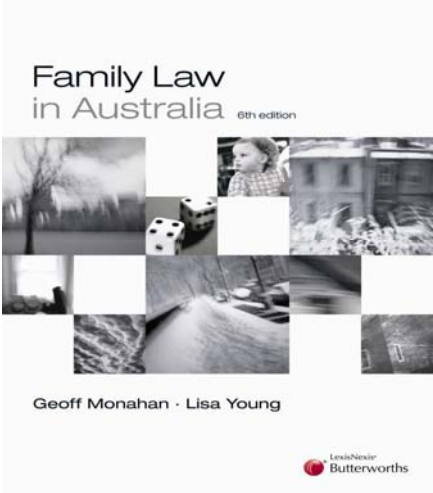


**2008 Supplement**  
**Family Law in Australia**  
6<sup>th</sup> edition  
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## Chapter 1 Law, Society and the Family

[1.53] In relation to Footnote 52, same-gender marriage will be permitted in Norway from 1 January 2009. It is also permitted in the US states of Massachusetts and California (subject to a Constitutional amendment ballot to be held in November 2008). Foreign same-gender marriages are also recognised in several countries including Aruba, Israel, Netherlands Antilles and in the US states of New Mexico, New York (under appeal) and Rhode Island. In addition, “civil unions” are now also permitted in Andorra, Belgium, Czech Republic, Hungary (from 1 January 2009), Luxembourg, the Netherlands and Uruguay. Foreign civil unions are also recognised in places like Argentina (Buenos Aires, Rio Negro), Brazil (Rio Grande do Sul) and Mexico (Coahuila, Mexico City),

In relation to Footnote 56, the Australian Capital Territory passed the Civil Unions Act 2006 (ACT) on 11 May 2006. This legislation was subsequently “disallowed” by the Governor-General (on advice from the Federal Government) on 13 June 2006.<sup>1</sup> The disallowance was despite some last minute changes to the legislation (addressing some of the concerns that had been raised by the Federal Attorney-General) that included defining that a “civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as marriage” and creating a separate register of celebrants.

Despite this setback, the Civil Partnerships Bill 2006 (ACT) was introduced into the Australian Capital Territory Parliament on 12 December 2006.<sup>2</sup> The Australian Capital Territory Government had hoped that this subsequent reform attempt would receive the support of the new Federal Government under Prime Minister Rudd but that was not to be.<sup>3</sup> In the end the Australian Capital Territory Government decided to amend the existing Bill and provide for a form of civil partnerships with an “administrative ceremony” rather than a legal ceremony.<sup>4</sup> This will involve a system of relationship registers similar to those currently operating in Tasmania<sup>5</sup> and being established in Victoria.<sup>6</sup> The Civil Partnership Act 2008 (ACT) finally commenced on 19 May 2008.

According to the new Act, a “civil partnership” is a particular type of domestic partnership which, when entered into, will be automatically regarded as being a domestic partnership for the purposes of Australian Capital Territory law and in particular, the Domestic Relationships Act 1994 (ACT). In this Act, the couple may be opposite-gender or same-gender. A person may enter into a civil partnership only if:

<sup>1</sup> Australian Capital Territory (Self-Government) Act 1988 (Cth), s 35.

<sup>2</sup> The original Bill did not proceed. In February 2007, the then Federal Attorney-General, the Hon Philip Ruddock, informed the ACT that “the Commonwealth would recommend that the Governor-General disallow the Civil Partnerships Bill 2006 (ACT) in its current form”: see Ruddock, P, *Media Release 22/2007*, 6 February 2007.

<sup>3</sup> The current Federal Attorney-General, the Hon Robert McClelland, indicated in February 2008 that he also has some concerns about the ACT Bill, in particular citing the “ceremonial aspects of the ACT model” as being “inappropriate”. He indicated that a relationships register, along the lines of that currently operating in Tasmania, would be more appropriate: see Maley, B, “Gay unions are OK ... just don't do it in public”, *The Australian*, 7 February 2008

<sup>4</sup> P Maley, and S Ryan, “ACT made to axe gay unions”, *The Australian*, 5 May 2008, <http://www.theaustralian.news.com.au/story/0,25197,23644429-2702,00.html>.

<sup>5</sup> Relationships Act 2003 (Tas) ss 11, 19.

<sup>6</sup> Relationships Act 2008 (Vic) ss 6, 17 (commences 1 December 2008).

- (a) the person is not married or in a civil partnership; and
- (b) the person does not have any of the following relationships (a *prohibited relationship*) with the person's proposed civil partner:
  - (i) lineal ancestor;
  - (ii) lineal descendant;
  - (iii) sister;
  - (iv) half-sister;
  - (v) brother;
  - (vi) half-brother; and
- (c) the person or the person's proposed civil partner, or both of them, live in the ACT.<sup>7</sup>

A civil partnership is terminated on the death or marriage of either party.<sup>8</sup> It may also be terminated by either or both of the parties, or by court order.<sup>9</sup> Under s 10, a civil partnership is terminated 12 months “after the day the termination notice is given to the registrar-general” and served on the other party. Under s 11, the Australian Capital Territory Supreme Court may make an order terminating the civil partnership if the court considers that:

- (1) On application by a party to a civil partnership,
  - (a) the civil partnership cannot be terminated under section 10; but
  - (b) it is not the intention, or is no longer the intention, of both parties to be in the civil partnership.
- (2) If the Supreme Court makes an order under subsection (1), the court must give a copy of the order to the registrar-general no later than 28 days after the day the order is made.

The first commitment (“administrative”) ceremony took place in Canberra on 2 June 2008.<sup>10</sup>

## Chapter 2 Developing an Australian Family Law

**[2.49] Children's matters:** The Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) received assent on 22 May 2006 and commenced on 1 July 2006. Further details are provided in the updates to Chapters 6 and 7.

## Chapter 4 Formation of Marriage

**[4.10]** See update for **[1.53]** in Chapter 1.

<sup>7</sup> Civil Partnership Act 2008 (ACT) s 6.

<sup>8</sup> Civil Partnership Act 2008 (ACT) s 9(1).

<sup>9</sup> Civil Partnership Act 2008 (ACT) s 9(2).

<sup>10</sup> D Curry, “Canberra's first same-sex civil union”, *Canberra Times*, 3 June 2008, <http://canberra.yourguide.com.au/news/local/news/general/first-samesex-civil-union/781937.aspx#>

## Chapter 5 Nullity and Divorce

**[5.89]-[5.95]** As a result of the passage of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), s 55A(2) has been amended to insert family consultants (see the commentary in relation to **[7.57]** below) as the only professionals who may prepare a report on whether proper arrangements have been made for the children.

**[5.99]** See the decision in *Lockhart and Lockhart*. [2006] FLC 93-292.

## Chapter 6 Children and Parents: Parentage and Parenting Disputes

As foreshadowed, shortly after the publication of this book, the Federal Parliament passed the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (“the Amending Act”).<sup>11</sup> The effect has been to introduce substantial changes to the way parenting matters are decided, both from a procedural and a substantive point of view. The changes will apply to all cases decided on or after 1 July 2006.<sup>12</sup> It is clear from the Full Court decision of *Vanderbum and Doriemus* (2007) FLC 93-324 that the new provisions have no retrospective effect whatsoever, and so in the lead-up to the changes decision makers should not have been taking them into account.<sup>13</sup>

Since the changes will affect much of Chapters 6 and 7 (for example, with changes in basic terminology), it is not possible until the next edition of this book to achieve a seamless integration of the changes with the existing text. At **[7.123]** onwards we have already provided a reasonably detailed discussion of the provisions of the relevant Bill, much of which was not changed in the final version of the Amending Act. However, readers need to be clear on the precise terms of the Amending Act. There are many resources now available on the changes, which readers can access. Also, there are cases now applying the new law, and, in particular, identifying when old case law can be relied upon and when it cannot.

Therefore, the purpose of this update in relation to Chapters 6 and 7, as far as the Amending Act is concerned, is to:

- outline the key changes made by the Amending Act in the relevant paragraphs of the text;
- identify where those changes are different to the text set out from **[7.123]** onwards and provide commentary; and
- outline and comment on case law dealing with the new law.

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<sup>11</sup> Assent was given on 22 May 2006.

<sup>12</sup> To assist practitioners and parties with transitional matters, the Chief Justice issued Practice Direction No 1 2006.

<sup>13</sup> Special leave was sought, but refused, to appeal this to the High Court: see *Guiness and Guiness* (2008) FLC 93-358.

To avoid repetition we note at the outset that the Amending Act no longer refers to where children “reside” but with whom they “live” and the term “contact” has been replaced with spending time, or communicating with, a child.<sup>14</sup>

**[6.5]** The Children (Equality of Status) Act 1976 (NSW) has been replaced by the Status of Children Act 1996 (NSW).

**[6.21]** New South Wales now also has legislation covering same sex couples.<sup>15</sup> See *H v J and anor* (2006) 36 Fam LR 316 on the disadvantage same sex couples might face from being a parent under state law, but not under the FLA. It now seems likely that s 60H of the FLA will be amended so that same sex couples are included in the definition of parent provided there: see the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.

**[6.23]** Note the case of *Ganter v Whalland* (2001) 28 Fam LR 260.

**[6.24]** The Assisted Reproductive Technology Act 2007 (NSW) has now been enacted. Note in particular Pt II Div 3 which deals with the use of gametes or embryos for research.

**[6.25]** A private member’s Bill – which was barely passed on a conscience vote – was required to give effect to the Lockhart recommendations: see the Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006 (Cth) which came into effect on 12 July 2007. Council of Australian Governments (COAG) has now agreed to give effect to the changes, but so far only the Australian Capital Territory, New South Wales, Queensland, Victoria and Tasmania have made the necessary legislative changes.<sup>16</sup>

**[6.27]** The legislation in New South Wales (see commentary on **[6.24]** above) places no restrictions on accessing assisted reproductive technologies. The Victorian Law Reform Commission has recommended that Victorian law be amended to permit equal access to single and lesbian women.<sup>17</sup> The government has accepted this recommendation and a Bill (which would repeal the Infertility Treatment Act 1995 (Vic)) is before parliament, however, there will be a conscience vote, so the outcome is difficult to predict.<sup>18</sup>

**[6.29]** Ultimately in the final Report the Victorian Law Reform Commission rejected the idea that there should be any general fitness to parent test:<sup>19</sup> see that report for the

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<sup>14</sup> Family Law Act 1975 (Cth), s 64B(2).

<sup>15</sup> The Status of Children Act 1996 (NSW), s 14 has been amended to include same sex couples by the Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 (NSW), though the amendments have not taken effect yet.

<sup>16</sup> Human Cloning and Embryo Research Amendment Act 2008 (ACT); Human Cloning and Other Prohibited Practices Amendment Act 2007 (NSW); Research Involving Human Embryos and Prohibition of Human Cloning Amendment Act 2007 (Qld); Infertility Amendment Treatment Act 2007 (Vic); and Human Cloning and Other Prohibited Practices Amendment Act 2007 (Tas).

<sup>17</sup> Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report*, Victorian Government Printer, 2007, Ch 4 and 5.

<sup>18</sup> Assisted Reproductive Treatment Bill 2008.

<sup>19</sup> Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report*, Victorian Government Printer, 2007, Ch 5.

alternative recommendations and note the Assisted Reproductive Treatment Bill 2008 (Vic), ss 11, 12, 14, 15 and 85.

**[6.31]** See the provisions of the Assisted Reproductive Technology Act 2007 (NSW); the Assisted Reproductive Treatment Bill 2008 (Vic) and the recommendations of South Australian Council on Reproductive Technology in, *Conception by Donation: Access to identifying information in the use of donated sperm, eggs and embryos in reproductive technology in South Australia*, 2000, SACRT.

**[6.38]** New South Wales has now passed legislation governing assisted reproductive technologies (see commentary above at **[6.24]** and **[6.27]**) and this includes provisions relating to surrogacy: see Pt 4. Under these provisions, commercial surrogacy and the solicitation thereof are prohibited and all surrogacy agreements are void.

The consequences of the differences in surrogacy laws around Australia were publicised in 2007 when Labor Senator Conroy, who lives in Victoria, went to New South Wales to avoid the application of the legislation in his home state. The Commonwealth Attorney-General at the time, Phillip Ruddock, stressed the need for national uniformity in this area at the next meeting of the Standing Committee of Attorneys-General. As a result, Victoria, Western Australia, South Australia, Tasmania and Queensland all announced reviews.

Western Australia is now considering the Surrogacy Bill 2007 (WA) under which surrogacy arrangements will not be enforceable and it will be an offence to enter into such an arrangement for reward (other than for costs covering reasonable expenses relating to the pregnancy). The proposed Pt 3 also provides for the transfer of parentage to arranged parents who live in Western Australia and where surrogacy was used because of the parents having fertility problems: proposed s 15. Notably, it will be assumed such a transfer is in the child's best interests, in the absence of evidence to the contrary: see proposed s 13(2). Because of the terms of the proposed s 15, transferring legal parentage should be straightforward for heterosexual couples, infertile single women and infertile women in same-sex relationships. Gay men, however, will not have this protection. The Bill has nearly finished its progress through parliament and should be passed in the near future.

**[6.45]** The Amending Act received assent on 22 May 2006.

**[6.52]** Section 60B was amended as foreshadowed at **[7.126]**. The objects of Pt VII are now stated in subsec (1) to include (in addition to the two existing objects):

- (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.

The inclusion of a provision in the objects section relating to protection from harm from abuse followed a recommendation by the Family Law Council.<sup>20</sup>

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<sup>20</sup> Family Law Council, Letter of Advice to the Attorney-General, Review of Div 11 — Family Violence, 16 November 2004.

The principles underlying these objects, as set out in subsec (2), have now had new subsecs (b) and (e) added:

- (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*) [emphasis added]; and
- ...
- (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

As noted throughout this Update, there have been a number of changes that specifically refer to grandparents. These changes must be considered in light of this principle, which underscores the value placed on children spending time with their wider family.

**[6.62]** Section 61C, which sets out who has parental responsibility in the absence of a court order, has not been altered. In addressing the effects of various provisions in the Amending Act, the Full Court (Bryant CJ, Finn and Boland JJ) said in *Goode v Goode* that in the absence of a Court order, the effect of s 61C remains that both parents have full parental responsibility, and this can be exercised either jointly or independently.<sup>21</sup>

This was contrasted with the position where there is an order for equal shared parental responsibility in place. The net effect is that where there is no order in place, parents ought to consult about major long-term issues, but there is no mechanism for enforcing that (other than obtaining an order) as there is no breach of an order when there is a failure to consult. Moreover, without consultation it would seem that parents can take such decisions independently. This is not now the case where an order is in place (see the commentary in relation to **[6.70]-[6.71]** below).

**[6.63]** While it remains impossible to register parenting plans, note the new s 64D which makes parenting orders subject to later parenting plans, unless the order contains an express provision to the contrary. Such a provision is only available in exceptional circumstances (see commentary at **[7.147]-[7.148]**).

**[6.69]** Section 65D has been amended to make clear that the broad discretionary power to make parenting orders is subject to s 61DA (the presumption in favour of equal shared parental responsibility) and s 65DAB (the obligation to consider parenting plans when making orders). Of course, s 65D was always subject to those provisions in Pt VII that governed the making of parenting orders (for example, the best interests principle and accompanying checklist).

**[6.70]-[6.71]** The introduction of the presumption in favour of equal shared parental responsibility effected by s 61DA (see generally **[7.134]-[7.137]**) in one sense strengthens the notion that shared parental responsibility should not be interfered with by court order lightly. However, it is arguable that there are two reasons why orders will still often be required. First, as discussed at **[7.136]**, equal shared parental responsibility refers to the allocation of parental responsibility in relation to major long-term issues. At the moment,

<sup>21</sup> (2006) 36 Fam LR 422; FLC 93-286, at [37].

where parents both have this under s 61C (ie without a court order), they can exercise it independently (see commentary at [6.62] above). Thus, to have the benefit of required consultation, a court order will be needed. Second, where orders are made about where a child shall live etc, there will need to be accompanying orders to reallocate parental responsibility for day-to-day decision making based on where the child is.

[6.73] The comments made at [7.147]-[7.149] about the changes concerning parenting plans remain accurate. The reference at [7.148] to a proposed amendment to the Bill was given effect by the new s 63C(1A) which provides an “agreement is not a parenting plan...unless it is made free from any threat, duress or coercion”.

[6.74] In relation to filing applications, it should be noted that Phase 3 of the new pre-action procedures began on 1 July 2008 (see commentary at [7.133] below). Thus, parties may not now file an application concerning children without producing a certificate from a family dispute resolution practitioner.

[6.76] As with the 1996 reforms, the 2006 reforms also brought with them significant changes to the way parenting orders are characterised. Under the old provisions there were a few main types of parenting orders, as referred to in [6.76], with “specific issues orders” encompassing all those orders not otherwise specifically mentioned. As with the terms “residence” and “contact”, “specific issues orders” have also been removed, in favour of a more extensive list of possible parenting orders. Subsection 64B(2) now reads as follows:

- (2) A parenting order may deal with one or more of the following:
- (a) the person or persons with whom a child is to live;
  - (b) the time a child is to spend with another person or other persons;
  - (c) the allocation of parental responsibility for a child;
  - (d) if 2 or more persons are to share parental responsibility for a child — the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
  - (e) the communication a child is to have with another person or other persons;
  - (f) maintenance of a child;
  - (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
    - (i) a child to whom the order relates; or
    - (ii) the parties to the proceedings in which the order is made;
  - (h) the process to be used for resolving disputes about the terms or operation of the order;
  - (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

Subsections (c) and (i) ensure that parenting orders can cover all aspects of parental responsibility (see [7.146]).

The old s 65E is now replicated in s 60CA.

[6.77] Residence orders are now referred to as parenting orders dealing with whom a child is to live.

Section 65G continues to impose protections where consent orders giving residence or parental responsibility to third parties are proposed. However, there are some differences effected by the Amending Act. First, the old provision imposed the restrictions where the order was in favour of a non-parent (or if a couple, that couple did not include a parent). The new provisions only impose the protections where the order is not in favour of a relative of the child (see the definition of “relative of a child” in s 4(1)). Second, the old provision-imposed protections where the proposed consent order gave away residence or short-term parental responsibility or long-term parental responsibility. The new provisions apply protections where the proposed order has a child living with a third party or where no parental responsibility at all is given to a relative. Finally, when the previous version of the section applied, the parties had to attend a counsellor to discuss the matter *and* the court had to consider a report from that counsellor. The new s 65G(2) has dropped the requirement for the report.

**[6.78]** These comments remain accurate with the exception that a parenting order reallocating parental responsibility as referred to in the last paragraph is no longer called a specific issues order.

**[6.79]** Similar issues of labelling will arise with the new terminology. Whereas before, parents had residence/residence or residence/contact orders, they may now have orders about where the child lives and with whom the child spends time or communicates. Presumably where an order does not involve a child staying overnight, it will be an order that a child “spend time with” the person in question. This could also apply to overnight orders, though in keeping with the move towards shared parenting, it would seem appropriate for these to be referred to orders as to where the child lives from time to time. Moreover, saying a child is to “spend time with” a person for the weekend, is somewhat ambiguous. It would be far clearer to simply refer to the child as living with a parent when they are staying overnight. As with the former types of orders, an order as to where a child lives or with whom they spend time will not otherwise affect parental responsibility (ss 61C and 61D), and so orders giving responsibility for the day to day care, welfare and development of a child will normally be attached to the parent when the child is in their care.

**[6.80]** Contact orders no longer exist as such, and there are now only orders dealing with whom a child lives and spends time. There is also the new category of orders dealing with the communication a child is to have with another person (s 64B(2)(e)); this would previously have been referred to as a type of contact order.

**[6.82]** The comments made in *B and B* (2003) 31 Fam LR 7 and referred to in this paragraph strengthen the argument for parenting orders to refer to a child “living” with a parent where the stay is overnight (see the comments above in relation to **[6.79]**).

**[6.83]** Note the amendment to the wording of s 60B(2)(b) referred to in relation to **[6.52]** above.

**[6.84]-[6.85]** Although the term “specific issues orders” is no longer used, all of the orders referred to in these paragraphs can still be made. They simply will not be called specific issues orders anymore, but rather just parenting orders allocating parental responsibility. As to s 65G(2), see the discussion in relation to **[6.77]** above.

**[6.86]** In relation to the amendments to s 65D, see the comments on **[6.69]** above. The old s 65E is now replicated in s 60CA.

**[6.87]** While attendance at family counselling before a parenting order is made in defended proceedings is generally still required (s 65F(2)), s 65F(1), which gave the court power to order parties to attend counselling at any time in parenting proceedings, has been repealed. However, the new s 13C(1)(a) gives a court hearing any proceedings under the FLA power, at any stage, to order attendance of the parties at family counselling. Note also that now, by the time a party files an application for parenting orders, they will have been required to go through the Pre-Action Procedures set out in Pt 2 of Sch 1 to the Family Law Rules 2004.<sup>22</sup> These require, amongst other things, that each “prospective party to a case...make a genuine effort to resolve the dispute before starting a case by...participating in dispute resolution, such as negotiation, conciliation, arbitration and counseling”. From 1 July 2007 the provisions of s 60I will take effect to replace the Pre-Action Procedures (see **[7.133]**). Note that these Pre-Action procedures, together with the establishment of Family Relationship Centres (see **[7.123]**), are at the heart of the Federal Government’s efforts to encourage parties to resolve their differences out of court.

The references in s 65L to family and child counsellors and welfare officers have been replaced with the term “family consultant”.<sup>23</sup>

**[6.89]** The old s 65E is now replicated in s 60CA. Section 60D has been repealed but the same definition of “interests” is now found in s 4(1). The best interests checklist is now found in s 60CC (see **[7.127]**-**[7.132]**). Note the reference in **[7.132]** to s 60CC(2)(4) should read s 60CC(4).

