

# The application of the *SPR Act 2006* amendments to the *Family Law Act 1975*

This chapter discusses the application of the 2006 changes that were made to Part VII of the *Family Law Act (FLA) 1975* through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (*SPR Act 2006*). The changes were intended to ensure that “children have a right to have a meaningful relationship with both parents after separation” and that “children live in an environment where they are safe from violence and abuse” (Explanatory Memorandum, p. 2). This discussion examines how the legislation contributes to the achievement of policy objective 2 in the 2007 Evaluation Framework (see Appendix B), which concerns greater involvement of parents post-separation and the protection of children from violence and abuse.

The questions considered in this discussion are:

- How is the legislation being applied in day-to-day legal practice?
- How do legal professionals, including judges, view its workability?
- What interpretations of key provisions are evident in the case law?

Data from the following sources inform this discussion:

- Qualitative Study of Legal System Professionals (QSLSP) 2008;
- Family Lawyers Survey (FLS) 2008;
- Family Court of Australia (FCoA), Federal Magistrates Court (FMC) and Family Court of Western Australia (FCoWA) court files, post-1 July 2006; and
- published judgments 2006–09.

This chapter has two parts. The first part looks at the workability of the legislation in day-to-day litigation and decision-making practice, while the second part examines how the legislation has been interpreted and applied in judgments.

## 15.1 The workability of the *SPR Act 2006*

A central message in the data from the Legislation and Courts Project, particularly those gathered in the QSLSP 2008 and FLS 2008, is that the *SPR Act* is complex and difficult to apply. This point has also been made in the case law, with, for example, one judge in the appeal case of *Robertson and Sento* ([2009] FamCAFC 49 ¶ 7)<sup>1</sup> observing that “Part VII in its current form is undoubtedly extremely complex”. As a consequence, the central message—that the best interests of children are the paramount consideration—is obscured to some extent, according to many family law system professionals.

An observation that was regularly made by QSLSP 2008 participants was that not only were the principles hard for lay people to understand, but even legal practitioners and judicial officers had trouble maintaining focus on this issue amid the other provisions (e.g., the presumption, and the child’s right to a meaningful relationship) outlined in the Act. One barrister noted that while “best interests” “is meant to be the paramount consideration, it gets lost in amongst all these loops and hoops and criteria that one must rather artificially go through”. As suggested in earlier chapters, differing approaches are evident among different decision-makers, and there are also perceived to be differences in approach between the FCoA and FMC.

<sup>1</sup> Finn J.

A more fundamental issue raised by lawyers and judicial officers was a concern that legislation that should be accessible to its users—separated families—had become extremely difficult to understand even for some professionals, let alone lay people. One judicial officer observed that: “I think very few average people can understand it ... they cannot go to the Internet, look up the *Family Law Act* and get the guts of it”. Further, the change in language from “residence and contact” to terminology based on “person[s] with whom a child is to live” (s64B(2)(a)) and “the time a child is to spend with another person[s]” (s64B(2)(b)) was seen by many QSLSP 2008 participants to be awkward and difficult to use.

At a practical level, participants said that the complexity of the legislation meant that advice-giving, litigation and judgment-writing all had become more time-consuming and complicated. Participants in an advice-giving role, particularly those working in high-volume legal aid and community legal centre practices, expressed concern that the complexity impeded clients’ understanding. Such concerns were seen to be particularly pertinent in relation to parents who were disadvantaged in some way (e.g., culturally and linguistically diverse [CALD] groups, people with low educational attainment, and self-represented litigants). This exchange in a focus group involving legal aid practitioners illustrates the point:

[First speaker:] “I suppose you’ve got to tell them a heap more stuff now. We have numerous check lists”.

[Second speaker:] “And they weren’t absorbing the little bit we told them before”.

It was argued that clients now needed more visits in order to obtain the information that they needed in order to understand the available options in their particular situation.

In relation to court-based advocacy practice, a barrister observed that the legislative pathway was complex and convoluted: “By the time you go through each and every step ... it’s a huge process and our job in formulating submissions is very difficult”. Representative of judicial reflections along these lines are these comments on judgment-writing under the framework:

What it means, to use the vernacular, is there are more hoops to go through now than ever before ... Where those factors were relevant, you would have dealt with them anyway. But if you don’t say that you’re dealing with them, and it takes extra time to go through each one when you are writing a judgment, it adds enormously to the time that judges have to spend in writing judgments ... Because if you don’t specifically say, “And now I deal with [whatever section it might be]” then you’re potentially creating a ground of appeal.

As noted at the outset, only a few participants spoke positively of the legislative framework. Positive comments mostly focused on the fact that the framework allowed them to give very specific advice to their clients about what courts take into account in making parenting orders. For example, a barrister noted that:

I think that the Act, particularly the expanded provisions in terms of what a judge needs to consider, brings to bear true focus on important issues. And those issues, I think, create a more level playing field than what there once was. I think it highlights what parents generally have to offer their children as a positive enquiry rather than [previously], which was more how deep is your bucket of mud you’ve got to bring to court.

### 15.1.1 Interim decisions

The making of decisions on an interim basis was also identified by family law system professionals as problematic, given the complex nature of the legislation and the eleven-step process outlined in *Goode and Goode* (2006) FLC 93–286 (see Section 15.2). A significant issue was the difficulty of assessing appropriate interim arrangements, and the applicability of the presumption in the context of limited evidence and limited time.

The difficulties are explained clearly in this quote from a judicial officer:

The real difficulties are that there are often many contested questions of fact, typically in the area of family violence. Some of the allegations are really in the nature of criminal offences. So to make a finding that the ground has been substantiated, to rebut the presumption of equal shared parental responsibility on an interim hearing, the theory

sounds good, the reality is different. Because of the constraints on time and the nature of an interim hearing rarely permit that issue to be looked at in real depth.

Two strategies are used to overcome this problem, according to participants' comments. A strategy available to litigators is not to seek any parental responsibility orders at the interim stage, since parental responsibility is shared in the absence of a court order anyway (*FLA* s61C). However, it was noted by a judicial officer that applications for orders for sole parental responsibility could be a basis for matters to be transferred from the FMC to the FCoA, and that this factor (and the desire to obtain an FCoA hearing) may motivate some lawyers to adopt different approaches.

A strategy available to judicial officers (and regularly referred to in the judicial officer data) is to use the discretion not to apply the presumption and to make time arrangements that prioritise the safety of the children (*FLA* s65DA(3)).

However, several legal practitioners suggested that this approach is inconsistently applied in interim proceedings, particularly in the FMC. A community legal centre lawyer noted that, even when allegations were raised and supported by evidence—including family violence orders made under state legislation—“we’re finding that is not making a great deal of difference to the arrangements that have been put in place for children”.

## 15.1.2 Consent orders

### Practices concerning consent orders

Orders may be made by consent—either to formalise agreements made outside a court process, or to formalise agreements made after court proceedings have been initiated and agreement subsequently occurs. In relation to the former type of orders, most of these are made by registrars in the FCoA, or registrars in the FCoWA in that jurisdiction. Depending on the stage of proceedings at which a matter settles, arrangements made by consent after proceedings have been initiated may be endorsed by registrars or the judicial officer responsible for the docket the matter is listed in. In order to explore any issues that may arise in relation to court endorsement of such orders, registrars and judicial officers in the QSLSP 2008 were asked about their practices in making consent orders and whether any issues of concern had arisen since the reforms.

The complex dynamics that settlement negotiations involve were touched on earlier (see Chapters 9 and 11). The tensions in this area are succinctly summarised in this comment by a legal practitioner about the choice litigants face in deciding whether or not to settle:

*Most of them settle by consent and you’ve got a real tension because those that settle by consent feel as if they’ve been bullied into it, get a settlement because they can’t afford it and they want to get it over and done with. Those that run the full trial feel as though they got shafted anyway because they didn’t get heard properly. So either way they feel as though they’ve lost.*

In reflecting on their practices concerning consent orders, a common observation among registrars and judicial officers was the limited supervisory role courts have in the context of a system that encourages parties to reach agreement by themselves.

In discussing their approach to consent orders, however, judicial officers indicated that where a matter had been in their list, they generally would have insight into whether the orders proposed were appropriate or not. Most registrars and judicial officers indicated that they would be active in asking questions or requesting further information if they had doubts about orders. For example, one judicial officer said: “If there is something that really stood out I would say, ‘Did you really mean to do this?’, bearing in mind what your client has said about the other party. You will usually get a rational explanation”.

Other judicial officers and registrars noted that they would be particularly inclined to ask questions in circumstances where there had been concerns about family violence and child abuse or the parties were self-represented or they came from CALD backgrounds. In such cases, they indicated they would be likely to scrutinise settlement proposals closely.

Registrars indicated that in relation to orders that were to be made by consent from the outset, their capacity to actively engage with the suitability of arrangements was limited because of the emphasis placed on parties reaching their own agreement. However, this was also an area

where views and practices differed. Some registrars adopted an approach that emphasised the issue of consent, while others took a stronger view of their obligation to assess the orders. These variations are illustrated by these two quotations:

It's governed a lot by the parties' consent. If they consent to something that on our own subjective assessment is [not durable, for example] then that's our personal view ... They swear [they are consenting] ... and we are here to service a consent [arrangement], as appalling as it might be on any subjective level. (Registrar)

If we have a gut reaction that they are not workable, we don't make them. (Registrar)

In cases where consent orders did raise concerns, registrars indicated they would either seek more information from the lawyers, where lawyers were involved, or refer them to a judicial officer's list for them to be made in open court. Some participants mentioned time constraints as a limitation on the amount of scrutiny that could be applied to arrangements arrived at by consent.

However, the following situations were highlighted as being ones in which further information might be sought:

- orders where there was no contact with a father provided for;
- orders where there was a history of family violence; and
- circumstances in which a registrar formed a concern about a power imbalance, including those where one party was not represented, or the arrangements seemed unusual and potentially unworkable (an example of the latter instance was an arrangement for a two-year-old girl that provided that she live with her mother during the day and her father at night).

### 15.1.3 Factual considerations: What issues are raised most frequently?

In deciding what arrangements are in a child's best interests (s60CC(1)), courts are required to consider a list of fifteen "considerations". These are divided into primary and additional considerations. Primary considerations are the "benefit to the child of having a meaningful relationship with both of the child's parents" (s60CC(2)(a)) and "the need to protect the child from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence" (s60CC(2)(b)). These considerations, including additional considerations, are shown in the text box (pages 339–340).

The considerations may or may not be relevant to varying extents in any particular case. It is the duty of the judge to consider those that are relevant and to assess the evidence relevant to any particular issue and the weight it should be accorded in relation to what orders are in a child's best interest. This is an area where strategic decisions by litigants and lawyers are important in deciding what issues to emphasise in any case, and discretionary assessments by decision-makers are important in making orders.

