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Family Law Parenting Arrangements: A New Pathway or Stuck on the Same Old Road?

Family Law Parenting Arrangements: A New Pathway or Stuck on the Same Old Road?

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INTRODUCTION

Major changes to the parenting provisions in Pt VII of the *Family Law Act 1975* (Cth) ('FLA') came into effect on 6 May 2024 when the *Family Law Amendment Act 2023* (Cth) (FLAA) commenced. These amendments have only been in effect for three months, but already some cases have been decided under the new laws. This paper explains the amendments, examines the cases and considers whether there are any useful lessons which can be drawn from them.

The structure of this paper is:

1. The parenting amendments
2. Overview of the parenting amendments
3. The cases
4. Are there any discernible trends?
5. Best interests (including violence and safety)
6. Parental responsibility vs long-term decision-making
7. Case examples of orders made
8. Reconsideration of final parenting orders
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10. Strategies for presenting evidence as to "best interests"
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1. THE PARENTING AMENDMENTS

The amendments included:

- the removal of the presumption of shared responsibility
- the abolitions of the "pathway" for determining care arrangements
- changes to the factors to consider in determining the best interests of a child
- the codification of the rule as to when final parenting orders can be reconsidered
- changes to the obligations of Independent Children's Lawyers (ICLs).

The amendments have largely been underpinned by a desire to both simplify the FLA (primarily for the benefit of litigants in person) and to provide a greater consideration of family violence. The amendments were in part based on the recommendations made five years ago by the Australian Law Reform Commission (ALRC) in F*amily Law for the Future: An Inquiry into the Family Law System* (Report 135) (ALRC Report) which set out (at [5.37]) that:

> *It is critical that legislative guidance on making decisions about the care of children is as simple and easy to understand as possible. This is particularly important to:*
>
> - *assist people without legal representation to understand their obligations under the Act and how the court will make decisions about children;*

- *avoid misunderstandings about what the guidance contained in the Act means;*
- *reduce the length and complexity of legal documents required for proceedings, thereby reducing costs to litigants, and reducing delay; and*
- *reduce the length and complexity of judgments in parenting cases and enhance their comprehensibility for litigants.*

These sentiments were echoed in the Explanatory Memorandum (p 2-3) to the Family Law Amendment Bill 2023 which emphasised the importance of the changes in addressing "a number of technical and interpretation issues raised by stakeholders to remove legal ambiguity and to ensure that the proposed changes to the [FLA] are clear for lawyers, family law professionals and self-represented litigants".

To the extent that the amendments may create new ambiguities, the ALRC Report, the Explanatory Memoranda to the Family Law Amendment Bill 2023 and the Convention on the Rights of the Child (UNROC) (referred to in s 60B) may be relevant to the task of resolving them. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 confirmed that a purposive approach should be taken to statutory interpretation. This means that, where an ambiguity arises, courts should look beyond the words of the statute at what Parliament intended to do.

Given the likelihood that parties will seek to rely upon extraneous materials to interpret the FLAA in the event of uncertainties or ambiguities, it is useful to set out the relevant legislation which enables, in some circumstances, for this to occur, namely s 15AB of the *Acts Interpretation Act 1901* (Cth) provides:

> *(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:*
> *(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or*
> *(b) to determine the meaning of the provision when:*
> *(i) the provision is ambiguous or obscure; or*
> *(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.*
>
> *(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:*
> *(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;*
> *(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;*
> *(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;*
> *(d) any treaty or other international agreement that is referred to in the Act;*
> *(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;*

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;
(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and
(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

2. OVERVIEW OF THE PARENTING AMENDMENTS

Presumption of equal shared parental responsibility

The presumption of equal shared parental responsibility under the former s 61DA was removed, as recommended in the ALRC Report (part of Recommendation 7).

Parenting pathway

Also abolished was the parenting pathway in the former s 65DAA, which the court was required to follow if the former presumption of equal shared parental responsibility applied. This pathway required courts to first consider equal time and then substantial and significant time. This change means that there are no circumstances where the court must consider either of these options for parenting time.

"Parental responsibility" vs "decision-making about major long-term issues"

There has been some confusion about how the term "parental responsibility" fits with "decision-making about major long-term issues." The Explanatory Memorandum indicates that decision-making about major long-term issues is only one aspect of parental responsibility explicitly (at [72]):

> *New subsection 61D(3) is intended to make it clear that decision-making about major long-term issues is a component of parental responsibility, and that parenting orders may provide for joint decision-making or sole decision-making in relation to a major long-term issue or issues.*

This suggests that, perhaps contrary to the intention of Parliament, orders about parental responsibility and decision-making may be more complex than before the amendments. The ALRC Report is of little assistance as although the ALRC considered replacing the term "parental responsibility" with "decision-making responsibility" it was primarily concerned with, and indeed recommended replacing the presumption of "equal shared parental responsibility" with a presumption of "joint decision making about major long term issues" (Recommendation 7). This

ALRC recommendation was not implemented in the amendments. Changing the term "parental responsibility" to "decision making responsibility", as recommended by the ALRC, would have removed the emotionally charged term “parental” which often makes it more difficult to negotiate sole parental responsibility orders even where there is considerable family violence and little or no positive communication between the parties.

The presumption of equal shared parental responsibility was introduced in 2006, and the ALRC Report and other enquiries have found that this section was commonly misinterpreted as creating a right to equal shared time with children. This confusion was aggravated by the pathway under the former s 65DAA which followed when the presumption applied.

There was a widely held view amongst lawyers and the community that the protection in the former s 61DA(2), which stated that the presumption of equal shared parental responsibility in s 61DA(1) did not apply if there were reasonable grounds to believe that a parent of the child has engaged in child abuse or family violence, was insufficient to prevent equal shared parental responsibility orders being made even where there had been significant family violence.

In a previous paper I made an error and stated that the terminology had changed. Instead, it appears that this aspect has been made more complex. The Explanatory Memorandum confirmed that it was not the intention of Parliament for “long-term decision-making” to replace the concept of “parental responsibility” but that there are two concepts. This was stated (at [76])):

> *New subsection 61D(3) (item 15) is intended to make it clear that, with the removal of the presumption of equal shared parental responsibility, the court may still make orders providing for joint decision-making about major long-term issues, and parties can continue to agree to such matters between themselves. The court will still be required to consider the allocation of parental responsibility, and responsibility for decision-making about major long-term issues, whenever this is raised by one of the parties, or on its own motion.*

The complexity of the amendments and the inconsistency with the ALRC Report has caused confusion for parties, the court and practitioners, and will no doubt continue to so, at least until the Full Court has had the opportunity to consider the issue.

For ease of reference the following table sets out the former and current provisions dealing with these terms:

Parental responsibility and decision-making	
Former provisions	**Current provisions**
Section 61B *In this Part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.*	**Section 61B remains**
Section 61C *(1) Each of the parents of a child who is not 18 has parental responsibility for the child.* *[Notes omitted]* *(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.* *(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).* *[Note omitted]*	**Section 61C remains**, although the notes have changed.
	Section 61CA added *If it is safe to do so, and subject to any court orders, the parents of a child who is not yet 18 are encouraged:* *(a) to consult each other about major long-term issues in relation to the child; and* *(b) in doing so, to have regard to the best interests of the child as the paramount consideration.*
Section 61D(1) *A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child* **Section 61D(2)** *A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):*	**Section 61D(1) & (2) remain**, but s 61D(3) was added – see below.

