider "Equal Time" or "Substantial and Significant Time"** if an order for Equal Shared Parental Responsibility is made.
- Removal of the concept of ESPR altogether.

NOTE:

- *This provision was commonly misunderstood by the media and general public as creating create an automatic right for a parent to have to equal time arrangements, which is one of the reasons there was a push for it to be removed.*

➢ ***What happens now?***

- *The removal of these provisions takes the Court back to a* ***"blank page" position:***
  - *There is no presumption about what parenting arrangements are in the best interests of the child*
  - *Any presumption about ESPR leading to a mandate to consider equal/substantial time (if reasonably practicable and in the child's best interests, etc) has been abolished*
- ***The court must have*** *regard to the new s.60B* ***Objects*** *and the new* ***s.60CC Best Interest factors when assessing what parenting arrangements are in the best interests of a child***

➢ **It remains open to the court to consider all options for 'spend time' arrangements**

S.60D and s.63DA
Consequential changes to adviser's obligations:

S.60D (Parenting orders) – Adviser's obligations in relation to **parenting orders** are simplified:

- to update the relevant provisions;
- to reflect the new wording in s.60CC and other changes; and
- to reiterate the paramountcy principle

"Advisers" means:

- *legal practitioners*
- *family counsellors*
- *family dispute resolution practitioners*
- *family consultants*

Advisers must:

- Inform the person that the best interests of the child are paramount (**this is unchanged**); and
- encourage the person to act in the child's best interests by applying the considerations in subsections 60CC(2) and (3).

S.60D and s.63DA – Changes to adviser's obligations (cont'd)

Parenting Plans:

- **Section 63DA amended** to remove the obligation to advise parents to consider the possibility of the child spending equal time with each parent or, if that is not reasonably practicable, substantial or significant time (**now that s.65DAA has been removed**)

- **Removed:** there is no longer an obligation for Advisers to tell parents that acting in the best interests of children means considering:
  - 'meaningful relationship with parents'; or
  - the need to give priority to the fact that the child must be 'protected from harm'

- **The s.60CC factors** 'cover the field' in relation to concepts of safety/FV. There is no hierarchy anymore (i.e. no primary/additional considerations where the court is directed to give 'protection from harm' more weight than the consideration of 'meaningful relationship'). Safety is the first of 6 "best interests" factors and must be be balanced against other s. 60CC factors now.

Removal of requirement to consider "Equal Time" or "Substantial and Significant Time" if ESPR order made (cont'd)

What does this mean in practice?

- **The Amendment Act offers no legislative insight into what kinds of parenting arrangement Part VII is now intended to promote, once the safety threshold is met i.e. once the court establishes that it is safe to make parenting orders in favour of both parents**
- There is no longer any "social engineering" element in Part VII; there are no mandatory presumptions or signposts from parliament as to what parenting orders should look like. There are objects and factors that must be considered, but no fixed starting point and no fixed destination
- **Adviser Obligation play a useful role in getting lawyers, mediators and counsellors to challenge parents to think pragmatically about how to share the parenting responsibilities for their children, in line with their capacities and their children's best interests. This can still include advising people of the option to consider equal / substantial and significant time but doing so is no longer mandatory**
- There is no reason why this cannot continue to happen under the 2023 Amendments, but Advisers will need to draw upon their experience (and sometimes expert information from social scientists and other sources/experts) to assist their clients formulate suitable proposals
- **Proposals should be supported by clear and persuasive evidence and should be in line with the new s.60B Objects and new s.60CC factors**

Rice v Asplund (1979) FLC 90-725

Reconsideration of Final Parenting Orders

Rice v Asplund - new s.65DAAA

Reconsideration of Final Parenting Orders:

Codification of the common law rule in ***Rice v Asplund*** (1979) FLC 90-725

Rule against reopening final parenting orders unless:

> **(a) 'Significant change of circumstances' since final parenting order was made; and**
>
> **(b) Court is satisfied, in all the circumstances, (taking into account the matters in (a) that it is in best interests of child for order to be reconsidered.**

The exception is where both parties consent to re-open (which in practice, puts an emphasis on negotiation and FDR/mediation).