In the data collection from FCoA, FMC and FCoWA files post-1 July 2006, data relating to this list (and some other issues) were collected. The purpose of this was twofold. First to examine the sorts of issues that are typically raised in children's matters. Second, to identify which are the most common factors raised. Table 15.1 shows the frequency with which particular issues are raised in the evidentiary material on the court files, across the sample of files where matters were settled either by consent after proceedings had been initiated or that were judicially determined. Factual issues relating to concerns about family violence and child abuse were collectively the most numerous across the sample. For example, material relevant to the need to protect children from physical harm was present in 19.1% of judicial determination cases. High proportions of cases also involved material containing assertions of family violence (e.g., physical violence was alleged in 33.5% of cases, and emotional or psychological abuse (including threats) was raised in 26.4% of judicially determined cases).

Interestingly, after the violence and abuse clusters, the next most frequently raised issue was the impact of substance misuse on a parent's capacity to parent their child, with this being raised in 32.5% of judicially determined cases and 27.2% of consent after proceedings were initiated cases.

The issue of the capacity of a parent to facilitate the other parent's relationship with a child also occurred frequently, with evidence regarding this factor relevant in 30.9% of judicially

## s60CC: How a court determines what is in a child's best interests

### Determining child's best interests

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

### Primary considerations

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

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

### Additional considerations

- (3) Additional considerations are:
- (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
  - (b) the nature of the relationship of the child with:
    - (i) each of the child's parents; and
    - (ii) other persons (including any grandparent or other relative of the child);
  - (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
  - (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
    - (i) either of his or her parents; or
    - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
  - (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
  - (f) the capacity of:
    - (i) each of the child's parents; and
    - (ii) any other person (including any grandparent or other relative of the child);
 to provide for the needs of the child, including emotional and intellectual needs;
  - (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
  - (h) if the child is an Aboriginal child or a Torres Strait Islander child:
    - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
    - (ii) the likely impact any proposed parenting order under this Part will have on that right;
  - (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
  - (j) any family violence involving the child or a member of the child's family;
  - (k) any family violence order that applies to the child or a member of the child's family, if:
    - (i) the order is a final order; or
    - (ii) the making of the order was contested by a person;
  - (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

- (m) any other fact or circumstance that the court thinks is relevant.
- (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
  - (a) has taken, or failed to take, the opportunity:
    - (i) to participate in making decisions about major long-term issues in relation to the child; and
    - (ii) to spend time with the child; and
    - (iii) to communicate with the child; and
  - (b) has facilitated, or failed to facilitate, the other parent:
    - (i) participating in making decisions about major long-term issues in relation to the child; and
    - (ii) spending time with the child; and
    - (iii) communicating with the child; and
  - (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.
- (4A) If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

### Consent orders

- (5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

### Right to enjoy Aboriginal or Torres Strait Islander culture

- (6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
  - (a) to maintain a connection with that culture; and
  - (b) to have the support, opportunity and encouragement necessary:
    - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
    - (ii) to develop a positive appreciation of that culture.

determined cases. Interestingly, there is a fairly marked difference in the extent to which this factor was relevant in judicial determination cases compared to consent after proceedings were initiated cases (30.9% and 18.5% respectively), whereas most other factors had fairly similar rates of occurrence between the two sub-samples. This issue is particularly frequent in judicial determination cases, suggesting that where evidence of this nature is relevant, a matter is less likely to settle. Case law on the application of s60CC(3)(c) is discussed in the next section.

The factors that relate directly to the characteristics of the child tended to be mentioned much less often than factors relevant to violence and abuse, substance misuse and the parent's ability to facilitate the child relationship with the other parent. The most frequently raised child-related factor was that of the views of the child in the judicial determination sub-sample (14.3%). Other child-specific considerations—including the impact of any change in arrangements on the child, the child's relationships with siblings and step-siblings, and any special needs of the child—were mentioned comparatively infrequently. This tends to support the qualitative data examined in Chapter 9 that indicates that litigation is parent-focused rather than child-focused.

## 15.1.4 The interpretation of key provisions in the *SPR Act 2006*

Decision-making in children's matters under the *FLA 1975*, as amended by the *SPR Act 2006*, involves the exercise of a significant amount of judicial discretion. Judicial officers are charged with the task of deciding what orders may be in a child's best interests (s60CA) on the basis of

**Table 15.1 Factual Issues alleged during proceedings, by type of proceeding, ranked from overall most frequent to least frequent, post-reform**

Factual issue <sup>1</sup>	Judicial determination	Consent after initiated proceedings
	%	
Impact of substance misuse on capacity to parent	32.5	27.2
Parent's assertion of family violence—physical	33.5	23.3
Parent's facilitation of child's relationship with other parent	30.9	18.5
Parent's assertion of family violence—emotional/psychological/threatened	26.4	20.7
Family Violence Order	19.5	12.7
Benefit to child of meaningful relationship with parent	15.4	13.9
Need to protect child from physical harm	19.1	9.4
Views expressed by child	14.3	10.1
Psychological/mental capacity of parent to meet child's needs	13.7	10.7
Need to protect child from neglect	13.8	9.6
Need to protect child from emotional/psychological harm	17.9	7.4
Need to protect child from witnessing family violence	13.2	9.9
Parents' attitude towards parenthood	9.5	10.1
Parental history—spending time	16.3	6.8
Other relevant fact or circumstance	11.7	8.1
Parent's ability to put child's needs before own	5.1	6.1
Need to protect child from sexual harm	8.2	4.1
Parental history—exercising responsibility	6.7	3.7
Effects on child due to change in arrangements	7.3	2.7
Capacity of parent to meet physical and material needs of child	4.8	3.7
Child's relationship with parent and/or new partner	6.1	2.1
Possibility that child's views were influenced	2.7	3.3
Parental history—financial/child support	5.8	1.8
Parent's assertion of family violence—sexual	3.5	3.1
Impact of parenting arrangement on child's psychological health	2.8	3.0
Child's relationship with siblings/step-siblings	2.0	3.3
Impact of social relationships of parent on child	1.8	2.7
Capacity of parent to meet psychological/mental needs of child	3.6	1.6
Physical capacity of parent to meet child's needs	1.9	1.6
Parental history—communicating	2.4	0.9
Impact of parenting arrangements on child's special/extracurricular activities	2.1	0.9
Parental history—other	0.5	1.3
Facilitation, if child is Indigenous, to enjoy his/her culture	0.4	1.4
Capacity of parent to meet educational needs of child	1.3	0.5
Impact of parenting arrangements on child's physical health	0.9	0.4
Special needs of child with regards to maturity, sex, lifestyle	1.0	0.2

Note: <sup>1</sup> Factual issue alleged at any stage during the proceedings.

Source: FCoA, FMC and FCoWA court files post-1 July 2006

factual findings that they may make in relation to a wide range of issues about which evidence may be adduced in court. Many of these issues are referred to in the s60CC checklist (see text box in Section 15.1.2) or dealt with under the umbrella of some of its wider sub-sections.<sup>2</sup>

While the presumption in favour of equal shared parental responsibility provides a starting point for the exercise of discretion, any orders made must ultimately reflect the judge's view about what arrangements are in the best interests of the child in the particular circumstances of the case, on the basis of any factual determinations made (*Goode and Goode* (2006) FLC

<sup>2</sup> For example, s60CC(3)(f), requiring the court to consider the capacity of each parent to provide for the child's needs, may direct attention to any difficulties, such as substance misuse, that a parent may have.

93–286). In crafting orders, the court is not confined to the proposals of the parties (*UvU* (2002) 211 CLR 238), though it must provide the parties with an opportunity to make submissions on any alternative arrangements it might be considering (*Bolito and Cohen* (2005) FLC 93–224).

As explained in Chapter 1, the *SPR Act* introduced a number of new concepts and terms, including the presumption of equal shared parental responsibility (s61DA) and the notion of each parent having a meaningful involvement in the child's life (s60B(1)(a)), the child having a meaningful relationship with each parent (s60CC(2)(a)) and the child spending substantial and significant time with each parent (s65DAA(2)). In addition, it elevated the importance of protecting children from harm from exposure to family violence and abuse to an Object (s60B(1)(a)), as well as citing this as one of two primary considerations (s60CC(2)(b)). This section examines how the new provisions are being interpreted at the appellate level and applied in case law.

At the time this report was being prepared, the High Court had heard an appeal in a matter involving a relocation decision (*MRR and GR* No B20 of 2009 [2009] HCATrans 316), the first High Court consideration of the *SPR Act* 2006. At first instance, the federal magistrate had denied a mother's application to relocate from north-west Queensland to Sydney. Orders were made for the 5-year-old child in the case to live with each parent on a week-about basis. Equal shared parental responsibility was ordered and the orders also provided that if the mother moved away from north-west Queensland, the child should live with the father (*Rosa and Rosa* [2009] FamCAFC 81 ¶ 1–2). The mother unsuccessfully appealed on a range of grounds, mostly relating to the weight placed on various factual issues by the federal magistrate (¶ 18–19). The appeal was also based on an argument that the federal magistrate decision had failed to adequately address a range of issues specified in s65DAA(5), including why an equal time arrangement was practical, and the parties' capacity to communicate (¶ 19). The full court acknowledged that the issues raised under s65DAA(5) relating to whether the proposed orders were reasonably practicable had not been explicitly dealt with in the first instance judgment (¶ 96), but held that factual issues relevant to these provisions had been dealt with in the judgment in relation to findings relevant to the application of other provisions (¶ 97–108). The question of whether it was necessary for this provision to be explicitly considered was a ground in the High Court appeal (*MRR and GR* No B20 of 2009 transcript of proceedings, 248, pp. 5–7). The High Court overturned the full court's decision, holding that it was not reasonably practicable for the child to spend equal or substantial and significant time with each parent and it was not open to the federal magistrate to make the order he did (*MRR and GR* No B20 of 2009 [2009] HCATrans 316, 40). The judgment had not been published at the time this report was being prepared.

The following discussion uses appellate judgments and, where appropriate, first instance decisions, to examine how key new provisions are being applied. This discussion provides a context for considering and understanding other aspects of the evaluation, particularly findings from interviews and focus groups with family law system professionals, the file analysis of family law files, and the Family Lawyers Surveys. The discussion of first instance judgments in particular provides a context for understanding the outcome patterns evident in the file analysis that were discussed in Chapters 8 and 9 and the discussion of how family violence is handled, discussed in Chapter 10.