(a) expressly provided for in the order; or *(b) necessary to give effect to the order.*	
	Section 61D(3) added *(3) A parenting order that deals with the allocation of responsibility for making decisions about major long-term issues in relation to the child (see subsection 64B(3)) may provide for joint or sole decision-making in relation to all or specified major long-term issues.*
Section 61DA(1) & (4) *(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.* *Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).* *(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.*	**Section 61DA repealed in full.**
Section 61DB *If there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order.*	**Section 61DB repealed**
	Section 61DAA added *(1) If a parenting order provides for joint decision-making by persons in relation to all or specified major long-term issues in relation to a child, then, except to the extent the order otherwise specifies, the order is taken to require each of the persons:* *(a) to consult each other person in relation to each such decision; and* *(b) to make a genuine effort to come to a joint decision.* *(2) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child*

	communicated by one of those persons, that the decision has been made jointly.
	Section 61DAB added *(1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who:* *(a) has parental responsibility for the child; or* *(b) shares parental responsibility for the child with another person;* *about decisions that are made in relation to the child during that time on issues that are not major long-term issues.* *Note: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long-term issues.* *(2) Subsection (1) applies subject to any provision to the contrary made by a parenting order.*
Section 64B - part (2) A parenting order may deal with one or more of the following: …. (c) the allocation of parental responsibility for a child; (d) if 2 or more persons are to share parental responsibility for a child--the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility; … (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child. (3) Without limiting paragraph (2)(c), the order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child. **…**	**Section 64 remains**, but notes added which don't affect this issue.
Section 65DAC *(1) This section applies if, under a parenting order:* *(a) 2 or more persons are to share parental responsibility for a child; and* *(b) the exercise of that parental responsibility involves making a*	**Section 65DAC repealed/moved**. See s 61DAA above.

decision about a major long-term issue in relation to the child. *(2) The order is taken to require the decision to be made jointly by those persons.* *Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).* *(3) The order is taken to require each of those persons: (a) to consult the other person in relation to the decision to be made about that issue; and (b) to make a genuine effort to come to a joint decision about that issue.* *(4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly*	
Section 65DAE *(1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who: (a) has parental responsibility for the child; or (b) shares parental responsibility for the child with another person; about decisions that are made in relation to the child during that time on issues that are not major-long term issues.* *Note: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long-term issues.* *(2) Subsection (1) applies subject to any provision to the contrary made by a parenting order.*	Section 61DAE **repealed/moved**. See s 65DAB above.

Under the amendments, the court must still regard the child's best interests as the paramount consideration when making a parenting order (s 60CA). However, the guidance as to how this is to be achieved has been simplified. In general terms, this is consistent with the recommendations in the ALRC Report to "reduce confusion and enhance the clarity of Pt VII" (at [5.35]).

The former four objects and five principles which were considered by the court whilst determining the best interests of a child have been replaced by the following two objects, in the new s 60B:

(a) to ensure that the best interests of children are met, including by ensuring their safety; and
(b) to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

UNICEF's simplified Convention on the Rights of the Child (UNROC) is an Annexure to this paper.

In addition, rather than there being two primary considerations and 14 additional considerations to be taken into account by the court when determining a child's best interests, there are now only six general considerations. These are contained in the much shorter s 60CC(2):

> *(a) what arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of:*
> *(i) the child; and*
> *(ii) each person who has care of the child (whether or not a person has parental responsibility for the child);*
> *(b) any views expressed by the child;*
> *(c) the developmental, psychological, emotional, and cultural needs of the child;*
> *(d) the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs;*
> *(e) the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so;*
> *(f) anything else that is relevant to the particular circumstances of the child.*

The reference to "safety" and its inclusion at the beginning of the list was deliberate and in line with the recommendations of the ALRC Report, which also sought that "safety" and "harm" not be "narrowly interpreted". (at [5.56])

Section 60CC(2A) requires that the court, when considering the matters in s 60CC(2), also consider family violence, specifically:

> *(a) any history of family violence, abuse or neglect involving the child or a person caring for the child (whether or not the person had parental responsibility for the child); and*
>
> *(b) any family violence order that applies or has applied to the child or a member of the child's family.*

Section 60CC(3) is an additional requirement that the court consider an Aboriginal or Torres Strait Islander child's right to enjoy their culture and the likely impact of any proposed parenting order on that right (Recommendation 6 of the ALRC Report).

Reconsideration of final parenting orders

Section 65DAAA was inserted to codify the rule contained in *Rice & Asplund* (1979) FLC 90-725 (largely worded in line with Recommendation 41 of the ALRC Report). In simple terms, the rule holds that in order to change final parenting orders, the applicant must establish that there has been a sufficient change in circumstances since the making of those orders to justify a re-consideration of a child's best interests. The public policy behind the rule is that there must be an end to litigation involving children.

However, the *Rice & Asplund* rule and the new statutory provision are arguably not precisely the same. Under the case law before the amendments, a "prima facie case" or "sufficient", "substantial", "material" or "significant" change in circumstances was a condition that the applicant had to satisfy for a review of a final parenting order. The statutory test has arguably been formulated in different

terms to the case law. For example, in *Marsden & Winch* [2009] FamCAFC 152 the Full Court formulated the test as (at [58]):

> *(1) for a prima facie case of changed circumstances to have been established; and*
>
> *(2) for a consideration as to whether that case is a sufficient change of circumstances to justify embarking on a hearing.*

The codification of *Rice & Asplund* is set out in s 65DAAA:

> *(1) If a final parenting order is in force in relation to a child, a court must not reconsider the final parenting order unless:*
>
> *(a) The court has considered whether there has been a significant change of circumstances since the final parenting order was made; and*
>
> *(b) The court is satisfied that, in all the circumstances (and taking into account whether there has been a significant change of circumstances since the final parenting order was made), it is in the best interests of the child for the final parenting order to be reconsidered.*
>
> *(2) For the purposes of determining whether the court is satisfied as mentioned in paragraph (1)(b), and without limiting section 60CC, the court may have regard to any matters that the court considers relevant, including the following:*
>
> *(a) the reasons for the final parenting order and the material on which it was based;*
>
> *(b) whether there is any material available that was not available to the court that made the final parenting order;*
>
> *(c) the likelihood that, if the final parenting order is reconsidered, the court will make a new parenting order that affects the operation of the final parenting order in a significant way (whether by varying, discharging or suspending the final parenting order, in whole or in part, or in some other way);*
>
> *(d) any potential benefit, or detriment, to the child that might result from reconsidering the final parenting order.*
>
> *(3) Despite subsection (1), the court may reconsider a final parenting order with the agreement or consent of all the parties to that order.*
>
> *(4) The failure of a court to comply with subsection (1) does not affect the validity of any order made by the court.*

The statutory test requires the change to be "significant", which is not the test used in all of the case law and even if there has not been a significant change, the court will still have a discretion to reconsider the parenting arrangements. This second leg of the statutory test seems to diverge from the case law and requires a consideration of best interests.

Duties of Independent Children's Lawyer

Part VII now includes an express requirement for an Independent Children's Lawyer (ICL) to meet with the child and give the child an opportunity to express their views. The new provisions are contained in ss 68LA(5A) to 68LA(5D). These amendments are based on Recommendation 44 of the ALRC Report which recommended that the FLA include a specific duty that the ICL comply with the *Guidelines for Independent Children's Lawyers* endorsed by the family courts from time to time

(ICL Guidelines). The ICL Guidelines are published on the website of the Federal Circuit and Family Court of Australia (FCFCOA) at https://www.fcfcoa.gov.au/fl/pubs/icl-guidelines.