Some commentary as to the effect of creating primary and additional considerations has already been provided (see **[7.127]**-**[7.132]**),<sup>24</sup> and see the recent Full Court decision in *Goode v Goode* (2006) 36 FamLR 422; FLC 93-286 (see above **[6.62]**). Further discussion of the new “best interests checklist” is set out below in the commentary at **[6.97]**.

**[6.95]** The old s 65E is now replicated in s 60CA. As the Amending Act has been passed, Div 12A has been enacted; see **[7.156]**-**[7.157]** which outlines the changes. See also the new s 69ZX(4)<sup>25</sup> which has the effect of overriding the decision in *Northern Territory of Australia v GPAO* (1999) 24 Fam LR 253.

**[6.96]** The old s 65E is now replicated in s 60CA. See the comments relating to **[6.52]** above in relation to the changes to s 60B. As to how a court should approach a matter under the new provisions, see comments relating to **[6.97]** below.

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<sup>22</sup> Family Law Rules 2004 (Cth), r 1.05

<sup>23</sup> In relation to the role of this new category of court officer (see s 38N(1)) see generally Pt III of the FLA and in particular s 11A.

<sup>24</sup> For further discussion of the likely effect of the change, see P Parkinson, “Decision-making about the best interests of the child: The impact of the two tiers” (2006) 20 *AJFL* 179.

<sup>25</sup> Inserted by the Evidence Amendment (Journalists’ Privilege) Act 2007 (Cth).

[6.97]-[6.98] Previously, in deciding what parenting order to make (other than child maintenance orders), a court had regard to the best interests principle (s 65E now s 60CA), the best interests checklist (s 68F(2) now s 60CC) and the objects and principles of Pt VII as set out in s 60B. The effect of the Amending Act has been to:

- expand s 60B (see commentary in relation to [6.52] above);
- recast an expanded best interests checklist (now s 60CC) into two tiers, being primary and additional considerations (see commentary in relation to [6.89] above and [7.128]-[7.132]) – also note the new considerations in ss 60CC(4)-(4A) (see [7.132]);
- introduce a presumption of equal shared parental responsibility (s 61DA, see [7.134]-[7.137]);
- where the presumption of equal-shared parental responsibility applies, require the court to consider equal-shared parenting time where practicable, and if not, then substantial time with each parent (s 65DAA, see [7.141]-[7.145]); and
- require the court to have regard to the most recent parenting plan, if any (s 65DAB).

In the case of *Goode v Goode* (2006) 36 Fam LR 422; FLC 93-286, (a case involving the correct principles to be applied in interim parenting decisions) the Full Court said the following about the new provisions:

1. The presumption of equal shared parental responsibility does not connote any presumption as to the amount of time the child should spend with each parent.<sup>26</sup>
2. The starting point for all parenting applications – be they for interim or final orders – is consideration of the presumption in favour of equal shared parental responsibility (s 61DA).<sup>27</sup>
3. If the presumption of equal shared parental responsibility is applied, this automatically triggers the operation of s 65DAA and so the consideration of equal (and then substantial) parenting time. This is “the first thing the Court must do”.<sup>28</sup> However, even if the presumption is not applied, the court may still order equal or substantial parenting time either because one of the parents has sought that, or because the best interests of the child require it. In this context it was noted that following from *U v U* (2002) 29 Fam LR 74; (2002) FLC 93-112 the court might make orders neither party sought, subject to according the parties procedural fairness.<sup>29</sup>
4. “Considering” making an order for equal or substantial time under s 65DAA means positively considering making such an order if the twin tests of reasonable practicability and the child’s best interests are met.<sup>30</sup>
5. When the court finds neither equal nor substantial time appropriate, “the issue is at large and to be determined in accordance with the child’s best interests...as ascertained by a consideration of [the factors in]...s 60B and s 60CC”.<sup>31</sup>
6. The process is the same whether it is a final or interim parenting order under consideration.<sup>32</sup>

<sup>26</sup> (2006) 36 Fam LR 422; FLC 93-286, at [40].

<sup>27</sup> *Ibid*, at [56].

<sup>28</sup> *Ibid*, at [65] point 5.

<sup>29</sup> *Ibid*, at [42]-[48].

<sup>30</sup> *Ibid*, at [64].

<sup>31</sup> *Ibid*, at [65] points 8 and 9.

7. “The child’s best interests remain the overriding consideration”.<sup>33</sup>

In the later case of *Taylor v Barker* (2007) 37 Fam LR 461; FLC 93-345 the Full Court clarified that to begin on this process, decision makers should first make findings on the matters set out in s 60CC, which sets out the considerations relevant to determining what is in a child’s best interests. However, a failure to adopt this specific order of consideration would not itself amount to an appealable error “unless such error arose from a failure to give adequate reasons or to have regard to the matters which the legislation requires must be considered”.<sup>34</sup>

The presumption of equally-shared parental responsibility does not arise if “there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in” abuse or family violence (see s 61DA(2) and [7.134]). According to Benjamin J, this objective test “will not present an onerous evidentiary hurdle”.<sup>35</sup> However, from a party’s perspective, this must be weighed against the introduction of a provision *mandating* a costs order where there is a finding that an allegation was falsely made (and violence allegations are notoriously difficult to prove).<sup>36</sup>

Benjamin J went on to hold that, even where the presumption did not apply, given the legislative intent behind the amendments, decision makers should, when making a parenting order, still consider whether there should be equal-shared parental responsibility.<sup>37</sup> As to the effect of the two-tiered best interests test, his Honour referred to separate commentary by Richard Chisholm, Patrick Parkinson and Tom Altobelli before concluding that the primary considerations did not “invariably outweigh” the additional considerations, “but some weight must be attached to the term “primary””.<sup>38</sup> He went on to agree with the conclusion of Bennett J<sup>39</sup> that the terms of the primary consideration in s 60CC(2)(a) did not require an assumption that it was always a benefit for a child to have a meaningful relationship with a child – rather, the court has to “evaluate the nature and quality of the relationship to establish whether any “benefit” or meaningful relationship exists”.<sup>40</sup> Benjamin J added this included an evaluation of whether any meaningful relationship could be established, and if it could, the benefit to the child of that relationship.

The difficulties for decision makers in interpreting this legislation are obvious. As was discussed in *Elsbeth* and *C v G*, the legislators have wanted to make clear the particular importance to be attached, when making parenting orders, to maintaining good relationships between children and both parents. This is undoubtedly assumed to be in children’s best interests. However, the legislation as drafted is not particularly clear. The legislation directs the decision maker, when deciding what is in a child’s best interests, to “consider...the benefit to the child of having a meaningful relationship with” both parents. This must be

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<sup>32</sup> Ibid, at [55].

<sup>33</sup> Ibid, at [65] point 11.

<sup>34</sup> *Taylor and Barker* (2007) 37 FamLR 461; FLC 93-345, at [63].

<sup>35</sup> *Elsbeth v Peter* (2007) 37 Fam LR 696; FLC 93-341, at [30].

<sup>36</sup> FLA, s 117AB.

<sup>37</sup> *Elsbeth v Peter* (2007) 37 Fam LR 696; FLC 93-341, at [32].

<sup>38</sup> Ibid, at [46].

<sup>39</sup> *C v G* [2006] FamCA 994.

<sup>40</sup> *Elsbeth v Peter* (2007) 37 Fam LR 696; FLC 93-341, at [48]-[49].

read subject to the objects section, which states that children have a right to have their best interests met through the benefit of both parents having meaningful involvement in their lives, to the extent consistent with the child's best interests.<sup>41</sup> It is simple enough to begin by saying that the nature and extent of any parenting order which facilitates a relationship between parent and child will be subject to a child's best interests. For example, where it is not in a child's best interests to be forced to see a parent, then such a parenting order will not be made. Beyond that, these provisions are ripe with ambiguity. Why is it not (as Benjamin and Bennett JJ suggest) *always* beneficial to a child to have a "meaningful relationship" with their parent? By only referring to "meaningful" relationships the legislature has perhaps intended to exclude those relationships which are not beneficial. The section does not prescribe any particular brand of "meaningful relationship" – and there must be an infinite variety of them. It simply requires the decision maker to "consider" the "benefit" to the child of a "meaningful relationship". At the same time, it requires the decision maker to consider the need to protect the child from harm.<sup>42</sup> Consequently, it is submitted that this simply provides a backdrop against which the evidence can be assessed. The "additional" considerations are matters that point more directly to evidence – the child's views, the effect of change, the nature of relationships, any family violence and so on. The primary considerations are cast more as goals, like the objects section, and it is hard to see how evidence could be directed towards them. As a decision maker, one must start from the position that it is of benefit to the child to have a meaningful relationship with both parents (which does not mean that a child must have a relationship with them) and it is necessary to protect the child from harm. However, what that means in terms of actual parenting orders will be determined by the evidence in the particular case on the various matters referred to in the additional considerations. It will be interesting to see what the Full Court has to say on the matter.

For an example of a decision applying the new provisions, see the decision of Rose J in *N v M* [2006] FamCA 958. In particular, note the application of s 60CC(4) to the facts.

**[6.99]** The old s 68F(2)(a) has been replaced by s 60CC(3)(a) – one of the additional considerations – and now says:

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 wishes.

**[6.102]** Section 68G has been replaced with s 60CD and expanded to say that a court may also inform itself of a child's views by making an order that the child's interests be represented by an independent child's lawyer.<sup>43</sup> The old s 68H is now found in s 60CE.

**[6.103]** The creation of the primary consideration in s 60CC(2)(a) – the benefit to the child of having a meaningful relationship with both parents – is intended to, and will no doubt, affect the weight the court gives to other competing matters listed only as "additional considerations" (see the discussion at **[7.127]**-**[7.132]**).

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<sup>41</sup> FLA, s 60B(1)(a).

<sup>42</sup> FLA, s 60CC(2)(b).

<sup>43</sup> FLA, s 60CD(2)(b).

**[6.108]-[6.109]** The new provisions are not intended to effect equal shared parenting – they are intended to increase the degree (and quality) of shared parenting, for the sake of the child. Thus, while equal shared care may increase, there is no evidence it is likely to become the norm (not least until care of children changes in intact families, as in many cases it is a function of who is available to care for the child). Therefore, it is likely that in most cases there will still be one parent with more care of the child than the other. It is submitted that, for the same reasons as prior to the amendments, this will continue to be more commonly mothers. This will not be because of any preference for mothers, but rather because mothers continue to play a more central role in parenting across the community. Note also the comments of Rose J in *Navaqaliva v Marshall* [2006] FamCA 958 in relation to the best interests principle, namely, that all other considerations, including the primary considerations and the principles underlying the objects of the Act, are subject to the best interests of the child.<sup>44</sup>

**[6.110]** The old s 68F(2)(c) has been replaced by s 60CC(3)(d) – one of the additional considerations – and now includes a specific reference to grandparents and relatives in looking at the effect of separating children from those with whom they have been living.

**[6.114]** Notwithstanding the introduction of the primary consideration of the benefit to a child of having a meaningful relationship with both parents (s 60CC(2)(a)), it might seem reasonable to argue that the weight of the status quo (and indeed other factors) should not change in parenting decisions under the new provisions. This is because there was always considerable weight given to maintaining contact with the parent with less care. However, the court's perception of what was best for children in the way of contact (often every second weekend and half the school holidays) does not accord with modern evidence on how children develop meaningful relationships with their parents. It is the frequency and quality of interaction – rather than the duration – that matters. In the past, contact orders appearing to maintain the status quo have often been ineffective, apart from enshrining the reality of one parent doing more parenting than the other. For example, a father who built a meaningful relationship with a child he saw every day, notwithstanding he did not do most of the caregiving, does not retain the status quo of interaction when his children do not see him for weeks at a time. As a result, the quality of the relationship between child and parent may suffer. If it is of benefit for a child to have a meaningful relationship with a parent, the new provisions – both the new primary consideration and s 65DAA – focus more directly on trying to create an environment in which meaningful relationships can be built or maintained. Thus, it was intended, and is likely, that courts will come up with parenting orders that allow children to have more, and more frequent, time with those parents not providing the bulk of the parenting. As to the likelihood of equal shared care orders, see the comments in relation to **[6.108]-[6.109]** above.

See the comments relating to **[7.145]** below as to emerging data on the impact of shared parenting regimes on children.

**[6.120]** The old s 68F(2)(b), (c) and (e) are now found in s 60CC(3)(b), (d) and (f) and a specific reference to grandparents and relatives has been added to all. As noted earlier (see the commentary in relation to **[6.52]** above) the Amending Act has sought to give greater

<sup>44</sup> [2006] FamCA 958, at [29].

recognition to the benefit to children of spending time with grandparents and other relatives. For a recent decision involving contact with a grandparent see *McKenzie and Edwards* [2006] FamCA 1314.

**[6.129]** Section 68F(2) has been replaced by s 60CC(3), and all of the subsections mentioned in this paragraph have been retained in substantially the same form.

**[6.137]** The old s 68F(2)(g) has now been elevated – in a pared down form – to a primary consideration: s 60CC(2)(b):

the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

“Family violence” is now defined in s 4(1) in the terms set out in **[7.139]**. A note to the definition has been added to explain that a person reasonably fears for their safety or wellbeing “if a reasonable person in those circumstances” would have that fear. Note the concerns mentioned in **[7.139]** about making this test objective, rather than subjective. For a decision discussing the interpretation of the new provision, see *Nawaqaliva v Marshall* [2006] FamCA 958.

The old s 68F(2)(i) is now found in the same terms in s 60CC(3)(j). The old s 68F(2)(j) has been moved to s 60CC(3)(k), and amended so that provision only now requires the court to consider final or contested family violence orders (see the commentary at **[7.152]** and also **[7.150]**).

**[6.138]** The old ss 68J and 68K are now found in ss 60CF and 60CG respectively. Proposed s 68F(1A) is now s 60CC(2).

**[6.139]** Old s 68F(1) is now s 60CC(1). A caveat should be placed on the last paragraph here. The following changes have the potential to endanger the extent to which family violence is properly taken into account in parenting matters:

- The new terms of s 60CC(3)(k) – see the commentary for **[6.137]** above;
- The new definition of “family violence” in s 4(1);
- New s 117AB – see the commentary at **[7.150]**; and
- New s 60CC(3)(c) – see commentary at **[7.131]**.

**[6.144]** The “friendly parent” provision is now s 60CC(3)(c). See commentary in relation to **[6.139]** above.

**[6.145]** Old s 68F(2) is now s 60CC(3), and subsec (l), (b), (e) and (f) are subsec (m), (b), (f) and (g) respectively. Old s 68F(2)(g) is now s 60CC(2)(b).

**[6.151]** Old s 68F(2)(a) is now s 60CC(3)(a) and old s 65E is now s 60CA.

[6.152]-[6.158] Amendments as foreshadowed in [6.158] were enacted by the Amending Act.<sup>45</sup>

## Chapter 7 Children and Parents: Additional Issues

As a result of the passage of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (“the Amending Act”), as from 1 July 2006 the term “contact” has been removed from Pt VII (s 64B(2)), and orders will presumably refer to a child “living with”, “spending time with” or “communicating with” their parents (and others).

[7.7] Note the amendments to s 60B(2)(b) and the commentary in relation to [6.52] above. Old s 68F(2)(d) is now s 60CC(3)(e) and has been amended in keeping with the terminological changes to parenting orders. Old s 65E is now s 60CA.

[7.8] The same can be said of the 2006 reforms, in that, whilst a child’s right to spend time, or communicate with, a parent remains subject to their best interests, it must be assumed that the latest round of amendments will further strengthen the “pro-contact” position of the court.

[7.10] The Amending Act has inserted further specific references to grandparents and other relatives.<sup>46</sup> These amendments make no legal change, as relatives fell into the classes of persons being referred to in any event. Note the commentary in relation to [6.52] above. Old s 65E is now s 60CA and ss 68F(2)(a), (b) and (c) are now ss 60CC(3)(a), (b) and (d).

[7.15] Old s 65E is now s 60CA and s 68F(2)(g) is now s 60CC(2)(b).

[7.24] The case of *Potter and Potter* (2007) 37 Fam LR 208; FLC 93-326 illustrates that it will not be enough to satisfy the unacceptable risk test to show that it is likely a child has been sexually abused. In this case, the trial judge was satisfied by the evidence that abuse was likely, but the child referred to the perpetrator as “daddy”, an expression she used in relation to her father and both of her grandfathers. The Full Court allowed an appeal against the trial judge’s order for supervised contact with the father.

[7.26] The definition of “abuse” is now found in s 4(1).

[7.27] The definition of “prescribed child welfare authority” is now found in s 4(1).

[7.28] The definition of “abuse” is now found in s 4(1). Section 68F(2)(g) is now s 60CC(2)(b), which makes a primary consideration in the making of any parenting order:

the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

<sup>45</sup> See FLA, ss 60CC(3)(g), (h), 60CC(6), 60B(2)(e), 60B(3).

<sup>46</sup> See FLA, ss 60B(2)(b), 60CC(3)(b)(ii), (d)(ii), (f)(ii).

[7.29] Section 100A was repealed by the Amending Act. Division 12A has substantially relaxed the general rules of evidence, including that against hearsay, applicable to parenting disputes: s 69ZT. The court has the discretion to apply the normal rules of evidence only if the circumstances are exceptional and the matters in s 69ZT(3)(b) have been taken into account. Subsection 69ZT(2) points out that the weight attaching to any evidence admitted as a result of this relaxation is a matter for the court. Notwithstanding these provisions, s 69ZV says that where the court decides to apply the rule against hearsay evidence in child related proceedings, evidence of representations made by a child about something relevant to the child's welfare are not inadmissible solely because of the rule against hearsay. This reflects the terms of old s 100A.

[7.38] Note the amendments made by the Amending Act to s 60B(2)(b) and referred to in commentary to [6.52] above. Old s 68F(2)(d) is now s 60CC(3)(e) and has been modified in keeping with the terminological changes made to parenting orders by the Amending Act.

[7.41] For a summary of the law on relocation just prior to the Amending Act coming into effect see *Walls v Robinson* (2006) FLC 93-251.

The impact of the Amending Act on relocation cases was destined to be a much discussed issue. The Full Court first considered the effect of the Amending Act on relocation cases in *Taylor and Barker* (2007) 37 Fam LR 461; FLC 93-345. Their Honours endorsed the approach set out in *Goode* for parenting applications generally and gave some guidance as to the logical, if not strictly necessary, order in which a decision maker might address the various sections. After considering the evidence under s 60CC, equal time must first be considered. If that is not in the child's best interests (as in this case), then its practicability is irrelevant. Then, substantial and significant time should be considered and, if the decision maker considers there are advantages to this, then at this stage relocation would sensibly be addressed as part of looking at whether that was practicable, under s 65DAA(5).

There has been ongoing discussion about whether specific provisions on relocation should be included in Pt VII. In May 2006 the Family Law Council issued its report to the Federal Attorney-General on relocation. There were four recommendations, including:

- Insertion of a new subsection 65N(2) to read:

“A parenting order that deals with whom the child is to spend time, imposes an obligation to maintain a relationship with a child in accordance with the terms of the order.”

This reflects the reality that relocation decisions stop parents moving away with children, but not parents moving away from children. It remains unlikely, however, that carer parents will bring enforcement proceedings against parents to try and stop them moving away from their children. Note also new s 60CC(4) which requires a court to consider, in making a parenting order, a parent's failure to fulfil parenting obligations, such as spending time with their child. Thus, if a parent moves away from their child, this can be considered in the making of any later parenting orders. However, it must be remembered that there is now a *primary* consideration directed at maintaining a meaningful relationship between child and parent, so it will be interesting to see the extent to which parental behaviour in moving away from children will affect later parenting orders sought by that parent.

- Insertion of new sections as follows:
  - (A) Where there is a dispute concerning a change of where a child lives in such a way as to substantially affect the child's ability to live with or spend time with a parent or other person who is significant to the child's care, welfare and development, the court must:
    - (1) Consider the different proposals and details of where and with whom a child should live, including:
      - (a) What alternatives there are to the proposed relocation;
      - (b) Whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted; and
      - (c) Whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.
    - (2) Consider which parenting orders are in the child's best interests having regard to the objects contained in section 60B and all relevant factors listed in section 60CC, and:
      - (a) Whether given the age and developmental level of the child, the child's relocation would interfere with the child's ability to form strong attachments with both parents;
      - (b) If a party were to relocate:
        - (i) What arrangements, consistent with the need to protect the child from physical or psychological harm, can be made to ensure that the child maintains as meaningful a relationship with both parents and people who are significant to the child's care, welfare and development as is possible in the circumstances;
        - (ii) How the increased costs involved for the child to spend time with or communicate with a parent or people who are significant to the child's care, welfare and development should be allocated;
      - (c) The effect on the child of the emotional and mental state of either party if their proposals are not accepted.
  - (B) The court may also consider the reasons the parent wishes to move away and any other relevant considerations.

All of these matters may be considered under the present provisions, as particularly pointed out in *U v U* (2002) 29 Fam LR 74; (2002) FLC 93-112. That is not to say, however, that such provisions would not affect decision making. The proposed provisions mandate consideration of competing proposals and also support the more interventionist role of the Court envisaged in *U v U* (for example by mandating consideration of alternatives to the relocation and the movement of the other parent). If the full range of proposals were to be on the table (as could be the case now) – including restraining the move and forcing the other parent to move – it is interesting to speculate how often the court would favour forcing a reluctant parent to relocate with the other parent and child, over keeping a carer parent in an established environment.

Although not a relocation case as such, in *Nawaqaliva v Marshall* [2006] FamCA 958 one parent's willingness to relocate to be with a child if they were unsuccessful (the parents were living in Port Macquarie and Sydney), and the other parent's ambivalence in that regard, appeared to weigh heavily in the trial judge's decision.

These issues have been canvassed in the recent Full Court decision of *Sampson and Hartnett* (No 10) (2007) 38 Fam LR 315; (2007) FLC 93-350. The significance of this case, both to relocation and other parenting decisions, is such that it warrants detailed consideration.