Two methods of selection were used for the judgments referred to in this section. Key appellate judgments are included where they provide interpretations of the law. Not all appellate judgments do this, as many appeals involve arguments that in essence represent objections to the way in which the first instance decision-maker may have exercised their discretion. The extent to which appellate judgments may interfere with a first instance decision is limited to very narrow grounds.<sup>3</sup> Appellate judgments have been selected that shed light on the application of key provisions and terms in the *SPR Act* 2006. Further, some appellate judgments and some first instance judgments have been selected to demonstrate how key provisions are being applied in day-to-day decision-making practice. Where variations in approach, particularly to substantive legal concepts, are evident among decision-makers, judgments that illustrate these variations have been included to the extent possible, bearing in mind that this is not intended to be an excessively technical discussion.

<sup>3</sup> In *Gronow v Gronow* (1979) 144 CLR 513, Stephen J summarised the approach in this way: “before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion” (¶ 519–520).

## 15.2 Decision-making post–1 July 2006: *Goode and Goode*

One of the first appellate decisions dealing with the interpretation of the *SPR Act 2006* was *Goode and Goode* (2006) FLC 93–286. In an extensive and detailed consideration of the provisions relating to parental responsibility (e.g., s61C, s 61D, s61DA) and time (e.g., s65DAA), the full court articulated its view of the appropriate interpretation of these provisions, as well as setting out the approach to be followed by courts in making parenting orders. The full court (Bryant CJ, Finn and Boland JJ) confirmed the continuing paramountcy of the best interests principle (s60CA) and the applicability of the presumption (s61DA) to decisions made on an interim basis.

The case involved an application by a father appealing against interim parenting orders made by Collier J in the Family Court, which essentially provided that the children live with the mother and spend time with the father. The father sought equal time with the children and equal shared parental responsibility. Collier J had applied s61DA, finding that equal shared parental responsibility did not apply. His Honour appears to have reached his decision by applying the principles in *Cowling AM v Cowling JH* (1998) FLC 92–801 and did not apply the provisions of s60CC, after finding that the existing arrangements for the children seemed to be working well and did not require changing.

In considering the nature of parental responsibility under the *SPR Act 2006*, the full court held that there were two distinct types of parental responsibility. The first exists by virtue of s61C and is vested in each parent until the child turns 18 and is unaffected by change in the nature of the parents' relationship such as separation or remarriage to another partner (¶ 30). This provision pre-dates the *SPR Act 2006* amendments and, relying on the authority of a pre-2006 full court decision, *B and B: Family Law Reform Act 1995* (1997) FLC 92–755, the court affirmed the prior position that this type of parental responsibility, "where no order has been made", would be exercised solely by the person who had the physical care of the children at the time in relation to day-to-day matters. Longer term, issues, such as "major surgery, education, religion and the like" (*B and B* ¶ 9.29) would require consultation between the parents (¶ 35).

The *Goode* full court then distinguished parental responsibility, arising by virtue of s61C, from parental responsibility arising as a result of a court order made as a result of the application of the presumption (s61DA) or otherwise.<sup>4</sup> Once such orders are made, the requirements of s65DAC are applicable, meaning that in relation to major long-term issues, the parents are required to consult each other and make a genuine effort to come an agreement about such issues (¶ 38).

The full court held that, where the presumption was applied and orders for equal shared parental responsibility made, the court was obliged to consider making orders for a child to spend either equal or substantial and significant time with each parent (s65DAA) as these provisions described "the path ... to be followed" (¶ 45). However, it also said that even where the presumption was rebutted or not applied, orders for equal or substantial and significant time could be made, if they were considered to be in the child's best interests, when the Objects (s60B) and the primary and additional considerations (s60CC) had been considered (¶ 47). This reflects the primacy of the "best interests" (s60CA) provision and the discretion this principle vests in courts to make orders based on the particular circumstances of the case.

Moreover, orders for equal or substantial and significant time could be made even where they were not sought by either party, as long as the court considered they would promote the child's best interests and the parties were accorded procedural fairness by having the opportunity to make submissions on options advanced by the court (¶ 48). This latter point relies on the pre-reform authority of the High Court in *U v U* (2002) 211 CLR 238 (see also *Bolitho and Cohen* (2005) FLC 93–224) and represents a jurisprudential thread that has been further developed following the enactment of the *SPR Act 2006* (see, for example, *Sampson and Hartnett* (No 10) (2007) 38 Fam LR 315).

A further significant point developed in *Goode* related to the meaning to be attached to the word "consider" in s65DAC, which provides that the court "must consider" making orders for equal or substantial and significant time where the presumption of equal shared parental responsibility was applied. The full court offered an interpretation emphasising the prescriptive aspects of the

<sup>4</sup> A court may find that the presumption is rebutted, but nonetheless make orders for shared parental responsibility (*Goode and Goode* (No 2) [2007] FamCA 315 ¶ 61–63).

term, holding that “the juxtaposition of ss 65DAA(1)(a), 65DAA(1)(b) and 65DAA(1)(c) suggests a consideration tending to a result, or the need to consider positively the making of an order, if the conditions in s 65DAA(1)(a), being the best interests of the child, and s 65DAA(1)(b), reasonable practicability, are met. The same considerations apply to s 65DAA(2)”. As discussed further below, the meaning of “consider” has been subject to other interpretations.

In summarising its approach, the *Goode* full court outlined the following eleven-step process for making decisions on an interim basis:

1. Identify the competing proposals of the parties.
2. Identify the issues in dispute in the interim hearing.
3. Identify any agreed or uncontested relevant facts.
4. Consider the matters in the s60CC list that are relevant and make findings about them (this may only be possible to a limited extent in interim hearings).
5. Decide whether the presumption applies (i.e., deciding whether or not it does not apply because there are reasonable grounds to believe there has been child abuse or family violence or that the decision-maker should use their discretion not to apply the presumption in interim proceedings).
6. If the presumption does apply, consider whether it should be rebutted because its application would not be in the best interests of the child.
7. If the presumption applies and is not rebutted, decide whether orders for equal time would not be in a child’s best interests because of one or more matters in s60CC or impracticability.
8. If the presumption is applicable, but equal time orders are not in a child’s best interests, consider whether orders for substantial and significant time might be appropriate.
9. If neither equal nor substantial and significant time is considered to be in the best interests of the child as a result of consideration of one or more matters in s60CC; or
10. If the presumption is not applied or is rebutted, then make such an order as is in the best interests of the child.
11. Even then, the court may need to consider equal or substantial and significant time, especially if, after affording the parties procedural fairness, the court considers such orders to be in the best interests of the child.

In summary, the full court decision of *Goode* confirmed the paramourcy of the best interests provision. It also confirmed the applicability of the presumption in interim matters and outlined an eleven-step process for courts to follow in decision-making. It further held that parental responsibility arises automatically under s61C, but is a different legal concept when orders under s61DA (or otherwise) are made. In this latter instance, an obligation to consult and reach agreement on decision-making accompanies the order. Further, the court interpreted “consider” to carry with it an obligation “to consider positively” the time arrangements contemplated by s65DAC.

An issue partly arising from the approach set out in *Goode* relates to whether decisions are susceptible to appeal where the decision-making pathway, including discussion of relevant legislative provisions and findings of fact, is not set out sufficiently clearly and explicitly. An issue referred to by some decision-makers in the interviews and focus groups with family law system professionals was the time-consuming, and in some instances difficult, process involved in adhering to the framework set out in the legislation and in *Goode*. In a decision after *Goode*, an appeal bench (Bryant CJ, Faulks DCJ and Finn J), held that a trial judge’s “failure to follow what we see as the logical approach would not lead to 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” (*Taylor and Barker* [2007] FamCA 1246 ¶ 63). While the requirement for adequacy of reasons is longstanding (see, for example, *Robertson and Sento* [2009] FamCAFC 49 ¶ 5–6) numerous appeals have been mounted—at times successfully—on the basis that these issues have not been set out sufficiently clearly.<sup>5</sup>

5 In *Robertson and Sento* [2009] FamCAFC 49 ¶ 5-6), the Full Court held that not only is the requirement for adequacy of reasons longstanding—pre-dating the 2006 amendments—but the case of *Goode* makes it clear that that requirement continues under the new legislation. Appeals that have been successful on the basis that these issues have not been set out sufficiently clearly include *Moose and Moose* [2008] FamCAFC 108, and *Oscar and Traynor* [2007] FamCA 1019.

### 15.2.1 Implications of *Goode*: Status quo

Since the *Reform Act 1995* (see Chapter 1), the question of the extent to which past time arrangements influence the decisions courts make on an interim or final basis has been undergoing jurisprudential revision. Prior to the *Reform Act 1995*, on an interim basis it was generally held to be appropriate to maintain the status quo unless there was evidence to establish that the child's health and wellbeing would be endangered by such a course of action (*Cowling AM v Cowling JH* (1998) FLC 92–801 ¶ 21, 22). In decision-making on a final basis, the status quo was considered to be one of several relevant issues, though neither party had any legal onus to prove it should be maintained or disturbed.<sup>6</sup> Relevant considerations were said to be the quality of the status quo, with changes to a longstanding arrangement requiring particularly careful explanation. The reasoning behind these approaches had two important threads. First, particularly in relation to interim decisions, it was considered important to maintain stability for children by maintaining existing time arrangements, especially when evidence had not been thoroughly tested and considered at trial. Second, it was considered that past time arrangements would have engendered a particular pattern in children's emotional relationships that should not be changed without due care.

As legislative support for shared parenting has increased, the emphasis placed on these principles in case law appears to have been declining, although there is variation in the approach to such issues among different decision-makers.<sup>7</sup> The implication arising from the approach articulated in *Goode* is that pre-existing time arrangements carry no particular weight, even on an interim basis, but each case is to be decided on its own merits. This point is illustrated by the full court's decision in *Dylan and Dylan* [2008] FamCAFC 109, in which a first instance decision of Carmody J was upheld. In this case, the arrangements ordered were contrary to the children's wishes and reflected the court's own arrangements fashioned as a compromise between the arrangements proposed by the mother and the father. In making the decision to make arrangements not consistent with the children's wishes, the trial judge noted that "I have reluctantly reached the conclusion that they should not be acted upon but only because I do not think they are consistent with either the requirements of the law or their overall long term best interests" (¶ 262 cited at ¶ 23), and went on to note that, among other things, the ICL submission on this point, the Family Report and the evidence of child psychiatrist, "did not take account of the changes to the law" (¶ 264 cited at ¶ 23).

While the full court (Warnick, May and Boland JJ) held that the parent's involvement prior to separation with the children was not irrelevant, and had not been treated as such by the trial judge, past patterns of care were of limited significance. The court at first instance said that:

... dominant maternal involvement during the marriage is not an argument against increasing paternal involvement after separation, especially in light of the amendments. Mothers and fathers interact differently with their children in some ways but similarly in others. Lack of experience itself does not suggest disinterest or incompetence. (*Dylan and Dylan* [2007] FamCA 842 ¶ 251)

The full court found no error in this treatment of the issue (¶ 57), upholding Carmody J's reasoning that the mother's argument that the difference between the father's application for time with the children after separation was undermined by the limited time he spent with them before separation "missed the point".