Section 68LA(5A) sets out two duties of the ICL, in addition to those which were already listed in s 68LA(5):

- to meet with the child; and
- to provide the child with an opportunity to express any views in relation to the matters to which proceedings relate.

The ICL is not required to perform these duties at the same time. Sometime there will be better and more appropriate ways to ascertain the views of a child than for the ICL to meet with the child.

Section 68LA(5AA) gives the ICL a discretion in relation to the duties in s 68LA(5A):

> *The independent children's lawyer has discretion in relation to the following matters (subject to any order or direction of the court with respect to the matter, for example under paragraph 68L(2)(b) or paragraph (5D)(b) of this section):*
>
> *(a) when, how often and how meetings with the child take place;*
>
> *(b) when, how often and how the child is provided with an opportunity to express views.*

There are exceptions to when an ICL is required to perform these duties, and these are listed in s 68LA(5C):

> *(a) the child is under 5 years of age; or*
>
> *(b) the child does not want to meet with the independent children's lawyer, or express their views (as the case requires); or*
>
> *(c) there are exceptional circumstances that justify not performing the duty.*

Section 68LA(5C) gives some guidance as to "exceptional circumstances", but confirms the broad, open-ended meaning of the phrase:

> *Without limiting paragraph (5B)(c), exceptional circumstances for the purposes of that paragraph include that performing the duty, would:*
>
> *(a) expose the child to a risk of physical or psychological harm that cannot be safely managed; or*
>
> *(b) have a significant adverse effect on the wellbeing of the child.*

The current version the ICL Guidelines (which are under review following the commencement of the FLAA) are somewhat similar (at [6.2]):

> *It is expected that the ICL will meet the child unless:*
>
> - *the child is under school age;*
> - *there are exceptional circumstances, for example where there is an ongoing investigation of sexual abuse allegations and in the particular circumstances there is a risk of systems abuse for the child;*
> - *there are significant practical limitations, for example geographic remoteness.*
>
> *The assessment about whether to meet with the child and the nature of that meeting is a matter for the ICL. An assessment may be made in consultation with any Family Consultant or other expert involved in the case.*

If the ICL considers that s 68LA(5) applies, then s 68LA(5D) applies, and the court must before making final orders:

> *(a) determine whether it is satisfied that exceptional circumstances exist that justify not performing the duty;*
>
> *(b) if the court determines that those circumstances do not exist—make an order requiring the independent children's lawyer to meet with the child or provide the child with an opportunity to express their views (as the case requires).*

3. THE CASES

The following is a list of cases made under the new reforms that will be discussed in this paper:

- *Shams & Alkaios* (No 2) [2024] FedCFamC2F 620
- *Garrido & Garrido* [2024] FedCFamC2F 634
- *Tandy & Padula* [2024] FedCFamC2F 671
- *Lavigne & Gavin* (No 2) [2024] FedCFamC2F 737
- *Cafferty & Bowles* [2024] FedCFamC1F 314
- *Bosch & Annema (No 3)* [2024] FedCFamC1F 357
- *Whitehill & Talaska* [2024] FedCFamC2F 768.

4. ARE THERE ANY DISCERNIBLE TRENDS?

Given the relatively few judgments dealing with the amendments that have been handed down, and reported in Austlii, it is hard to identify any definitive trends. There have been no reported appeals as at 3 August 2024. Regardless, there are some useful indications of how the court may deal with the new provisions that practitioners might wish to consider, pending directions from the Full Court of the Federal Circuit Court of Australia ('the Full Court").

The following issues have arisen in the reported cases:

- Best interests (ss 60B and 60CC) including violence and safety;
- Equal shared parental responsibility vs joint long-term decision-making (ss 61D and 61DAA)
- Reconsideration of final parenting orders (s 65DAAA)
- Duties of Independent Children's Lawyers (ss 68L, 68LA and 68M)

5. BEST INTERESTS (INCLUDING VIOLENCE AND SAFETY)

The changes to ss 60B and 60CC are summarised above. A significant part of the change is to focus on the new term "safety". In determining the best interests of the child, the previous version of s 60CC(b) required that the court consider the "need to protect" a child from physical or psychological harm as a result of being subjected to, or exposed to, abuse, neglect or family violence. One of the changes to the way in which the FLA instructs the court to determine a child's

best interests is the shift in focus to "promoting the safety" of the child, including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm (s 60CC(2)(a)).

Garrido & Garrido

In *Garrido & Garrido* [2024] FedCFamC2F 634, after the mother had concluded her case during the defended hearing, and part way through the father's cross-examination of the single expert witness, the court was advised that the parties had reached agreement on the orders they sought to be made regarding the two children.

Judge Taglieri discussed whether the court needed to be satisfied that the orders were in the children's best interests when making orders by consent. She confirmed (at [20]) that under the amendments, a parenting order must be in the best interests of the child, even if it is sought by consent. The amendments did not, in this respect, change the law. She explained this (at [21] and [23]):

> *Sections 60B, 60CA, 60CC of the Act as amended provide the means by which the Court is to be satisfied that a parenting order is in the best interests of a child, but the provisions are not exhaustive and operate in the context of Division 12A. In my view, these provisions are intended to have application even when parties come to an agreement during the proceedings and invite the Court to make orders by consent. If it were otherwise, the welfare and safety of children would be at risk contrary to the objects of Part VII of the Act […]*
>
> *The statutory scheme makes it plain, in my view, that for as long as there are pending proceedings before the Court, the Court's function and duty when making parenting orders is governed by the overriding objects of Part VII of the Act and the best interests of the child. This is the case even when a proceeding is to be concluded summarily by the making of final orders by consent.*

Of note was Judge Taglieri's reference above to ss 60B, 60CA and 60CC not being "exhaustive" – a reminder that the shorter list of matters for the courts to consider in determining best interests should not place a constraint on the court considering all relevant matters.

Judge Taglieri made the order she was asked to make that the father cease all time and contact with one of the children. The single expert witness had given unchallenged opinion that the child was at risk of immediate emotional harm by the father alienating her from the mother. However, Judge Taglieri harboured some concerns that the order she was being asked to make was not in the child's best interests. These concerns included:

- The single expert have given oral evidence that "the complete cessation of time between Y and the father also entails the risk of emotional harm to her related to the termination of a mutually loving and meaningful relationship with the father, and the prospect that later in life she will blame the mother for depriving her of the opportunity to continue her relationship with the father." (at [11])
- She had concerns about the father's "motives and reasons for consenting to these orders now when he has previously taken a steadfast view that he seeks orders that would allow him to continue spending time with Y. Frankly, he may have simply been worn down or pressured by the financial costs of completing the trial." (at [12])

- “I may be able to infer from the father's evidence some conscious acceptance of Dr B’s views. … [I]t may be that he now latently accepts that he needs to gain reflective capacity on the impact of how he communicates and behaves interpersonally, and now seeks to alter the way he communicates and behaves so that he does not adversely impact the children and the mother.” (at [13])

- “It is trite to observe that interpersonal conflict is not always caused by one party alone or caused because a person has bad motives or intends harm to others. It is possible that the father's behaviours, as extensively reported by Dr B, are due to an undiagnosed disorder or condition.” (at [14])

- “I have concerns that the consent orders, if made, will not serve the long term best interests of Y and that there may have been alternative orders that could have served both the short term and long term best interests. Regrettably, the parties’ request that consent orders be made has deprived the opportunity of a full ventilation of the evidence and the making of ultimate findings. This means there is a fair chance, in my view, that the family will again be exposed to further proceedings in this Court at a future time.” (at [15])

She concluded with some regret (at [16]):

> *I cannot force the parties to complete the defended hearing and so being satisfied that there is sufficient evidence to justify a termination of Y’s time with the father for a period, I will make the orders sought by consent …*

Shams & Alkaios (No 2)

Shams & Alkaios (No 2) [2024] FedCFamC2F 620 concerned a relocation dispute. There were two children of the relationship. The court found that from around December 2017 there was an equal time arrangement. This changed in January 2023 when the mother unilaterally relocated to Queensland with both children.