Moore J heard the initial application, which involved parenting applications in respect of two children under four. The father lived in Sydney and, since the parties' separation in late 2004, the mother had been living in Geelong, where her family lived. The final orders in effect required (though this was not stated) that the mother move with the children to Sydney, by ordering that the children live in Sydney, and that they have increasing contact with the father. Unlike *U v U* (2002) 29 Fam LR 74; (2002) FLC 93-112, the mother had made it clear at trial that she did not intend on moving to Sydney. Indeed, the father was also clear that he did not seek that the mother move to Sydney – rather he proposed the children live with him and that he pay the bulk of the costs associated with her travelling to Sydney for contact. The children did not have a strong relationship with the father, due, Moore J found, to the inappropriate attitude of the mother. However, her Honour thought it critical that both parents play a part in the daily lives of the children. Moore J considered it impractical for the father to move to Geelong as he had another child in his care and the mother of that child lived in Sydney.

As the majority of the Full Court noted, Moore J's decision raised the issues of the court's power to coerce parents to move, the effect of s 92 of the Constitution on any order requiring interstate relocation and on the propriety of orders that are not responsive to the parties' applications, but rather engineer new family arrangements.<sup>47</sup>

All three judges upheld the appeal, remitting the matter back to Moore J. However, the reasoning of the majority (Bryant CJ and Warnick J) differed significantly from that of Kay J. Kay J was not convinced that the court had the power to order a parent to move from a well established place of residence so as to place a child's home closer to that of the other parent (or if such a power did exist, it would be exercisable only in exceptional circumstances).<sup>48</sup> Further, Kay J found that the actual orders (for example, "...The children's residence is to be established in Sydney") were vague and unlikely to be enforceable.<sup>49</sup> This is a clear example of why legal drafters should not use the passive voice! Finally, his Honour held that Moore J had failed to comply with the mandatory obligation, where making an order for equal or substantial time, to consider whether such an order was "practicable" (s 65DAA). In that regard, his Honour pointed to the failure of the trial judge to address issues such as how the mother would afford the move, where she would live given the father's place of residence was uncertain and the important matter of how the parties were going to communicate to resolve any problems that arose with this rather vague arrangement being imposed by her Honour. Kay J's views on how such a case should be handled were apparent from his concluding paragraph:

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.<sup>50</sup>

<sup>47</sup> *Sampson and Hartnett* (No 10) (2007) 38 Fam LR 315; (2007) FLC 93-350, at [6].

<sup>48</sup> *Ibid*, at [121].

<sup>49</sup> *Ibid*, at [132].

<sup>50</sup> *Ibid*, at [136].

In contrast, Bryant CJ and Warnick J seemed more at ease with the trial judge's actual decision: "We do not say that the true 'effect' of her Honour's orders was a wrong result. However, it was an extreme one and we think required an unusually stringent enquiry."<sup>51</sup> Moreover, they were satisfied that the court could make coercive orders that fell outside any proposals of the parties. This includes an injunction to force a parent to move to a particular location, so long as the injunction is limited to the extent necessary to advance the child's best interests.<sup>52</sup> Notwithstanding this, they held that her Honour failed to give proper consideration to alternative proposals (other than one parent moving to live where the other was) and to the practicability of the mother moving to Sydney.<sup>53</sup>

For a further post-amendment example of a relocation decision see *M v S* (2007) 37 FamLR 32; FLC 93-313.

In *Morgan and Miles* (2007) 38 Fam LR 275; FLC 93-343 Boland J had to consider the impact of the Amending Act on interim applications involving relocation. After referring to *Goode* (see commentary to [6.97] above) and the impact of the Amending Act on interim applications generally, her Honour pointed out that the particularly difficult nature of relocation cases:

make it highly desirable that, except in cases of emergency, the arrangements which will be in the child's best interests should not be determined in an abridged interim hearing, and these are the type of cases in which the child's present stability may be extremely relevant on an interim basis.<sup>54</sup>

Thus, although the *Cowling* approach of maintaining stability no longer applies, this decision highlights that in relocation cases stability is a particularly important consideration. So, while pre-separation parenting arrangements may no longer "set the scene" as it were for post-separation interim parenting arrangements, as might be expected, it seems unlikely parents will be permitted to relocate on an interim basis.

Another feature of the case was that the move was over a relatively short distance (144km) and the father could have the same contact time with the child as was agreed under a parenting plan. The mother essentially argued on appeal that this was not, therefore, a relocation case and so all that should be considered (if anything) was appropriate new contact arrangements. The Federal Magistrate, however, took into account time the father was spending with the children outside of what was agreed and whether allowing the mother to stay (she had already moved) with the children in the new town pending trial would impact on the father's relationship with the children. Having found this would be the result, the children were ordered to be returned, and Boland J disallowed the mother's appeal. When read with Boland J's comments on interim relocation decisions, this emphasises that where a parent wishes to move location with a child, the move will impact on contact arrangements and the other parent will not agree, notwithstanding the distance of the move, the parent may be forced to postpone the move until the matter can be resolved in court or by agreement. We have already pointed to the particular impact on carer parents of the way relocation cases are treated. This decision affirms the likelihood that "relocation" law will

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<sup>51</sup> Ibid, at [77].

<sup>52</sup> Ibid, at [58].

<sup>53</sup> Ibid, at [78].

<sup>54</sup> *Morgan and Miles* (2007) 38 Fam LR 275; FLC 93-343, at [88].

operate more harshly on those parents, as parents moving away from their children are not likely to face these constraints, even where their move is likely to adversely affect the child's ability to spend time with them.

**[7.42]-[7.55]** This section should be read in light of the new provisions in Div 10 of Pt VII which were enacted by the Amending Act (see the commentary at **[7.159]**).

**[7.57]** The Amending Act has amended, and substantially reorganised, the provisions in relation to counseling, which as a separate topic in relation to children is not now dealt with in Pt VII. Part II of the FLA now sets out the “Non-Court Based Family Services”, including family counselling, family dispute resolution and arbitration. Pt III introduces new provisions on “family consultants”. Part IIIA sets out the obligations imposed on lawyers, court officers, family dispute counsellors, dispute resolution practitioners and arbitrators to inform parties about both court based and non-court based processes and services. Finally, Pt IIIB sets out the court's powers in relation to court and non-court based family services.

The Amending Act has created two distinct sets of services for litigants. First, the court based service is that provided by family consultants.<sup>55</sup> The family consultant is there to: assist and advise the parties including dispute resolution; and assist and advise the court including giving evidence, making reports and advising on appropriate services and professionals to help the parties.<sup>56</sup> The court can seek advice from a family consultant<sup>57</sup> and order parties to attend appointments with family consultants.<sup>58</sup> Unlike the position with counsellors, communications with family consultants are not privileged.<sup>59</sup> Section 62G has been amended so that family reports can now only be prepared by family consultants (that is, not by family counsellors). Note r 15.03 of the Family Law Rules 2004 (Cth) which permits parties to applications for final orders to apply for an order for a “family report” to be prepared. Family report is defined in the dictionary to the Rules to be a report under s 62G (or s 55A in relation to divorce).

Family counselling on the other hand is a non-court based family service. Section 13C(1)(a) empowers the court, at any stage in proceedings, to order one or more of the parties to attend counselling. Section 10B defines the process of family counselling and that it is provided by a “family counselor”. Section 10C outlines who qualifies as a “family counselor”. Section 10D sets out the limited circumstances in which a family counsellor may disclose a communication made to them during family counselling, including where they reasonably believe it is necessary to assist an independent children's lawyer to represent the child's interests. Generally, disclosure is permitted where the commission of an offence seems likely and imminent, and this includes specific reference to disclosures to protect children from the risk of harm. However, disclosure is mandatory where required under some other law (eg under mandatory reporting laws, see from **[15.45]**). The right to disclose information is a different thing, however, from its admissibility in court proceedings.<sup>60</sup>

<sup>55</sup> See FLA, Pt III (ss 11A-11G).

<sup>56</sup> FLA, s 11A.

<sup>57</sup> FLA, s 11E.

<sup>58</sup> FLA, s 11F.

<sup>59</sup> FLA, s 11C.

<sup>60</sup> FLA, s 10D(6).

Section 10E(1) replaces s 62F(8) and maintains the confidentiality of family counselling, by making evidence of all things said in counselling inadmissible. Old s 62F(9) is substantially replicated in s 10E(2).

**[7.58]** Section 65L has been amended so that now only family consultants can be ordered to supervise or assist compliance with parenting orders. Note that in *In The Marriage of Bainrot* (1976) FLC 90-003, referred to in this paragraph, the Judge's comments about supervision of the order highlighted the confidential nature of discussions with the person supervising the order. Section 11C, however, renders communications with a family consultant admissible.

**[7.62]** Section 68M has been amended to bring it in line with the new terminology introduced with the Amending Act. However, it has also been expanded so that independent children's lawyers can now seek an order that a child be made available "for an examination to be made for the purpose of preparing a report about the child for use by the independent children's lawyer in connection with the proceedings".<sup>61</sup> Note, this is much wider than the previous provision which only allowed "psychiatric or psychological examination".

**[7.63]** Only family consultants can now prepare family reports under s 62G (see commentary in relation to **[7.57]** above). The judicial comment about the admissibility of evidence in reports discussed in this paragraph will take on less significance now that the rules of evidence in parenting cases have generally been relaxed (see Div 12A and the commentary in relation to **[7.29]** above).

**[7.66]** Section 65G has been amended so that a report is not now required (see the commentary in relation to **[6.77]** above). Accordingly, r 15.04 of the Family Law Rules 2004 (Cth) has been removed.

**[7.68]** An order permitting or restraining a change of name will not now be a specific issues order, but an order allocating parental responsibility.<sup>62</sup> Change of name is specifically identified as a major long-term issue about a child.<sup>63</sup> Where there is an order that parents share parental responsibility in respect of major long-term issues, the parents will no longer be able to take a decision about those issues (including the name of a child) without consulting the other parent.<sup>64</sup> The terms of the section would seem to mean that, not only is there an obligation to consult, but if agreement cannot be reached, a decision cannot be taken by either parent.<sup>65</sup> Moreover, failure to consult will result in a breach of the order for shared parental responsibility: s 65DAC(3). Note old s 65E is now found in s 60CA.

**[7.71]** Note the changes to the names for the various parenting orders in s 64B(2). See the commentary in relation to **[6.77]** and **[6.85]** above which set out the changes to s 65G. Old s 68F(2) is now found in ss 60CC(2) and (3) and s 68F(3) is now replicated in s 60CC(5).

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<sup>61</sup> FLA, s 68M(2).

<sup>62</sup> FLA, ss 64B(2)(c), (3).

<sup>63</sup> FLA, s 4(1).

<sup>64</sup> FLA, s 65DAC.

<sup>65</sup> FLA, s 65DAC(2).

[7.72] Old ss 65E and 68F(2)(k) are now ss 60CA and 60CC(3)(l) respectively.

[7.74] Old s 65E is now s 60CA.

[7.80] New s 61DA(3) provides that the presumption of equal shared parental responsibility applies when making an interim parenting order unless the court considers it would not be “appropriate in the circumstances”. Most court orders will include equal shared parental responsibility in respect of major long-term decisions, and the effect of this is to require the court to go through the process laid down in s 65DAA (considering equal parenting time and then substantial parenting time: see commentary in relation to [6.97] above) when making parenting orders. Also, considering the benefit to a child of maintaining a meaningful relationship with both parents has been elevated to a primary consideration.<sup>66</sup> Section 60B has also been altered (see commentary in relation to [6.52] above). After the passage of these amendments, it was suggested that the principles previously used in determining interim parenting applications would require reconsideration.<sup>67</sup>

The matter came before the Full Court (Bryant CJ, Finn and Boland JJ) in *Goode v Goode* (2006) 36 Fam LR 422; FLC 93-286.<sup>68</sup> The parents in this case separated in late May 2006 and the interim hearing was decided by Collier J on 10 August 2006. Due to the timing of the matter the orders sought by the parties were not framed in terms of the new law. The father sought parenting orders that effectively had the children spending equal time with each parent. The mother sought orders giving her primary residence and the father contact with the children every second weekend and half the school holidays, with some additional mid-week contact for the oldest child. Both parents sought that there be an order for joint responsibility for the long term care, welfare and development of the children. The mother had been the primary caregiver both before and after separation, though the father’s position was that he had effectively been forced to acquiesce to the mother’s post-separation proposal.

At first instance Collier J made orders in line with the mother’s proposals but failed to make an order for equal shared parental responsibility. His Honour did not suggest that the approach set out in *Cowling* was inappropriate as a result of the new laws and found there was nothing suggesting the status quo was not serving the children’s interests. It thus appeared that he applied the approach of maintaining the status quo in the absence of any danger or harm to the children.

The Full Court held that Collier J erred in his fundamental approach and remitted the matter for rehearing. In reaching this conclusion, their Honours took the opportunity to discuss some of the effects of the Amending Act (see commentary in relation to [6.97]-[6.98] above), and in particular how it impacted on interim parenting applications:

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<sup>66</sup> FLA, s 60CC(2)(a).

<sup>67</sup> See R Chisholm, “Interim Proceedings After the Family Law Amendment (Shared Parental Responsibility) Act 2006”, (2006) 20 *AJFL* 219.

<sup>68</sup> This was confirmed in *Keach v Keach* [2007] FLC 93-353.

- Some aspects of interim parenting applications have not changed: the abridged nature of proceedings, the reliance on agreed facts and issues not in dispute (rather than being drawn into consideration of factual disputes) and the practice of having regard to the care arrangements prior to separation, the current circumstances of the parties and their children, and the parties' respective proposals for the future.<sup>69</sup>
- However, the Amending Act has changed the application of prior case law to interim parenting decisions. Changes to s 60B, the introduction of the presumption of shared parental responsibility and the mandatory consideration of equal and substantial parenting time evince an intention to abandon the previous presumption in favour of preserving a well settled status quo. The decision maker must follow the new statutory steps, and where there is equal shared parental responsibility this clearly favours substantial involvement of both parents in children's lives (subject to the need to protect children from harm). Maintaining the status quo may nonetheless result if that is in the children's best interests, in particular if controversial evidence is not able to be tested at the interim stage.<sup>70</sup>
- When will it not be "appropriate in the circumstances" to apply the presumption of equal shared parental responsibility in interim decisions: s 61DA(3)? The discretion not to apply the presumption is not "to be exercised in a broad exclusionary manner, but only in circumstances where limited evidence may make the application of the presumption, or its rebuttal, difficult".<sup>71</sup> Even if the presumption is not applied, however, the Full Court held that the other changes to Part VII (s 60B(1)(a) and s 60CC(2)(a)) required an abandonment of any preference for the status quo at an interim stage.<sup>72</sup>

The Full Court went on to set out a format for dealing with interim parenting cases which gives effect to their conclusions on the operation of the various sections.<sup>73</sup>

On the facts of this particular case, the Full Court held that the trial judge was correct in not applying the presumption of equal shared parental responsibility. The wife had alleged violence on the part of the father, and these allegations were untested at the time of the trial. For this reason, Collier J held it was inappropriate to apply a presumption of equal shared parental responsibility (even though both parents had sought joint parental responsibility). However, notwithstanding that the presumption did not apply, his Honour then fell into error in applying *Cowling*, and not applying ss 60B(1)(a) and 60CC(2)(a). Because the father had sought equal time, the trial judge was bound to consider that option in light of those, and other relevant, provisions.

**[7.82]** Section 65D(2) has now been made subject to ss 61DA and 65DAB. It is not clear how this will affect the operation of the section as the Court was always required to have consideration to other matters in exercising the powers granted in this section.

**[7.85]** There may be parents with orders made under the old provisions that would prefer to have their matter considered under the new law. However, commentators have suggested the changes effected by the Amending Act will not be sufficient, on their own, to re-open a matter.<sup>74</sup> For a discussion of the impact of the Amending Act in this area see Sarah

<sup>69</sup> *Goode v Goode* (2006) 36 Fam LR 422; FLC 93-286, at [68].

<sup>70</sup> *Ibid*, at [72]-[73].

<sup>71</sup> *Ibid*, at [78].

<sup>72</sup> *Ibid*, at [80].

<sup>73</sup> *Ibid*, at [82].

<sup>74</sup> See for example CCH, *Australian Family Law and Practice* [16-320].

Middleton, “Time for a Change? Shared Parenting, Variation of Orders and the Rule in Rice and Asplund”.<sup>75</sup>

For detailed consideration of how the rule in *In the Marriage of Rice & Asplund* (1979) FLC 90-725 works (in particular the consequences of whether the “threshold test” is determined at the beginning or end of the hearing and the significance to the outcome of the magnitude of the change sought), see *SPS and PLS* [2008] FLC 93-363.

**[7.86]** The structure of Div 11 has been amended quite significantly, in part to take account of the changes in terminology effected by the Amending Act. There is now no equivalent of the encompassing term “Division 11 contact orders”.<sup>76</sup> The definitions of the terms “family violence” and “family violence order” are now found in s 4(1).

The purpose of the division is now set out in s 68N. The Family Law Council had questioned the tension created between protection from violence and promotion of contact under the old section.<sup>77</sup> Notably, old s 68Q(c) has now been replaced with this purpose: “to achieve the objects and principles in section 60B” (s 68N(c)). As a result of the Amending Act, s 60B now includes as an object, the protection of children from harm (s 60B(1)(b)) (this was recommended by the Council), but of course it also has the maintenance of meaningful involvement with both parents “to the maximum extent consistent with the best interests of the child” as an object.

**[7.88]** The reference to **[7.42]** here should read **[6.138]**. Old s 68K is now found in s 60CG. Old s 68R has been replaced with s 68P and that section has been amended as a result of the new terminology for parenting orders effected by the Amending Act.

**[7.89]** Old s 68T has been replaced with s 68R. Courts deciding on family violence orders can no longer “make” parenting orders, they can only “revive, vary, discharge or suspend” them. Old s 68T(4) is now found in s 68R(2).

Under the new provisions, the limitations on varying an order are now as follows:

- The court must still make or vary a family violence order (old s 68T(2)(a) is now found in s 68R(3)(a)). As before, this means the court cannot decline to make or vary the family violence order, but go on to vary a parenting (or other listed) order.
- The court must have before it “material that was not before the court that made that order”: s 68R(3)(b). In other words, if the material about family violence now being relied upon to seek (or change) a family violence order was before the court that made the parenting order, then the original parenting order cannot be changed.
- The proceedings to make or vary the family violence order must not be interim proceedings (old s 68T(2)(d) is found in s 68R(4)).

The considerations relevant to the court in deciding whether to vary an order are now set out in s 68R(5):

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<sup>75</sup> (2006) 34 *Federal Law Review* 399.

<sup>76</sup> FLA, s 68N(a)(ii).

<sup>77</sup> Family Law Council, Letter of Advice to the Attorney-General, Review of Div 11 – Family Violence, 16 November 2004.

- The purposes of the Division (see above);
- Whether contact is in the child's best interests; and
- If changing a parenting (or other listed) order that was inconsistent with a family violence order when it was made, the court has to be satisfied that this is appropriate because someone has been, or is likely to be, exposed to violence as a result of that order.

Old s 68T(3)(a)(ii) is now found in s 68S(1)(e).

**[7.90]** See the preceding paragraphs which set out the new sections resulting from the Amending Act.

**[7.91]** The reference to **[7.42]** should read **[6.137]**.

**[7.101]** It has been reported that in a case heard in Victoria, the Family Court of Australia has sanctioned a "sex change" operation for a 12-year-old girl (it seems the youngest child yet). It appears from media reports that the parents were separated and that the father may have opposed the operation but lacked the funds to fight the application.<sup>78</sup>

**[7.106]** See **[7.153]-[7.155]** which remain an accurate summary of the changes to enforcement proceedings as a result the Amending Act.

Prior to the amending Act, the only section dealing with standards of proof in this Division was s 70NEA. That section applied to whether a person had a reasonable excuse for contravening a parenting order and confirmed the standard of proof was the balance of probabilities. This section has now been replaced with s 70NAF which also confirms the civil standard for that issue, and all other matters under the division, except where the court is fining, imprisoning or making (or enforcing) a community service order (or enforcing a bond): see s 70 NAF. In those cases, the standard is beyond reasonable doubt. The Full Court<sup>79</sup> has commented on the difficulties this section will cause, because until the question of the appropriate penalty is considered, the parties will not know the standard of proof that applies. So, a party can be found not to have contravened an order, or to have had a reasonable excuse, all on the balance of probabilities. However, if a contravention without excuse is proved, and one of the quasi-criminal penalties is being considered, then the decision maker must be satisfied to the criminal standard. But satisfied of what? The Full Court held that:

notwithstanding the "oddities" of process that may arise, the effect of s 70NAF(3) is this: before an order of the type referred to in that subsection is made, the court must be satisfied beyond reasonable doubt of all the factual matters that relate to the finding of contravention, to the treatment of the contravention as one to which Subdivision F of Division 13A applies, and...if imprisonment is imposed, the inappropriateness of other available orders.<sup>80</sup>

<sup>78</sup> See for example <http://www.abc.net.au/news/stories/2008/05/25/2254801.htm> and <http://www.news.com.au/story/0,23599,23754742-2,00.html> (both accessed 25 July 2008).

<sup>79</sup> *Dobbs v Brayson* (2007) FLC 93-346.

<sup>80</sup> *Ibid*, at [51].

The only solution, it seems, is for parties to assume from the start that the higher standard is required and where decision makers intend imposing the relevant orders, they should explicitly note the application of that higher standard.<sup>81</sup>

**[7.108]** The sections referred to in this paragraph have been amended to reflect the changes effected by the Amending Act to the terminology for parenting orders.

**[7.109]** Sections 65Y and 65Z have been amended in line with the changes in terminology to parenting orders effected by the Amending Act. Now, those sections apply if there is in force “a parenting order to which this Subdivision applies”. That term is defined in s 65X(1) and includes any order granting parental responsibility and any order that a child is to live, spend time, or communicate with a person. Similar amendments have been made to ss 65ZA and 65ZB.