A similar point was made by another full court comprised of Finn, Coleman and Thackray JJ in the decision of *Dicosta and Dicosta* [2008] FamCAFC 161, which followed *Goode and Goode*.<sup>8</sup> In that case, the father unsuccessfully appealed against orders made by Brewster FM in the FMC that the children live with the father five nights a fortnight. The father was seeking orders for equal time. In concluding their analysis of the appeal grounds, the full court held that:

we would say that we do not accept the contention of counsel for the appellant father that the result arrived at in this case must mean that a parent who had not been the primary carer for the children prior to separation would never be able to assume such a role in the future. It cannot be emphasised too strongly that notwithstanding the provisions

<sup>6</sup> *Burton* (1978) 4 Fam LR 783 p. 786, cited in *Barber and Salmon* [2009] FMCAfam 272 at ¶ 179.

<sup>7</sup> See, e.g., *Barber and Salmon* [2009] FMCAfam 272, ¶ 180, and *Whelan and Scott* [2008] FMCAfam 203.

<sup>8</sup> *Dicosta and Dicosta* [2008] FamCAFC 161, ¶ 35.

of the amended legislation, every case remains to be determined on its own facts having regard to the findings required to be made under that legislation.(¶ 61)

The full court held that the additional considerations concerning the effect of any changes in the child's living arrangements "must require that there still be some consideration of the existing arrangements for the child in question ((s60CC(3)(d)) in light of any findings made about the nature of the child's relationship with each parent (s60CC(3)(b))" (¶ 35).

### 15.2.2 After *Goode*: Further analysis of "consider", best interests and discretion

The full court's discussion of the meaning of "consider" in *Goode* is classified under the doctrine of precedent as *obiter dicta*. In plain language, this means comments made by a court as part of a general discussion about legal interpretation, rather than comments that are directly relevant to the particular legal points that are being determined in the decision (these are called *ratio decidendi*). In *Goode*, the appeal did not turn on the meaning of "consider", so rather than being binding *ratio*, these comments may strictly be considered *obiter*. As such, though they hold legal weight because they emanate from a full court, they are not considered "binding" on other judges. For this reason, the meaning of "consider" has undergone further development in case law, and there is now an alternative interpretation to the one offered by the full court in *Goode*.

This alternative interpretation comes from a decision by the Chief Judge of the Family Court of Western Australia, the Hon. Stephen Thackray. His Honour's decision in *F and B* [2008] FCWA 132 is noteworthy not just for its discussion of "consider", but also for its approach to the issue of best interests.<sup>9</sup>

Rather than basing the meaning of "must consider" on its immediate legislative context (i.e., s65DAA), Thackray CJ followed an approach to statutory interpretation that suggests words that recur in a particular piece of legislation should be accorded a consistent meaning, particularly when they are used in the same section of an Act (per Hodges J in *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452). Noting that the words "must consider" also occur in the *SPR Act 2006* in relation to the s60CC checklist (and its forerunner in the *Reform Act 1995*, s68F), Thackray CJ relied on a passage from *B and B: Family Law Reform Act 1995* (1997) FLC 92-755 which, in the context of a discussion of s68F, emphasised the discretionary nature of decision-making about best interests in general and in relation to the factors in s68F in particular. His Honour emphasised this statement in *B and B*: "the circumstance that the facts in individual cases may vary almost infinitely, that the inquiry is a positive one tailored to the best interests of the particular children and not children in general, and that the Court is required to take into account all factors which it perceives to be of importance in determining that issue" (¶ 9.51 in *B and B*, ¶ 27 in *F and B*). He noted that s65DAA(1) and s65DAA(2) suggest particular outcomes (i.e., equal or substantial and significant time arrangements where they are reasonably practicable and in a child's best interests), but departed from the *Goode* bench's formulation of "consider" as "tending towards a result", on the basis that Parliament, in enacting the *SPR Act 2006*, had maintained the discretionary nature of the "best interests" inquiry. His Honour posed these two questions:

- Why would Parliament merely require the Court to "consider" making an order that is both in the best interests of a child and reasonably practicable when the Court's fundamental obligation is to make orders that are in the best interests of the child?
- Why not instead direct the Court to make such an order?

In answering these questions, Thackray CJ argued that the best interests inquiry would not yield just one answer in any particular case, but there would often be "a number of possible outcomes in one case that could be seen as promoting the best interests of the child and being reasonably practicable". In such instances, judicial officers had the responsibility of considering all the available options and selecting the one most consistent with the paramountcy of the child's best interests, rather than "considering" options "tending towards the results", indicated in s65DAA(1) and (2).

<sup>9</sup> For another interpretation more consistent with the *Goode* approach but arguably narrower still, see *H and H* [2007] FMCAfam 27, where Altobelli FM said at para 58: "the word 'consider' in s65DAA is given a narrow contextual application—it is not to consider at large, but rather to consider a reasonably narrow range of results specified in s65DAA".

The point that more than one type of arrangement may meet the best interests criterion was made eleven years ago by the High Court in *CDJ & VAJ* (1998) 197 CLR 172 at 219), which held that “best interests are values not facts”. It is a point that decision-makers return to regularly (e.g., *Runcorn and Raine* [2008] FamCA 837) in decision-making under the *SPR Act 2006*, in discussing the tension that arises out of the paramountcy of the discretionary best interests principle (s60CA) and the provisions that direct courts to consider particular outcomes, that is, equal or substantial and significant time where the presumption of equal shared parental responsibility is applied.

### 15.3 Objects and principles: Meaningful involvement and protection from harm

As noted earlier in this report, the factual circumstances relevant to many parenting disputes mean that courts frequently need to give active consideration to the question of how to weigh the two key primary considerations in the s60CC checklist,<sup>10</sup> which often stand in some tension to each other (see, for example, Chisholm, 2007, 2008; Parkinson, 2007). These considerations have been described (by Brown J in *Mazorski and Albright* (2007) 37 Fam LR 518) as “the twin pillars” underpinning the parenting provisions in the Act: “the first is the importance to children of having a meaningful relationship with both parents; the second is the need to protect children from physical and psychological harm” (¶ 3).

The case law demonstrates that, in any particular case, this tension will be resolved through reference to the evidence and the exercise of discretionary judgments as to how to balance these issues in making orders in particular circumstances. Significantly, however, the cases also demonstrate that questions of evidence and proof are less complex in relation to the first of these pillars (meaningful relationship) than the second. Indeed, one judgment has even suggested that “meaningful relationship” (s60CC(2)(a)) has an implicitly presumptive basis,<sup>11</sup> meaning that the existence or otherwise of a meaningful relationship in any given case is always open to rebuttal on the basis of evidence provided. While this approach has subsequently been explicitly rejected in a full court decision,<sup>12</sup> comments by Murphy J in *Runcorn and Raine* (2008) FamCA 837 reflect an approach characteristic of many first instance decisions:

... significantly, as it seems to me, the Act does not require a court to consider whether a party’s proposal is important, significant and valuable to a child. Rather, it appears to require the court to consider that such a relationship is of benefit to the subject children. Whilst not a “presumption” necessary to be rebutted (in the same sense as, for example, the express presumption as to equal shared parental responsibility), the paragraph appears to be presumptive in concept or effect. (¶ 47)

In contrast to the presumptive nature of s60CC(2)(a), Murphy J emphasised that the relevance of the other of the two pillars, the need to protect children from harm, and other factual issues relevant to the best interests inquiry under s60CC(3), need to be based on findings of fact:

Findings about harm or abuse or the risk of either, or the likely effect of change for a child, or the capacity of one or both parents to provide for children’s needs, all involve findings of fact which can readily be seen as likely to impact on orders about the nature and extent of a future parent/child relationship. (¶ 42)

In turn, the full court (Warnick, Thackray and Le Poer Trench JJ)<sup>13</sup> has observed that “findings of fact involve a weighing of the probabilities and are not made in a vacuum”, with such findings in a civil case being based on a consideration of the evidence as a whole, rather than one piece of evidence in isolation (citing Gibbs CJ and Mason J in *Chamberlain v R* (No2) (1984) 153 CLR 521 at 536).

<sup>10</sup> In the Objects provisions, the need to ensure children have the benefit of both their parents “having a meaningful involvement in their lives” is recognised (s60B(1)(a)); while in s60CC(2)(a), the “benefit to the child of having a meaningful relationship with both parents” is stated as one of two primary considerations.

<sup>11</sup> *Runcorn and Raine* [2008] FamCA 837.

<sup>12</sup> *McCall and Clark* [2009] FamCAFC 92.

<sup>13</sup> *Marsden and Winch* (No 3) [2007] FamCA 1364 ¶ 155.

In contrast to Murphy J's approach in *Runcorn*, other decisions have interpreted s60CC(2)(a) as requiring a careful evaluation of the evidence. For example, Benjamin J in *John and Chris* [2007] FamCA 393 concluded that the court should conduct an "evaluation [that] should include consideration of whether, on the facts, a meaningful relationship can be established and, if so, whether it is of benefit to the child" (¶ 39).<sup>14</sup>

In *McCall and Clark*, the full court (Bryant CJ, Faulks DCJ and Boland J) identified three possible approaches to s60CC(2)(a) (¶ 118). The first, the "present relationship approach", would require examination of the evidence of the nature of the child's relationship with each parent at the time of the proceedings to consider the benefit to the child of having a meaningful relationship with each parent, and these findings would influence the orders made. The second, the "presumption approach", was similar to that outlined by Murphy J in *Runcorn*. This approach was rejected as being beyond the intention of the legislature (¶ 120). The third, the "prospective approach", would be based on a consideration of the evidence at the time of trial, with orders being framed to "ensure the particular child has a meaningful relationship with both parents" where this was in their best interests.

The full court held that the prospective approach reflects the "preferred" interpretation of s60CC(2)(a). It also indicated that the present relationship approach may also be relevant in some instances (¶ 119) and that courts were required to consider the issues raised under s60CC(3)(b) concerning the nature of the child's relationship with each parent and others, including grandparents. It further noted, in favour of the preferred prospective approach, that if the present relationship were "exclusively applied", then courts would be limited in making orders that allowed a relationship to develop in the absence of an existing one.

The following section begins with a further examination of the jurisprudence on the interpretation of "meaningful". This is followed by an examination of how tensions between the two pillars in s60CC(2) (i.e., meaningful relationship and protection from harm) are manifested and resolved in day-to-day decision-making.