In February 2023 an order was made requiring the mother to return the children to Melbourne. The mother complied with this order, although she did not return to Melbourne and at the time of judgment was still residing in Queensland. The mother sought orders for the children to relocate to Queensland. The father, in turn, sought that the children remain in Melbourne.

Judge Glass ordered that the children remain in Melbourne unless the parents jointly decided otherwise. If the mother remained in Queensland (as she expressed was her intention to do), the children were to live with their father and spend time with their mother, both in Melbourne and in Queensland. If the mother returned to Melbourne, the children were to live with both parties in a week-on week-off equal time arrangement. Judge Glass also made an order, pursuant to s 61DAA, that the parties “make joint decisions in relation to all major long-term issues.”

A large part of Judge Glass’ judgment was dedicated to the consideration of any history of family violence, abuse or neglect involving the children or a person caring for the children (s 60CC(2A)(a)).

Judge Glass discussed the allegations of family violence made by the mother against the father, which he did not find compelling. It is useful to consider the specifics of the allegations insofar as they were relevant to the court’s determination of the arrangements which would promote the safety

of the children. They illustrate the importance of the evidence given by the parties and their witnesses and the application of the new “safety” focus.

With respect to some of the assertions of physical violence, Judge Glass preferred the evidence of the father over that of the mother and her friend (whose evidence was in some respects inconsistent with that of the mother). Some of the mother’s evidence was inconsistent with contemporaneous police records. The police records also showed that the mother advised the police that “the kids were more than safe with him [the father]… and that she is certainly not in fear of him.” This, and other statements made by the mother to the police, were consistent with the mother’s description to the children’s day care centre that the split was “amicable”. The incidents of alleged physical family violence by the father towards the mother did not, therefore, suggest that the children’s safety was jeopardised in the father’s care.

The father denied that he had put his hands around the throat of either of the children but admitted that when Y was younger, he had grabbed Y by the front of his shirt when he was having a tantrum. Judge Glass was not satisfied that this amounted to abuse or family violence within the statutory definitions.

The mother asserted that the father had committed financial abuse by cutting her off financially. The case law is not yet well-developed regarding the definition of “financial abuse” so cases which examine such allegations are helpful. The Attorney-General’s Department in its publication “Understanding coercive control and economic and financial abuse” (https://www.ag.gov.au/families-and-marriage/publications/understanding-coercive-control-and-economic-and-financial-abuse) says that “Economic and financial abuse involves someone controlling your ability to get, use or keep your money or economic resources.” The Department sets out signs of coercive control and economic and financial abuse including someone:

- *Monitoring your spending and not letting you choose how to spend your money*
- *Forcing you to buy things or sign contracts*
- *Making you lend or give people your money or belongings*
- *Creating debts in your name*
- *Stopping you from accessing your bank accounts, making you give them your account details, or not telling you information about your money*
- *Making it hard for you to get or keep a job*
- *Not making child support payments after relationship separation*
- *Making demands for further, and/or excessive, dowry payments.*

The definition under s 4AB(2) of the FLA appears to be broader than this, however, and extends to, but is not limited to:

> *(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*
>
> *(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support*

These allegations may easily be made in the context of separation and parties trying to adjust the sharing of income and other financial resources to meet the expenses of two households rather than one, and there is as yet little court guidance as to when such allegations will amount to family violence.

The basis of the mother's allegation in this case was that the father removed her access to his business account. However, the mother still had access to her own funds which consisted of maternity leave pay for 6 months, Centrelink payments for 3 months and then further pay from retail employment. In addition, the father continued to meet all of the outgoings for the household, the mother and the children including rent and childcare fees. Judge Glass was "not satisfied that the mother was denied financial autonomy, or that financial support was unreasonably withheld from her." (at [30]).

With respect to the allegation of verbal abuse, Judge Glass said that the term "abuse" is defined in the FLA only insofar as it is used in relation to a child (s 4(1) – which is not replicated in the definition and examples of family violence in s 4AB). Judge Glass held (at [33]):

> *Both parties have inappropriately sworn at each other. In evidence are messages between the parties in which both use a range of inappropriate language towards each other. The evidence does not satisfy me that the use of language by one party was worse than the language used by the other. I am not satisfied that it coerced or controlled either party, or caused them to be fearful. It accordingly does not amount to family violence.*

Also relevant was that the mother maintained the equal time arrangement despite her apparent concerns about the children's safety

Judge Glass gave considerable weight to the evidence of the family consultant. Although he said (at [107]) he was not bound to accept her recommendations or her evidence in whole or in part:

> *I am responsible for considering and giving appropriate weight to the totality of the evidence presented. Nevertheless, her evidence, which I find to be suitably qualified and based on appropriate foundation, carries substantial weight. Departure from it requires careful consideration.*

Shams & Alkaios does not provide much assistance in determining whether there is a significant difference between "protecting" from family violence and "promotion of safety." Indeed, it was not an issue that appears to have been raised by the parties. However, it confirms that in considering the best interests factors, parties should ensure that they have credible and fact-based arguments, particularly in relation to allegations of family violence, abuse, or risk. Where inconsistent evidence is provided, or generalised claims are made, the court is less likely to find that a particular order is required to promote safety. This does not appear to be substantially different to the approach before the amendments when "protection" from family violence was the focus.

However, Glass J considered, perhaps more carefully than may have been done before the amendments, whether particular behaviour amounted to family violence and the impact of that behaviour on the safety of children and their carers.

Lavigne & Gavin (No 2)

In *Lavigne & Gavin (No 2)* [2024] FedCFamC2F 737 final orders were made prior to the amendments. Those orders were partially suspended by a Senior Judicial Registrar at an interim hearing and orders made for the father to have professionally supervised time and for an updated family report and family therapy. The father sought a review of the interim orders regarding his time with the children.

Judge Harland considered the submissions by the mother and the ICL, as well as supervision and family reports, and concluded that the four children of the relationship were at risk of emotional and psychological harm from the father. The situation was made more difficult because one of the children, X, was neurodivergent and experienced emotional regulation and behavioural difficulties.

Judge Harland did not refer to the amendments explicitly, however, she examined s 60B when considering the children's safety and set out the considerations required under s 60CC in regard to the children's best interests.

Judge Harland referred (at [16]), to "ongoing psychological harm to the children due to the father's over involvement of the children in the adult disputes and his manipulative behaviour". Judge Harland gave extensive consideration to a number of incidents between the children, their father and their mother. These incidents were observed by a professional supervisor during the children's time with their father, recorded by counsellors, teachers and the children's psychologists as well as recorded in various Police reports.

The judge examined the risks in line with the fact that (at [122]):

> *As this is an interim hearing much of the contested evidence cannot be tested. The Court must take a cautious approach that prioritises the children's safety.*

Judge Harland concluded (at [17]) that she accepted that "the children love both parents and want to spend more time with their father." However, she was "satisfied that the children are at an unacceptable risk of psychological and emotional harm which to date has not been ameliorated sufficiently by supervisors". The court was required to make a decision which was in the best interests of the children despite it being (at [54]) "the case that children can spend time with and love a parent who at the same time can be unsafe".

