Australian Shared Parental Responsibility Law

By Jacqueline Campbell and Maria Kourtis

Jeremy Morley reported in the May 2008 American Bar Association International Family Law Committee newsletter about problems with the presumption of equal shared parental responsibility which commenced in Australia in 2006. Under the 2006 amendments, if the presumption is not rebutted, the court must consider whether it is in the child's best interests and reasonably practicable for the child to spend equal time with each of the parents. The amendments were introduced largely as a result of strong pressure by men's groups. This pressure also resulted in significant changes in the child support formula (and therefore reductions).

The research which should have directed the previous Government in deciding whether to introduce a shared parental responsibility presumption is now being more closely examined, updated by social scientists and used as evidence in court. Recently, we ran a trial involving a child about whom interim orders for shared care had been made. The father sought 50/50 care both at the interim hearing and the final hearing. The interim orders provided that the child spent 5 nights each fortnight with the father, broken up so that there were 8 changes each fortnight. The child was only 16 months old at the time the interim orders were made. A second child, conceived just prior to the separation, had since been born and the father sought equal shared care of that child within a very short time frame.

The mother reported that the older child was overly clingy, unsettled and distressed when returned to the mother's care. The father reported no such behaviors while the child was with him.

In Australian parenting disputes a family report is often prepared by a child psychologist or similarly qualified professional. The report gives recommendations to resolve the dispute. Part way through the lengthy trial, the family report writer told the parties' legal representatives that the child's behaviour was consistent with stress and an indicator that the parenting regime was not beneficial to the child. The report writer recommended that the child spend more time with the mother, and that the father's time be re-structured so that it occurred less frequently, say only weekly, but for a longer period of time.

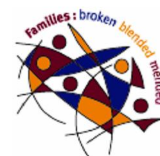
The family report writer was influenced by the high level of conflict between the parties, the deterioration in the older child's behavior in the mother's care (but not reported by the father) and the limited communication and trust between the parents. The Court, after hearing the evidence, made interim orders reducing the father's time with the older child by one night a week, and consolidating the father's time into a single block. The younger child's time with the father was increased slightly, and was scheduled to take place regularly throughout the week.

Our experience is that shared care arrangements are often agreed to by parties under the shadow of the new legislation in the mandatory pre-court family dispute resolution process or shortly after proceedings are issued. Once in place it can be very hard to change the arrangements and many parents don't have the financial or emotional strength to continue such risky litigation. Legal aid funding is only available to parties with very limited incomes and few assets. Unless there are allegations of family violence, child abuse, drug use etc, the merit test is a further hurdle.

At the recent National Family Law Conference in April 2008 in Adelaide, an excellent paper was presented by Clinical Child Psychologist and Family Therapist, Dr. Jennifer McIntosh and a former Family Court Judge, the Honorable Richard Chisolm about the impact on children of a shared parenting regime in high conflict families.

Federal Magistrate Tom Altobelli provided commentary on the paper. He referred at length to the research by Janet Johnston and in particular to the article "Children's Adjustment in Sole Custody compared to Joint Custody Families and Principles for Custody Decision Making" (1995) *Family and Conciliation Courts Review*, 33, pp 415-425. He concluded that "The law is not the problem here, the evidence is."

The preliminary research on the 2006 amendments shows about half of the interim shared care orders are made by consent. Most interim orders are made without the parties, their legal practitioners and the court having the benefit of a family report. Limited evidence from the parties is before the court by way of affidavits only. There is no cross-examination of the parties at the interim stage.



After two years, the impact of the changes are being assessed and there is a move by the courts, lawyers and family counselors to interpret the law in a way which more closely follows the Full Court's pronouncement in the 2006 case of *Goode*:

> *"In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable."*

The precise impact of the recent research on orders made at the interim stage is unknown. However, Courts and legal practitioners are able to invite the Court to consider the research when making interim orders in the absence of professional evidence. Anecdotally, there appears to be more awareness by the Court and legal practitioners of the impact on children of making interim orders for shared care, particularly where there is a high level of conflict between the parents.

Jacqueline Campbell and Maria Kourtis practice in Melbourne, Australia, at Forte Family Lawyers. For more information, please visit their website at www.fortefamilylawyers.com.au.

Originally published by the American Bar Association International Family Law Committee Newsletter . October 2008.