### 15.3.1 Meaningful relationship

#### Definition of "meaningful relationship"

There is no definition of "meaningful relationship" in the Act, and different decision-makers have offered different constructions of the term. A definition frequently referred to in the case law and endorsed by the full court<sup>15</sup> was formulated by Brown J in the first instance Family Court decision of *Mazorski and Albright* (2007) 37 Fam LR 518. There are three important aspects of the definition proposed in this case. Starting with a semantic analysis of the notion of "meaningful", Brown J equates the use of the term "meaningful" in the context of "meaningful relationship" with "significant", which is said to be synonymous with "important or of consequence". Second, Her Honour emphasised the child's perspective, holding that a meaningful relationship "is one which is important, significant and valuable to the child". Third, Her Honour suggested that "meaningful" was an essentially "qualitative adjective" rather than a "strictly" quantitative concept. Quantitative considerations were said to be relevant at a different stage of the best interests consideration, namely those relevant to the application of the equal shared parental presumption and the application of s65DAA (the provisions relating to equal or substantial and significant time arrangements).

A slightly different view has been adopted by Murphy J, which suggests "quantity" (in the sense of time) is an element of a "meaningful relationship", but not necessarily determinative.<sup>16</sup> In discussing Brown J's approach, Murphy J emphasised the word "strictly" in relation to Brown J's analysis of "meaningful". However, other decision-makers have adopted the emphasis in Brown J's definition of the qualitative nature of the term "meaningful" and its non-quantitative characteristics. In *Godfrey and Sanders* (2007) 208 FLR 287, Kay J indicated that the term indicated an aspiration for a "meaningful relationship, not an optimal relationship" (¶ 36).

<sup>14</sup> This decision adopted the reasoning of Bennett J in *G and C* [2006] FamCA 994 in relation to this point: *Chris and John* ¶ 39.

<sup>15</sup> May, Boland and O'Reilly JJ in *Moose and Moose* [2008] FamCAFC 108 ¶ 67; see also *McCall and Clark* [2009] FamCAFC 92.

<sup>16</sup> *Runcorn and Raine* [2008] FamCA 837 ¶ 45.

In *Loddington and Derringford* (No 2) [2008] FamCA 925, Cronin J suggested that “for there to be a meaningful relationship, it must be healthy, worthwhile and advantageous to the child” (¶ 169), further adding that the issue was relevant to both parents, not just fathers (¶ 172). His Honour emphasised the individualised nature of the consideration that should occur, suggesting that “this assessment as to how a child will benefit must be done on the peculiar facts of what the parents are offering” (¶ 173). Given that the case involved two very young children, Cronin J also considered what relationship might be meaningful given the children’s developmental stages. The next two paragraphs set out the analysis proposed in this regard:

The creation of a meaningful relationship in very young children must be seen from two perspectives. In the case of a parent to whom there is a major attachment, the benefit that the children receive from the meaningful relationship is the continuation of all of the things that will protect that attachment. For the children, it is knowing that they are returning to their mother and that she is available for them as their major form of security. Other benefits such as toilet training, discipline, eating habits, learning to play, read and so forth presumably follow more easily if the secure attachment is not disturbed. (¶ 175)

The position of a parent who may be a very good and loving parent but who is not the major attachment figure, is no less important. In the case of very young children, it is not so much the time spent with the children but the gap between visits and the quality of time spent that is important. (¶ 176)

### Managing the tension: s60CC(2)(a) and (b)

As noted earlier, cases where there are concerns about the potential for children to be exposed to harm highlight the tensions involved in decision-making in this area. As Murphy J’s approach, outlined above, suggests, “meaningful relationship” has a presumptive quality,<sup>17</sup> while issues relevant to exposure to harm need to be established on the basis of evidence.<sup>18</sup> The nature of the evidence adduced, discretionary decisions as to the weight to be accorded to such evidence, and discretionary assessments of which factors are important in any one case, influence outcomes in this area, as the following discussion of cases demonstrates.

The case of *M and L (Aboriginal Culture)* (2007) FLC 93–320 provides an example of how these issues play out in practice. This full court decision upheld a mother’s appeal against parenting orders made by Brown FM, which provided that the children, aged 9 and 5, live with the father and his family in the north-eastern region of the Northern Territory. The orders also provided that the children spend as much time as possible with the mother and her family on the outskirts of a small town located east of Darwin.

Among the key relevant factual issues in this case were a history of family violence perpetrated by the father, the circumstances in which the mother cared for the child and the circumstances in which the children would be cared for by the father. Both parents were Indigenous. The father proposed to care for the child with the assistance of his father and other relatives in his community. The federal magistrate considered evidence concerning all these issues and made orders that the child live with the father and his family. The mother’s appeal was framed on the basis that the federal magistrate had made the orders by attaching insufficient weight to findings that she had been always been the primary caregiver and that there was no dispute regarding her parenting capabilities. She also argued that insufficient weight was given to the father’s history of violence and alcohol consumption and to their effects on the children.

The full court, comprised of Kay, Strickland and Warnick JJ, not only agreed with the mother but formed the view that Brown FM had ultimately reached his decision by primarily relying on unsubstantiated evidence that the mother had relied on communal care of the children and that the community in which the father resided provided better opportunities for the children.

After analysing the parties’ arguments and reviewing the evidence on which they were based, Kay J noted that the federal magistrate had “perhaps skirted over the domestic violence issue more than it ought to have been skirted over” (¶ 36). He noted no evidence had been adduced

17 Case law pre-dating the *SPR Act 2006* (Cth) recognised a child’s need for a relationship with both parents where this did not expose them to risk. See, e.g., *U and U* (2002) 29 Fam LR 74, per Hayne J ¶ 176.

18 The Full Court in *Marsden and Winch* [2007] FamCA 53, however, has rejected the proposition that s60CC(2) (a) must be “displaced” (¶ 79).

to show that the mother's care was inadequate (¶ 44), and that "concessions were made that the mother loved her children and parented them appropriately" (¶ 45). However:

by way of stark contrast there was ample evidence of the father's violent behaviour and alcohol abuse. These matters seem to have been put almost to one side and matters aimed at maximising the children's opportunity to become immersed in their patrilineal culture became [a] dominant consideration. (¶ 45)

The orders made by the federal magistrate were set aside and the matter was remitted for re-hearing.

In *Marsden and Winch* (No 3) [2007] FamCA 1364, a decision of Faulks DCJ in which he determined that it was not in the best interests of a 4-year-old girl to spend time with her father, was upheld by an appeal bench. Among the factual issues that contributed to Faulks DCJ's decision were findings that the husband had a history of compulsive sexual behaviour involving voyeurism and young women, and that he had an "obsessive attitude" to his relationship with the mother, which had necessitated her obtaining restraining orders against him. The husband had been jailed for breaching one of these orders. There was extensive evidence considered at trial about these issues, including evidence from a psychiatrist as a Single Expert witness. The full court upheld the decision on the basis that Faulks DCJ had sufficiently weighed the meaningful relationship principle against the protection from harm principle, with detailed reference to the evidence, and his conclusion that spending time with the father raised the possibility of psychological harm, outweighing the possible benefits, should stand.

## 15.4 Parental responsibility

As noted earlier, the decision in *Goode and Goode* established that parental responsibility may arise in two ways under the *SPR Act 2006*. The first is by virtue of s61C and is vested in each parent regardless of relationship status, unless varied by a court order. The second arises through the application of the presumption in s61DA. The equal shared parental responsibility presumption is not applicable where there are reasonable grounds to believe a parent of a child has engaged in family violence or child abuse (s61DA(2)). Further, it may be rebutted on the basis of evidence that establishes that orders providing for equal shared parental responsibility would not be in the best interests of the child (s61DA(4)). Decision-makers also have the discretion not to apply the presumption in interim proceedings (s61DA(3)).

Parental responsibility is defined in s61B as "all the duties, powers, responsibilities and authority which by law, parents have in relation to children". Further, s61D provides that a parenting order confers parental responsibility for a child on a person to the extent reflected in that order and doesn't diminish parental responsibility except to the extent provided for in the order. Where orders providing for shared parental responsibility have been made, s65DAC imposes an obligation on parents to make "decisions jointly" (s65DAC(2)), except where these decisions do not involve "major long term issues" (s65DAE) and the child is spending time with the person needing to make such decisions. Major long-term issues are not defined in the legislation exhaustively, but the s4 definition of the term explicitly recognises matters concerning:

- the child's education, both current and future;
- the child's religious and cultural upbringing;
- the child's health; and
- changes to the child's living arrangements that make it significantly more difficult for the child to spend time with the other parent.

In relation to the last point, the relevant provision (s4) says decisions concerning establishing new relationships do not come within its ambit, unless the new relationship would involve the partner moving to a new area, making it "significantly more difficult for the child to spend time with the other parent". The distinction between major long-term issues and other aspects of parental responsibility have been described by a full court as "fraught with ambiguity" (*Chappell and Chappell* [2008] FamCAFC 143).<sup>19</sup>

<sup>19</sup> This decision also notes that the legislation makes no explicit provisions for orders concerning the day-to-day care, welfare and development of a child (¶ 51). Orders for joint parental responsibility, as were made under the *Reform Act 1995*, are no longer provided for in the legislation (*Newlands and Newlands* [2007] FamCA 168).

Issues relating to parental responsibility have been the subject of numerous decisions that indicate a range of complex aspects to the way in which these provisions have been expressed. A key question is what form parental responsibility takes, and how orders for parental responsibility may be expressed, in circumstances where the presumption of equal shared parental responsibility is not applied or is rebutted and has been the subject of developing case law since the implementation of amendments. An examination of the cases reveals a variety of approaches to the question of what orders regarding parental responsibility may be made in such circumstances. In a technical sense, different interpretations are evident among different decision-makers, but the philosophical and practical approach is summarised in this comment of Thackray CJ:

The fact the presumption does not apply is by no means the end of the matter. Judges in this Court have long taken the view that it is generally appropriate for both parents to have an equal say in major decisions about their children.<sup>20</sup>

The general trend in decisions is for orders to be made for shared parental responsibility (except in extreme cases, see below), sometimes with exceptions for particular issues. The legal pathway that is followed varies, but the reasoning commonly suggests that, notwithstanding the non-application or rebuttal of the presumption, shared parental responsibility is considered to be in children's best interests in the majority of cases.<sup>21</sup>

As discussed in Chapter 9, the "reasonable grounds" test for the non-application of the presumption (s61DA(2)) is not a high standard of proof, and a formal finding on the evidence is not necessary (see, for example, *Hunt and Theophane* [2008] FamCA 956 ¶ 7). However, this is not always the approach decision-makers take, and the framing of this provision has been described by one judge as "a curious and perhaps unhelpful form of legislative drafting ... encountered usually in the criminal jurisdiction".<sup>22</sup>

In some instances, the treatment of the presumption is unclear and a full court of the Family Court accepted an argument, based on pre-reform case law,<sup>23</sup> that "it is sufficient if, as occurred in the present case, the substance of the issue is considered and dealt with in a way that permits an appellate court to discern either expressly or by implication the path by which the result has been reached" (*Marsden and Winch* (No 3) [2007] FamCA 1364 ¶ 73). In other instances, explicit consideration is given to the presumption and the strength of evidence upon determinations as to its rebuttal or non-application may be made (eg *Bookburst and Bookburst* [2009] FamCA 6, ¶ 141–159). In *John and Chris* [2007] FamCA 393, Benjamin J suggested the court should make a declaration dealing with the question of whether the presumption applied, had not been applied, or had been rebutted (¶ 25).