Whilst maintaining the orders for supervised time, Judge Harland had concerns that the children would feel unheard. With the assistance of the Court Child Expert she wrote the children a letter. The ICL was at liberty to give the children the letter to the children and explain the orders to them.

Perhaps reflecting the different evidence before the court, and perhaps also the changes to the legislation, the findings and outcome in the earlier interim decision of *Lavigne & Gavin* [2021] FamCA 612 were very different. McClelland DCJ found that he was unable at an interim hearing to make findings as to the mother's allegations of family violence and, given the father's commitment to self-improvement, he was not satisfied that there was a real risk of harm to the children in the father's unsupervised care.

In weighing up the risks, McClelland DCJ said (at [146]-[148]):

> *In assessing risk, the Court is effectively engaging in the task of attempting to predict the future. It is not possible, in these interim proceedings, to make a final determination as to what occurred on those occasions which have been of concern to the mother and, indeed, the maternal grandparents and W.*
>
> *In those circumstances, I accept the submission, of senior counsel for the mother, that, in the context of interim parenting proceedings, the Court should take a cautious approach. Specifically, it was contended by senior counsel for the mother that the Court should avoid orders that place the children at an unacceptable risk of either physical and/or psychological harm. In that context, I accept that, even if the robustness of the father's approach in respect to the children has not caused physical injury, that a repetition of the forceful restraint of X which occurred in March 2020, could be extremely distressing to the children, and could potentially cause emotional and, hence, psychological harm to them.*
>
> *While caution is required, and the March 2020 incident does give cause for concern, I am not satisfied that there is a real risk that it will be repeated. In forming that view, as noted, I have had regard to the father's account to the investigators from DCJ, as to the circumstances in which he restrained X. I have also noted the father's expression of regret, and his account to the DCJ investigators, as to how he would manage the care of four children, particularly in circumstances where they are quarrelling. I have also noted the content of the Report of Dr F, referring to the father's ongoing work with him to develop effective parenting strategies, as well as stress management strategies to improve his composure and demeanour.*

Cafferty & Bowles

In *Cafferty & Bowles* [2024] FedCFamC1F 314, orders were made with the consent of the father and the ICL. Final orders, which had been made as recently as 2022, were discharged. The case proceeded only 2 days after the amendments commenced. The mother did not attend the hearing and was not contactable. The court ordered that the father be permitted to relocate the child to Country B, with the mother allowed to exercise supervised time with the child.

The mother had experienced considerable mental health issues which had escalated since the making of the final orders. As a result, the mother had spent very limited time in person or through electronic communication with the child. Justice Strum applied each of the new s 60CC(2) factors but made little commentary regarding the changes. However, he conducted his analysis by examining each subsection of s 60CC(2) separately, thus providing an example as to what evidence is to be adduced and presented to the court.

In considering s 60CC(2)(a) Strum J also noted that an intervention order had been made against the father in favour of the mother and child following separation in May 2019 although (at [60]), He found this to have "reduced (if any) relevance at the present juncture in time".

In contrast to the past history of family violence, Strum J found that the current state of the mother's mental health was of risk to the child and compromised the mother's capacity to have parental responsibility for the child under s 60CC(2)(d). He therefore held that it would "promote the safety of the child" for the child to have limited contact with his mother and relocate overseas with the father.

Justice Strum did not discuss the impact of the removal of the word "meaningful" regarding the relationship between the child and their parents, although the case concerned the issue of relocation of the child to another country, and therefore the continuation of a "meaningful" relationship with both parents would generally have been an issue. However, given that the mother had done little to spend time with the child and "meaningfully communicate" with him due to her current and predicted future mental health, Strum J concluded (at [96]) that the child would have suffered "an emotional loss" even if the father and child remained in Australia.

Bosch & Annema (No 3)

Bosch & Annema (No 3) [2024] FedCFamC1F 357 involved a parenting dispute between the mother in Australia, who had the majority care of the child, X, since his birth in 2013. The mother relocated with X to Australia in late 2013. The father was in the USA and had very little face to face contact with X between 2020 and the trial. The parties were in dispute about how much time and in what circumstances X will spend time with the father. A significant factor was X's diagnosis of autism spectrum disorder and attention hyperactive deficit disorder along with other associated health problems. Orders made by Justice Christie made included for the father to spend supervised time with X in Australia and have electronic communication with him.

There were allegations, accepted to some extent by the court, of family violence perpetrated by the father towards the mother prior to X's birth and shortly following his birth.

The mother sought sole parental responsibility and the father sought "joint decision making" responsibility. Justice Christie held that the mother should have sole parental responsibility. One consideration that supported sole parental responsibility was (at [17]):

> *X has an awareness that his parents [we]re not on friendly terms. A requirement that they communicate and cooperate to reach joint decisions would create a greater potential for further exposure to likely conflict.*

Christie J gave extensive consideration to s 60CC(2)(c) and held that there were safety considerations. These were summarised by the mother (at [24]) as:

> *(a) Allegations that the father had been violent and abusive in his dealings with the mother; and*

> *(b) Allegations that the father experienced erratic mood changes during his relationship with the mother such that she is concerned about this occurring during time with X.*

Justice Christie was also satisfied that there were risks to X's "welfare and wellbeing" in his father's care which necessitated that the father's time be supervised. These matters, which were broader than family violence, were not considered under the heading of "safety considerations" but could have been listed there:

> *(a) The fact that the father does not accept X's diagnoses;*
> *(b) The fact that the father has not spent time with X absent supervision;*
> *(c) The fact that X has absconded from the father in the past;*
> *(d) The fact the father has failed to follow the expert recommendations – engagement with X's treaters and parent specific education; and*
> *(e) The family report writer's evidence that the father's correspondence with the mother raises concerns about the father's mental health which have not been addressed by an assessment and the potential risks which flow from this militate against unsupervised time.*

6. PARENTAL RESPONSIBILITY VS LONG-TERM DECISION-MAKING

The confusion about the effect of the amendments has been reflected in the way in which parties have sought parenting orders under the new provisions, with some parties seeking (as in *Shams & Alkaios*) orders regarding long-term decision-making only, without an order for parental responsibility.

To be clear, the new provisions do confer on the court the power to make an order for joint long-term decision-making on major issues and the validity of making such an order is not in doubt. Rather, it is the relationship between "parental responsibility" and "long-term decision-making" that requires clarification. Can parties still seek orders for equal shared parental responsibility under the FLA? Or should they be seeking an order for joint decision making on major long-term issues? Or both?

The revised s 61DAA, which is the former s 65DAC, moved to a more appropriate place in the FLA where it is easier to find. It provides that, subject to court orders, and if it is safe to do so, parents are encouraged to consult each other about major long-term issues and, in doing so, to have regard to the best interests of the child. According to the Explanatory Memorandum, this provision is not enforceable but is intended to guide parents.

7. CASE EXAMPLES OF ORDERS MADE

Orders made since the amendments have not been consistent in their application of the amendments and the new terminology. In some cases, this reflects confusion about the concept of joint decision-making and its relationship to parental responsibility. The following examples are from cases heard in the first few months following the amendments. They may not reflect the position when the case law ultimately settles.