**[7.110]** Section 67K has been amended to reflect the changes to terminology for parenting orders effected by the Amending Act. This effects no practical change as the section was previously broadly worded, so that, in addition to specified classes of people, any “person concerned with the care, welfare or development of the child” could apply for a location order. This remains the case. The reference to s 67(M)(6) should read s 67M(5).

**[7.112]** Section 67T has been amended to reflect the changes in terminology for parenting orders effected by the Amending Act.

**[7.113]** Old s 65E is now s 60CA.

**[7.115]** As a result of the changes in terminology effected by the Amending Act, s 111B has again been amended.

The term “rights of custody” has been considered by the Full Court in *J and Director-General, Dept of Community Services* (2007) FLC 93-342. After describing the definition in reg 4 as “somewhat unsatisfactory”, their Honours held that to have “rights of custody” (in this case under the law of Georgia in the United States) a parent must have the right to decide where the child shall live (presumably this can be jointly held). In this particular case, the father had a right to be consulted, but as the orders gave the mother the right to make the final decision if they disagreed, then the father did not have “rights of custody”. As a result, the removal by the mother of the child was not wrongful. This case emphasises that the Central Authority, which bears the onus of establishing the removal is wrongful, must pay close attention to the precise nature of the orders in the foreign jurisdiction.

**[7.118]** For a recent and thorough discussion of the case law on how past family violence perpetrated in the child’s place of habitual residence relates to the assessment of “grave risk” in reg 16(3)(b): see *Zafiroopoulos and the Secretary of the Department of Human Services State Central Authority* (2006) 35 Fam LR 489; (2006) FLC 93-264. Contrast the outcome in that case (where the risk of violence on returning to Greece was not sufficient to trigger the

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<sup>81</sup> See *Dobbs and Brayson* at [66] and the reference there to the approach adopted by Benjamin J in *Elsbeth v Peter* (2007) 37 Fam LR 696; FLC 93-341.

exception), with the decision in *McDonald v Director General, Dept of Community Services, NSW*.<sup>82</sup> In the latter case, it was found the mother had suffered Post-Traumatic Stress Disorder as a result of the violence to which she was subjected by the father and there was a danger it would resurface if she and the child were sent back. This triggered the exception, however, it is discretionary, and the trial judge was of the view protection could be provided by ordering that certain conditions be met (as is provided for under reg 15). On this basis, the order for return was made. On appeal, the Full Court (Kay, Warnick and Boland JJ) held that where conditions are to be attached so as to avoid the “grave risk”, those conditions “need to be clearly defined and be capable of being objectively measured as to whether or not the conditions have been fulfilled”.<sup>83</sup> The appeal was successful, as the conditions in this case did not meet these criteria.

A later case provides an example of appropriate conditions. In *Dept of Community Services and Frampton* (2007) 37 Fam LR 583; FLC 93-340 the Kenyan mother lost her visa to remain in the United Kingdom, nearly two years after she separated from the father of the parties’ child. The mother returned to Kenya and as it was clear she would not be granted a visa, she asked the father to sign divorce papers, so she could marry her new Scottish partner and return to Scotland. The father refused, apparently saying “Enjoy your life in Kenya”. The mother then moved to Australia and at this point the father sought the return of the child to the UK. It was agreed that there would be a grave risk to the child if the mother could not return with the child. The trial judge was not satisfied that appropriate conditions could be crafted, but the Full Court disagreed, outlining the minimum conditions required here:

It seems to us essential that the mother have the legal ability to enter and stay in the United Kingdom pending the outcome of anticipated proceedings about L’s future parenting. It further appears essential considering the mother’s financial position, that the means of transporting L and the mother to the United Kingdom be provided. Finally it seems essential that some financial arrangement be made to ensure the mother and child have the ability to find accommodation upon their arrival, and have provision for their day to day living expenses, at least until an application for support can be made by the mother to an appropriate court.<sup>84</sup>

**[7.119]** *Zafiroopoulos and the Secretary of the Department of Human Services State Central Authority* provides an example where the strong objection of a very mature child aged just under eight was held to fall outside the exception, on the basis of the child’s young age.

**[7.122]** Two later cases have confirmed that the section of *B and B (Re jurisdiction)* (2003) 172 FLR 286; (2003) 31 Fam LR 72 extracted at **[6.82]** is of limited application. The Full Court has held that the trial judges in both *Kwon and Lee* (2006) FLC 93-287 and *Karim and Khalid* (2007) 38 Fam LR 300; FLC 93-348<sup>85</sup> fell into error in applying the clearly inappropriate forum test to cases that were factually very different to *B and B (Re jurisdiction)*. The latter case involved a stay application and children who were outside of Australia. The two more recent cases involved decisions about whether children within Australia should be returned to non-Convention countries. In *Kwon and Lee* the Full Court held that the relevant passage

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<sup>82</sup> [2007] FamCA 1440.

<sup>83</sup> *Ibid*, at [29].

<sup>84</sup> *Dept of Community Services and Frampton* (2007) 37 Fam LR 583; FLC 93-340, at [34].

<sup>85</sup> Unfortunately *Kwon and Lee* was not available to the trial judge hearing this later case.

of *B and B (Re jurisdiction)* was obiter dicta and was “perhaps too widely stated for general application” It was stated:

We consider the following principles can be distilled from authority:

- (i) where an Australian court's jurisdiction under the Act is properly invoked in respect of a family law matter, including an application for divorce, and an issue of competing *fora* arises, generally the principles to be applied in respect of an application for a stay or anti suit injunction are those applicable at common law;
- (ii) in cases involving competing applications for differing types of relief arising from the breakdown of a marriage, or a de facto relationship (where the parties have children of that relationship), including some applications for parenting orders, it may be appropriate pursuant to the Court's inherent power to grant a stay or an anti suit injunction based on common law principles;
- (iii) the granting of relief by way of a stay of proceedings is more likely to be appropriate in a case where the child or children, the subject matter of the litigation, are resident in the foreign forum, and there is no necessity to make any order other than a stay to determine the application before the Court;
- (iv) in proceedings involving competing *fora* when the child is in Australia and the Court's jurisdiction is regularly invoked, and it is necessary to make a parenting order for interim residence or an aspect of parental responsibility to provide effective relief, the principles relevant to the granting of a stay or an anti suit injunction are not the appropriate principles to be applied, and the Court must make such orders as are necessary with the child's best interests as its paramount consideration (s 60CA);
- (v) if an order sought in addition to, or ancillary to, a stay is a parenting order it must be instituted under Part VII of the Act and determined in accordance with s 60CA;
- (vi) in some circumstances, such as an abduction from a non Hague Convention country it may be appropriate for the matter to be dealt with by way of a speedy summary hearing and an order for the return of the child to the foreign jurisdiction. In making such summary order the Court will have regard to the child's best interests as its paramount consideration;
- (vii) in cases, such as in (ii) above, where the Act does not proscribe a "best interests" requirement, the child's best interests will often be a significant and weighty matter to be taken into account; and
- (viii) that litigation involving children is not strictly *inter partes* litigation, and the child's best interests will almost inevitably be a significant matter.<sup>86</sup>

**[7.133]** The new pre-action procedures requiring most parties to attend family dispute resolution prior to filing any application and aimed at reducing litigation, have now taken full effect (from 1 July 2008). Thus, the provisions in ss 60I(7) and (12) now apply to all parenting proceedings. The exceptional cases where a certificate of attendance are not required are set out in s 60I(9) and include: where the court is satisfied on reasonable grounds that abuse or family violence has occurred or there is a risk or a child being subjected to violence or abuse; urgent applications; at least one of the parties cannot effectively participate in the process; or the application is made by consent of all parties.

**[7.141]** The Full Court has clarified that, where substantial and significant time is concerned, the minimum requirement is as set out in s 65DAA(3), but this alone may not be sufficient

<sup>86</sup> *Kwon and Lee* (2006) FLC 93-287, at [83].

to constitute substantial and significant time.<sup>87</sup> The Full Court pointed out that duration and frequency of visits may impact on whether the time is significant<sup>88</sup> and upheld this particular appeal on the basis of the particular way the visits were scheduled by the trial judge (involving, for example, long breaks).

**[7.145]** Data is beginning to emerge about the implications for children in shared care arrangements. McIntosh and Chisholm found:

that substantially shared care arrangements may entail risks for children's healthy emotional development in families that have the following specific factors, especially in combination:

*Parent factors:*

- Low levels of maturity and insight;
- A parent's poor capacity for emotional availability to the child;
- Ongoing, high level conflict;
- Ongoing significant psychological acrimony between parents;
- Child is seen to be at risk in the care of one parent.

*Child factors:*

- Under 10 years of age;
- The child is not happy with a shared arrangement;
- The child experiences a parent to be poorly available to them.<sup>89</sup>

**[7.153]** Some reported decisions are now available where s 70NBA has been utilised. In *Sandler and Kerrington* (2007) FLC 93-323 the mother was found to have breached parenting orders made some nine months earlier. She did not attend the contravention hearing and the parenting order was reversed in favour of the father. On appeal, she raised the fact that she was not notified that parenting orders would be considered, that the father had not sought care and that the reasons of the trial judge who originally awarded her care of the child were not before the Federal Magistrate. These reasons had accepted evidence that it would be harmful to the child to change care. It appears the Federal Magistrate reversed care with the thought that this would be challenged and there would soon be a fuller hearing.<sup>90</sup>

It is not surprising that Warnick J found this was not a proper basis for making such a decision and that the decision was flawed due to the lack of information before the court. His Honour noted that this section was designed, at least in part, to make it easier for the court to vary a parenting order during contravention proceedings where it became apparent that there was a problem being caused by the form of the orders, such as an ambiguity.<sup>91</sup> A separate application is thereby avoided and in such cases a summary process is appropriate. However, clearly a more significant change can be made, and in that case the normal process (as set out under the Amending Act) is required. If the parenting orders have been made recently, this includes establishing a change in circumstances (see *In the Marriage of Rice & Asplund* (1979) FLC 90-725 discussed at **[7.84]**). This process was not followed here. Moreover, notwithstanding that the relevant forms pointed out to the mother that care could

<sup>87</sup> *Eddington and Eddington* (No 2) (2007) FLC 93-349, at [54].

<sup>88</sup> *Ibid*, at [66].

<sup>89</sup> J McIntosh and R Chisholm, "Shared care and children's best interests in conflicted separation: A cautionary tale from current research" 20(1) *Australian Family Lawyer*, 9.

<sup>90</sup> *Sandler and Kerrington* (2007) FLC 93-323, at [39].

<sup>91</sup> *Ibid*, at [43].

be changed, given that the father had served on her another application regarding parenting orders, seeking that the child live with the mother in the interim, it was reasonable for her to assume the Federal Magistrate would not consider a reversal of care. Thus the mother was denied procedural fairness. However, despite the order reversing care having been made just under two months ago, and notwithstanding that his Honour had no evidence before him on the effects on the child of what he presumed was a traumatic move, Warnick J assumed it would not promote the child's best interests to return him to his mother, leaving the matter to be resolved in the pending parenting proceedings. In *Irvin and Carr* (2007) FLC 93-322 the Full Court approved Warnick J's comments on the proper process in respect of s 70NBA. *Dobbs and Brayson* (2007) 38 Fam LR 95; FLC 93-346 provides an example where a trial judge imprisoned the mother as a sanction for breaching a parenting order and reversed care, but failed to consider properly whether this was in the child's best interests.

**[7.156]-[7.157]** As discussed in these paragraphs, Div 12A introduced the procedures for what is now called the "Less Adversarial Trial" (LAT). The provisions have been fleshed out by Ch 16A of the Family Law Rules 2004 (Cth) and Practice Direction No 2 of 2006. For a brief summary of the background to these changes and how the provisions operate, see *Truman and Truman* (2008) 38 Fam LR 614; FLC 93-360. One of the features of the LAT is that it will most likely be spread out over a period of months, with the potential for orders to be made as the case progresses. In this case the Full Court held that one of the new LAT rules, r 22.03(2), which limited appeals of such orders to the end of proceedings, was ultra vires. This has since been repealed.

By giving the court greater control over how parenting cases are run, questions of procedural fairness have arisen. Judges in LATs now have much greater control over what evidence will be presented: see s 69ZX. In *Truman* it was confirmed that the normal requirements of procedural fairness apply to LATs. One particular question raised in that case was what was required of the trial judge, in terms of procedural fairness, if the Judge intended to ignore affidavit evidence filed in relation to interim proceedings, when determining those interim matters at the start of the LAT. In this case, the trial judge had made it clear from the outset this material would not be considered, had taken oral evidence from both parties and the family consultant, and counsel for both parties had made submissions on the day about the exclusion of this evidence. The Full Court found this satisfied the requirements of procedural fairness. However, the trial judge had failed to afford the father procedural fairness in another respect. The trial judge had concluded that the mother had changed her position on the orders she sought. The father was entitled to be advised of this conclusion so he could be heard on the matter.

The Full Court in *Truman* also considered the requirement to give reasons for orders made as the LAT proceeds. Neither written nor lengthy reasons are required, but the grounds leading to the conclusions must be explained and the findings on the principal contested issues listed. Shortly after *Truman*, this issue was raised again in *Crestin and Crestin and Ors* (2008) FLC 93-368. Here the trial judge did not meet the required standard; he failed to identify what evidence was relied on; he did not address key issues raised by the mother, namely violence allegations and the child's ability to cope with a change to the parenting

arrangements;<sup>92</sup> and he failed to explain what weight, if any, was placed on unsworn statements of the family consultant.

## Chapter 8

### Financial Support of Married and De Facto Partners

**[8.3 and 8.18]** For a discussion of the UK position on the “clean break” principle see the 2006 case of *Miller v Miller; McFarlane v McFarlane* [2006] 3 All ER 1.

**[8.28]** The last sentence of this paragraph should refer to Chapter 12 (and not Chapter 11).

**[8.35]** For a recent discussion of the UK approach see *Miller v Miller; McFarlane v McFarlane*.

**[8.42]** In *Miller v Miller; McFarlane v McFarlane*,<sup>93</sup> the House of Lords recognised the compensatory nature of maintenance within the context of a property re-adjustment. According to Lord Nicholls of Birkenhead, the law is:

aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.<sup>94</sup>

This case is discussed further in the update for Chapter 12.

**[8.46]** It had been expected that the former Howard Liberal-National Government would introduce the long-awaited Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth) during the 2007 Autumn session of parliament. That did not eventuate. The Rudd Labor Government finally introduced the Bill during the 2008 Winter session of parliament and it is currently before the Senate.<sup>95</sup> If implemented, the Bill will give effect to the references of legislative power by those states that have done so (currently New South Wales, Victoria, Queensland and Tasmania)<sup>96</sup> and will be extended to cover financial

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<sup>92</sup> In fact, the paternal grandparents were the original applicants and the parents the respondents, but as the father was to see the child at his parents' home, it was in essence an application about the time he would spend with the child.

<sup>93</sup> [2006] 3 All ER 1 (Lord Nicholls of Birkenhead; Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Mance).

<sup>94</sup> *Ibid*, at p 8.

<sup>95</sup> On 26 June 2008 the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth) 2008 was referred by the Senate to the Legal and Constitutional Affairs Committee for inquiry.

<sup>96</sup> South Australia is yet to legislate for a reference of powers. The Commonwealth will rely on its power over Territories to apply the proposed new legislation in the Australian Capital Territory, the Northern Territory and Norfolk Island.

disputes between same-gender de facto couples. It will also provide virtually identical maintenance rights to those currently enjoyed by married couples.<sup>97</sup>

The Senate Standing Committee on Legal and Constitutional Affairs released its report into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth) 2008 on 27 August 2008 (the Senate Report).<sup>98</sup> The Senate Report supports the Bill, subject to five recommendations. Those recommendations are:

1. to amend the definition of the term “child of de facto relationship” in proposed s 90RB of the Bill;
2. to review the definitions of “de facto”, “couple”, “de facto partner”, “child”, “parent”, related definitions and parentage presumptions to ensure consistent concepts and terminology in all federal legislation;
3. that the Federal Government should renumber the FLA;
4. that the transitional provisions in the Bill should be amended to enable couples to opt in to the new regime by mutual agreement, subject to appropriate safeguards, where their relationship breaks down before the commencement and their property and/or spouse maintenance matters have not been finalised; and
5. that, subject to the above recommendations, that the Bill be passed.<sup>99</sup>

The fourth recommendation is somewhat problematic as there is no suggestion as to what the “safeguards” might be. In New South Wales, Northern Territory and South Australia, where there is no equivalent to s 75(2) of the FLA, it may be hard to achieve consent as there the parties’ respective interests will be very different. In cases where there is not an issue, parties may wish to consent because of the advantages and cost savings in dealing with the specialist family courts. The issue of financial agreements was largely unaddressed by the Senate Committee.

**[8.47-8.50]** In late 2006 South Australia passed legislation that amended their then De Facto Relationships Act 1996 (SA) and a number of other statutes.<sup>100</sup> The revised legislation, which commenced on 1 July 2007 and now known as the Domestic Partners Property Act 1996 (SA), extended the existing de facto relationships legislation to same-sex de facto couples and also to adults in a “close personal relationship”.

In April 2008 the Relationships Act 2008 (Vic) received assent and it will commence on 1 December 2008. This new Act, which will repeal Pt IX of the Property Law Act 1958 (Vic),<sup>101</sup> will extend the existing statutory rights to a domestic relationship:

<sup>97</sup> Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth) 2008 Division 2 Subdivision B – Maintenance, cls 90SD-90SJ.

<sup>98</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) [Provisions]* (report, 27 August 2008), [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/family\\_law/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/family_law/report/index.htm) (viewed 10 September 2008).

<sup>99</sup> The three Liberal-National Party senators supported the five recommendations made by the committee but added two further recommendations: first, that the words “or in another de facto relationship” in paragraph 4AA(5)(b) of the Bill be omitted; and, second, that the proposed s 90SB be omitted, and substituted with an amended provision. For details see: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/family\\_law/report/d01.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/family_law/report/d01.htm) (viewed 10 September 2008).

<sup>100</sup> Statutes Amendment (Domestic Partners) Act 2006 (SA) (which received assent on 14 December 2006).

<sup>101</sup> Relationships Act 2008 (Vic) s 72.

between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof ...<sup>102</sup>

The new Victorian Act will also introduce a system of relationship registration and allow “relationship agreements”.<sup>103</sup> The new legislation also permits domestic partners the right to seek maintenance orders and incorporates considerations that mirror s 75(2) of the FLA.<sup>104</sup>

As mentioned in the update to Chapter 1, the Australian Capital Territory’s Civil Partnership Act 2008 (ACT) commenced on 19 May 2008. This Act amended various statutes including the Domestic Relationships Act 1994 (ACT) (eg by including a “civil partnership” within the definition of a domestic relationship).

### Child-bearing expenses

**[8.52]** The FLA creates a liability for the father to contribute to the mother’s child-bearing expenses provided he is not married to the mother (otherwise spousal maintenance would be applicable).<sup>105</sup> Section 67B specifically provides that:

The father of a child who is not married to the child's mother is, subject to this Division, liable to make a proper contribution towards:

- (a) the maintenance of the mother for the childbirth maintenance period in relation to the birth of the child; and
- (b) the mother's reasonable medical expenses in relation to the pregnancy and birth; and
- (c) if the mother dies and the death is as a result of the pregnancy or birth, the reasonable expenses of the mother's funeral; and
- (d) if the child is stillborn, or dies and the death is related to the birth, the reasonable expenses of the child's funeral.

Note that in s 4 of the FLA, a “childbirth maintenance period” means:

the period that begins on the day mentioned in paragraph (a) or (b) and ends 3 months after the child's birth:

- (a) if the mother:
  - (i) works in paid employment; and
  - (ii) is advised by a medical practitioner to stop working for medical reasons related to her pregnancy; and
  - (iii) stops working after being so advised and more than 2 months before the child is due to be born;the period begins on the day on which she stops working; or
- (b) in any other case--the period begins on the day that is 2 months before the child is due to be born.

This provision is made constitutionally possible due to a reference of powers by the states.<sup>106</sup> The relevant FLA provisions relating to childbirth expenses have no application in WA but identical provisions are found in Pt 5 Div 8 (ss 133-141) of the *Family Court Act* 1997 (WA).

<sup>102</sup> Relationships Act 2008 (Vic) s 35(1).

<sup>103</sup> Relationships Act 2008 (Vic) Ch 2, 3.

<sup>104</sup> Relationships Act 2008 (Vic) Ch 3, Pt 3.3, in particular s 51.

<sup>105</sup> Pt VII Div 8 sdiv B (ss 67B-67G).

<sup>106</sup> See s 3, Commonwealth Powers (Family Law-Children) Act 1986 (NSW), (SA), (Vic); Commonwealth Powers (Family Law) Act 1987 (Tas); Commonwealth Powers (Family Law-Children) Act 1990 (Qld).

Not surprisingly it is the mother (or the mother's legal personal representative) who may institute proceedings for childbirth expenses at any time during her pregnancy and no later than 12 months after the birth of the child, subject to leave of the court and proof by the mother of related hardship.<sup>107</sup> Under s 67D(1), the court has the power to make a childbirth expenses order "as it thinks proper", and the types of orders it can make are set out in s 67D(2) paragraphs (a)-(j). The types of orders are not dissimilar to the powers in s 66P(1) (for child maintenance) and s 80(1) (for spousal maintenance).