Further, while the legislation involves a distinction between the non-application of the presumption (s61DA(2)) and the rebuttal of the presumption on best interests grounds (s61DA(4)), this distinction seems to be blurred in day-to-day legal practice, with judgments dealing with the rebuttal of the presumption in a range of circumstances (e.g., *Runcorn and Raine* (2008) FamCA 837). There are cases where the presumption is not applied or rebutted on the grounds of family violence, but orders for shared parental responsibility are deemed to be in the children's best interests (e.g., *Goode and Goode* (No 2) [2007] FamCA 315. This is the approach endorsed by Kay J, in the appellate decision of *Kennedy and Kennedy* [2007] FamCA 1221 ¶ 38, where it was held that when the presumption of equal shared parental responsibility is deemed not to apply, the starting point for the court's consideration is s61C—the provision that automatically vests each parent with parental responsibility, regardless of relationship status (¶ 38)—with orders to be made subject to the best interests criterion.

The following discussion refers to a number of cases to demonstrate the variety of approaches taken. A key point is that while the presumption may be not applied or rebutted, orders for

<sup>20</sup> *W and W* [2006] FCWA 103 ¶ 23.

<sup>21</sup> In *Hyland and Starke* [2008] FMCAfam 1035, Reithmuller FM made orders for equal shared parental responsibility on the basis of a best interests analysis where the father had admitted family violence (¶ 93), having found the presumption did not apply (¶ 15). In *Thorn and Jennings* [2008] FMCAfam 1330, the presumption was held to be rebutted on the basis of family violence (the father had criminal convictions for assaulting the mother: ¶ 63).

<sup>22</sup> *Bookburst and Bookburst* [2009] FamCA 6, ¶ 156.

<sup>23</sup> *Bennett and Bennett* (1991) FLC 92–191. This case did not deal with a presumption, but rather more generally with the question of adequacy of reasons.

equal shared parental responsibility are at times nonetheless made.<sup>24</sup> The circumstances in which parental responsibility is removed are usually quite extreme in a factual sense, often involving high levels of violence, conflict, mental health issues or substance misuse, or in some cases, the failure of a parent to respond to legal proceedings. These points are illustrated by the cases outlined in the following sections. The purpose of the discussion of these cases is to illustrate the application of the law through examples of first instance judgments.

The approach of making orders for equal shared parental responsibility despite a finding that the presumption did not apply, is demonstrated in a decision of Ryan J, made on an interim basis.<sup>25</sup> This decision arose from proceedings that occurred as a result of the appeal decision discussed earlier, *Goode and Goode* (2006) FLC 93–286, where the appeal was allowed and the matter remitted for re-hearing. In the subsequent proceedings, *Goode and Goode* (No 2), Ryan J held that the presumption did not apply due to the history of family violence. However, Her Honour held it was nonetheless in the children’s interests that they see their parents working together and that there be an interim order for shared responsibility. Her Honour suggested that had such an order been in place previously, it may have averted disputes over aspects of parental responsibility because “the mother would have better understood her obligation to discuss [matters concerning the children] with the father” (¶ 62). Although orders for shared parental responsibility were made, the father’s interim application for equal time was not successful, as Ryan J held that the proposal was “contraindicated by the potential disorganisation his proposal will bring to the children’s lives during school term” (¶ 63).

In the decision of *Kennedy and Kennedy* [2007] FamCA 1221, Kay J of the FCoA, sitting as a single appellate judge, upheld an appeal against orders made by a federal magistrate for the parents to exercise equal shared parental responsibility in circumstances where the father had admitted making threats to kill the mother, destroying her property and engaging in other threatening behaviour. In addition to orders for equal shared parental responsibility, the federal magistrate had ordered that the two children of the relationship, aged 7 and 3, live with each parent on a week-about basis. Kay J observed that “there was an aura of violence pervading the [appeal] proceedings” (¶ 40), and held that s61DA(1) (the presumption) should not have been applied, nor should s65DAA (time arrangements where the presumption is applied). In exercising discretion to remake the orders (rather than remitting the matter for re-hearing), he made orders for the children to be cared for, consistent with arrangements pre-dating the federal magistrate’s orders.

In *Gulloway and Tarneit* [2008] FamCA 412, the following factual findings were relevant. The father was a drug addict and had a criminal history. He had been violent to the mother during the relationship. He had had no direct contact with the child, aged 5, since the previous year. The mother had been happily repartnered for several years and there was a child from that new relationship. After the father instituted proceedings in the Family Court, he was ordered to undergo psychiatric assessment, which revealed him to be suffering from a personality disorder. As a result, supervised time at a contact centre was ordered, although the father failed to attend the sessions. He also failed to attend the court hearings. At the time of the final hearing, he sent a message to the court that he was unable to attend as he was currently in jail, but provided no further details.

Cronin J found that the presumption was rebutted, rather than not applied, not only because of the violence but also because the father had shown himself unable to have a meaningful relationship with his son, primarily by not attending the contact centre visits. Final orders were made that the mother have sole parental responsibility and that the father have no time with the child.<sup>26</sup>

The decision in *Hampton and Anor & Pepper* [2008] FamCA 791 involved a 12-year-old child whose biological father was living in the US. It appeared the father had had no contact with his child for some years and the litigation had been ongoing for some time. After the father ceased to be actively involved in the litigation, in failing to respond to served documents and his lawyers ceasing to act, the judge made final orders vesting shared parental responsibility in the mother and her new partner. It was held that the presumption was rebutted on the basis that its application would not be in the child’s best interests and there was no meaningful relationship to be sustained (¶ 15).

<sup>24</sup> For example, *Goode and Goode* (No 2) [2007] FamCA 315.

<sup>25</sup> Decision-makers have the discretion not to apply the presumption at interim level: s61DA(3).

<sup>26</sup> For another such example, see: *Grover and Rathdowne* [2008] FamCA 1143.

In *Thorpe and McGregor* [2008] FamCA 927, the presumption was held to be not applicable on the grounds of family violence. Further orders provided for there to be no contact between the three children (aged 12, 10 and 8) and the father. The factual background of this matter, dealt with in *Magellan*, was a history of violence so extensive that the mother and two younger children had an indefinite state protection order against the father and that the state child protection authorities had substantiated concerns that the children were subject to emotional abuse through witnessing their father's violence against their mother. The family consultant involved in the case gave evidence that the father used the children as objects to cause harm to the wife and that he had openly denigrated the mother in the presence of the children. The father's argument was that there had been no violence and no harm caused to the children. The orders made also provided for the children to undergo counselling.

In *Doolan and Nixon* [2008] FamCA 946, orders were made for a 9-year-old child to have no face-to-face contact with his father and for the mother to have sole parental responsibility. Watts J found the presumption to be rebutted on best interests grounds on the basis of factual findings concerning the father's alcoholism and his violent and abusive behaviour. Evidence from the family consultant indicated the child found his father's behaviour difficult to deal with, as the father was abusive and "not nice" when intoxicated and the child felt unsafe in his presence, particularly after witnessing an assault by the father on another family member. The mother had tried to encourage the boy to attend contact with his father (this was substantiated by the family consultant and the contact centre) but the boy had started to resent the mother for making him attend contact, despite his concerns about his safety, and questioned whether she loved him. Watts J found that there was no meaningful relationship between the boy and his father as the father had failed to modify his behaviour or take action to make the boy feel safe.

In the first instance FCoWA decision of *W and W* ([2006] FCWA 103, Thackray CJ held the presumption was not applicable because there was evidence of family violence. In relation to the question of parental responsibility, outside the context of the presumption, he said: "the fact there has been family violence is clearly an important factor in determining whether it is appropriate for the parents to share parental responsibility; however, the nature of the violence needs to be assessed to determine whether it should have any impact" (¶ 23).

According to Thackray J's analysis, the history of family violence of itself was not such as "to have any real impact on the allocation of parental responsibility" (¶ 24). There were, however, other issues that supported the mother's argument in favour of sole parental responsibility, notably a poor relationship where communication was by email, in which the father "abuse[d], annoy[ed] and denigrate[d], the mother" (¶ 25). His Honour concluded that the orders for shared parental responsibility requested by the father would simply provide: "an ongoing forum in which to denigrate and belittle [Mrs W]. [Mr W] treats the mother of his children with utter contempt and considers her opinions to be worthless" (¶ 26). Accordingly, he allocated sole parental responsibility to the mother. He nonetheless encouraged her to seek the father's input, but noted this was a matter entirely for her (¶ 26).

In the decision of *Maluka and Maluka* [2009] FamCA 647, a factual history involving extreme, long-term violence and abuse was deemed to warrant the non-application of the presumption and the making of orders for sole parental responsibility. In addition, orders were made permitting the mother to live wherever she wanted to and restraining the father from living with, spending time with or communicating with the children (aged 7 and 5). Benjamin J made the following factual finding (among others):

I am satisfied that throughout the time the parties lived together the father on regular occasions beat the mother, including at time in the presence of the children and children were significantly affected by this. I accept the mother's evidence that from time to time the children were screaming as the mother was being beaten by the father. I am also satisfied that the father was aware the children were present and had no insight (and continues to have no insight) into the impact of his violence and abuse upon the mother and consequently upon them (¶ 47).

Other relevant factual findings were that the father was facing criminal proceedings arising from breaches of intervention orders taken out against him by the mother and that he had used one of the children as a "human shield" to protect himself when being attacked by someone wielding a tomahawk. The father's application sought equal shared parental responsibility, and that the children spend time with him every second weekend, on alternate Wednesday evenings and for half school holidays.