A recent requisition received from a judicial registrar referred to a proposed consent order:

> "The parties have equal shared parental responsibility…"

The requisition reads (with the underlining in the original):

> *As you will be aware, the Family Law Amendment Act (2023) (Cth) came into effect on 6 May 2024. The amendments made changes to what the Court must consider when determining what is in the child's best interest, and importantly how separated parents are to make decisions about long-term issues for the children. Whilst the Amendment Act does not change the current position in the Family Law Act 1975 that separated parents retain parental responsibility, which can be exercised jointly or separately, it does provide amendments to the Court's powers to make orders that deal with the allocation of responsibility for making decisions about these issues. You will note the language used in, for example, sections 61D(3) and 61DAA adopts the terminology of joint decision-making in relation to major long-term issues.*
>
> *In light of the above, and on review of proposed orders, it is not sufficient to simply state the parents have equal shared parental responsibility for children. The proposed orders should refer to the allocation of responsibility for making decisions about major long-term issues in relation to the children — see section 64B(3) of the Family Law Act. Accordingly, proposed Order 1 requires amendment.*

If the Judicial Registrar is correct, then it is mandatory for parties to seek an order regarding the allocation of joint decision-making when seeking an order regarding parental responsibility. That doesn't seem to be what the amendments say. Furthermore, it is curious that s 64B(3) was not amended save to add notes which are not pertinent to this issue.

In *Peder & Peder* [2024] FedCFamC1F 337 Justice Carew made orders (by consent):

> *The parents have joint decision-making for major long-term decisions for the children…*
>
> *In the exercise of joint decision-making, the parents will…*

In *Bosch & Annema (No 3)* (discussed above) Justice Christie ordered:

> The mother have sole parental responsibility for the child, X, born 2013 ("the child").

In *Shams & Alkaios* (No 2) (discussed above), Judge Glass made an order that:

> *The parties make joint decisions in relation to all major long-term issues in relation to the Children, X, born 2013, and Y, born 2016.*

This order was proposed by the father. The main issue in dispute was whether the children should be relocated to Queensland. The mother sought an order for sole parental responsibility even if the children lived with the father in a different state. Judge Glass considered that depriving the primary caregiver of parental responsibility was not in the children's best interests, but he made the order sought by the father although (at [113]) he had some "some doubt about the parties' capacity to co-operate and communicate in relation to such decision-making".

Ultimately, *Shams & Alkaios* does not provide a clear and definite answer to the shared parental responsibility vs long-term decision-making debate. Until clear guidance is provided by the Full Court

of the FCFCOA it may be prudent for practitioners to seek orders for parental responsibility and order for decision-making in regard to major long-term decisions.

Indeed, it may be that, in the wake of the amendments, the court requires allocation of "decision-making on long-term issues" in orders sought for parental responsibility. The court requisition cited above required that an order sought for equal shared parental responsibility (with no mention of joint decision-making of long-term issues) be amended to include a reference to joint decision-making on major long-term issues. It was not clear whether the opinion of the judicial registrar was that it would grant an order for equal shared parental responsibility *including* joint decision-making on long-term issues, or if all references to equal shared parental responsibility should be removed. The latter seems unlikely.

In *Cafferty & Bowles* (discussed above), a similarly worded order to *Shams & Alkaios* was made with the consent of the father and the ICL (the mother did not defend the proceedings). Justice Strum ordered:

> *The Applicant Father, to the exclusion of the Respondent Mother, have Parental Responsibility for decision-making for the child in relation to all major long-term issues provided that he keep the respondent mother promptly advised of such decisions by email or text-message to an email address and/or mobile telephone number provided by her to him for such purpose.*

It is interesting to note that, there was seemingly no distinction made between parental responsibility and decision making. Justice Strum did not discuss his reasoning for wording the order as above, although he did refer to ss 61D and 61DAB in his judgment.

This case should be regarded with care given that Justice Strum warned against relying on it with respect to two aspects of the amendments, the orders were made by consent, the matter was undefended, the hearing was only 2 days after the commencement of the amendments and the judgment was delivered only 5 days later.

8. RECONSIDERATION OF FINAL PARENTING ORDERS

Cafferty & Bowles

In *Cafferty & Bowles* regarding ss 65DAAA, Strum J noted, at [24], that despite the order being made by consent, s 65DAAA(3) was not engaged. He held that he was satisfied as to the matters in s 65DAAA(1)(a) and (b), saying (at [24]):

> *In summary, I consider the significant change of circumstances to be constituted by the unanticipated continuation and/or deterioration of the mother's mental health since the 2022 Orders were made, contrary to the optimism of her treating psychologist at the time; the minimal time spent by her since then; and the work opportunities and/or obligations overseas of the father, with whom the child lives, which have arisen since then.*

However, he also went on to say that the case was not the "appropriate vehicle" through which to interpret the language of "a significant change of circumstances" other than to observe that the amendments appeared to be a statutory codification of the principle in the line of cases commencing with *Rice & Asplund*.

Whitehill & Talaska

Judge O'Shannessy considered the new s 65DAAA in *Whitehill & Talaska*. Final orders concerning the only child of the relationship, X, were made in April 2023 and a "threshold" hearing was set for August 2024. The applicant mother sought urgent interim orders restricting the father's time with X prior to the August 2024 hearing.

Evidence presented by the mother was largely unsupported by evidence and disputed by the father. Further, the mother's assertions that the father's actions implied a deterioration of his mental health which should be considered a "significant change in circumstances" were rejected by Judge O'Shannessy. The father was ordered to undertake an objective psychiatric examination pending the interim hearing, but no change was made to the final parenting orders.

Judge O'Shannessy confirmed the codification of the rule in *Rice & Asplund* (at [6]):

> *From 6 May 2024, Parliament replaced the previously applicable body of law known as the rule in Rice & Asplund… with section 65DAAA of the Act. The rule in Rice & Asplund was a body of Judge made law to the effect that once final parenting orders were made further litigation about parenting orders would not be heard unless there had been a sufficient change in circumstances that warranted reopening litigation about children's arrangements. The settled rationale of the rule was that repeated litigation about children was usually not in the best interests of the children involved and should be avoided. … This body of law developed consequential or attached rules as to evidence and procedure, but always retained flexibility to deal with the multitude of factual matters that arose, in the best interests of the children.*

Judge O'Shannessy quoted from para 97 of the Explanatory Memorandum in support of the codification and the purpose of the rule:

> *New section 65DAAA codifies the common law rule established by Rice and Asplund (1979) FLC 90-725 and elaborated on in subsequent cases, that is, where final parenting orders are in place the applicant must establish that there has been a significant change of circumstance since the making of the orders before those orders can be reconsidered. The rule is founded on the notion that continuous litigation over a child or children is generally not in their best interests.*

Judge O'Shannessy addressed the new s 65DAAA and assessed whether it required a "change in circumstances" as the rule in *Rice & Asplund* required, explaining (at [12]):

> *[O]n its face, section 65DAAA **does not** require a change of circumstances or provide that there must be a prima facie change of circumstances, rather, whether there is or is not a change of circumstances **must be "considered"** and all of the circumstances must be taken into account including section 60CC and whether there has been a change of circumstances. This is, on the face of the new section, a difference of substance not merely of emphasis when compared to the orthodox recitation of the rule.*

Thus, despite the intention of Parliament as expressed in the Explanatory Memorandum (at [97]) to codify the rule, Judge O'Shannessy deferred to the wording of s 65DAAA. At [17] - [19] he opined:

> *Whether or not significant change or a prima facie significant change of circumstances was always a fundamental requirement, … it is clear enough that it is not an absolute requirement for the "reconsideration" of final orders under section 65DAAA. Rather the absolute requirement continues to be the best interests of the child/ren. Clearly, if after considering the issue it is determined that there has been a "significant change in circumstances", the circumstances would more powerfully contend for the final orders to be "reconsidered". But the absolute or mandatory requirement remains the Court's consideration of the best interests of the children.*
>
> *So, in determining whether it is in the best interests of the child for the "final" order to be reconsidered, the engine room provision of section 60CC must be had regard to, and the court should consider any matter relevant to that test and the court* ***may*** *consider the four matters described at section 65DAAA(2)(a), (b), (c) & (d). But the context is the same underlying premise of the rule in Rice & Asplund.*
>
> *Taken as a whole, I understand the provision to mean those four matters should be had "regard to" unless the circumstances of the case meant a provision did not or could not apply.*

Given that the best interests of children is the paramount consideration of s 65DAAA, the court must refer to the s 60CC factors alongside the s 65DAAA(2) factors. This is a change in the law.