In determining what contribution the father of the child should make, the court must take the following matters into account:

- the financial circumstances of the mother and the father of the child;<sup>108</sup>
- the financial commitments of the respective parties;<sup>109</sup> and
- any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.<sup>110</sup>

As with the situation for spousal maintenance, the court is also obliged to take into account a party's capacity to earn and derive income but to specifically disregard the mother's entitlement to an income-tested pension, allowance or benefit.<sup>111</sup> If the court is satisfied that the mother is in immediate need of financial assistance, and it is not practicable in the circumstances to determine immediately what order (if any) should be made, the court may order the payment, pending the disposal of the proceedings, of such periodic or other amount as the court considers appropriate.<sup>112</sup>

The practical relevance of these provisions is questionable, particularly given the availability of the lump sum "baby bonus" (formerly called the "maternity payment") from the Federal Government since 1 July 2004.<sup>113</sup> This payment is currently \$5,000 and is not currently income-tested (although this will change on 1 July 2009; see below).<sup>114</sup> As the baby bonus is not currently an income-tested benefit, it may be taken into account in any contested application for child-bearing expenses. The baby bonus is generally only payable to one eligible claimant, with the default payee being the mother. Where there is shared care of a baby within the first 13 weeks of the child's life, the intention is that the "maternity payment" remains a payment to the mother. However, in unusual circumstances such as where the mother did not have ongoing primary responsibility for a baby for this period, the payment may be paid to the other carer (or apportioned between both carers in a shared care arrangement).<sup>115</sup>

<sup>107</sup> FLA, ss 67F and 67G.

<sup>108</sup> FLA, s 67C(1)(a).

<sup>109</sup> FLA, s 67C(1)(b).

<sup>110</sup> FLA, s 67C(1)(c).

<sup>111</sup> FLA, ss 67C(2) and 67C(3).

<sup>112</sup> FLA, s 67E.

<sup>113</sup> For details see the Federal Government's Family Assistance Office website:

[http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-maternity\\_payment\\_eligibility.htm](http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-maternity_payment_eligibility.htm) (viewed 25 September 2008). The payment may be made when a child is adopted or in a situation where a child is stillborn.

<sup>114</sup> The maternity payment increased to \$5,000 on 1 July 2008.

<sup>115</sup> For details see the Federal Government's Family Assistance Office website:

[http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-maternity\\_payment\\_eligibility.htm](http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/publications-factsheets-maternity_payment_eligibility.htm) (viewed 25 September 2008).

As mentioned above, a new “family income test” will apply to the baby bonus, limiting eligibility to families with an adjusted taxable income equivalent to \$150,000 or less a year. This will be calculated based on earnings in the six months following the birth of a child or an adopted child entering a parent’s care. The test will be applied pro rata on an annual basis, so that the amount is equivalent to \$75,000 in the six months after birth.<sup>116</sup>

Lastly, a liability for child-bearing expenses may be relevant in a child support dispute where a party is seeking a change to an administrative assessment made under the Child Support (Assessment) Act, 1989 (Cth) (discussed later at [10.45]). Under “Reason 9” of the Child Support Agency’s reasons for a change of assessment” (also discussed later at [10.45]),<sup>117</sup> a father may argue that he has “a legal duty to maintain another person or other children not included in the child support assessment” (ie the mother of his unborn child).

## Chapter 9 Financial Support of Children: Family Law Act

[9.5] The second sentence of this paragraph should refer to Chapter 6 (and not Chapter 8).

## Chapter 10 Financial Support of Children: Child Support Acts

[10.1] As mentioned in the Preface to the current edition, on 28 February 2006 the Federal Government announced major changes to the child support scheme in line with the recommendations made by a Ministerial Taskforce that are discussed in this chapter (see [10.83]-[10.89]). The legislation to support these changes was subsequently passed and has now commenced.<sup>118</sup> These changes were rolled out in three stages and broadly speaking included:<sup>119</sup>

- (as from 1 July 2006), a reduction in the maximum income amount that can be used in a child support assessment<sup>120</sup> to ensure child support payments are better aligned with the actual costs of caring for children; and an increase in the minimum payment

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<sup>116</sup> For details see the Federal Government’s Family Assistance Office website:

[http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/whats\\_new-budget0809.htm](http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/whats_new-budget0809.htm) (viewed 25 September 2008).

<sup>117</sup> Assessment Act, ss 98C, 117; also see CSA website - <http://www.csa.gov.au/payer/coa.aspx>.

<sup>118</sup> Child Support Legislation Amendment (Reform of Child Support Scheme – Initial Measures) Act 2006 (Cth) Child Support Legislation Amendment (Reform of Child Support Scheme – New Formula and Other Measures Act 2006 (Cth).

<sup>119</sup> For a summary of the child support reforms see:

[http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport\\_reforms.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport_reforms.htm) (viewed 26 September 2008).

<sup>120</sup> The reduction on 1 July 2006 was from \$139,347 to \$104,702; as from 1 January 2007 the new “cap” income amount was \$109,135.

of child support payable from \$260 to \$320 per year (ie just over \$6 per week) that will, in future years, be indexed to the Consumer Price Index (CPI);<sup>121</sup>

- (as from 1 January 2007), the review of Child Support Agency decisions (including a change of assessment review) by the Social Security Appeals Tribunal (SSAT); and
- (as from 1 July 2008), the introduction of a new child support formula (discussed below).

Information about these changes is available from the website of the Department of Families, Housing Community Services and Indigenous Affairs.<sup>122</sup>

**[10.16]** Since 1 January 2007 it is possible for the payee to enforce a registrable maintenance liability.<sup>123</sup> Section 30(3) of the Registration and Collection Act now states that:

If a registrable maintenance liability is registered under this Act, the payee of the liability is not entitled to, and may not enforce payment of, amounts payable under the liability other than by instituting a proceeding under section 113A to recover a debt due in relation to the liability.

Section 113A requires the payee to notify the Child Support Registrar of an intention to institute a proceeding to recover debt. If proceedings are properly instituted to recover a debt due in relation to the liability, the relevant court may exercise all the powers of the Child Support Registrar under s 120(1) of the Registration and Collection Act.<sup>124</sup>

**[10.32]** The court has the power to order the recovery of amounts wrongly paid under the Assessment Act.<sup>125</sup> Where the court has made a declaration under s 107 of the Assessment Act that the payee was not entitled to an administrative assessment of child support for the child because the payer is not the parent of the child, it may determine the amount that is to be recovered by the payer and whether payment is to be made in the form of a lump sum payment or a periodic amount.<sup>126</sup> In doing so, the court must have regard to the following matters:

- (a) whether the payee or the payer knew, or should reasonably have known, that the payer was not the parent of the child;
- (b) whether the payee or the payer engaged in any conduct (by act or omission) that directly or indirectly resulted in the application for administrative assessment of child support for the child being accepted by the Registrar;
- (c) whether there was any delay by the payer in applying under section 107 for a declaration once he or she knew, or should reasonably have known, that he or she was not the parent of the child;
- (d) whether there is any other child support that is, or may become, payable to the payee for the child by the person who is the parent of the child;
- (e) the relationship between the payer and the child;
- (f) the financial circumstances of the payee and the payer.<sup>127</sup>

<sup>121</sup> As from 1 January 2007 the minimum payment of child support payable is \$333.

<sup>122</sup> See [http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport\\_reforms.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport_reforms.htm) (viewed 25 September 2008).

<sup>123</sup> Registration and Collection Act, ss 30, 113A; as amended by the Child Support Legislation Amendment (Reform of Child Support Scheme – New Formula and Other Measures Act 2006 (Cth).

<sup>124</sup> Registration and Collection Act, s 120(1A).

<sup>125</sup> Assessment Act, s 143(1)-(3A).

<sup>126</sup> Assessment Act, s 143(3A).

<sup>127</sup> Assessment Act, s 143(3B).

This section was recently considered by the High Court (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) in *Magill v Magill*.<sup>128</sup> Gummow, Kirby and Crennan JJ held that where parties have separated, this section, together with s 66X of the FLA, provide the only remedy for “economic loss caused by a wife to a husband, after the breakdown of their marriage” as a result of paternity fraud.<sup>129</sup> This was not, however, the central issue in the case.

Mr and Mrs Magill were married in 1988 and they had three children before separating in 1992. Following their separation the wife applied for child support and by and large the husband paid that support until 1999. Some time after separation (and after gaining access to the wife’s diary) the husband became aware the wife believed he may not have fathered all of their children. In 1995 the wife admitted she had begun ongoing sexual relations with another man less than six months after the birth of their first child. She later gave evidence confirming that she had had unprotected sex with this man every few weeks until mid-1990, with the frequency declining after her second child was born. In 2000 parentage tests were conducted that confirmed that the husband had not fathered the two younger children. As a consequence the court ended, and retrospectively varied, the husband’s child support liability for the youngest two children (see Child Support (Assessment) Act 1989 (Cth), s 143). The husband subsequently sued the wife in deceit seeking damages of various kinds. A Victorian County Court judge found the tort of deceit applied and awarded the husband \$70,000 (being \$30,000 for general pain and suffering, \$35,000 for past economic loss and \$5,000 for future economic loss). The wife successfully appealed. The Victorian Court of Appeal found that the husband had not made out the tort of deceit, in particular that the wife made representations which induced reliance by the husband.<sup>130</sup>

The husband’s subsequent appeal to the High Court of Australia was dismissed by all of the six High Court Justices. All their Honours agreed that Mr Magill had not made out deceit on the facts of the particular case. It is clear from the decision that (at least in jurisdictions where deceit is still open for paternity fraud<sup>131</sup>) it will be very difficult to establish all of the necessary elements of the tort. In particular, deceit requires a representation, and so more than silence about an affair, or doubt as to paternity, is required. The High Court was clear there is no obligation of disclosure. On the point of principle, that is, whether as a matter of public policy such actions should be available to couples, five of their Honours held that the action was not available in this case, with Heydon J alone disagreeing on that point. All of their Honours rejected the wife’s submission that somehow s 119 (abolition of spousal immunity in tort) and s 120 (abolition of actions for damages for adultery) of the FLA excluded deceit in these circumstances. Gummow, Kirby and Crennan JJ held that “the tort [of deceit] does not apply to false representations made during the course of a marriage about an extra-marital sexual relationship or paternity”.<sup>132</sup> Their Honours reached this conclusion because firstly, the common law should not proceed on a “divergent course” from the no-fault statutory scheme for family law (and that would be the result of allowing this action) and secondly because deceit was primarily aimed at commercial disputes and therefore inappropriate in this context. Hayne J took a more novel approach,

<sup>128</sup> (2006) 231 ALR 277.

<sup>129</sup> *Ibid*, at [110].

<sup>130</sup> *Magill v Magill* (2005) 33 Fam LR 193.

<sup>131</sup> See for example *P v B (Paternity: Damages for Deceit)* [2001] 1 Fam Law R 1041.

<sup>132</sup> (2006) 231 ALR 277, at [86].

drawing inspiration from the contractual rule presuming a lack of intention to create legal relations between family members. For deceit to apply, Hayne J held that such a presumption would need to be rebutted, that is, it would need to be shown that the couple intended legal consequences to flow from their representations. Gleeson CJ also found the tort did not apply in this situation though his precise reason is more difficult to divine. His judgement does, however, express sympathy for the core reasoning in the two judgements already mentioned.<sup>133</sup> Heydon J was the only judge who evinced no great concern at the prospect of couples suing each other for paternity fraud, instead expressing concern at the just actions which might be denied if any such bar were imposed. His Honour said the tort was originally widely drawn, no exceptions had been made and there was no good reason to make one here. At the time deceit was developed, however, there was spousal immunity in tort – thus, the judges of those times had no need to consider whether an exception was appropriate, because there was already one in place.

Obiter statements by four of their Honours strongly suggest the same principle would be applied to de facto couples.<sup>134</sup>

**[10.38-10.39]** As mentioned at **[10.1]** above, significant child support changes commenced on 1 July 2008. Most significant, of course, is the new child support formula<sup>135</sup> developed in 2005 by the Ministerial Taskforce on Child Support. Other issues worth noting from the 2008 changes include the following:

- for parents with 2-5 nights per fortnight care (ie less than 35% of care), while they will now get a reduction in child support, they will not be able to share any Family Tax benefit (FTB) (though they will remain entitled to other benefits such as Rent Assistance, Health Care Card and the Medicare Safety Net).<sup>136</sup>
- the minimum child support payment will apply to all cases of a payer, and will not be split between cases.<sup>137</sup>
- parents who:
  - disclose taxable incomes less than would be required to obtain a government support benefit; and
  - do not obtain a support benefit; and
  - do not have at least shared care;will be required to pay \$1,060 per year per child up to a maximum of \$3,180 per year.<sup>138</sup> Parents can apply to the CSA Registrar to avoid this provision<sup>139</sup> but they must establish that their income is “less than the pension PP (single) maximum basic amount and that it would be unjust and inequitable to expect them to pay the amount assessed under this section”. The availability of this administrative option would not seem to preclude parents from making a Change of Assessment (COA) application, where matters other than income can also be considered. Any change resulting from the administrative process will factor in only the income of the parent.

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<sup>133</sup> Ibid, at [29] and [49]

<sup>134</sup> Ibid, at [133] and [165].

<sup>135</sup> Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006, Sch 1.

<sup>136</sup> A New Tax System (Family Assistance) Act 1999 (Cth), new ss 22(7), 25.

<sup>137</sup> Assessment Act, s 66(7).

<sup>138</sup> Assessment Act, s 65A.

<sup>139</sup> Assessment Act, s 65B.

- step-children will be able to be included as a relevant dependant of a parent in limited circumstances (where no other person can provide support for them).<sup>140</sup>
- lastly, a six month suspension of a child support assessment will be available for trial reconciliations (this will avoid a carer parent having to re-apply for an assessment if the reconciliation is unsuccessful).<sup>141</sup>

**(a) “New formula” (commenced 1 July 2008)**

The “new formula”<sup>142</sup> has the following key features:

- parental income (now including certain non-taxable benefits though not FTB Pt A or B)<sup>143</sup> is combined after deduction of equivalent exempt incomes;<sup>144</sup>
- the costs of the children are calculated by reference to parental combined income and age of children (bands are 0-12; 13+), up to a maximum of three children;<sup>145</sup>
- the parents’ shares of the child support costs are allocated between them according to their respective proportion of total parental income, after allowing for the actual care (over 14%) that they have. This in turn leads to a child support percentage which is applied to the costs of the child;<sup>146</sup>
- reductions for relevant dependants will be calculated in accordance with similar principles, so that parents with higher incomes will receive a greater reduction for dependants and parents with lower incomes will receive reduced deductions; and
- there will be no increase in child support where there are more than three children. Part 5, Div 2 of the amended Assessment Act includes the following “simplified outline” that details the new formulas that will apply:<sup>147</sup>
  - The Costs of the Children Table published by the Secretary each year (based on the table in Schedule 1 to this Act) sets out the costs to parents of raising children in various age ranges.
  - These costs are to be met by both parents (by paying child support or by caring for their children) according to each parent’s capacity to meet the costs.
  - To determine each parent’s capacity to meet the costs, the parents are assessed in respect of the costs of the child.
  - Formulas 1 and 2 apply if both parents’ incomes are taken into account in determining each parent’s capacity to meet the costs of their children, and each parent only has one child support case.
  - Formulas 3 and 4 apply if both parents’ incomes are taken into account in determining each parent’s capacity to meet the costs of their children, and at least one of the parents has multiple child support cases.
  - Formulas 5 and 6 apply if only one parent’s income is taken into account in determining the parent’s capacity to meet the costs of his or her children (such as because the other parent is not a resident of Australia).

<sup>140</sup> Assessment Act, definition for “relevant dependent child” in s 5.

<sup>141</sup> Assessment Act, s 150E.

<sup>142</sup> Part 5 Div 1 of the amended Assessment Act includes a “simplified outline” of the new method of assessment: see Assessment Act, s 35A.

<sup>143</sup> This is to align income definitions with Centrelink definitions and will arguably reduce the need for COA applications.

<sup>144</sup> Assessment Act, Div 1-3.

<sup>145</sup> Assessment Act, Div 6 and Sch 1 “The Costs of Children Table”.

<sup>146</sup> Assessment Act, Div 4 and 5.

<sup>147</sup> Assessment Act, s 35B.

- Formulas 2, 4, 5 and 6 also allow child support payable to non-parent carers of children to be worked out.
- In some cases, the annual rate of child support payable by a parent is assessed under Subdivision B of Division 8 (low income parents and minimum annual rates of child support).

By way of example, “Formula 1”, which will arguably apply to a majority of cases, is designed to ascertain “the annual rate of child support payable for a child for a day in a child support period if no non-parent carer has a percentage of care for the child for the day”.<sup>148</sup> Section 35B states:

- Step 1: work out each parent’s child support income for the child for the day (see s 41).
- Step 2: work out the parents’ combined child support income for the child for the day (see s 42).
- Step 3: work out each parent’s income percentage for the child for the day (see s 55B).
- Step 4: work out each parent’s percentage of care for the child for the day (see s 48).
- Step 5: work out each parent’s cost percentage for the child for the day (see s 55C).
- Step 6: work out each parent’s child support percentage for the child for the day (see s 55D).
- Step 7: work out the costs of the child for the day (see ss 55G and 55H).
- Step 8: if a parent has a positive child support percentage under step 6, the “annual rate of child support” payable by the parent for the child for the day is worked out using the formula:

$$\frac{\text{Parent's child support income for the child for the day}}{\text{Parent's combined child support income for the child for the day}} \times \text{Costs of the child for the day}$$

- Note: if a parent’s percentage of care for a child is more than 65%, the parent’s annual rate of child support for the child is nil (see s 40C).

**(b) Child support income**

Part 5 Div 3 of the amended CSAA includes the following “simplified outline” for calculating a parent’s child support income:<sup>149</sup>

- The income used in determining a parent’s capacity to meet the costs of his or her children might be reduced by the following amounts:
  - (a) the self-support amount (to take account of the parent’s need to support himself or herself);

$$\frac{\text{Parent's adjusted taxable income for the child for the day}}{\text{Parent's combined child support income for the child for the day}} - \frac{\text{Parent's self-support amount for the day}}{\text{Parent's combined child support income for the child for the day}}$$

- (b) a relevant dependent child amount (if the parent cares for a relevant dependent child or step-child of the parent);

$$\frac{\text{Parent's adjusted taxable income for the particular child for the day}}{\text{Parent's combined child support income for the child for the day}} - \frac{\text{Parent's self-support amount for the day}}{\text{Parent's combined child support income for the child for the day}} - \frac{\text{Parent's relevant dependent child amount for the day}}{\text{Parent's combined child support income for the child for the day}}$$

- (c) a multi-case allowance (if the parent has multiple child support cases).
- The relevant dependent child amount and the multi-case allowance take account of the costs of relevant dependent children, and children in other child support cases, in a similar way to the way in which the costs of the children are worked out for children in a child support case.

<sup>148</sup> Assessment Act, s 35.

<sup>149</sup> Assessment Act, s 40E – please note that some details from new s 41 have been included into the table.

- A parent's adjusted taxable income for a year of income can be reduced under section 44 in respect of a particular child if the parent earns additional income during the first 3 years after separating from the other parent of the child.

Section 43 of the Assessment Act details the parent's "adjusted taxable amount" as follows:

- (1) Subject to subsection (2), a parent's *adjusted taxable income* for a child for a day in a child support period is the total of the following components:
  - (a) the parent's taxable income for the last relevant year of income in relation to the child support period;
  - (b) the parent's reportable fringe benefits total for that year of income;
  - (c) the parent's target foreign income for that year of income;
  - (d) the parent's net rental property loss for that year of income;
  - (e) the total of the tax free pensions or benefits received by that parent in that year of income.

Note 1: Other provisions that relate to a person's adjusted taxable income are section 34A and Subdivisions B and C of Division 7.

Note 2: The components of the definition of *adjusted taxable income* are defined in section 5.

- (2) If the Registrar amends an assessment under section 44, then for the purposes of the assessment, the person's *adjusted taxable income* for a child to whom the assessment relates, for a day in the child support period, is the amount determined by the Registrar.

Section 44 of the Assessment Act purports to quarantine income from overtime and second jobs during the first three years after separation. This provision has been described as applying where that income is earned for the purpose of assisting with re-establishment costs, however, that is not actually specified in the section. In fact, the section refers to income "of a kind that it is reasonable to expect would not have been earned, derived or received in the ordinary course of events." It is worth noting that the maximum income reduction that can be achieved through such an application is 30%. Consequently, adjustments on this basis will no longer fall under COA Reason 7 and will be dealt with administratively.

Section 45 of the amended Assessment Act details the "self support amount" as one third of the "annualised MTAWWE figure for the relevant September quarter". A definition of "MTAWWE" is included in s 5A(1) of the amended Assessment Act:

The *annualised MTAWWE figure* for a relevant September quarter means the figure that is 52 times the amount set out for the reference period in the quarter under the headings "Average Weekly Earnings—Trend—Males—All Employees Total Earnings" in a document published by the Australian Statistician entitled "Average Weekly Earnings, Australia".

Sections 46 and 47 of the Assessment Act detail how to work out, respectively, a "parent's relevant dependent child amount" and "multi-case allowances".

### (c) "Costs of children" table

Section 55G of the Assessment Act details how the "costs of children" are calculated:

- (1) If an annual rate of child support for a day in a child support period is assessed for a child under section 35, 36, 37 or 38 (Formulas 1 to 4), identify the column in the Costs of the Children Table for that child support period that covers the combined child support income of the parents of the child.

Note: The Secretary publishes the updated Costs of the Children Table in the *Gazette* each year for child support periods that begin in the next year (see section 155).

- (2) If an annual rate of child support for a day in a child support period is assessed for a child under Subdivision D of Division 2 (Formulas 5 and 6), identify the column in the Costs of the Children Table for that child support period that covers the child support income of the parent of the child.

Note: This subsection also applies in working out the relevant dependent child amount and the multi-case allowance (see step 4 of the method statement in section 46 and step 3 of the method statement in section 47).

- (3) Identify the number of children (the *child support children*) in the child support case that relates to the child.
- (4) Identify the ages of the child support children at the time the administrative assessment is made. If there are more than 3 child support children, use the ages of the 3 oldest children.
- (5) Identify the item in the relevant column in the Costs of the Children Table that covers that number of child support children of those ages.
- (6) The amount worked out for the item in accordance with Schedule 1 to this Act is the *costs of the children*.

