

# The new face of parenting



Significant changes to the parenting provisions of the Family Law Act have passed through parliament. The changes are the result of the biggest review of family law legislation since 1996. Chris Turnbull sums up some of the critical changes.



**T**he *Family Law Amendment (Shared Parental Responsibility) Act 2006* (the new Act), which was passed on March 30, 2006, comes into effect on July 1, 2006. Although the new Act is lengthy, the changes are nowhere near as radical as those first proposed.

## Objects of the Act

The objects of the *Family Law Act 1975* (the Act) as currently set out in s60B have been changed and extended. Specifically, instead of children having a "right of contact", the new Act sets the objects of the part now to:

- a) Ensure the children have the benefit of both of their parents having a meaningful involvement of their lives to the maximum extent; and
- b) Communicate on a regular basis with both their parents and other people significant to their care, welfare and development.

The best interests of the child remain the paramount consideration.

## Determining the best interests of a child

Under the Act, s68F(2) sets out the matters which a court must consider in determining what is in a child's best interests. No particular priority is afforded to any of the factors set out in that section. The new Act preserves all of the original elements of s68F(2) but reduces them to 'Additional Considerations' and adds two 'Primary Considerations':

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

## Dispute resolution

In 2004, the Family Court of Australia amended its rules to add 'Pre-action Procedures' that require the parties to attend a form of primary dispute resolution prior to the commencement of proceedings.

To some extent, this requirement has been thwarted by applications being made to the Federal Magistrates Court of Australia (which operates under its own rules that do not include an obligation to undertake Pre-action Procedures).

The new Act applies the dispute resolution provisions of the Family Law Rules 2004 to a parenting application to any court exercising jurisdiction under the *Family Law Act*.

Subject to the usual exceptions, all parties in all parenting cases will now be required to undertake Pre-action Procedures.

## Presumption of equal shared responsibility

The Act confers parental responsibility for a child on a person, but only to the extent that any orders confer duties, powers, responsibilities or authority in relation to the child on the person.

The new Act requires the court to apply a presumption that it is in the best interests of the child for a child's parents to have equal shared responsibility for the child. This presumption can only be dislodged where a parent has engaged in abuse of the child or there is family violence. This is not a presumption of equal time with both parents.

## Obligations of advisers

The new Act adds entirely new obligations upon advisers. An adviser means a person who is a legal practitioner, a family counsellor, a

family dispute resolution practitioner, or a family consultant. If an adviser gives advice or assistance to people in relation to parental responsibility for a child following the breakdown of the relationship between those people, the adviser must:

- a) Inform them that they could consider entering into a parenting plan in relation to the child; and
- b) Inform them about where they can get further assistance to develop a parenting plan and the context of the plan.

If an adviser gives advice to people in connection with the making by those people of a parenting plan in relation to a child, the adviser *must*:

- a) Inform them that, if the child spending equal time with each of them is reasonably practicable and in the best interests of the child, that they could consider the option of an arrangement of that kind; and
- b) Inform them that, if the child spending equal time with each of them is not reasonably practicable or not in the best interests of the child, that if the child spending *substantial and significant* time with each of them is reasonably practical and is in the best interest of the child, that they should consider the option of an arrangement of that kind.

## Residence and contact re-defined

Under the Act, an order about where a child is to live is a 'Residence Order' and an order about whether a child is to have contact with another person or persons, is a 'Contact Order'. Anything else (in effect) is a 'Specific Issues Order'. The new Act enables a parenting order to now deal with one or more of the following:

- a) A person or persons with whom the child is to live;

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- b) The time the child is to spend with another person or persons;
- c) The allocation of parental responsibility for a child;
- d) The form of consultations that persons are to have with one another about decisions made in exercising joint parental responsibility;
- e) Communication the child is to have with a person or other persons;
- f) Maintenance of a child;
- g) Steps to be taken before an application is made to court for a variation of the order to take into account the change in the circumstances of a child or the parties;
- h) The process to be used for resolving disputes about the terms or operation of the orders; and
- i) Any aspect of the care, welfare and development of the child, or any other aspect of parental responsibility for the child.

The parenting order may provide that the parties to the proceedings must consult with a family dispute resolution practitioner to assist with resolving a dispute.