The new s 65DAAA does not explicitly reference the case law subsequent to *Rice & Asplund* which provided extensive guidance to the courts as to how to interpret the rule. Judge O'Shannessy examined the impact of the amendments on the relevance of these authorities and said (at [23]) that it is "difficult to discern an intention that those previously applicable attached rules or principles should **not** apply from the text of section 65DAAA". Importantly, at [24]-[25] O'Shannessy J outlined the intention of Parliament when making the amendments and their effect on the application of the new section:

> *I am satisfied that Parliament did not intend to discard the existing body of attached or consequent rules or practice of the jurisprudence of the rule in Rice & Asplund.*
>
> *…. Parliament intended that those attached or consequent rules of the body of law known as the rule in Rice & Asplund should continue to apply. I am so satisfied because of the statements in [97] of the Explanatory Memorandum and the reference to "codifies existing case law" in the second reading speech and the absence of other necessary provisions and the absence of facilitative or nuts and bolts type provisions in section 65DAAA. Those flexible attached or consequent rules can be discerned from the many authorities dealing with Rice & Asplund.*

O'Shannessy J's interpretation of the legislation (at [26]) was that the law which had developed subsequent to *Rice & Asplund was* "attached to" *Rice & Asplund* and should be applied "unless they limit or extend the operation of the scheme of s 65DAAA". He summarised some of these attached rules (at [21]):

- *New or consequent applications would usually, but not always, be dealt with as a preliminary hearing on the papers; and*

- *The required significant change of circumstances needed to be something not contemplated by the final orders or reasons or decision.*

- *At a hearing on the papers, unless contradicted by incontrovertible evidence or the applicant's evidence was implausible or contradictory, the evidence of the party seeking to reopen or re-litigate was accepted for the purpose of that hearing, including evidence of controversial matters; and*

- *Further expert evidence such as a family report maybe, but would usually not be, undertaken before determination that sufficiently changed circumstances now existed that justified the further litigation; and*

- *A minor change to existing orders may be appropriate without the Rice & Asplund threshold being crossed. (footnotes removed)*

The common theme in the cases of *Cafferty* and *Whitehill* is that the judges were reluctant to interpret the codification of *Rice & Asplund* as changing the law.

9. DUTIES OF INDEPENDENT CHILDREN'S LAWYERS

Tandy & Padula

The application of these new provisions was discussed in *Tandy & Padula* [2024] FedCFamC2F 671 where the ICL sought the following orders:

> *The father do all acts and things necessary to facilitate any request by the ICL to meet with the child, pursuant to s 68LA(5A) of the Act, including but not limited to delivering the child to the offices of Legal Aid NSW at any such times and dates are reasonably requested by the ICL in writing*.
>
> *In the event that the father does not facilitate the ICL's request to meet with the child, leave is granted for the ICL to relist the matter on 24 hours' notice in writing*.

Relying on s 68LA(5B)(b), the father objected to these orders as he said that X had expressed to him, on a number of occasions, that she did not wish to meet with the ICL. He further contended that X could not be compelled to express a view.

Judge Beckhouse made an order that the father deliver X to the ICL, at a time and date proposed by the ICL. In part, this was because Judge Beckhouse was (at [44]):

> *Concerned that without X meeting with the ICL, the Court is unable to receive an independent, unbased perspective of her views and wishes in relation to the final parenting arrangements that are made.*

Judge Beckhouse gave a number of useful directions regarding the effect of the new provisions. She rejected the idea that a child meeting with an ICL was a new concept (at [28]):

> *A reading of the legislative amendments might leave the impression that a child meeting with an ICL is a new initiative. This is not the case. The existing National Guideline for Independent Children's Lawyers (2021) ("the National ICL Guidelines") provide guidance to the ICL in fulfilling their role, including that ICLs should meet with children in most circumstances (Parts 5 and 6.2 of the National ICL Guidelines). The National ICL Guidelines have been endorsed by this Court and is a publicly available document on the Court's website. It was also tendered by the father.*

Judge Beckhouse noted that, unlike the "exceptional circumstances" exception contained in s 68LA(5B)(c), the court was not required to determine whether it was satisfied that the child did not want to meet with the ICL in order for an ICL to not have to perform their duty under s 68LA(5B)(b).

Judge Beckhouse went on to hold (at [41]):

> *The source of power that allows the Court to compel a parent to facilitate a meeting between the ICL and the child can be found elsewhere. Section 68L(2)(b) provides that the Court can make such other orders as it considers are necessary to secure the independent representation of the child's interests. Arguably, an order facilitating a meeting between the child and the ICL may well be necessary to secure the representation of X's best interests. The note at the conclusion of section 68LA(5D) supports this reading.*

That is, the power for the Court to make an order as proposed by the ICL, in this specific circumstance, did not stem from the new provisions, but rather already existing guidelines. This suggests that, in spite of the amendments, the court's power to grant such an order is substantially unchanged. The exception to this may be a scenario where s 68LA(5B)(c) is relied upon.

Judge Beckhouse confirmed that the source of the court's power did not solely stem from the amendments to the FLA (at [42]-[44]):

> *But, even if I am in error, as these proceedings arise under Part VII of the Act, the Court can exercise injunctive powers under s 68B of the Act. Under this section, the Court has the broad discretion to grant an injunction "unconditionally or on such terms and conditions as the court considers appropriate" (pursuant to s 68B(3)).*
>
> *An injunction made under s 68B is informed by the best interests of the child, but it does not have to be the paramount consideration in my decision making (Hedlund & Hedlund [2021] FedCFamC1A 84; (2021) FLC 94-065 at [114]).*
>
> *To be abundantly clear (as cases such as Oberlin & Infeld [2021] FamCAFC 66; (2021) FLC 94-017 requires), I can make this injunctive order under s 68B(1) because I am concerned that without X meeting with the ICL, the Court is unable to receive an independent, unbiased perspective or her views and wishes in relation to the final parenting arrangements that are made.*

Just as Judge Glass provided substantial weight to the evidence of the Family Consultant's report to determine what was in the child's best interests in *Shams & Alkaios*, Judge Beckhouse relied upon the Family Report completed by the Court Child Expert (CCE) on 11 December 2023. The father alleged that X did not want to meet the CCE, and was tearful, unwilling and intimidated. However, in her report, the CCE found that once X had settled, she "presented as a confident child with an infectious smile and dimples, and a delightfully expressive an exuberant manner and style of speech." Judge Beckhouse found from the evidence contained in the CCE report, that X did wish to express a view, contrary to the father's assertions. Judge Beckhouse determined that a meeting between the ICL and X should therefore take place in order to independently verify the father's claims that the child did not want to meet with or express a view to the ICL. She said (at [55)]:

> *The steps taken by the father to satisfy the Court that X does not wish to meet with the ICL were unfortunate. Whilst he is no doubt acting in what he believes to be the best interests of X, he is not independent, and I cannot be satisfied that he provided X with accurate*

> *information about the role played by the ICL. To rely upon his evidence about X's willingness and ability to discuss her circumstances with an ICL would, in my view, be at best superficial and potentially erroneous.*

The views expressed by Judge Beckhouse indicate the caution with which the court may approach the evidence of one of the parties as to the child's willingness to meet with the ICL without any other evidence.