The “costs of children’s table” is found in Sch 1 of the Assessment Act (the actual figures for 2008 can be obtained from the Child Support Agency):<sup>150</sup>

#### 1 The Costs of the Children Table

Costs of the Children Table						
Parents’ combined child support income or parent’s child support income						
Fraction of MTAW	0 to 0.5	0.5 to 1	1 to 1.5	1.5 to 2	2 to 2.5	Over 2.5
Child support Children						
Costs of the children						
All children aged 0-12 years						
1 child	17%	15%	12%	10%	7%	
2 children	24%	23%	20%	18%	10%	
3 children	27%	26%	25%	24%	18%	
All children aged 13+ years						
1 child	23%	22%	12%	10%	9%	
2 children	29%	28%	25%	20%	13%	
3 children	32%	31%	30%	29%	20%	
At least one child aged 0-12 years and one child aged 13+ years						
2 children	26.5%	25.5%	22.5%	19%	11.5%	
3 children	29.5%	28.5%	27.5%	26.5%	19%	

#### 2 Child support income ranges—fraction of MTAW row

- (1) In each column of the Fraction of MTAW row are specified 2 amounts. These amounts refer to:
  - (a) the parents’ combined child support income; or
  - (b) if only one parent’s income is to be used—the parent’s child support income.
- (2) To work out the first dollar amount in each column (other than the first column), take the second amount in the previous column (worked under subclause (3)) and add one dollar.

<sup>150</sup> See [Child Support Scheme Reforms, Fact Sheet Ten: The new child support formula and the costs of children](http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/childcare/$file/10_child_support_scheme_reforms_factsheet.pdf): [http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/childcare/\\$file/10\\_child\\_support\\_scheme\\_reforms\\_factsheet.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/childcare/$file/10_child_support_scheme_reforms_factsheet.pdf) (viewed 26 September 2008).

Note: The first dollar amount in each column is the lowest combined child support income, or child support income, covered by that column.

- (3) To work out the second dollar amount in each column (other than the last column), multiply the second fraction specified in that column by the annualised MTAW figure for the relevant September quarter.

Note: The second dollar amount in each column is the highest combined child support income, or child support income, covered by that column.

### 3 Costs of the children

- (1) Each item in the Costs of the Children Table sets out a method of working out the costs of the children.
- (2) If, under section 55G, an item is identified in the first column of the table, the *costs of the children* is the amount that is the percentage specified in that item of the parents' combined child support income, or the parent's child support income, (as the case requires).
- (3) If, under section 55G, an item (the *relevant item*) is identified in a row in the second, third, fourth or fifth column (the *relevant column*), the *costs of the children* is the total of the following amounts:
  - (a) the total of the amounts worked out for each item in that row in each of the previous columns by multiplying the percentage specified in that item by the highest combined child support income, or child support income, covered by that column;
  - (b) the amount worked out by multiplying the percentage specified in the relevant item by the difference between:
    - (i) the parents' combined child support income, or the parent's child support income, (as the case requires); and
    - (ii) the highest combined child support income or child support income in the previous column.
- (4) If, under section 55G, an item is identified in a row in the last column, the *costs of the children* is the total of the amounts worked out for the items in that row in each of the previous columns in accordance with paragraph (3)(a).

#### (d) Care percentage

Part 5 Div 4 and 5 of the Assessment Act includes the following "simplified outline" for the working out the percentages of care relevant to the new formula:<sup>151</sup>

- A person's (whether the person is a parent or a non-parent carer of a child) percentage of care for the child for a day in a child support period is the percentage of care of the child that the person is likely to have during a 12 month period.
- A percentage of care for a child is as determined by an oral agreement or a parenting plan made by the parents of the child (or a parent and a non-parent carer), or as determined by a court order.
- The Registrar can make a determination of a person's percentage of care for a child in certain cases (such as if there is no such agreement, plan or order, or if care of the child changes).
- A parent's percentage of care for a child is used in s 55C to work out the parent's cost percentage for the child.
- A non-parent carer's percentage of care is used in s 40A to work out how much child support the non-parent carer is entitled to be paid for the child.
- A parent's income percentage represents the parent's capacity to meet the costs of the child.
- A parent's cost percentage represents the extent to which the parent is taken to have met the costs of the child through care.
- A parent's child support percentage is the difference between the parent's income percentage and his or her cost percentage. Generally, if the parent has a positive child

<sup>151</sup> Assessment Act, ss 47A, 55A.

support percentage, the annual rate of child support payable by the parent is that percentage of the costs of the child.

$$\frac{\text{Parent's child support income for the child for the day}}{\text{Parents' combined child support income for the child for the day}}$$

- If a parent has multiple child support cases, the annual rate of child support payable by the parent for a child is capped by the parent's multi-case cap for the child.

Under s 55C of the Assessment Act, “a parent’s or non-parent carer’s cost percentage for a child for a day in a child support period is the percentage worked out using the table based on the parent’s or non-parent carer’s (as the case requires) percentage of care for the child for the day”:

Cost percentages		
Item	Column 1 Percentage of care	Column 2 Cost percentage
1	0 to less than 14%	Nil
2	14% to less than 35%	24%
3	35% to less than 48%	25% plus 2% for each percentage point over 35%
4	48% to 52%	50%
5	more than 52% to 65%	51% plus 2% for each percentage point over 53%
6	more than 65% to 86%	76%
7	more than 86% to 100%	100%

Section 55D of the Assessment Act uses the following calculation:

$$\text{Parent's income percentage for the child for the day} - \text{Parent's cost percentage for the child for the day}$$

A parent’s child support percentage for a day in a child support period is taken to be nil if the amount worked out using the formula is negative.<sup>152</sup>

**(e) An example using the “new formula”**

The Ministerial Taskforce<sup>153</sup> provided several examples to explain the new formula. The following is the “Tom and Meng” example (which is based on the figures applicable in 2005):<sup>154</sup>

<sup>152</sup> Assessment Act, s 55D(2).

<sup>153</sup> A copy may be accessed from:

[http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport\\_ministerial\\_taskforce.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport_ministerial_taskforce.htm) (viewed 26 September 2008).

<sup>154</sup> P Parkinson (Chair), “In the Best Interests of Children - Reforming the Child Support Scheme Summary Report and Recommendations of the Ministerial Taskforce on Child Support”, Canberra, 2005, Appendix 1 at p 33:

[http://www.facsia.gov.au/internet/facsinternet.nsf/via/childcare/\\$file/summary\\_report\\_15jun2005.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/via/childcare/$file/summary_report_15jun2005.pdf) (viewed 26 September 2008).

Tom and Meng have three children, all under 12. They separate. All of the children live with Meng. They stay with Tom for 25 per cent of the nights per year (generally alternate weekends and half of school holidays).

*Step 1: Find Tom and Meng's Child Support Incomes*

Tom has an Adjusted Taxable Income of \$51,500 and Meng has an Adjusted Taxable Income of \$27,000. Deducting the self-support component (\$16,883) from each gives Tom a Child Support Income of \$34,617 and Meng a Child Support Income of \$10,117.

*Step 2: Calculate the costs of the children*

Tom and Meng's Combined Child Support Income is \$44,734. The cost of the children is calculated by taking 27 per cent of the first \$25,324 of this and 26 per cent of \$19,410 (the remainder of the Combined Child Support Income).

27 per cent of \$25,324 is \$6,837, and 26 per cent of \$19,410 is \$5,047, giving a total of \$11,884. (In Table A: Costs of Children, this is shown as \$6,837 plus 26 cents for each dollar over \$25,324.) This is the cost of the children.

*Step 3 Apportion this cost between the parents*

This cost is apportioned according to each parent's capacity to pay. A parent's capacity to pay is determined by the proportion that they have of the Combined Child Support Income. Tom has 77.38 per cent of the Combined Child Support Income, so Tom is responsible for 77.38 per cent of the cost and Meng is responsible for 22.62 per cent of the cost.

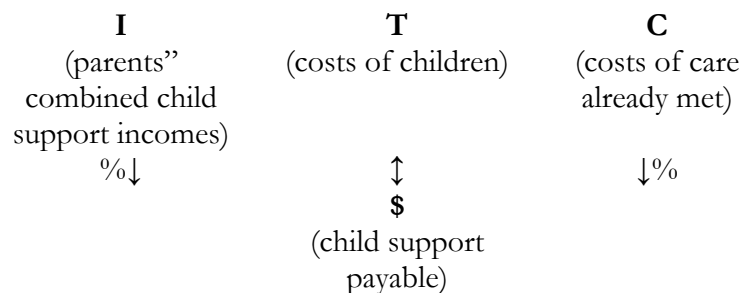
Under the formula, Tom is given credit for incurring 24 per cent of the children's costs by caring for the children. Therefore only the balance of Tom's obligation must be contributed through his child support payment. Tom's payment is his total obligation (77.38 per cent of the children's cost) less his credit due to care (24 per cent). His payment is 53.38 per cent of the costs of the children.

53.38 per cent of \$11,884 is \$6,344. Tom must pay this to Meng.

Interestingly, and by way of comparison, if one uses the "old formula" (and child support figures applicable in 2005), the relevant child support payable by Tom to Meng is \$12,172, ie  $32\% \times (\$51,500 - \$13,462) = \$38,038$ .

**(f) The "new formula" in a nutshell**

The new formula may be summarised as follows:



$$\$ = [\text{Father's IT}\% - \text{C}\%] + [\text{Mother's IT}\% - \text{C}\%]$$

**I** - Parents combined Child Support Income Amount (CSIA) (ie CSIA = Adjusted Taxable Income – Self Support Amount)

- T** - Costs of children based on variables (ie according to **I** + number and ages of children)
- C** - Percentage costs of care already met by virtue of care arrangements (% of time for each parent)
- \$** - Child support payable

Using the “Tom and Meng” example provided by the Taskforce (see [10.39] (e) above),<sup>155</sup> this translates to:

- I** - \$44,734 (Tom CSIA is \$34,617 + Meng’s CSIA is \$10,117)  
(ie when combined, Tom’s % is 77.38% and Meng’s % is 22.62%)
- T** - \$11,884 (based on the “Table of Costs” used by the Taskforce)
- C** - Care arrangements - Tom’s 25%, Meng 75%
  
- \$** [Tom 53.38% (77.34%-24%)] + [Meng 0% (22.62%-76%)]  
ie Tom pays Meng \$6,344 (\$11,884 x 53.38%)

[10.41] In relation to the “old formula” that existed up until 30 June 2008, the “cap” on child support income payable by the liable parent was changed on 1 July 2006 to “2.5 times the yearly equivalent of the EAWE” (and not the “AWE”).<sup>156</sup> The “EAWE” is discussed at [10.42].

[10.45] The Child Support Agency (CSA) has interpreted the relevant statutory provisions to produce its 10 reasons for a change of assessment.<sup>157</sup> The 10 reasons are:

1. The costs of maintaining a child are significantly affected by high costs of enabling a parent to spend time with, or communicate with, the child.
2. The costs of maintaining a child are significantly affected by high costs associated with the child's special needs.
3. The costs of maintaining a child are significantly affected by high costs of caring for, educating or training the child in the way both parents intended.
4. The child support assessment is unfair because of the child's income, earning capacity, property or financial resources.
5. The child support assessment is unfair because the payer has paid or transferred money, goods or property to the child, the payee, or a third party for the benefit of the child.
6. The costs of maintaining a child are significantly affected by the payee's high child care costs for the child (and the child is under 12 years).
7. The parent's necessary expenses significantly affect their capacity to support the child.
8. The child support assessment is unfair because of the income, earning capacity, property or financial resources of one or both parents.
9. The parent's capacity to support the child is significantly affected by:
  - o their legal duty to maintain another child or person,
  - o their necessary expenses in supporting another child or person they have a legal duty to maintain
  - o their high costs of enabling them to spend time with, or communicate with, another child or person they have a legal duty to maintain.

<sup>155</sup> A copy may be accessed from:  
[http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport\\_ministerial\\_taskforce.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport_ministerial_taskforce.htm) (viewed 26 September 2008).

<sup>156</sup> Assessment Act, s 42 (as amended by the Child Support Legislation Amendment (Reform of Child Support Scheme – Initial Measures) Act 2006 (Cth), Sch 2). The relevant “cap” amount in 2007 was \$109,135.

<sup>157</sup> Assessment Act, ss 98C, 117; also see CSA website — <http://www.csa.gov.au/payer/coa.aspx>.

10. The parent's responsibility to maintain a resident child significantly reduces their capacity to support the child support child.<sup>158</sup>

**[10.46-10.58]** On 1 January 2007 significant changes commenced in relation to reviewing certain Child Support Agency (CSA) decisions (including an objection to an administrative assessment) and the role to be played by the Social Security Appeals Tribunal (SSAT).<sup>159</sup> As a consequence of this major reform, the majority of child support objection decisions (including a “change of assessment” objection decision) must now be reviewed by the SSAT rather than the court (ie in most cases the SSAT will be the final avenue for review of a CSA decision). The CSA and parents will only be able to appeal a decision of the SSAT to a court on a “question of law” (ie how the law or legal principle was interpreted and how it was applied to the facts of the case) and not on a question of fact. In addition to the power to order the recovery of amounts wrongly paid under the Assessment Act<sup>160</sup> (above, **[10.33]**), the court will retain jurisdiction in various matters including parentage declarations, applications for a “change of assessment” for a period more than 18 months prior to the date of application, stay orders, enforcement matters sought by the payee and setting aside a child support agreement.

**[10.59]** In relation to an order for provision of child support otherwise than in the form of periodic amounts paid to carers entitled to child support, the court must also have regard to “any determination in force under Pt 6A (departure determinations) in relation to the child, the carer entitled to child support and the liable parent”.<sup>161</sup>

**[10.83-10.89]** See update for **[10.1]** above.

## Chapter 12

### Property Distribution on the Breakdown of Marriage: Adjustment Issues

**[12.3]** For a discussion of the UK position on the “clean break” principle see 2006’s *Miller v Miller; McFarlane v McFarlane* [2006] 3 All ER 1..

**[12.13-12.16]** In the 2006 case of *Miller v Miller; McFarlane v McFarlane*,<sup>162</sup> the House of Lords made some interesting observations about the “equal shares” concept. In her judgment, Baroness Hale of Richmond stated that:

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<sup>158</sup> See CSA website - <http://www.csa.gov.au/ParentsAndCarers/specialCircumstances.aspx> (viewed 26 September 2008).

<sup>159</sup> See generally Registration and Collection Act, Pts VII, VIIA, VIII, XIII A; Assessment Act, Pt 7; and Social Security (Administration) Act 1999 (Cth) Pt 2; all as amended by Child Support Legislation Amendment (Reform of Child Support Scheme - New Formula and other Measures Act 2006, Schedules 3-4.

<sup>160</sup> Assessment Act, s 143(1)-(3A).

<sup>161</sup> Assessment Act, s 124(2)(aa).

<sup>162</sup> [2006] 3 All ER 1 (Lord Nicholls of Birkenhead; Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Mance).

an equal partnership does not necessarily dictate an equal sharing of the assets. In particular, it may have to give way to the needs of one party or the children. Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution ...

But there are many cases in which the approach of roughly equal sharing of partnership assets with no continuing claims one against the other is nowadays entirely feasible and fair ...

I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living.<sup>163</sup>

In addition, the House of Lords commented on the “lost opportunity” issue associated with one party forgoing career options to undertake the role of homemaker and/or parent. This issue was picked up by Baroness Hale in her discussion of “compensation for relationship-generated disadvantage”. Her Honour noted that:

... some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties’ needs, then a premium above needs can reflect that relationship-generated disadvantage.<sup>164</sup>

As to the wife’s entitlement, Baroness Hale held:

In *McFarlane's* case, there has been an equal division of property, but this largely consisted of homes which can be characterised as family assets. This was not enough to provide for needs or compensate for disadvantage. The main family asset is the husband's very substantial earning power, generated over a lengthy marriage in which the couple deliberately chose that the wife should devote herself to home and family and the husband to work and career. The wife is undoubtedly entitled to generous income provision for herself and for the sake of their children, including sums which will enable her to provide for her own old age and insure the husband's life. She is also entitled to a share in the very large surplus, on the principles both of sharing the fruits of the matrimonial partnership and of compensation for the comparable position which she might have been in had she not compromised her own career for the sake of them all. The fact that she might have wanted to do this is neither here nor there. Most breadwinners want to go on breadwinning. The fact that they enjoy their work does not disentitle them to a proper share in the fruits of their labours.<sup>165</sup>

[12.39] In *Miller v Miller; McFarlane v McFarlane*,<sup>166</sup> the House of Lords recognised the compensatory nature of maintenance within the context of a property re-adjustment. According to Lord Nicholls of Birkenhead, there is nothing in the relevant UK statute to suggest that parliament intended periodical payments orders to be limited to payments

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<sup>163</sup> Ibid, at 35-36.

<sup>164</sup> Ibid, at 34-35.

<sup>165</sup> Ibid, at 40.

<sup>166</sup> [2006] 3 All ER 1 (Lord Nicholls of Birkenhead; Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Mance).

needed for maintenance. The same might be said about s 80(1)(a) of the FLA. His Lordship then stated:

In particular, I consider a periodical payments order may be made for the purpose of affording compensation to the other party as well as meeting financial needs. It would be extraordinary if this were not so. If one party's earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage.<sup>167</sup>

His Lordship later concluded that the wife (who had been a full-time homemaker and parent by agreement between the parties) was:

entitled to a periodical payments order in respect of her financial needs. She needed money to live in the former matrimonial home which was to be the continuing home for her and the children. But it would be manifestly unfair if her income award were confined to her needs. This is a paradigm case for an award of compensation in respect of the significant future economic disparity, sustained by the wife, arising from the way the parties conducted their marriage.<sup>168</sup>

...

Her compensation claim is not needs-related; it is loss-related. So the compensation element of her claim is not directly affected by the use she makes of her resources.<sup>169</sup>

Does such an approach conflict with the “clean break” principle? This issue was also addressed by Lord Nicholls:

There is of course a significant practical difference between providing compensation by appropriate division of existing capital assets and providing compensation by means of a periodical payments order. Of its nature a lump sum payment is once and for all. A lump sum payment represents, to that extent, the financial closure of a failed marriage. It draws a line under the past. Periodical payments represent the opposite. Future earnings and future payments lie in the future. They are a continuing financial tie between the parties. Today the undesirability of such continuing ties is regarded as self-evident.<sup>170</sup>

After noting the relevant UK provision, his Lordship stated:

The court is required to “consider” whether it would be “appropriate” to exercise its powers in a particular way. But the section gives no express guidance on the type of circumstance which would render it inappropriate for the court to bring about a clean break ... The subsection is expressed in general terms. It is apt to refer as much to a periodical payments order made to provide compensation as it is to an order made to meet financial needs. But, expressly, [the relevant provision] is not intended to bring about an unfair result ... the goal the court is required to have in mind is that the parties’ mutual financial obligations should end as soon as the court considers just and reasonable.<sup>171</sup>

This view accords with comments made by the Full Court (Fogarty, Maxwell and Nygh JJ) over 20 years ago in *In the Marriage of Lee Steere*<sup>172</sup> (see [12.9] and [12.26]).

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<sup>167</sup> *Ibid*, at 11.

<sup>168</sup> *Ibid*, at 22.

<sup>169</sup> *Ibid*, at 23.

<sup>170</sup> *Ibid*, at 12.

<sup>171</sup> *Ibid*, at 12-13.

<sup>172</sup> (1985) 10 Fam LR 431; FLC 91-626.

In her judgment in *Miller v Miller; McFarlane v McFarlane*,<sup>173</sup> Baroness Hale of Richmond commented that the “clean break” issue will ultimately depend upon whether the assets are sufficient to produce a fair property settlement:

There is obviously a relationship between capital sharing and future income provision. If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision.<sup>174</sup>

## Chapter 13

### Property Distribution on the Breakdown of Marriage: Additional Issues

[13.15-13.21] In the recent decision of *Black v Black* (2008) 38 Fam LR 503; (2008) FLC 93-357, the Full Court (Faulks DCJ, Kay and Penny JJ), in determining that a strict interpretative approach is required when considering the validity of a financial agreement, found that a particular agreement was “flawed” and not enforceable. In the appeal, the husband argued that the trial judge had erred in rejecting the proposition that the statutory requirements should be strictly interpreted. The husband contended that the relevant provisions required his solicitor, at the time he signed the final amended version of the financial agreement, to re-certify the agreement in accordance with s 90G(1)(c), which the solicitor failed to do despite making notes about the changes. The husband further contended that the law required the agreement to be in accordance with the wording then used in s 90G(1)(b).<sup>175</sup> In its response, the Full Court stated:

The Act permits parties to make an agreement which provides an amicable resolution to their financial matters in the event of separation. In providing a regime for parties to do so the Act removes the jurisdiction of the court to determine the division of those matters covered by the agreement as the court would otherwise be called upon to do so in the event of a disagreement. Care must be taken in interpreting any provision of the Act that has the effect of ousting the jurisdiction of the court. The amendments to the legislation that introduced a regime whereby parties could agree to the ouster of the court’s power to make property adjustment orders reversed a long held principle that such agreements were contrary to public policy.<sup>176</sup>

The Full Court then went onto say:

The underlying philosophy that had guided the courts in enunciating that principle was seen to place too many restrictions on the right of parties to arrange their affairs as they saw fit. The compromise reached by the legislature was to permit the parties to oust the court’s jurisdiction to make adjustive orders but only if certain stringent requirements were met.<sup>177</sup>

The Full Court further observed at [44] that the agreement entered into by the parties did not specifically refer to the requirements, although the certificate did.<sup>178</sup> Their

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<sup>173</sup> [2006] 3 All ER 1.

<sup>174</sup> *Ibid*, at 39-40.

<sup>175</sup> *Black v Black* (2008) 38 Fam LR 503 at 507.

<sup>176</sup> *Ibid*, at 511.

<sup>177</sup> *Ibid*.

<sup>178</sup> *Ibid*.