In circumstances where parents are in conflict over decision-making about aspects of parental responsibility, courts have the discretion to allocate some aspects of decision-making power to one parent rather than the other (see ss61C, s61D). The reported cases<sup>27</sup> indicate that this is an option frequently used by courts where parents are in conflict. A variety of approaches is evident in tailoring orders. In numerous cases, there have been decisions made where the parties are to share responsibility for some long-term decisions but not for others. In other cases, one party will hold the final say. In others, one party is given sole responsibility for a period of time, after which both parties are to have shared equal responsibility. Some orders also impose an obligation on the parent with decision-making power to consult the other parent by taking particular steps, but then provide the decision-maker with the ultimate say.

This is an area where the exercise of discretion in the individual circumstances of the case is very clearly evident, with judges balancing the strong philosophical concept of shared parental responsibility in the Act against a variety of other considerations, including the need for decision-making power to be allocated on a workable basis between parties in conflict, and the need to observe the requirement in the Act of making decisions that are least likely to lead to further proceedings (s60CC(3)(I)). The dilemmas raised in the course of this consideration are reflected in this comment of Cronin J, in a case involving intense conflict between the parents over the day-to-day management of issues relating to their children:<sup>28</sup>

There comes a point in time where the Court cannot govern the daily lives of parents. In relation to significant issues however such as health and education, these children need an opportunity to have those issues determined quickly and decisively. (¶ 235)

In this case, Cronin J ordered that the mother have sole responsibility in the areas of education and health until 2011, but that otherwise the parties have shared responsibility. In *Arman and Arman* [2008] FamCA 923, Cronin J similarly made a “split” responsibility order by awarding the mother sole responsibility in all areas other than cultural matters and religion.

## 15.5 Time arrangements

In relation to arrangements for time spent between the child and the parent, a similarly discretionary approach is indicated by the cases, with a wide variety of arrangements ordered, depending on the factual circumstances. As explained earlier, the consequence of the application of the presumption of equal shared parental responsibility and the making of orders for equal shared parental responsibility is an obligation on the court to consider making orders for the child to spend equal (s65DAA(1)) or substantial and significant time (s65DAA(2)) with each parent. Substantial and significant time arrangements are defined in the legislation (s65DAA(3)) as occurring “only if”:

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

In considering orders for substantial and significant time, courts are required to consider whether proposed arrangements are “reasonably practicable” (s65DAA(5)). This involves considering:

- how far the parents live from each other (s65DAA(5)(a));
- the parents’ current and future capacity to implement the arrangement (s65DAA(5)(b));
- their current and future capacity to communicate and resolve difficulties (s65DAA(5)(c));

<sup>27</sup> See Chapter 9 for a discussion of patterns in orders for parental responsibility.

<sup>28</sup> *Loddington and Derrington* (No 2) [2008] FamCA 925.

- the impact that an arrangement of that kind would have on the child (s65DAA(d)); and
- any other matter as the court considers relevant (s65DAA(5)(e)).

In *Eddington and Eddington* (No 2) [2007] FamCA 1299, the full court (Finn, Coleman and Collier JJ) held that “orders made for time spent cannot satisfy the requirements of substantial and significant time unless they literally meet all the requirements” of s65DAA(3). Further, whether arrangements met the definition would “vary from case to case” with what “constitutes substantial and significant time in one factual context” not meeting the definition in another (¶ 54).

The legislation is silent as to what time arrangements should or may be considered where the presumption is not applied, and *Goode and Goode* (2006) FLC 93\_286 indicates that this matter should be determined according to the discretionary best interests principle. The following summaries demonstrate the variety of approaches that are taken, with contact being ceased or curtailed only in extreme factual circumstances, and courts making arrangements for equal or substantial and significant amounts of time even where the relationship between the parents is poor. The extent to which arrangements reflect the requirements of s65DAA depend upon the factual circumstances of the case and the way in which individual decision-makers approach the question of discretion. The cases described in the following sections provide examples to illustrate these points.

### 15.5.1 Equal time

*M and H* [2008] FCWA 16 provides an example of equal time arrangements being ordered for a 6-year-old girl. In light of evidence suggesting the parties had a poor relationship and communication difficulties, Thackray CJ held that the difficulties posed by these issues would be no different in an equal time arrangement than in the existing arrangement involving the child “moving to and fro between the homes of her parents on a number of occasions each fortnight” (¶ 153). His Honour noted that he had considered the implications of the arrangements for the child:

In considering the impact of an equal shared care arrangement on [the child], I do not discount the difficulties associated with a child not having one permanent base which she can call “home”. There would be very few adults who would relish such a disruptive arrangement, which could potentially last for a decade or more. However, disadvantages associated with any arrangement need to be weighed against the advantages. In my view the fact there may be some adverse impact upon [the child] of a week about arrangement does not mean that the arrangement is not reasonably practicable within the meaning of the legislation. (¶ 155)

In light of concerns about how the loss of her primary caregiver status would affect the mother, Thackray CJ ordered that the orders be delayed several months so that the mother could obtain counselling to come to terms with no longer being the primary caregiver.

In the case of *Hibbins and Hibbins* [2008] FMCAfam 228, Baumann FM made orders maintaining a week-about arrangement that had been in place for more than two years and appeared to be working well for the child. The parents were found to be in “chronic conflict” and to have exposed the child (aged 9) to the conflict and involved her in the litigation (she had been seen by a family consultant three times). The mother’s application to reduce contact by introducing an arrangement that would mean the child was with her for nine nights and the father for five in a two-week cycle was rejected and the father’s proposal to maintain the week-about arrangement was upheld. In considering the child’s wellbeing, Baumann FM made the following observation: It is a consistent amazement to me that there are cases that come before the Court where, despite chronic conflict and dysfunction between the parents; exposure by a child overly and inappropriately to conflict and to the litigation; and demonstrated inability of the parents to consistently remain child focused and insightful; the child still presents as happy, securely attached and generally well loved and cared for by those parents. (¶ 1)

Baumann FM held that the primary consideration relating to the need to protect children from harm was relevant in the case, conceptualising the parents’ involvement of the child in their conflict as a relevant issue in this context. In considering whether the child manifested any damage as a result of the situation he concluded that:

In circumstances where the child has been well aware of the conflict (she has been interviewed by report writers on at least three separate occasions) the lack of detectable transference of negative views held by a parent to T suggests the parents have disguised some of their negative views. Alternatively she shows a maturity beyond her years and is capable of seeing some of her parents' silliness for what it is. (¶ 45)

## 15.5.2 Substantial and significant time arrangements

*Tilney and Liatos* (No 3) [2007] FMCAfam 1016 involved a dispute over the care of a 3-year-old boy whose mother, the court (Neville FM) found, had a long history of "intermittent" drug-taking and had contracted hepatitis C. The boy had been cared for in a shared arrangement between the parents, but the parents' relationship had deteriorated as a result of the father's discovery of the mother's previously undisclosed drug addiction. The father had applied for the child to spend very limited time with the mother and the mother sought continuation of the shared care arrangement, arguing that she was overcoming her drug addiction. Neville FM made a series of orders that allowed for a week-about arrangement to be instituted three years after the proceedings if annual hair follicle drug tests proved the mother had been free of drugs for the three-year period. He also made orders applying the equal shared parental responsibility presumption, but these were contingent on the mother remaining drug-free and would be revoked if a twice weekly regime of drug testing revealed the mother had resumed taking drugs. Initially, a time regime based on a fortnightly cycle was allowed for in the orders, with the child spending four days between 9 am and 5 pm with the mother in one week and a weekend from 5 pm Friday to 5 pm Sunday in the second week. This time was to be supervised by either of the mother's parents or another person agreed to by the parents. The time orders were contingent on the mother remaining drug-free and a positive drug test would mean the time orders would cease operation until she returned clear test results for three consecutive weeks. In light of the circumstances of the case, Neville FM held that the child's best interests required that the orders should reflect the requirements of s65DAA(2) (substantial and significant time) rather than s65DAA(1) (equal time).

In *Williams and Robb* [2009] FamCA 316, Burr J made orders for a 12-year-old girl to spend pupil-free days and public holidays with her father, in addition to the pre-existing arrangements for her to spend alternate weekends with her father. In making the orders, His Honour emphasised the role of s65DAA and its requirement that courts consider equal or substantial and significant time arrangements. In rejecting the mother's argument against the extension of time (she argued it would restrict the girl's ability to make her own social arrangements), Burr J commented that:

it is appropriate to extend the husband's time to include those pupil free days, not just on the basis that it represents the child's best interests to do so, but because in my view, the legislation obliges me to consider such additional time being spent with the husband ... In my view, those pupil free days afford an opportunity in a very limited way to increase that substantial and significant time that the husband is able to spend with her. (¶ 8)

In recognition of the girl's wishes to maximise her involvement in extra-curricular activities, orders were also made that the father is "to use his best endeavours to reasonably ensure [the child's] attendance at all of her extra curricular activities as accord with [the child's] wishes". (¶ 17)

In *Thorn and Jennings* [2008] FMCAfam 1330, the court made orders for two children, aged 10 and 12, to spend time with their father from Wednesday to Monday in alternate weeks and half the school holidays. Sole parental responsibility was allocated to the mother. A key issue was the father's violence towards the mother (including in the presence of the children) and others. He had a criminal conviction for assault of the mother. The father was seeking a week-about arrangement and sole parental responsibility. The mother was seeking sole parental responsibility and for the children to spend time with the father from Friday to Monday every second weekend and for part of the school holidays. There was disagreement about which school the children should attend and the sole parental responsibility outcome allowed this decision to be made by the mother. The federal magistrate made this finding:

I am satisfied that the father has in the past been unable to avoid violence and has been a perpetrator of family violence on his partners. Further he has attempted to minimise the

seriousness of a number of these incidents to the court. In deciding this matter I intend to give much weight to this history of violence and the father's attitude. (¶ 43)

However, it was also found that the children had a loving relationship with their father, who had demonstrated his commitment to parenthood through involvement with the children's extra-curricular activities.

### 15.5.3 Restricted time arrangements

The decisions demonstrate that orders for restricted or no time spent are made only in extreme factual circumstances, involving all or some of the same concerns relevant to parental responsibility, such as family violence, concerns about child abuse, substance misuse, and mental health problems. The decisions summarised below indicate that the threshold for contact to be curtailed or ceased is high, with behaviour representing an unacceptable risk of harm to the child (including in an emotional/psychological sense) being established on the facts.

In *Arman and Arman* [2008] FamCA 923, Cronin J ordered that it was in the best interests of the children that time with the father be limited to unsupervised day-only time plus telephone contact. In this case, the father repeatedly ignored court orders (particularly with respect to drinking heavily at night while with the children), continued to denigrate the mother in front of the children and refused to accept responsibility for the impact of his actions on the children. Any view of an expert, including the family report writer, which was inconsistent with his own views was treated by him as unacceptable and therefore to be ignored. This included the finding that one of the children was starting to demonstrate overt symptoms of trauma and required immediate professional help.