New s.65DAAA - Rice v Asplund

Reconsideration of Final Parenting Orders (cont'd)

- These changes have been made to the FLA to reduce the re-opening of litigation (as the courts recognise that ongoing litigation is not in the best interests of a child). There needs to be a positive benefit to the child when re-opening a final parenting order
- The new s.65DAAA will limit scope for separated couples to keep going back to court regarding final parenting arrangements without good cause
- Codification of the rule in Rice v Asplund will increase awareness of the applicable legal principles as now they are set out in the Act, not just in case law

Observations

Streamlined list of s.60CC factors is non-hierarchical

- Distinction between ‘primary’ and ‘additional’ considerations gone
- Removal of multi-level approach means all relevant s.60CC issues in relation to all orders sought, must be considered
- **NOTE:** ***Banks & Banks*** **[2015] FamCAFC 36** – the court does not need to expressly discuss in its judgment legislative provisions that are not relevant to the determination, only those that are relevant.
- The court now has wide discretion to consider the unique circumstances of each child in any parenting dispute and make a case-by-case decision that reflects the best interests of that child without any fixed starting point and without any pre-determined leaning or presumption as to the outcome

Observations (cont'd)

- **Emphasis on Safety:**
  - **s.60CC(2)(a) - court must consider safety factors generally; and**
  - **s.60CC(2A) – court must also consider FV and FV orders as part of considering safety under subsection (2)(a)**
- Subject to safety issues, the Amendment Act has removed almost all references to the importance of having both parents and having grandparents involved in children's lives after separation. It has also removed all references to equal shared parental responsibility, equal time and substantial and significant time. e.g.
  - The word 'meaningful' has been removed from the phrase 'meaningful relationship' in the best interest factors in s.60CC;
  - The new "Objects" in s.60B no longer make any reference to "ensuring that children have the benefit of both of their parents having a 'meaningful' involvement in their lives"
  - Dramatic simplification of the s.60B "Objects" includes **removal of "Principles underlying Objects"**, including removal of the principle that children have the right to know, spend time and communicate with both parents.
  - Whilst s.60B 'Objects' still refers to giving "effect to the Convention on the Rights of the Child (1989)", certain aspects (which were spelled out in the previous version of the Act) are no longer specifically spelled out. In any event Object #2 is just an overarching provision.

What does this mean for us in practice?

"Blank Page" approach to parenting arrangements

- The court now has a **"Blank page"** in terms of considering which arrangements will be in the best interests of a child, on a case-by-case basis. There is no guidance or benchmarking in the Act.

Cowling's case ***Cowling and Cowling*** **[1998] FamCA 19**

- Some people have asked, is this a return to the "old days" of using the "status quo" as a starting point to work out what is in the best interests of a child? Some ask, is that even what Cowling's case stood for? In both cases the answer is "probably not!"
- If there ever was a preference for the "status quo" in years gone by, arguably we cannot adopt that approach now, as a pre-determined starting point would be just another kind of "presumption".
- **The new legislation does not permit presumptions.** It is unlikely the Court will treat status quo as a default starting point (irrespective of where it ends up) for this reason.
- However, the sentiments of the Full Court in **Cowling's case** are still very relevant to a common-sense assessment of what is in the best interests of a child, and remain entirely consistent with the "paramountcy principle" and "best interests" factors even under the new legislation, including in respect of a focus on safety:

What does this mean for us in practice? (cont'd)

Cowling's case

***Cowling and Cowling* [1998] FamCA 19 –** the Full Court held (inter alia):

> *"In determining an interim residence application, the best interests of the child are the paramount consideration.* ***These interests will normally be best met by ensuring stability in the child's life pending a full hearing of all relevant issues****. Where at the date of the hearing the child is well settled in his environment, that* ***stability will usually be promoted by an order providing for a continuation of that arrangement, unless*** *there are overriding indications relevant to the child's welfare to the contrary, such overriding indications would include* ***convincing proof that the child's welfare would be really endangered*** *by the child remaining in that environment.*
>
> ***The Court is entitled to place such weight upon the importance of retaining the child's current living arrangements as it sees fit in the circumstances****. In determining that weight, the Court may take account of the circumstances giving rise to that fact and may examine* ***whether the current living arrangements arose by virtue of some agreement between the parties, as a result of acquiescence or were unilaterally imposed*** *by one party on the other, the* ***duration*** *of the current living arrangements and whether there has been any* ***delay*** *in instituting proceedings or in the proceedings being listed for hearing."*

What does this mean for us in practice? (cont'd)

Changes in parental thinking around shared care – 2006 vs. 2024?