Honours stated at [45] that although “recital R and clause 29 of the agreement dealt predominately with advice in relation to the legal implications of the agreement and each party’s rights and obligations”,<sup>179</sup> the statements did not meet the requirements of s 90G(1)(b). Consequently, the Full Court stated:

[45] ... we are of the view that strict compliance with the statutory requirements is necessary to oust the court’s jurisdiction to make adjustive orders under s 79.

[46] ... the agreement itself was flawed as it did not meet the statutory requirements.<sup>180</sup>

The Full Court did not think it was necessary to determine whether or not the certificate prepared by the husband’s solicitor’s pre-dated the amendments to the agreement because it did not satisfy the statutory requirements and was therefore not binding upon the parties.<sup>181</sup> Ultimately, the appeal by the husband was successful, the effect of which was to set aside the financial agreement.

In light of this decision, lawyers should re-examine their role in the formation of financial agreements and take even greater care when advising and acting for their clients in this form of financial dispute resolution.<sup>182</sup>

**[13.35-13.39]** As expected, an application for special leave to appeal to the High Court challenging the validity of the provisions in Pt VIII AA of the FLA was recently considered and special leave was refused.<sup>183</sup> Consequently, the third party provisions are constitutional. The appeal arose from an unreported decision of O’Ryan J in *Marriage of Hunt*.<sup>184</sup> The wife sought orders against the husband and various third parties related to a company (Primo Meats), which, she claimed, was controlled by the husband or, alternatively, was otherwise subject to the jurisdiction of the court either by virtue of s 106B or Pt VIII AA of the FLA. The third parties sought summary dismissal of the wife’s application arguing that the court had no jurisdiction to make the requested orders as the provisions relied on were unconstitutional and that there was no reasonable likelihood of success. In his decision on 14 March 2006, O’Ryan J upheld the validity of the relevant provisions (specifically s 106B, discussed at **[13.41]** and ss 90AE(2)(a) and 90AF(2)(a)) and indicated he would dismiss the application for summary judgment. Following a further hearing on 17 May 2006, his Honour revoked the prior orders dismissing the summary judgment application and instead dismissed the objections to jurisdiction made by the applicants.<sup>185</sup> In reaching his decision, O’Ryan J provided the following analysis of Pt VIII AA (and in particular ss 90AE and 90AF):

[64] Section 90AA provides that the object of Part VIII AA is to allow the court, when it is either making an order altering property interests in respect of the parties to a marriage under s 79, or making an order or injunction under s 114 to make an order under s 79 or s 114, or grant an injunction under s 114, that is directed to, or alters the rights, liabilities or property interests of a third party. When consideration is given to s 90AE(2)(b) and s 90AF(2)(b) the Parliament, in clear and unambiguous words, has expressed

<sup>179</sup> Ibid.

<sup>180</sup> Ibid, at 511-512.

<sup>181</sup> Ibid, at 512.

<sup>182</sup> For a discussion see R Benjamin, “The practical implications of financial agreements: Adopting a strict interpretation” (2008) 13(4) *Current Family Law*, forthcoming.

<sup>183</sup> *Slazenger and Ors v Hunt and Ors* (S108/2006), *Lederer and Anor v Hunt and Ors* (S109/2006) (1 September 2006); see <http://www.hcourt.gov.au/registry/sresults/01-09-2006Syd.pdf>

<sup>184</sup> FamCA Unreported SYF5099/03 (14 March 2006).

<sup>185</sup> For a discussion see T Altobelli, Editorial, “Constitutional challenge to Part VIII AA” (2006) 20 *AJFL* 114.

an intention to give power to deal with the rights and interests of third parties and not simply procedural rights and interests.

...

[71] Section 90AE confers certain powers to make orders under s 79 binding on third parties. The power is discretionary and there is no obligation to make any of the orders identified in the section. The discretion given by s 90AE(1) and s 90AE(2) must however, be exercised by reference to the matters set out in s 90AE(3) and s 90AE(4). The discretion is therefore broad but is not unfettered. The third party must be accorded procedural fairness in relation to the making of an order under s 90AE. Further, the court must always make orders that are just and equitable.

[72] Section 90AE(1)(d) provides that in proceedings under s 79 the court may make an order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party. It would appear to deal with the circumstances in *Ascot Investments v Harper* and thus would prevent a party escaping an obligation to transfer property legitimately the subject of an order under s 79 to the other party to the marriage because of the refusal of a director of the company or the company itself to register the transfer. By reason of s 90AC it is irrelevant that it may override the articles of a company, the general law, or a state law. Although there is no issue in this case as to the constitutional validity of s 90AE(1) I accept the submission on behalf of the wife that s 90AE(1)(d) is a law with respect to marriage or matrimonial causes and is also supported by the corporations power in s 51(xx) of the Constitution: *Actors and Announcers Equity Association of Australia and Others v Fontana Films Pty Ltd* (1982) 150 CLR 169.

[73] The effect of s 90AE(3) is to prescribe circumstances which must exist before the court can exercise its discretion to make an order under s 90AE(1) or s 90AE(2). It sets out preconditions to the exercise of power. So, if the court were satisfied that the conditions in s 90AE(3)(c), (d) and (e) were met, and that for the purposes of s 90AE(3)(a), the making of the order were either “reasonably necessary” or was “reasonably appropriate and adapted, to effect” what s 79(1) is directed to achieving, namely, a division of property between spouses, the court can then make an order.

...

[75] To the extent that the laws of a state would apply to interfere with the exercise of power under s 90AE(1) or s 90AE(2), s 90AC has the effect of excluding the operation of those laws and, if s 90AE(1) and s 90AE(2) are a valid law, by reason of that exclusion s 109 of the Constitution makes the state laws inoperative: *P v P* (supra) at p 607 per Mason CJ, Deane, Toohey and Gaudron JJ; *Western Australia v The Commonwealth (The Native Title Case)* (1995) 183 CLR 373 at pp 464-8 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453 at pp 464-6; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at pp 627-9 per Gleeson CJ, Gummow, Kirby and Heydon JJ.

...

[83] In conclusion, when consideration is given to each of the provisions of Part VIII A it is clear that they are directed to making effective the powers under s 79 and s 114 of the Family Law Act. In my opinion, this is necessary given the need in financial proceedings between parties to a marriage under the Family Law Act to deal with issues that arise which interface between the interests of parties to the marriage and the rights, duties and obligations of third parties.

In relation to the constitutional objections, O’Ryan J concluded:

[94] The question that arises is whether the Parliament has the power under the marriage and divorce and matrimonial causes powers to make laws which intrude upon the rights, duties and obligations of third parties. This issue was raised in *Gould* [referring to *Gould and Gould: Swire Investments Ltd* (1993) FLC 92-434] and Fogarty J pointed out at p 80,438 that the argument in that case that the constitutional power does not extend this far would seem to suggest that there is to be implied in paras (xxi) and (xxii) a limitation which does not attach to any other of the powers in s 51: *Bourke and Ors v State Bank of New South Wales* (1990) 170 CLR 276 at pp 284-5. In *Burton v Honan* (1952) 86 CLR 169 the High Court upheld the validity of legislation, as being a law with respect to customs and excise, which provided for

the forfeiture of goods even though they were in the hands of a bona fide purchaser for value: see especially per Dixon CJ at pp 178-9: See also *Precision Data Holdings Ltd v Wills* (supra) at pp 190-1.

...

[99] In conclusion, just as with the power under s 51(xvii) to make laws with respect to bankruptcy and insolvency, it is within the legislative power of the Commonwealth to make laws under paras (xxi) and (xxii) with respect to the consequences, not just for parties to a marriage but also for those with whom they are in a relationship and the rights, duties and obligations of a third party.

For a discussion of this judgment, and in particular arguments considered by O’Ryan J, see Tom Altobelli’s editorial, “Constitutional challenge to Part VIII A A” recently published in the *Australian Journal of Family Law*.<sup>186</sup> Dr Altobelli<sup>187</sup> comments:

Thus, at least for the present time, the third party powers contained in ss 90AE (2) and 90AF(2) have been found to be laws with respect to marriage, divorce or matrimonial causes, or at least incidental thereto. His Honour notes that the entire scheme of Part VIII A A is such as to carefully constrain the Court’s capacity to make orders against third parties so that it is sufficiently connected to the powers that support it. The decision of O’Ryan J is consistent with the obiter comments of Strickland J in another unreported case, which raised similar factual and legal issues save that there was no direct challenge to the validity of the third party powers. In this decision, which we will call *S and S* for present purposes (Strickland J, Melbourne, MLF 2847 of 2002) Strickland J had regard to the context and limitations found within Pt VIII A A itself and in particular the requirement that there be proceedings under s 79 and the need to comply with ss 90AE(3) and 90AK, and found, obiter, that s 90AE(2) was constitutionally valid.

[13.41] As mentioned in the update for [13.35-13.39], an application for special leave to appeal challenging *inter alia* the constitutional validity of s 106B (and more specifically the provisions in Pt VIII A A) of the FLA was recently considered by the High Court and special leave was refused.<sup>188</sup> Consequently, s 106B (and the third party provisions) are constitutional. The appeal arose from an unreported decision of O’Ryan J in *In the Marriage of Hunt*.<sup>189</sup> In *Hunt*, the challenge to the validity of s 106B was merely a formal one as the third parties recognised that his Honour was bound by the Full Court’s decision in 1993’s *Gould and Gould: Swire Investments Ltd* (1993) 17 Fam LR 156; FLC 92-434. Interestingly, as Tom Altobelli points out in his recent editorial, “Constitutional challenge to Part VIII A A”,<sup>190</sup> “O’Ryan J would have been well familiar with that decision as he appeared as Senior Counsel for the wife in that case”.<sup>191</sup>

[13.54] Capital Gains Tax (CGT) roll-over relief has finally been extended to transfers in financial agreements and arbitral awards.<sup>192</sup> These amendments to the Income Tax Assessment Act 1997 (Cth), that took effect from 12 December 2006, extend CGT roll-over relief to transfers between spouses made under: first, a binding financial agreement under the FLA or a corresponding written agreement that is binding because of a corresponding foreign law; second, an arbitral award under the FLA or a corresponding arbitral award

<sup>186</sup> Ibid.

<sup>187</sup> Now Federal Magistrate Altobelli.

<sup>188</sup> *Slazenger and Ors v Hunt and Ors* (S108/2006), *Lederer and Anor v Hunt and Ors* (S109/2006) (1 September 2006); see <http://www.hcourt.gov.au/registry/slresults/01-09-2006Syd.pdf>.

<sup>189</sup> FamCA Unreported SYF5099/03 (14 March 2006).

<sup>190</sup> (2006) 20 *AJFL* 114.

<sup>191</sup> Ibid, p 115.

<sup>192</sup> Tax Laws Amendment (2006 Measures No 4) Act 2006 (Cth).

under a corresponding state, territory or foreign law; and third, a written agreement that is binding because of a state, territory or foreign law relating to de facto marriage breakdowns and that, because of such a law, cannot be overridden by an order of a court except to avoid injustice. A capital gain or loss that would otherwise be made by an individual, a company or a trustee is deferred until the transferee spouse or former spouse disposes of the CGT asset. The new provisions also take into account the way in which both the transferor and transferee spouses use the dwelling when determining the transferee spouse's eligibility for the main residence exemption.

## Chapter 14

### Property Distribution on the Breakdown of a De Facto Relationship

**[14.6]** Since the 6<sup>th</sup> edition was published, the Australian Capital Territory, South Australia and Victoria have made changes to their de facto relationship laws. In addition, the long awaited Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) was finally introduced into Federal Parliament on 25 June 2008.

In late 2006 South Australia passed legislation that amended their then De Facto Relationships Act 1996 (SA) and a number of other statutes.<sup>193</sup> The revised legislation, which commenced on 1 July 2007 and now known as the Domestic Partners Property Act 1996 (SA), extended the existing de facto relationships legislation to same-sex de facto couples (bringing it into line with all other states and territories) and also to adults in a "close personal relationship" (bringing it into line with the current legislation in Australian Capital Territory, New South Wales and Tasmania, and in Victoria from 1 December 2008).

In April 2008 the Relationships Act 2008 (Vic) received assent and it will commence on 1 December 2008. This new Act, which will repeal Pt IX of the Property Law Act 1958 (Vic),<sup>194</sup> will extend the existing statutory rights to a domestic relationship:

between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof ...<sup>195</sup>

The new Victorian Act will also introduce a system of relationship registration and allow "relationship agreements".<sup>196</sup>

The Australian Capital Territory's Civil Partnership Act 2008 (ACT) commenced on 19 May 2008. This Act amended various statutes including the Domestic Relationships Act 1994 (ACT) (eg by including a "civil partnership" within the definition of a domestic relationship). The legislation also introduced a system of relationship registration (see Chapter 1 in this supplement).

<sup>193</sup> Statutes Amendment (Domestic Partners) Act 2006 (SA).

<sup>194</sup> Relationships Act 2008 (Vic), s 72.

<sup>195</sup> Relationships Act 2008 (Vic), s 35(1).

<sup>196</sup> Relationships Act 2008 (Vic), Chs 2, 3.

[14.20] As previously mentioned (see [14.6] above), new legislation has been passed in the Australian Capital Territory, South Australia and Victoria.<sup>197</sup> At a national level, the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) was finally introduced into Federal Parliament on 25 June 2008 and is currently being debated in the Senate (see [8.46] above).

[14.21] The minimum relationship length requirement remains two years under the new Relationships Act 2008 (Vic) (s 42(2)(c)) and is also two years under the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) (s 90SB(a)). Exceptions to the minimum length requirement include where the parties have a child, where the applicant has made significant contribution to the relationship or there would be serious injustice to the applicant if the financial order was not made.<sup>198</sup> Under both regimes, there is a further exception to the minimum two year requirement where a relationship has been registered.<sup>199</sup>

The Victoria legislation requires one or both of the partners to have lived in Victoria at the time of the application (and for at least one third of the total period of their relationship unless the applicant has made a substantial contribution to the relationship in Victoria).<sup>200</sup> This residence requirement does not apply if the relationship was registered in Victoria.<sup>201</sup>

There is a similar residence requirement under the proposed Commonwealth regime. As Western Australia and South Australia are yet to constitutionally refer powers with respect to financial aspects of de facto relationships, the Commonwealth Bill defines both “non-referring” and “participating” states. It does so in such a way that allows for these states to refer powers after the Bill is passed.<sup>202</sup> Either or both parties must be resident in a participating jurisdiction when the application is made and one or both parties must have been ordinarily resident for at least one third of the relationship or have made a substantial contribution to the relationship.<sup>203</sup>

[14.22] Under the Domestic Partners Property Act 1996 (SA), a “domestic partner” means a person who is about to enter, has lived in or lives in a “close personal relationship” – this is further defined as:

the relationship between 2 adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis, but does not include—  
(a) the relationship between a legally married couple; or

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<sup>197</sup> Statutes Amendment (Domestic Partners) Act 2006 (SA)/Domestic Partners Property Act 1996 (SA) (commenced 1 July 2007); Civil Partnership Act 2008 (ACT) (commenced 19 May 2008); Relationships Act 2008 (Vic) (commences 1 December 2008).

<sup>198</sup> Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth), s 90SB(c)-(d); Relationships Act 2008 (Vic), s 42(3).

<sup>199</sup> Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth), s 90SB(d) (“registered under a prescribed law of a State or Territory”); Relationships Act 2008 (Vic), s 42(1).

<sup>200</sup> Relationships Act 2008 (Vic), s 42(2).

<sup>201</sup> Relationships Act 2008 (Vic), s 42(1).

<sup>202</sup> Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth), ss 90RA, 90RC.

<sup>203</sup> Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth), ss 90SD, 90SK.

- (b) a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind.<sup>204</sup>

This revised definition includes a note that states that “two persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them”.

As mentioned in the supplement to Chapters 1 and 8, the Australian Capital Territory has recently introduced the Civil Partnerships Act 2008 (ACT) which amended various statutes including the Domestic Relationships Act 1994 (ACT) (eg by including a “civil partnership” within the definition of a domestic relationship).

Under the new Relationships Act 2008 (Vic) a “domestic relationship” means:

- (a) a registered relationship; or
- (b) a relationship between two persons who are not married to each other but who are living together as a couple on a genuine domestic basis (irrespective of gender).

Under s 4AA(1) of the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) a person is in a “de facto relationship” with another person if:

- (a) the persons are not legally married to each other; and
  - (b) the persons are not related by family (see subsection (6)); and
  - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.
- Paragraph (c) has effect subject to subsection (5).

Interestingly, under s 4AA(5):

- (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
- (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

In other words, this provision is expressly stating that a person can be in two relationships at the same time. This is consistent with case law in New South Wales.<sup>205</sup>

The “checklist of factors” that can be used to determine the existence of an unregistered relationship remains under the new Relationships Act 2008 (Vic) (s 35(2)) and is included in the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) (s 4AA(2)). The relevant provision of the Commonwealth Bill states that the circumstances “may include any or all of the following”:

- (a) the duration of the relationship;
- (b) the nature and extent of their common residence;
- (c) whether a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (e) the ownership, use and acquisition of their property;
- (f) the degree of mutual commitment to a shared life;

<sup>204</sup> Domestic Partners Property Act 1996 (SA), s 3.

<sup>205</sup> See *Green v Green* (1989) DFC 95-075 and the *New South Wales De Facto Service*, CCH Australia at [2-630].

- (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
- (h) the care and support of children;
- (i) the reputation and public aspects of the relationship.

**[14.24]** As previously mentioned, the Civil Partnerships Act 2008 (ACT) and the Relationships Act 2008 (Vic) both have registration procedures similar to that which currently exist under the Tasmanian legislation.<sup>206</sup> The Australian Capital Territory also offers four registration options for couples seeking to enter into a civil partnership:<sup>207</sup>

- Deputy Registrar-General witnesses statutory declaration, endorses and registers application (counter – no bookings required).
- Deputy Registrar-General endorses and registers application (statutory declaration witnessed by other qualified person) (counter – no bookings required).
- Deputy Registrar-General conducts commitment ceremony, witnesses statutory declaration, endorses and registers application (pre-ceremony interview required – booking required).
- Deputy Registrar-General attends commitment ceremony, but only endorses and registers application (booking required).

The ACT legislation differs from its Tasmanian counterpart in that a “civil partnership” can be terminated (apart from the death or marriage of either party) by the filing of a notice which, if not revoked, will take effect 12 months later (as distinct from the 90 days it takes for the revocation of a “deed of relationship” under the Tasmanian legislation).<sup>208</sup> A similar procedure to that operating in Tasmania will apply in Victoria when the Relationship Act 2008 (Vic) commences on 1 December 2008.<sup>209</sup>

The Supreme Court of the Australian Capital Territory also has the power to terminate the relevant relationship where it considers that “the civil partnership cannot be terminated under section 10”.<sup>210</sup> Similarly, under the Tasmanian legislation, a magistrate has the power to revoke a “deed of relationship”, although the Act is silent as to what factors a magistrate might take into account in the exercise of this power.<sup>211</sup> In Victoria, the relevant court “may order the revocation of the registration of a registered relationship”.<sup>212</sup>

**[14.25]** As previously mentioned, “close and caring” relationships may be included in the South Australia and Victoria legislative regimes but are not included in the new Commonwealth Bill. As noted in **[14.22]** above, and consistent with the relevant legislation in New South Wales, the Australian Capital Territory and Tasmania, the South Australian legislation excludes a close personal relationship “where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind”.<sup>213</sup> Similarly, in Victoria, a “domestic relationship” includes:

<sup>206</sup> Relationships Act 2003 (Tas), ss 11-18.

<sup>207</sup> Department of Justice and Community Safety, Office of Regulatory Services, “How to enter into a Civil Partnership”, [http://www.rgcdso.act.gov.au/bdm/bdm\\_civil.html#](http://www.rgcdso.act.gov.au/bdm/bdm_civil.html#) (viewed 27 September 2008).

<sup>208</sup> Civil Partnerships Act 2008 (ACT), s 10; Relationships Act 2003 (Tas), ss 16-17.

<sup>209</sup> Relationships Act 2008 (Vic), ss 12-15.

<sup>210</sup> Civil Partnerships Act 2008 (ACT), s 11.

<sup>211</sup> Relationships Act 2003 (Tas), s 18.

<sup>212</sup> Relationships Act 2008 (Vic), s 16; also see s 65 (“A person may apply to - (a) the Supreme Court; or (b) the County Court; or (c) the Magistrates’ Court - for an order or relief under this Part”).

<sup>213</sup> Domestic Partners Property Act 1996 (SA), s 3.

the relationship between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a relationship in which a person provides domestic support and personal care to the other person—

- (i) for fee or reward; or
- (ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).<sup>214</sup>

**[14.26]** The relevant provision for an order for the alteration of property interests under the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) is s 90SM. The relevant provision for a property adjustment order under the Relationships Act 2008 (Vic) is s 45.

**[14.27]** Section 90SM(4) of the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) mirrors s 79(4) of the FLA.

**[14.28-14.29]** The new legislation in Victoria incorporates prospective considerations. Section 45(1) of the Relationships Act 2008 (Vic) requires the court to also consider:

- (c) the nature and duration of the domestic relationship; and
- (d) any relevant matter referred to in section 51.

Section 51, which allows the court to order maintenance, substantially mirrors s 75(2) of the FLA.

As noted in **[14.27]** above, s 90SM(4)(d)-(g) of the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) mirrors s 79(4)(d)-(g) of the FLA.