In *Wadmal and Amrita* (No 2) [2008] FamCA 1062, Brown J limited the father's time with a 2-year-old girl to supervised time at a contact centre (rather than supervised by a relative). Relevant factual findings were that the father, "behind a veneer of empathetic charm" (¶ 112), had "the capacity for explosive physical and verbal violence" (¶ 112) and had subjected the mother to physical abuse. Expert evidence had indicated he may suffer from a psychopathic personality disorder. Notwithstanding this, the child was found to have "a warm loving relationship" (¶ 127) with both her mother and father. In balancing safety concerns about the father's behaviour, including a concern that he wanted to have the child circumcised for cultural reasons, against the potential harm that could be done from the removal of the relationship, Brown J observed that a "court must be very cautious about making orders which eliminate contact between a parent and child" (¶ 125). This caution underpinned the decision to maintain supervised contact and allocate sole parental responsibility to the mother.

## 15.6 Factual considerations: s60CC(3)(c)

Data from the file analysis discussed earlier indicate that the so-called "friendly parent" criterion in s60CC(3)(c), which requires the court to consider the extent to which a parent has facilitated the other parent's relationship with the child, is frequently raised in the parties' material. The concept that a parent should facilitate the involvement of the other parent in the child's life has long been influential in family law decision-making (Kaspiew, 2007), but the explicit inclusion of this principle in the legislation has led some commentators to suggest that litigants will be discouraged from raising concerns about their child's wellbeing in the care of the other parent (Rathus, 2007). The following discussion demonstrates how s60CC(3)(c) is being applied in case law. Again, a significant variation is evident in the approaches taken by different judges, but it is clear that this issue is given significant emphasis by decision-makers, such that it is a potentially determinative factor in decision-making in the context of the emphasis on "meaningful involvement" with each parent being in a child's best interests. In the context of this principle, some decision-makers view behaviour that impedes or fails to facilitate to a sufficient extent the other parent's relationship with the child as a form of harm and/or emotional abuse. In some cases, such findings are held to warrant orders being made for the residence of the children to change and, in some circumstances, restrictions being placed on spending time with the parent whose behaviour is inconsistent with s60CC(3)(c).<sup>29</sup> The following case summaries outline the approaches evident in decision-making for this issue.

<sup>29</sup> See, for example, *S and H* [2008] FCWA 23; *Edgar and Reagan* [2008] FMCAfam 46.

In *Irish and Michelle* [2009] FamCA 66, Benjamin J made orders for two children (aged 7 and 9) to move interstate to live with their father. This was in light of findings that the mother was unable to assist the older child to overcome her feelings of trauma at the breakdown of her parents' relationship, largely as a result of her own feelings about the separation, leading to the child expressing opposition to spending time with the father and his new partner. Although expert evidence suggested that improvements in the mother's attitude and behaviour had occurred by the time of trial and she had adopted strategies to assist the child, who was described as "strong willed", to have a positive relationship with her father, the judge doubted these improvements would continue after the trial finished, concluding that: "sadly this is a case where the children may be at unacceptable risk of psychological harm if they remain with their mother as their primary carer" (¶ 218). The children's views were that they wished to remain resident with their mother, a position consistent with the submissions of the ICL and the recommendation of the family consultant. The court orders provided for the parents to have equal shared parental responsibility, the children to live with their father, his new partner and her daughter interstate and the children to spend time with their mother in school holidays and one weekend per month.

In the first instance Family Court decision of *Bain and Stewart* (No 6) [2008] FamCA 1135, Cronin J made final orders that the child be removed from the mother's care and instead be placed permanently with the father. Sole parental responsibility was given to the father. Time with the mother was to be on a gradually increasing and supervised basis. These orders were made after interim orders ten months earlier by Guest J placed the child with the father. Further interim orders by Cronin J four months later ceased all communication between the child and the mother in order to ascertain how the child would cope. The social science evidence indicated the child not only thrived but stabilised and was no longer displaying the behavioural problems he had earlier shown. The judgment indicated these orders were made reluctantly and only after the mother had been provided by the court with numerous opportunities over a three-year period to change her stance as a "no contact" parent. She had failed and the child had as a result developed behavioural problems.

*Runcorn and Raine* [2008] FamCA 837 is another first instance Family Court decision where the children were permanently removed from living with their mother and instead placed with their father as a result of the mother's attitude towards the father and his role in the children's lives. The mother had several children with several fathers and sought to exclude the fathers from the children's lives. She would not allow any of the children to use their father's surnames, constantly belittled the fathers to the children and made allegations of abuse. When the mother was psychiatrically assessed, she was found to be most likely suffering from a mixed personality disorder, with both histrionic and borderline features. Murphy J held:

I find that the children are at risk of psychological or emotional harm if exposed to significant care by their mother. I find that she sees no meaningful role for the father in the children's lives and it is highly likely that, not only will she not promote a meaningful relationship between them and their father, but will actively seek to undermine that relationship. (¶ 289)

Other cases demonstrate the application of s60CC(3)(c) in circumstances where fathers have been found not to support relationships between mothers and children to a sufficient extent.<sup>30</sup> An example is *Vile and Prabszic* [2009] FamCA 25, a first instance FCoA decision in which Watts J ordered that a 7-year-old child be removed from his father's primary care to that of his mother. Sole parental responsibility was allocated to the mother, and she had an obligation to attempt to "reasonably consult" with the father prior to making decisions of a long-term nature. Initially, the child was to spend time with the father on a supervised basis and the orders provided for non-supervised time to be phased in over a nine-month period. The relevant factual findings were that the mother had suffered a significant mental illness following the parties' separation as a result of the violence and other treatment she had suffered at the hands of the father and his mother during the relationship. Psychiatric examination of the parties revealed the mother to be fully recovered with an excellent prognosis. She demonstrated insight into her illness as well as its impact on the child. She had rebuilt her relationship with the child in an appropriate manner, assisted by professionals. The father, however, was assessed as having a narcissistic

<sup>30</sup> See also: *Sawyer and Reid* [2009] FamCAFC 33. In that case, the Full Court upheld orders placing the children primarily with the mother as a result of findings that the father's violence had impacted on the children's ability to have a meaningful relationship with either parent.

personality with over-valued ideas, or an encapsulated delusion that the mother remained ill, unsafe and should have minimal involvement in the child's life.

Watts J accepted the mother's argument that it would be "more likely for the child to have a meaningful relationship with both his parents if he lives with his mother than if he lives with his father" (¶ 80). His Honour further found that in his father's care, "there is a prospect that the child could be subjected to the risk of abuse in the wider sense of that term; that is trauma and psychological injury [i.e., damage to his relationship with his mother] in the event that he continues to be primarily resident with his father" (¶ 88).

In *Durand and Morel* [2009] FMCAfam 22, Roberts FM expressed concern about the mother's ability to facilitate a 4-year-old child's relationship with her father on the basis of evidence from staff at a contact centre and the Family Report writer. The contact centre staff had indicated that the mother had prolonged goodbyes with the child instead of saying goodbye and leaving quickly. Roberts FM referred to affidavit evidence of the mother in relation to family violence prior to separation, noting that the father denied violence but admitted heated arguments in the presence of the child. Finding violence was no longer an issue, the federal magistrate observed that the mother's agreement to equal shared parental responsibility was an encouraging sign in light of concerns about her ability to facilitate the child's relationship with the father:

Because it is in the interests of the child for the parties to move forward and put the difficulties of the past behind them, I have deliberately not made a finding about whether the mother's actions at handovers of the child were intentional or not. However, I can say that if I had come to a conclusion that her actions were intentional in order to pursue some agenda to exclude the father from the child's life, I would have had no hesitation in concluding that such behaviour was emotional child abuse on her part. That is because the evidence is clear that the child has become stressed at handovers and the only conclusion to be drawn would have been that the mother had deliberately caused stress to her child in order to pursue a personal agenda. (¶ 57)

The father's application for the child to spend time with him from Thursday evening to Sunday evening every second week, plus Thursday nights in the alternate week was successful. The mother had agreed to Friday to Sunday evenings in alternate weeks. There was also disagreement over school holiday contact in summer holidays and the orders in relation to this largely reflected the father's application.

## 15.7 Summary

This section has discussed case law arising from the implementation of the *SPR Act 2006* for the purpose of examining the legal context for the empirical findings arising from this evaluation. A key point to note is the discretionary nature of decision-making in the family law context and the way that jurisprudence develops in the context of matters that are litigated and, in some instances, appealed. The significance of this issue is that examination of judgments sheds light on the nature of matters that are litigated and the way in which the law is applied in these contexts. The way it is applied and interpreted in a discretionary decision-making context adds to our understanding of how the legislation is operating in court-based practice. The wider question of what impact it has had on matters that do not proceed to court and are resolved through discussion and negotiation has been examined in Chapter 9. The discussion of the case law adds to the insights presented in that chapter by illustrating the outcomes and approaches in reported decisions that are influential in informing family law system professionals' views of how the legislation is operating and, perhaps more importantly, influence the advice they give to clients about what their position under the law might be. Further, analysis of cases and interpretations of the legislation add to the perspectives of family law system professionals discussed in Section 15.1, particularly in relation to the qualitative insights into the complexity of the legislation and the variation in approaches that are evident.

Overall, the discussion of the cases presented in this chapter illustrates some key themes that are consistent with insights based on qualitative data (interviews and focus groups with family law system professionals) and quantitative data (Family Lawyers Survey 2008). First, as the discussion of the full court's decision in *Goode and Goode* indicates, the legislation is particularly complicated, with an eleven-step decision-making pathway outlined in that decision, even for interim determinations. This complexity is further illustrated by the discussion in relation to

parental responsibility and the application of the presumption, with a variety of approaches manifested in the cases discussed.

Second, the discussion of discretionary approaches to decision-making about “best interests” and the individualised nature of case-by-case decision-making illustrates the point that the s60CA (best interests) discretion results in a wide variety of arrangements being ordered, depending on the circumstances of the case. This discretionary application of the best interests principle contrasts with the understandings of many parents, discussed in Chapter 9, that the Act mandates equal time arrangements. It also adds to the understanding of lawyers’ concerns about whether the presumption is the best legislative expression for the philosophy of shared parental responsibility. The third point arises from two parts of the discussion in this chapter: decision-making concerning the two primary considerations and the application of the so-called “friendly parent” criterion in the s60CC(3) list of additional considerations (s60CC(3)(c)). The strength of emphasis in decision-making on the need to maintain meaningful relationships between parents and children is illustrated in the way in which behaviour that reflects non-facilitation of the other parent’s relationship is conceptualised in some decisions as a form of emotional abuse, justifying a change of residence and, in some cases, curtailment of the child’s relationship with the other parent.