- Many people in society by now may have adapted their thinking around sharing of parenting responsibilities, due to the 2006 'Shared Parental' Amendments.
- Substantial /equal time is now common in 2024, whereas 80/20 type care arrangements were more common pre-2006, even in **absence** of risk factors
- **It is suggested that in family law practice in 2024:**
  - Many separated parties will continue to make their own balanced arrangements through FDR following separation, given societal thinking has been largely transformed by the post-2006 'shared care norms';
  - Advisers and parties will not forget what they have learned. They will invariably continue to canvas substantial/equal time options where appropriate, even though it is no longer mandated;
  - In the absence of risk or safety issues, it is unlikely we will have a sudden rush on more parents pushing for primary /equal care (as compared to the trend pre-2006) if parenting orders are not already in place;
  - Majority of families may therefore benefit from the "Blank page" nature of the new legislation. It will enable more flexible arrangements, not a "one size fits all" or presumptive approach.

What does this mean for us in practice? (cont'd)

Conversely, it is predicted in 2024 and beyond there will be increase in litigation in cases with safety/FV/risk issues:

- The court has a mandate to take safety issues very seriously and it will need to be more proactive in intervening in these cases. This is appropriate given the current epidemic of FV in society
- In cases with safety/FV/risk issues, we will likely see more outcomes that are skewed away from equal/substantial time and a spike in cases where the evidence and legal argument is largely focused on "**Unacceptable risk" factors**
- There will be an increased reliance upon Social Science and expert evidence around safety/risk and FV issues and its impact on families/kids
- Family lawyers will need to be more vigilant and educated around FV issues when taking instructions (including adopting trauma-informed practice) and will need to be more thorough than ever when drafting affidavit material/ gathering evidence as to safety/FV/risk factors from a wide range of sources (doctors, schools, police, DFFH etc) and experts

Interim hearings - simplified Part VII – Observations

Goode & Goode [2006] FamCA 1346 – is it still applicable?

- Paragraph 82 of Goode & Goode is less relevant now that the 2006 version of the parenting pathway has changed. However it is still relevant insofar as it sets out the practical process for dealing with evidence at interim hearings:

    - *"identify the competing proposals of the parties;*
    - *identify the issues in dispute in the interim hearing;*
    - *identify any agreed or uncontested relevant facts;*
    - *consider the matters in [**the new version of]** s.60CC that are relevant and, if possible, making findings about them (in interim proceedings there may be little uncontested evidence to enable more than a limited consideration of these matters to take place);"*

THEN the Court must decide on parenting arrangements that are in the best interests of the child, which ultimately still comes back to analysis of the evidence and assessing best interest factors.

Evidence as to s.60CC (3) Factors – Observations

Eaby & Speelman - [2015] FamCAFC 104

- The Full Court observed in this case that:
    - at an interim hearing the court often must weigh the probabilities of competing claims and assess the impact upon children, depending upon whether those controversial assertions are going to be acted upon, or rejected
    - The court cannot just disregard evidence because facts are in dispute, nor can it rely solely upon agreed facts. It has to grapple with the evidence in considering what orders are best.

Quality of Affidavit Evidence

- In practice, when running interim hearings under the new Part VII pathway, it will therefore be very important to ensure that all **affidavit material clearly and carefully spells out the evidence in relation to relevant s.60CC factors** in terms of the orders sought (including orders sought as to where the child lives, with whom the child spends time and whether the party is seeking sole or joint responsibility for decision-making in relation to MLT Issues).
- **In the absence of any presumptions/benchmarks, parenting arrangements are "at large" and the court will be reliant upon clear, credible and well supported evidence** to assist it in the exercise of its discretion in terms of what parenting orders are in the best interests of a child.

SUMMARY OF OTHER KEY CHANGES TO THE FLA

Amendment Act: Schedule 2

Enforcement of child-related orders

Other Key Changes to FLA

Summary #1

Part VII, Division 13A – Enforcement – redrafted to clarify the consequences of non-compliance and simplify the provisions to make them more user-friendly. Key features:

- No major change to underlying principles of enforcement
- Removal of specific costs orders provisions from Div 13A – **costs will now be dealt with under the longstanding costs provisions in s.117 of the FLA**
- Removal of Court's power to order Community Service Orders for non-compliance (although the court retains a broad range of sanction powers for non-compliance with parenting orders)
- Clarification of the court's powers, including the power to make the following orders at any time (without necessarily having to make a finding of contravention):
  - Vary a parenting order
  - Order that a child spend additional time with a person **(including a new delegated power to Registrars in both Div 1 & Div 2 to make interim orders for "make-up" time)**
  - Order parties to attend parenting orders programs

