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## Family law 2006 – the year in review

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**Jacqueline Campbell, partner of Forte Family Lawyers reviews the major family law changes and cases of the last 12 months.**

2006 – Another big year of change. One of the more important changes was the removal of the monetary jurisdiction of the Federal Magistrates Court in family law matters. There were significant changes regarding parenting disputes and child support. From 12 December 2006, CGT rollover relief applies to transactions under financial agreements.

We also have more reported cases than in past years including some on superannuation splitting. Unfortunately, few of the reported cases on parenting disputes were particularly helpful for guidance on the legislative changes with respect to parenting disputes.

### Parenting disputes

There is a presumption of equal shared parental responsibility and encouragement of arrangements which enable the “contact parent” to spend more time with the children than in the past.

The new Div 12A of the Rules sets out principles for conducting child-related proceedings on a less formal basis than traditionally.

A child no longer “resides” with a parent but lives with a parent. The time with the other parent is not called “contact”, but is time spent with a child or communicating with a child.

Two new objects were added to the Act. The best interests of the children are met by:

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

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

The primary considerations are reflective of the two new objects.

The additional considerations include the “views” of the children and the willingness and ability of the parents to facilitate, and encourage, a close relationship between the child and the other parent.

### Presumption of equal shared parental responsibility

A presumption of equal shared parental responsibility usually applies unless there are reasonable grounds to believe that a parent has engaged in child abuse or family violence. It can also be rebutted by evidence that equal shared parental responsibility is not in the child’s best interests.

### Equal time or substantial and significant time

If a parenting order provides for equal shared parental responsibility, the court must consider whether the child spending equal time with each parent is in the best interests of the child and is reasonably practicable. If it is, the court must consider making an order for equal time.

If the court decides against equal time, the court must consider the appropriateness of the child spending substantial and significant time with each of the parents.

“Substantial and significant time” is defined as time which allows the parent to be involved in the child’s daily routine and occasions of special significance.

In determining what time it is reasonably practicable for a child to spend with each of the child’s parents, the court must have regard to such factors as:

- how far apart the parents live from each other
- the parents’ current and future capacities to implement the arrangement and to communicate with each other to resolve difficulties that might arise
- the impact the arrangement would have on the child.

### Parenting plans

Parenting plans, first introduced in 1996, and later removed from the Act, have returned. They can deal with such matters as who a child lives with or spends time with, how parental responsibility is shared, child maintenance, and other aspects of care, welfare and development or parental responsibility. Its return makes it easier for parties to formalise child maintenance arrangements for adult children.

For detailed commentary on parenting proceedings under the new regime, see CCH’s *Australian Family Law & Practice* at ¶13-000 and following in the Children tab, and ¶51-100 and following in the Courts, Procedure, Evidence tab. The legislative changes are consolidated in the *Australian Family Law Handbook* and the 25th edition of *Australian Family Law Act 1975 with Regulation and Rules*.

### Child support

The major change in 2006 was the reduction in the “capped” level of the income. The top level of income of the payer under the formula fell from \$139,347 to \$104,702 per annum on 1 July 2006. This caused a substantial reduction in the child support assessments in many families. Non-agency payments for certain expenses such as school fees and medical costs can now be credited for up to 30% of the child support liability at the option of the payer rather than the previous 25%. The minimum payment was increased from \$5 per week to a little over \$6 per week and will be CPI indexed.

Legislation passed in December 2006 will cause further changes from 1 January 2007 and 1 July 2008. The 1 January 2007 changes include giving the Social Security Appeals Tribunal the power to determine objections to certain Child Support Agency decisions.

For full coverage of child support matters, see CCH’s *Australian Family Law Child Support Handbook*.

### Reported judgments

There are many cases to choose from, but some of the more important cases have shown how the court is dealing with superannuation. They include:

- *Doherty and Doherty* (2006) FLC 93-256. The full court upheld the decision of the federal magistrate dividing the property as to 55% to the wife and 45% to the husband. The wife retained the family home, and the husband received little else but his superannuation. The husband did not give evidence or make submissions as to the appropriate form of the orders and therefore the

federal magistrate was justified in making those orders.

- *Trott and Trott* (2006) FLC 93-263. The “one size fits all” approach of valuing under the Regulations can lead to a valuation which does not reflect the “true value” of the superannuation. Although the court was bound by s 90MT(2)(a) to accept the value under the Regulations, the parties agreed with the single expert that a different figure should be used. The court accepted this. It is also a good example of the asset-by-asset approach or two pools approach. Watts J assessed contributions to superannuation differently to contributions to non-superannuation. He assessed the s 75(2) factors over the total pool.
- *M and M* (2006) FLC 93-281. The full court held that the West and Green (1993) FLC 92-395 formula is rarely useful if superannuation is being split. However, in the absence of other evidence, it was a rough guide.

There have been a number of other helpful cases:

- *JS and GP* [2006] FamCA 150. The full court held that the wife should receive twelve months’ periodic spousal maintenance as a lump sum although there was no suggestion that the husband would not pay. The wife had sold shares to meet her genuine living expenses while her application for spousal maintenance was stood over part heard. A lump sum enabled her to re-build her savings. The husband had the available capital and borrowing capacity to meet an order of \$13,000 without financial hardship.
- *AM and KAO* [2006] FamCA 734. The trial judge divided the property 60/40 in favour of the husband on the basis of contributions and then gave the wife 33% for s 75(2) factors. The practical effect of the orders was that the wife received 46% more of the assets of the parties than did the husband. All but \$1905 of the wife’s property was immediately available to her, giving her approximately \$400,000 to re-house herself and the three children. The husband was left with only \$5,000 for that purpose. The full court said the result was “plainly unjust”. In the fourth step the trial judge should have re-visited contribution and s 75(2) factors. The full court split the assets 62.5% in favour of the wife, which included 22.5% for s 75(2) factors. The husband received about \$80,000.
- *RH and JH* [2005] FamCA 1295. The full court considered the retention of significant superannuation as part of the assets retained by the husband to be a s 75(2) factor.
- *N and M* [2006] FamCA 958. This was a parenting case determined in accordance with the new shared parenting regime. This case will be reported in a forthcoming update of CCH’s *Australian Family Law & Practice*.

Since the commencement of the *Bankruptcy and Family Law Legislation Amendment Act 2005* there have been no significant reported cases. However, a review of *Kowaliw and Kowaliw* (1981) FLC 91-092 has possibly started:

- *Crampton and Crampton* (2006) FamCA 528. The full court did not discount the Wife’s entitlements because she lost about \$140,000 gambling. A psychiatrist diagnosed a psychiatric condition as the cause of her psychological gambling for about 12 months.

## Conclusion

The major legislative changes in the past 12 months have dealt with parenting disputes and how they are resolved. In the next 12 months we are likely to see these changes being considered by the courts.

Superannuation cases are being dealt with and reported more commonly by the courts. In fact, one of the best changes in the past twelve months has been the vastly improved availability of decisions of both trial judges and the full court.

From 1 January 2007, all first instance judgments will be published by the Family Court of Australia.

## Related CCH titles:

- [\*Australian Family Law Handbook \(incl Aust Child Support Handbook\)\*](#)
- [\*Australian Family Law Child Support Handbook\*](#)
- [\*Australian Family Law & Practice\*](#)

- *Australian Family Law Act 1975 with Regulations and Rules, 25th edition*
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