



a Wolters Kluwer business

BACK

Print

Premium News

Countdown to new Family Law Regime

Wednesday, 28 June, 2006

On 1 July significant new laws concerning children proceedings, along with changes to the regulations and rules, come into force. This article provides a timely look at the main changes, and how CCH will guide practitioners through the upheaval.

Overview of the changes

The following extracts are from the Introduction to the upcoming 25th edition of CCH's *Family Law Act 1975 with Regulations and Rules*, written by Jacqueline Campbell, Partner at Forte Family Lawyers, Melbourne and CCH consultant author.

The Explanatory Memorandum to the Bill said that the "initiatives in the Bill represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards cooperative parenting".

It seems likely that it will be easier for a contact parent to obtain more time with the children than in the past. Then again, the 1996 reforms trumpeted great changes which it appears were happening in practice anyway. The extent to which the 2006 reforms are ahead of changes in society with respect to the sharing of parental responsibility and time with a child, is uncertain and will undoubtedly remain so for some time.

From 1 July a child no longer "resides" with a parent but lives with a parent. The time with the other parent is no longer called "contact", but is time spent with a child or communicating with a child.

Two new objects were added to the two in the previous s 60B. The new objects provide that the best interests of the children are met by:

- (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child, and
- (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The best interests of the child remains the paramount consideration in making a parenting order. However, if there are no family violence or child abuse issues, the benefit to the child of having a meaningful relationship with both parents is the most significant factor that the court must take into account when determining "best interests" (s 60CC(1) and (2)).

In determining what is in a child's best interests, there are both primary considerations and secondary considerations.

The primary considerations are in s 60CC(2), which replaces s 68F(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.

The additional considerations are in s 60CC(3). This section refers to “views” rather than “wishes” of the children. The references to “other persons” in s 68F(2) are expanded and expressly refer to grandparents and other relatives of the child.

One of the new considerations is “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” (s 60CC3(c)).

The principles for conducting child related proceedings are set out in s 69ZN:

- The court must consider the needs of the child concerned and the impact that the conduct of proceedings may have on the child in determining the conduct of the proceedings
- The court must actively direct, control and manage the conduct of the proceedings
- The proceedings must be conducted in a way that will safeguard:
 - the child concerned against family violence, child abuse and child neglect, and
 - the parties to the proceedings against family violence
- The proceedings must, as far as possible, be conducted in a way that will promote cooperative and child-focused parenting by the parties
- The proceedings must be conducted without undue delay and with as little formality, and legal technicality and form, as possible

The court has duties and powers related to giving effect to the principles. These are set out in s 69ZQ. The court must:

- decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily
- decide the order in which the issues are to be decided
- give directions or make orders about the timing of steps that are to be taken in the proceedings
- in deciding whether a particular step is to be taken, consider whether the likely benefits of taking the step justify the costs of taking it
- make appropriate use of technology
- if the court considers it appropriate – encourage the parties to use family dispute resolution or family counselling
- deal with as many aspects of the matter as it can on a single occasion
- deal with the matter, where appropriate, without requiring the parties’ physical attendance at court.

Presumption of equal shared parental responsibility

There is a presumption of equal shared parental responsibility when parenting orders are made (s 61DA(1)). The presumption does not apply if there are reasonable grounds to believe that a parent has engaged in child abuse or family violence (s 61DA(2)). The presumption can be rebutted by evidence that it is not in the child’s best interests (s 61DA(4)).

If a parenting order provides for equal shared parental responsibility, the court must:

- consider whether the child spending equal time with each of the parents would be in the best interests of the child and is reasonably practicable, and
- if it is, consider making an order for equal time (s 65DAA(1)).

If the court decides against equal time, the court must:

- consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child and is reasonably practicable, and
- if it is, consider making an order for the child to spend substantial and significant time with each of the parents (s 65DAA(2)).

“Substantial and significant time” is defined as time, including week days, that allows the parent to be involved in the child’s daily routine and both parent and child to be involved in occasions of special significance to each other (s 65DAA(3)).

Section 60CC(4) makes relevant the extent to which both parents have taken or failed to take the opportunity to spend time with and communicate with their child, participate in major long-term decisions and fulfilled maintenance obligations. This will assist the primary caregiver, but there is also an obligation on the primary caregiver to facilitate the other parent having this kind of involvement (s 60CC3(c)).

Parents sharing parental responsibility are not required to consult each other on issues that are not long-term issues (s 65DAE). The “major long term issues” with respect to a child are defined as issues about the care, welfare and development of the child of a long-term nature

The obligation of the court to firstly consider equal and then substantial time will possibly place increased pressure on the court to make orders that result in the child living near both parents, wherever possible. Section 65DAE(e), will be an additional pressure. The court’s approach to relocation in *A and A: Relocation Approach* (2000) FLC ¶93-035 is likely to be reviewed.

Violence or abuse

Parties who have been victims of violence or have children who have suffered from abuse are both assisted and hindered by the changes. Protecting a child from harm is a s 60B object and a primary consideration in the s 60CC best interest factors. However, a party must satisfy the court that it has reasonable grounds to believe that the case was not appropriate for family dispute resolution before filing an application. In ascertaining “best interests” under s 60CC(3)(k), a court cannot take into account a family violence order unless it is a final order or made after a contested hearing.

The Act emphasises “family dispute resolution” and the role of Family Relationship Centres. Dispute resolution may be inappropriate if there are issues of violence and/or child abuse. Section 60I places an onus on a practitioner to provide the court with a certificate certifying the client’s attendance at dispute resolution before a matter can be heard, unless “the court is satisfied and there are reasonable grounds to believe” that there has been or is a risk of family violence or abuse.

Parenting plans

Parenting plans, first introduced in 1996, and later removed from the Act, have returned. They may deal with such matters as who a child lives with or spends time with, whether parental responsibility is shared or allocated, child maintenance, (making it easier for parties to have binding arrangements regarding tertiary students) dispute resolution and other aspects of care, welfare and development or parental responsibility.

CCH is here to help

We hope to make the transition as easy as possible in the following ways:

Legislation updates

All the changes to the Family Law Act, Family Law Regulations and Family Law Rules will be incorporated into the legislation in CCH’s *Australian Family Law Handbook*.

The new edition of the paperback book, *Family Law Act 1975 with Regulations and Rules*, will contain all the changes up to 1 July 2006.

Detailed commentary

A major update to the Children tab in CCH's *Australian Family Law & Practice* is underway, providing expert analysis by Anne Marie Rice, partner at Carter Naughton Rice, Brisbane.

Business builders

Two new Business Builders have been added to our family law collection, dealing with the new changes.

Business Builders are a simple way to inform your existing and prospective clients about family law issues without the political spin or legal jargon. These clear and concise documents are available for you to download and customise with your firm's details.

The current family law business builders are:

- **How does the new family law regime affect you?**
- **Family violence under the new family law regime**
- **Financial arrangements after relationship breakdown**
- **De factos and financial agreements**
- **Pre-nuptial agreements**

Related CCH titles:

- **[Australian Family Law Handbook \(incl Aust Child Support Handbook\)](#)**
- **[Australian Family Law & Practice](#)**
- **[Australian Family Law Act 1975 with Regulations and Rules, 25th edition](#)**
- **[Business Builder: How does the new family law regime affect you?](#)**

CCH Australia Limited
ABN 95 096 903 365