Other Key Changes to FLA

Summary #2

Amendment Act: Schedule 3

Definitions of "member of the family" and relative

- *Definitions of 'relative' and 'member of the family' expanded to include Aboriginal and Torres Strait Islander concepts of family*
- ***Subsection 4(1) -*** *The definition of '**relative of a child**' in has been updated to provide that, for an Aboriginal or Torres Strait Islander child, a relative of that child includes any person, "**who in accordance with the child's Aboriginal or Torres Strait Islander culture (including but not limited to any kinship systems of that culture), is related to the child**".*
- ***Subsection 4(1AD) -*** *Expanded definition of 'relative of a person'*
  - *if a person is an Aboriginal or Torres Strait Islander child, a person is a relative of that child if, in accordance with that child's Aboriginal or Torres Strait Islander culture (including but not limited to any kinship systems of that culture), they are related to the child*
- ***Subsection 4(1AB) –*** *Expanding of the definition of 'relative of a person' consequently **expands the definition of 'member of the family'** for the purposes of:*
  - *the definition of **step-parent** in subsection 4(1);*
  - *the definition of **family violence** in section 4AB; and*
  - *the reference to '**connection with family**' in the additional "best interest factors" that apply for Aboriginal or Torres Strait Islander children in paragraph **60CC(3)(a).***

Amendment Act: Schedule 3

Definitions of "member of the family" and relative

Other Key Changes to FLA

Summary #2 (cont'd)

- *These definitions are intended to be considered and applied with reference to a child's Aboriginal or Torres Strait Islander culture.*
- *This is defined in subsection 4(1) of the Family Law Act as follows:*

Section 4(1) - *Aboriginal or Torres Strait Islander culture in relation to a child:*

- *(a) means the culture of the Aboriginal or Torres Strait Islander community or communities to which the child belongs; and*
- *(b) includes Aboriginal or Torres Strait Islander lifestyle and traditions of that community or communities.*

Other Key Changes to FLA

Summary #3

Amendment Act: Schedule 4

Independent Children's Lawyers

- ***Schedule 4*** contains amendments to provisions about Independent Children's Lawyers (ICLs), including:
  - a requirement for ICLs to meet with children (subject to exceptions); and
  - To give the child an opportunity to express a view; and
  - expanding the use of ICLs in cases brought under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention).

Requirement to meet with the child and provide opportunity to express a view

- Aimed at ensuring ICL's meet with children in every suitable case and to improve national consistency in ICL practice
- Having the chance to express views can be of great importance to children and it assists the court in determining what is in their best interests. These amendments give children a louder voice in family law proceedings, in a protected way
- Amendments are consistent with children's rights under Article 12 of the CRC

Provisos and other guidelines

- ***S. 60CE*** - the ICL cannot require the child to express the child's views in relation to any matter
- ***New subsection 68LA(5AA)*** – An ICL has discretion in relation to when / how often / how the meetings with the child take place, subject to any order or direction of the court

Other Key Changes to FLA

Summary #3 (cont'd)

Amendment Act: Schedule 4 Independent Children's Lawyers (cont'd)

- **New subsection 68LA(5B)** - ICL **not required to meet with a child** if:
  - They are **under 5 years** of age
  - if the **child does not want to** meet with the ICL or does not want to express their views
- **New subsection 68LA(5C)** – ICL also not required to meet with a child if:
  - there are **exceptional circumstances** that justify it, which includes but is not limited to:
    - circumstances which would expose the child to a risk of physical or psychological harm that cannot be safely managed; or
    - if it would have a significant adverse effect on the wellbeing of the child.
- **New subsection 68LA(5D)** - Court must determine whether it is satisfied exceptional circumstances exist that justify not performing the duty and the Court can override the ICL and direct them to perform this duty
- There is no specific timeline – timing is flexible depending on facts and circumstances of each case. ICL must however perform these duties at some time **prior to the court making final orders** unless the exceptions apply.
- **Section 68LA(5)(b)** – An ICL must **put any views of the child fully before the court.** They have discretion in how they inform themselves and can seek advice from a family consultant, an expert in the case, a treating practitioner or further information from a parent/carer, etc.

Other Key Changes to FLA

Summary #4

Amendment Act: Schedule 5: Case Management

Schedule 5 contains two new Parts to be introduced into the Family Law Act:

- **Part 1:** introduces new '**harmful proceedings orders**'. These prevent vexatious litigants from filing /serving new applications without obtaining leave from court
- **Part 2:** expands the '**overarching purpose of family law practice and procedure**' and the duties under it, to cover all proceedings instituted under the Family Law Act.