**[14.30]** In the recent case of *Kardos v Sarbutt*,<sup>215</sup> the New South Wales Court of Appeal (Brereton J; Basten JA and Hunt AJA agreeing) simplified the four-step approach formulated by Powell J in *D v McA* and stated:

The exercise of jurisdiction under s 20 involves three main steps. The first is the identification and valuation of the property of the parties, which determines the “divisible pool of property” - that is, “the property of the parties to the relationship or either of them” referred to in s 20 which may be the subject of an adjustive property order under that section. The second is the evaluation and balancing of the respective contributions of the parties of the types referred to in s 20, and typically though not invariably results in an apportionment between the parties on a percentage basis of the overall contributions of the types referred to in s 20 of each of them, made to the date of hearing. The third is the determination of what order is required sufficiently to recognise and compensate the applicant’s contributions, and typically results in an order which leaves the applicant with that percentage identified in the second step of the divisible property identified in the first step.<sup>216</sup>

**[14.32]** In the 2006 case of *Kardos v Sarbutt* (above, **[14.30]**), the New South Wales Court of Appeal commented that the relevant legislation does not specify any particular method in the

<sup>214</sup> Relationships Act 2008 (Vic), s 35(1).

<sup>215</sup> (2006) 34 Fam LR 550.

<sup>216</sup> *Ibid*, at 558.

formulation of an appropriate order for the adjustment of property interests under s 20.<sup>217</sup> While it was open to the trial judge to adopt the “asset-by-asset” approach, whether as the primary approach or as a checking method, it was not mandatory. The court then stated:

... the principal indicator for an asset-by-asset analysis is discrepant identifiable contributions of the parties to different assets ... Such an approach will often be contra-indicated where, as here, there has been a pooling of income. Moreover, as the 1984 amendments to the Family Law Act, which require domestic contributions to be taken into account whether or not they are traceable into property, have been reflected in the Property (Relationships) Act from its inception, an asset-by-asset approach almost always carries the risk of undervaluing domestic contributions which are not reflected in any particular asset, although that is of less than usual concern in this case.<sup>218</sup>

Similarly, in the recent case of *Bilous v Mudaliar*<sup>219</sup> Ipp JA observed:

If a global approach is adopted, regard must still be had to the origin and nature of the different assets. If an asset-by-asset approach is adopted, care must be taken to avoid the risk of undervaluing domestic and non-financial contributions and regard must be had to the overall result. Some situations do not lend themselves either to a pure global approach or to a pure asset-by-asset approach. In some cases the judge may decide to have regard to the particular contributions made to individual assets, weigh up the overall respective contributions to the parties and make differing apportionments in relation to the interests of the parties in different assets.<sup>220</sup>

Consequently, the court retains a broad discretion in determining the approach to adopt in considering what order to make under s 20(1) of the New South Wales legislation.<sup>221</sup>

**[14.41]** The long-awaited Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth) was finally introduced during the 2008 Winter session of parliament and it is currently before the Senate.<sup>222</sup> If implemented, the Bill will give effect to the references of legislative power by those states that have done so (currently New South Wales, Victoria, Queensland and Tasmania)<sup>223</sup> and will be extended to cover financial disputes between same-gender de facto couples. As mentioned previously, above **[14.27]**, s 90SM(4) of the Commonwealth Bill mirrors s 79(4) of the FLA.

The Senate Standing Committee on Legal and Constitutional Affairs released its report into the Commonwealth Bill on 27 August 2008 (the Senate Report).<sup>224</sup> The Senate Report supports the Bill, subject to five recommendations. Those recommendations are:

1. to amend the definition of the term “child of de facto relationship” in proposed s 90RB of the Bill;

<sup>217</sup> Ibid, at 564.

<sup>218</sup> Ibid, at 565.

<sup>219</sup> [2006] NSWCA 38.

<sup>220</sup> Ibid, at [43].

<sup>221</sup> See *Bilous v Mudaliar* [2006] NSWCA 38 at [42] (Ipp JA; Giles and McColl JJA agreeing); *Saric v Steward* [2006] NSWCA 260 at [63] (McColl JA; Handley and Santow JJA agreeing).

<sup>222</sup> On 26 June 2008 the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth) 2008 was referred by the Senate to the Legal and Constitutional Affairs Committee for inquiry.

<sup>223</sup> South Australia is yet to legislate for a reference of powers. The Commonwealth will rely on its power over Territories to apply the proposed new legislation in the Australian Capital Territory, the Northern Territory and Norfolk Island.

<sup>224</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) [Provisions]* (report, 27 August 2008), [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/family\\_law/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/family_law/report/index.htm) (viewed 10 September 2008).

2. to review the definitions of “de facto”, “couple”, “de facto partner”, “child”, “parent”, related definitions and parentage presumptions to ensure consistent concepts and terminology in all federal legislation;
3. that the Federal Government should renumber the FLA;
4. that the transitional provisions in the Bill should be amended to enable couples to opt in to the new regime by mutual agreement, subject to appropriate safeguards, where their relationship breaks down before the commencement and their property and/or spouse maintenance matters have not been finalised; and
5. that, subject to the above recommendations, that the Bill be passed.<sup>225</sup>

As previously mentioned, above [8.46], the fourth recommendation is somewhat problematic as there is no suggestion as to what the “safeguards” might be. In New South Wales, Northern Territory and South Australia, where there is no equivalent to s 75(2) of the FLA, it may be hard to achieve consent as there the parties’ respective interests will be very different. In cases where there is not an issue, parties may wish to consent because of the advantages and cost savings in dealing with the specialist family courts. The issue of financial agreements (discussed below [14.48]) was largely unaddressed by the Senate Committee.

[14.42-14.43] In Western Australia, the time limit for commencing proceedings is now two years “after the relationship ended”.<sup>226</sup> The time period remains one year in South Australia under the renamed Domestic Partners Property Act 1996 (SA).<sup>227</sup> The time limit for commencing proceedings under the new Relationships Act 2008 (Vic) and the proposed Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) is two years.<sup>228</sup> “Out of time” applications are also possible in these jurisdictions.<sup>229</sup>

[14.45] In the 2005 case of *Selemore v Bull*,<sup>230</sup> the New South Wales Court of Appeal (Mason P; Tobias JA and Brownie AJA agreeing) held that Master Macready (at first instance) had correctly recognised that the relevant provision required him to consider the preponderance of hardship and also whether the residual discretion ought to be exercised in the plaintiff’s favour.<sup>231</sup> The court confirmed that the relevant provision does not lay down a general time-limit and the court’s discretion to extend it. According to their Honours, the relevant provision requires the court:

... to treat an application for leave to apply as a normal event, calling for the court to consider two stages, a finding relating to hardship and the exercise of a discretion, without any special jealousy for the

<sup>225</sup> The three Liberal-National Party senators supported the five recommendations made by the committee but added two further recommendations: first, that the words “or in another de facto relationship” in paragraph 4AA(5)(b) of the Bill be omitted; and, second, that the proposed s 90SB be omitted, and substituted with an amended provision. For details see: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/family\\_law/report/d01.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/family_law/report/d01.htm) (viewed 10 September 2008).

<sup>226</sup> Family Court Act 1997 (WA), s 205ZB(1).

<sup>227</sup> Domestic Partners Property Act 1996 (SA), s 9(3).

<sup>228</sup> Relationships Act 2008 (Vic), s 43(1); Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth), s 44(5) (“from the end of the de facto relationship (the *standard application period*)”).

<sup>229</sup> Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth), s 44(6); Domestic Partners Property Act 1996 (SA), s 9(3); Relationships Act 2008 (Vic), s 43(2); Family Court Act 1997 (WA), s 205ZB(2).

<sup>230</sup> [2005] NSWCA 365.

<sup>231</sup> *Ibid*, at [20].

observance of the time limit or particular concern for it... In considering whether a court should exercise a discretion conferred by statute to make an order in favour of some course, it is usual to consider whether there is a sound and positive ground or a good reason for making the order. Ultimately however it is not ... legally necessary to define exactly the ground on which a discretion is exercised favourably to an applicant (quoting from Bryson J in *Beavan v Fallschaw* (1992) 15 Fam LR 686 at p 687).<sup>232</sup>

Consequently, the court made it clear that it “is not mandatory that there be an explanation for delay”.<sup>233</sup>

[14.46-14.47] As mentioned previously, above [14.41], the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) was finally introduced into Federal Parliament on the 25 June 2008 and it is currently before the Senate.<sup>234</sup> If implemented, the Bill will give effect to the references of legislative power by those states that have done so (currently New South Wales, Victoria, Queensland and Tasmania)<sup>235</sup> and will be extended to cover financial disputes between same-gender de facto couples.

The Commonwealth Powers (De Facto Relationships) Act 2006 (WA) received assent on 26 June 2006.

[14.48] The revised Domestic Partners Property Act 1996 (SA) will extend the existing de facto relationships legislation to adults in a “close personal relationship” and will allow the parties to enter into a “certified domestic partnership agreement”.<sup>236</sup>

The Relationships Act 2008 (Vic), which will commence on 1 December 2008, includes a new Pt 3.2 “Relationship Agreements” (ss 35-38). A “relationship agreement” is defined in s 35(1) as:

an agreement, or a variation of an agreement, between two persons, whether or not there are other parties to the agreement -

- (a) that is made before, on or after the commencement of this Act -
  - (i) in contemplation of their entering into a domestic relationship; or
  - (ii) during the existence of their domestic relationship; or
  - (iii) in contemplation of the termination of their domestic relationship; or
  - (iv) after the termination of their domestic relationship; and
- (b) that provides for financial matters, whether or not it provides for other matters.

If enacted, the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth) will allow de facto couples to enter into a “financial agreement”.<sup>237</sup> These provisions<sup>238</sup> more-or-less mirror Pt VIIIA of the FLA. As it is currently drafted, the provisions which deal with financial agreements (Pt VIIIAB of the Bill), will apply to agreements made under the legislation of participating states. This is of some concern because there are differing state provisions in relation to requirements to enter into financial

<sup>232</sup> Ibid, at [12].

<sup>233</sup> Ibid, at [13]; see also *In the Marriage of Carlton* (1982) FLC 91-272.

<sup>234</sup> On 26 June 2008 the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (Cth) 2008 was referred by the Senate to the Legal and Constitutional Affairs Committee for inquiry.

<sup>235</sup> South Australia is yet to legislate for a reference of powers. The Commonwealth will rely on its power over territories to apply the proposed new legislation in the Australian Capital Territory, the Northern Territory and Norfolk Island.

<sup>236</sup> Domestic Partners Property Act 1996 (SA), ss 3, 5-8.

<sup>237</sup> Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth), ss 90UB-90UE.

<sup>238</sup> Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth), ss 90UA-90UN.

agreements. In addition, under the current legislation in New South Wales, Northern Territory, South Australia and Victoria (until 1 December 2008), there is no equivalent to s 75(2) of the FLA. Will the fact that a s 75(2) equivalent will now apply mean that s 90UM(1)(f) of the Bill could apply as a ground for setting it aside? The Senate Standing Committee on Legal and Constitutional Affairs responded to this concern by saying that it would be difficult to see how a change in legislation would make it impracticable to carry out an agreement under the proposed s 90UM(1)(f).<sup>239</sup> Alexandra Harland comments that:<sup>240</sup>

... this does not address the issue that the same requirements for a State agreement to be binding and the same provisions for setting aside agreements do not apply. It may be that, in New South Wales, this will not be so much of an issue as the requirements for an agreement to be binding is similar, but other States have quite different requirements. In the Northern Territory it is not necessary for parties to receive independent legal advice in order for the agreement to be binding.<sup>241</sup> The requirements in the Australian Capital Territory and Tasmania are similar to New South Wales.<sup>242</sup> South Australia places quite different obligations on lawyers. In order for the agreements to be binding there must be lawyers' certificates annexed to the agreement which certify that: the lawyer explained the legal implications of the agreement; the party gave the lawyer "credible assurances" that the party was not being coerced or acting under undue influence; and the party signed the agreement in front of the lawyer.<sup>243</sup> In Queensland a recognised agreement only needs to be witnessed by a justice of the peace or a solicitor.<sup>244</sup> Victoria does not currently have any provision in relation to agreements but a written agreement can be taken into account by a court when making an order for property adjustment.<sup>245</sup>

Harland further comments that if these state-based financial agreements:

... are to be treated as Pt VIIIAB agreements, and therefore enforceable as such, then there should be specific provision to ensure that a party will not be able to set aside the agreement simply because the legislation has changed. If there is not a provision stating this then there could be a rise in applications seeking to set old agreements aside.

Section 90UJ of the Commonwealth Bill deals with when an agreement is binding. It mirrors s 90G of the FLA which means that lawyers practitioners will have to be aware of the consequences of the 2008 case of *Black v Black*<sup>246</sup>, discussed above [13.15-13.21].

Section 90RC of the Commonwealth Bill deals with the relationship of this Commonwealth law with state and territory laws and presumably this is intended to avoid

<sup>239</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) [Provisions]* (report, 27 August 2008) at [3.138] and [3.139], [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/family\\_law/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/family_law/report/index.htm) viewed 22 September 2008.

<sup>240</sup> A Harland, "A new era in de facto relationships law: Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth)", 13(4) *Current Family Law*, forthcoming (October 2008).

<sup>241</sup> De Facto Relationships Act 1991 (NT), s 45.

<sup>242</sup> Domestic Relationships Act 1994 (ACT), s 33, Relationships Act 2003 (Tas), s 62.

<sup>243</sup> Domestic Partners Property Act 1996 (SA), s 5.

<sup>244</sup> Property Law Act 1974 (Qld), s 266.

<sup>245</sup> Property Law Act 1958 (Vic), s 285(1)(c); but note that "relationship agreements" will be introduced when the Relationships Act 2008 (Vic) commences on 1 December 2008 (see, in particular, s 59 which will require inter alia that each party be independently legally advised before signing the agreement and that the applicable legal practitioner's certificate be endorsed on, annexed to or otherwise accompany the agreement).

<sup>246</sup> (2008) 38 Fam LR 503; (2008) FLC 93-357

parties forum shopping. The section provides a few examples as to how it will operate. According to Harland:<sup>247</sup>

The potential impact of this section on the validity of agreements made before the commencement of the Bill is concerning. Many parties have entered into agreements pursuant to the requirements of the current State and Territory legislation which, in New South Wales for example, include the requirement that each party receive independent legal advice before entering into the agreement.<sup>248</sup> Those agreements should remain enforceable under the relevant State and Territory law as would have been contemplated by the parties at the time of entering into those agreements.

The difficulty with s 90RC turning agreements made under non-referring States into agreements under Pt VIIIAB is that potentially very different provisions applied to the State agreements. How will these differences be applied under Pt VIIIAB?

**[14.51]** As mentioned, above **[14.48]**, the Relationships Act 2008 (Vic), which will commence on 1 December 2008, allows parties to enter into a “relationship agreement”. Under s 59(1) of the Relationships Act 2008 (Vic) “a court must not make an order or do any other thing that is inconsistent with the terms of a relationship agreement between the domestic partners who are parties to the proceeding, if the court is satisfied that”:

- (a) the agreement is in writing; and
- (b) the agreement is signed by the partner against whom it is sought to be enforced; and
- (c) each partner was given a legal practitioner’s certificate before the time at which the partner signed the agreement; and
- (d) each legal practitioner’s certificate is endorsed on, annexed to or otherwise accompanies the agreement.

Under s 59(2), a “legal practitioner’s certificate”:

- (a) must be signed by the legal practitioner giving it; and
- (b) must state that the legal practitioner provided legal advice to the party to whom the certificate was given, independently of the other party to the domestic relationship, as to the following matters -
  - (i) the effect of the agreement on the powers of a court under this Part;
  - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement.

If a Victorian court is satisfied that a “relationship agreement” did not comply with s 59(1) then it “may make any order or do any other thing that it could have made or done if there were no relationship agreement between the partners”.<sup>249</sup>

**[14.52]** The revised Domestic Partners Property Act 1996 (SA) allows adults in a “close personal relationship” to enter into a “certified domestic partnership agreement”.<sup>250</sup> In addition to the execution and certification requirements, the relevant agreement must contain “a provision (the warranty of asset disclosure) under which each party to the agreement warrants that he or she has disclosed all relevant assets to the other”.<sup>251</sup>

<sup>247</sup> A Harland, “A new era in de facto relationships law: Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth)” (2008) 13(4) *Current Family Law*, forthcoming (October 2008).

<sup>248</sup> Property (Relationships) Act 1984 (NSW), s 47.

<sup>249</sup> Relationships Act 2008 (Vic), s 59(3).

<sup>250</sup> Domestic Partners Property Act 1996 (SA), ss 3, 5-8.

<sup>251</sup> Domestic Partners Property Act 1996 (SA), s 3.

[14.57] As mentioned in the update to Chapter 13, capital gains tax (CGT) roll-over relief has now been extended to transfers in financial agreements and arbitral awards.<sup>252</sup> These amendments to the Income Tax Assessment Act 1997 (Cth), that took effect from 12 December 2006, (inter alia) extend CGT roll-over relief to transfers between de facto spouses made under: first, an arbitral award under a corresponding state, territory or foreign law; and second, a written agreement that is binding because of a state, territory or foreign law relating to de facto marriage breakdowns and that, because of such a law, cannot be overridden by an order of a court except to avoid injustice. A capital gain or loss that would otherwise be made by an individual, a company or a trustee is deferred until the transferee spouse or former spouse disposes of the CGT asset. The new provisions also take into account the way in which both the transferor and transferee spouses use the dwelling when determining the transferee spouse's eligibility for the main residence exemption.

## Chapter 15 Violence and Abuse

[15.1] Further recent evidence of the Federal Government's appreciation of this problem is the creation by the newly elected Rudd Labor Government of a National Council to Reduce Violence Against Women and Children which is to develop a National Plan to Reduce Violence Against Women and Children.

[15.6] The relevance of violence to parenting matters is dealt with elsewhere. However, in this paragraph there was some discussion of past amendments showing a response by the government to concerns about violence. The government is of the view that the amendments resulting from the passage of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) ("the Amending Act") do not water down the protection of women and children from violence, but rather strengthen that goal. For example, one of the stated objects of Pt VII (which deals with the making of parenting orders) is "protecting children from physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence".<sup>253</sup> Also, the best interests checklist has been divided into primary and additional considerations, and one of the two primary considerations is the need to protect children from harm from being subjected or exposed to abuse.<sup>254</sup>

[15.13] See the decision in *Oates and Crest* (2008) FLC 93-365.

[15.19] Each element of the offence must be proved beyond reasonable doubt.<sup>255</sup>

[15.22] The Victorian Parliament has introduced the Family Violence Protection Bill 2008 with the intention of replacing the Crimes (Family Violence) Act 1987. Also, the Northern

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<sup>252</sup> Tax Laws Amendment (2006 Measures No. 4) Act 2006 (Cth).

<sup>253</sup> FLA, s 60B(1)(b).

<sup>254</sup> FLA, s 60CC(2)(b).

<sup>255</sup> *Mead v Mead* (2006) FLC 93-267.

Territory's Domestic Violence Act 1992 has undergone significant reforms to strengthen the protection of victims of domestic violence, including children.

**[15.23]** The Amending Act has attempted to simplify Div 11, and amendments have been made. Old s 68K is now found, in identical terms, in s 60CG. Old s 68R is now found in s 68P. Section 68P has been restructured and amended to reflect the change in terminology in parenting orders, in particular the abandonment of the term "contact" (see commentary to **[6.76]** above). Old s 68T has been recast into s 68R and has been amended to reflect the new terminology for what was contact. Also, in line with the recommendation of the Family Law Council<sup>256</sup> this section has been amended so that courts making or varying family violence orders can now only "revive, vary, discharge or suspend" existing parenting and other orders – previously s 68T allowed the court to make such orders as well.

**[15.44]** Old s 65E is now replicated in s 60CA.

**[15.45] and [15.48]** Western Australia has now introduced mandatory reporting by certain professional groups (doctors, nurses, police officers and midwives) of suspected sexual abuse of children (see the new Div 9A of Pt 4 of the Children and Community Services Act 2004 (WA)).

**[15.46]** New South Wales has amended its legislation (Children and Young Person's (Care and Protection) Act 1998 (NSW)) to clarify the position with respect to mandatory reporting requirements relating to children prior to birth. Now, where a child is born who "was the subject of a pre-natal report under section 25 and the birth mother of the child did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report" (s 23(f)) then the child is "at risk of harm" and the mandatory reporting provisions under s 27 apply. More significantly, however, the Act has also been amended so that the Children's Court must now admit and consider evidence that a parent has previously had a child permanently removed from their care or has been named as involved in causing a reviewable death of a child. Such evidence now raises a rebuttable presumption that this is evidence that the child the subject of the current care application is in need of care and protection. The parent may rebut this presumption on the balance of probabilities: see s 106A.

**[15.52]** Section 67ZA(1) has been amended to reflect changes made under the Amending Act and now refers to family consultants (see Pt 3 and the commentary in relation to **[7.57]** above), family counsellors (see Pt II Div 2 and the commentary in relation to **[7.57]** above), family dispute resolution practitioners (see Pt II Div 3) and lawyers independently representing children's interests (see Pt VII Div 10). The definition for "abuse", which remains the same, has been moved to s 4(1).

Section 19N has been repealed and the confidentiality provisions for family counsellors and dispute resolution practitioners have been moved to ss 10E and 10J respectively. The exceptions in respect of abuse are found in ss 10E(2) and 10J(2).

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<sup>256</sup> Family Law Council, Letter of Advice: *Review of Division 11 – Family Violence*, 16 November 2004, p 2.

**[15.59]** Section 68B(1)(b) has been amended to reflect the changes to terminology relating to parenting orders introduced by the Amending Act.

**[15.62]** The Australian Capital Territory has passed legislation to overhaul the Children and Young People Act 1999 (Children and Young People Act 2008 (ACT)) but it has not yet come into effect.

**[15.64]** More recent data from the Australian Institute of Health and Welfare confirms the increasing rates of children being placed in out-of-home care.

**[15.66]** The Mullighan Report, the result of the South Australian inquiry into sexual abuse and death of children in state care, was released in March 2008. It provides further evidence of the harm suffered by children in state care and made 54 recommendations, most of which have been accepted by the South Australian government: see [http://www.service.sa.gov.au/ContentPages/sagovt/mullighaninquiry\\_cisc.aspx](http://www.service.sa.gov.au/ContentPages/sagovt/mullighaninquiry_cisc.aspx).