### Court must consider child spending equal time

The court will now be required to consider in each case whether the child spending equal time with each of the parents would be in the best interests of the child and consider whether the child spending equal time with each of the parents is reasonably practicable and if it is, consider making an order to provide for the child to spend equal time with each of the parents.

### What is substantial and significant time?

If the court does not make an order for a child to spend equal time with each of the parents, then the court will be required to consider whether the child or children can spend substantial and significant time with a parent.

Substantial and significant time is defined by the new Act as the child spending time with a parent on:

- a) days that fall on weekends and holidays, and;
- b) days that do not fall on weekends and holidays, and
- c) the time the child spends with the parent that allows the parent to be involved in the child's daily routine and occasions that are of particular significance to the child.

### Reasonable practicality

In determining whether it is reasonably practical for a child to spend equal time or substantial and significant time with each of the child's parents, the court must have regard to:

- a) How far apart the parents live from each other;

- b) The parents current and future capacity to implement an arrangement for the child spending equal time or substantial and significant time with both of the parents;
- c) The parents' current and future capacity to communicate with each other;
- d) The impact that an arrangement would have on the child; and
- e) Such other matters the court considers relevant.

### Conduct of proceedings

The new Act requires that any court considering an application for a parenting order must:

- a) Decide which of the issues require full investigation, and those which may be disposed of summarily;
- b) Decide the order in which the issues are to be decided;
- c) Give directions about the timing of steps that are to be taken in the proceedings;
- d) Consider whether the likely benefits of taking the step justifies the costs of taking it;
- e) Make appropriate use of technology;
- f) If appropriate, encourage the parties to use family dispute resolution or family counselling;
- g) Deal with as many aspects of the matter as possible on a single occasion; and
- h) Deal with the matter (where appropriate) without the parties physical attendance at court.

### Rules of evidence

With the exception of the court's control of questioning of witnesses, interpreters, examination of a person without subpoena or other process and improper questions, the provisions of the *Evidence Act 1995* do not apply to child-related proceedings unless the court decides to apply one or more of the provisions of the part.

### 'Child representative' re-defined

The concept of a children's representative remains in the new Act but is re-defined as an 'independent children's lawyer', who is a lawyer who represents the child's interests in proceedings under an appointment made under a court order. The independent children's lawyer must form an independent view based on the evidence available to them of what the best interests of the child are and inform the court of that view. The independent children's lawyer must:

- a) Act impartially in dealings with the parties to the proceedings;
- b) Inform the court of the views that the child has expressed in relation to matters to which the proceedings relate; and
- c) If a report or other documents that relate to the child are to be used in proceedings, analyse the report to identify the most significant elements and ensure that those matters are properly drawn to the court's attention.

### Effect of the changes

The practical effects of the changes are far more significant than the changes to the legal principles that govern a court exercising its discretion in determining the best interests of a child or children.

In fact, nothing in the changes to determining the best interests of the child dramatically affects the current law, save to the extent that the court will now be required to consider equal time arrangements.

The court already had power to make arrangements for equal time.

The new Act does however codify what (anecdotally) seems to be now taking place in practice, that is, joint parenting arrangements (or shared care arrangements) are being ordered in circumstances where there is sufficient communication between the parents and where such orders are reasonably practical and workable.

For parties approaching the family law system, the changes will be dramatic. Parties will, in almost all cases, be advised by a family counsellor, a family consultant or their lawyer that if appropriate, consent orders (or parenting plans) should be made for spending equal time with both parents.

Until there are a series of cases setting out what 'consideration' of equal time (or substantial and significant time) means (and what evidence would be required to support such an order) there will be enormous uncertainty for parties and practitioners as to litigation outcomes. In any event, the pressure for parties to resolve matters out of court will be even greater.

### Potential pitfalls

1. The new Act contains a number of transitional provisions. Practitioners should look very carefully at any matter presently before the court, or about to be litigated in light of these provisions.

2. Specific mention is made that the amendments to the Act are not to constitute changed circumstances that would justify making an order to discharge or vary a parenting order made before commencement.

### The future

Only time will tell whether this new Act is a significant change in the law or merely a change in perception. Whatever the outcome, those practising family law are set for interesting times ahead.

The full text of the new Act is available on the Parliament of Australia website – please see [www.aph.gov.au](http://www.aph.gov.au).

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