Harmful proceedings orders

- **s.103QAC -** Court has power on its own initiative, or upon application by a party (at any time proceedings are on foot)
- Court needs to be satisfied that there are reasonable grounds to believe that further proceedings would be harmful to the respondent to the vexatious litigant.
- Harm may include:
  - psychological harm or oppression
  - major mental distress
  - behaviour which causes a detrimental effect on the other party's capacity to care for a child
  - financial harm

Other Key Changes to FLA

Summary #4 (cont'd)

Amendment Act: Schedule 5: Case Management (cont'd)

Part X1 FLA – Procedure & Evidence
New Division 1A—Overarching purpose

- **FLA new S.95** - "The overarching purpose of the family law practice and procedure provisions is to **facilitate the just resolution of disputes**:
  - in a way that ensures the safety of families and children
  - in a way that promotes the best interests of the child (in matters where the paramountcy principle applies)
  - according to law, and
  - as quickly, inexpensively and efficiently as possible".

- Parties and their legal representatives have a statutory duty to conduct proceedings in a way that is consistent with the overarching purpose

- Cost orders can be made against parties and legal representatives who breach the duty

Other Key Changes to FLA

Summary #5

Amendment Act: Schedule 6 – Communicating details of family law proceedings

FLA – new Part XIVB - Restriction on communication of proceedings

Schedule 6 of the Amendment Act **removes section 121 of the Family Law Act and replaces it with new Part XIVB:**

- No significant policy changes
- The **new Part XIVB** is intended to simplify the language and clarify when parties can share identifiable family law information.
- Part XIVB takes account of the need for people to share family law information and documents with family and friends as well as addressing issues arising from the proliferation of social media use

Prohibitions:

- Identifying another party publicly (by name, address, picture, video or describing them), or providing details about where they live or work, or other clear links to their identity such directly or via their relationships with others, is a clear breach of a party's privacy and is prohibited by Part XIVB
- Existing penalties and offences from the old s.121 are retained.

Other Key Changes to FLA

Summary #5 cont'd

Amendment Act: Schedule 6 – Communicating details of family law proceedings

New s.114Q - A person commits an indictable offence if:

(a) the person communicates to the public an account of proceedings under this Act; and

(b) the account identifies:

(i) a party to the proceedings; or

(ii) a witness in the proceedings; or

(iii) a person who is related to, or is associated with, a party to the proceedings; or

(iv) a person who is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate.

- Generally, clients talking to friends and family (support people) about their case is not a breach, but emails and texts can be passed onto others as a screenshot etc, so parties need to be very careful what they put in writing and with whom they share the information as it can be used against them
- Publication of **identifying details** may be an indictable offence in breach of s.114Q
- Social media should be used very carefully in all Family law cases

Other Key Changes to FLA

Summary #5 cont'd

Amendment Act: Schedule 6 – Communicating details of family law proceedings

New s.114S (1) - A communication is **not** considered "to the public" if:

(a) "the person or body has a significant and legitimate interest in the subject matter of the communication"; and

(b) "that interest is substantially greater than, or different from,

the interests of members of the public generally".

s.114S(2) - Examples of acceptable use –

- Private communication to family or friends
- Use of a document or transcript in connection with court proceedings or processes under the FLA 1975 (including to a welfare authority, or in connection with disciplinary proceedings
- Use of a document in connection with court proceedings by members of the legal profession or a law student (including to Legal Aid or for professional/technical or training purposes)

Amendment Act: Schedule 7: Family Report Writers

Other Key Changes to FLA

Summary #6

Family report writers

- New power for Government to make regulations providing **standards and requirements to be met by family report writers** who prepare family reports.
- Mirrors the powers enabling establishment of a regulatory scheme for family dispute resolution practitioners and family counsellors (section 10A of the Family Law Act)
- Not yet developed - further consultation with stakeholders and consideration of impacts needed
- So whilst Schedule 7 will commence on 6 May 2024, the standards and requirements will commence once the regulations are developed in consultation with relevant stakeholders

Other Key Changes to FLA

Summary #7

Amendment Act: Schedule 10: Review of FLA Amendment Act 2023

Schedule 10: Review of FLA 2023 Amendments

- There will be a review of the operation of the Amendment Act to ensure the new provisions are operating as intended.
- Review must commence ASAP after the 3rd anniversary of the commencement of the Amendment Act
- Review to be completed within 12 months.
- A report of the review must be tabled in Parliament

QUESTIONS?

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