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The father, with whom the child lived, and the ICL agreed on the proposed orders. Despite the ICL not having met with the five-year-old child, as required under s 68LA(5A), Justice Strum made final orders. This was largely because the father wished to relocate with the child to the northern hemisphere prior to the beginning of the school year and adjourning the hearing to allow for a meeting would have delayed this move. Practitioners should be cautioned from applying this case widely as it was heard only 2 days after the amendments came into effect and the order were made by consent. Justice Strum was aware that the case might attract interest due to the timing of his judgment (only 7 days after the amendments commenced) and cautioned (at [27]).:

> *this case is not the appropriate vehicle through which to consider what might otherwise generally constitute "exceptional circumstances" for the purpose of s 68LA(5B)(c).*

10. STRATEGIES FOR PRESENTING EVIDENCE AS TO "BEST INTERESTS"

The most significant aspect of the change to s 60CC is that the list of factors is far shorter, although there is still a catch-all. That catch-all is at the end of a much shorter list and has been changed.

The catch-all was:

- s 60CC(2)(m) - "any other fact or circumstance that the court thinks is relevant".

It now is:

- s 60CC(2)(f) - "anything else that is relevant to the particular circumstances of the child".

The effect of this change to the catch-all was expressed in the Explanatory Memorandum (at [49]):

> *to account for the myriad of circumstances that arise in family law proceedings. It is not intended or expected that the court would take into account trivial or inconsequential matters in determining whether there is 'anything else' that is relevant to the particular circumstances of the child in making a decision of what is in the best interests of the child.*

Justice Christie in *Bosch & Annema (No 3)* (discussed above) referred (at [56]) to s 60CC(2)(f), and commented that it allowed her to give broader effect to s 60CC(2)(d) than a narrow reading allowed:

> *Section 60CC(2)(d) of the Act directs the court to consider the capacity of persons who have or it is proposed may have parental responsibility. If read narrowly, the section might preclude consideration of the capacity of persons who will spend time or communicate with a child but do not have parental responsibility (or are not proposed to have parental*

> *responsibility). In any event, s 60CC(2)(f) enjoins me to consider all relevant circumstances and so I propose to consider the capacity of each of X's parents.*

The amendments removed some of the more practical aspects of s 60CC, which are often not considered by family report writers but which may be relevant in a contested hearing, for example:

- Contributions to financial support of children (s 60CC(3)(ca))
- Practical difficulties and costs arising in relation to children spending time with both parents (s 60CC(3)(e))
- Participation in decision making (s 60CC(3)(c))
- Attitude and approach to responsibilities of parenthood (s 60CC(3)(i))

There is a risk that the practicalities of parenting, parental responsibility and shared parenting arrangements may be given less weight by the parties, their lawyers and interim decision makers because they are no longer explicitly stated in the FLA. There is an argument that the "catch-all" enables these practical matters and other matters which were in the former s 60CC are still relevant. They may provide a useful checklist when obtaining instructions and drafting Affidavits.

The phrasing of affidavits has to change to line up with the new language of Pt VII, particularly the emphasis on "safety" rather than "protection" from family violence and long-term decision making.

It is possible that the reduction in the number of objects, principles and considerations to be considered by the court in relation to a child's best interests will have no effect on outcomes. The court may still consider matters although they are not expressly stated in the FLA, because they fall under the catch-all in s 60CC(2)(f) or are dealt with in the UNROC which is incorporated in s 60B(b). The reduction in the number of matters which must be expressly considered may mean that the UNROC is given greater relevance simply because it is far more obvious and has greater prominence than previously. It was one "additional object" of the four objects of Pt VII. It is now one of only two objects, the five principles are gone and the 16 considerations in s 60CC(2) have been reduced to four. The removal of a hierarchy of matters to consider in relation to a child's best interests is consistent with Australia's obligations under UNROC. UNROC does not take a tiered approach to the best interests of children (submissions summarised at [5.45] – [5.46] of the ALRC Report) and "where a statute is ambiguous, it should be interpreted in a manner consistent with Australia's obligations under international conventions" (at [5.34] of the ALRC Report)

However, Judge Beckhouse in *Tandy & Padula* referred to the UNROC, and quoted favourably from Justice Bennett in *Zammit & Zammit* [2020] FamCA 950 at [24] in a manner which suggests that the UNROC does not add to the matters relevant to a child's best interests (or at least it did not do so before the amendments):

> *The significance of an object of the legislation being to give effect to the Convention, is that it provides a basis to interpret the Act within the context of international human rights principles (including the Convention) to the extent that is compatible with the express intention evinced in the legislation.*

More generally, the likelihood is that the law has been intentionally changed by the amendments to ss 60B and 60CC. According to the Explanatory Memorandum (p 5), refining the list of "best interests" factors has the "aim of reducing complexity and repetition", but also "enhancing the focus on the needs of individual children". It states that the previous formula "can detract from the focus on the best interest of the child." The redrafted s 60CC is said (at 9 of the Explanatory Memorandum) to provide the court:

> *with the ability to consider the unique circumstances in each parenting matter in a way that places the best interests of a child at the forefront of decision making.*

The courts are likely to interpret the legislative changes as intending to effect a change in meaning and outcomes (albeit not significantly) by giving a different emphasis to the various factors considered in relation to best interests of children in their individual circumstances, rather than giving all factors the same weight in all cases.

Already, there has been some assistance with the interpretation of "financial abuse" and "verbal abuse". Such allegations seem to be made frequently in parenting cases in the courts, but the new focus on "safety" seems to have required the courts to more closely consider whether particular allegations amount to family violence before considering the possible impact on safety of children and their carers.

11. DOES THE APPROACH TO LITIGATION NEED TO BE RECONSIDERED?

The government's main motivation for the amendments was to simplify and clarify the previous legislation. Therefore, it is likely that the intention was that the court continue to make judgments, balancing histories of mental illness, family violence and addiction with other risks to the child that they may or may not pose in the future. The Explanatory Memorandum makes it clear (at [7] – [8]) that the policy underlying these sections of the FLA remains unchanged, namely that the best interests of the child is the paramount consideration. The amendments were not intended to change the view of what is in the best interests of children, but to "reduce complexity and increase the focus on the best interests of children". Arguably, the only change is that judgments will simply be made under new and fewer headings.

Litigation styles are unlikely to change dramatically for legal practitioners. Hopefully, litigants in person (and lawyers) will find it easier to draft Affidavits and Outlines of Case. The biggest impact is likely to be on those who negotiate and settle outside the court system or during the course of litigation, where it may be harder to settle cases due to:

- the removal of the s 65DAA pathway, which included the comforting words that a non-primary caregiver can still have "substantial and significant time" with their child;
- the removal of the presumption of equal shared parental responsibility may mean that more parents, even those who can communicate well, will no longer agree to shared parental responsibility or joint long-term decision making.

Previously, s 65DAA had a cascading (or descending) step-like structure. This meant that if the parents had equal shared parental responsibility, and equal time was not in a child's best interests and reasonably practicable, the court had to consider whether "significant and substantial" time was "reasonably practicable".

The removal of the reference to "significant and substantial time" (contained in the previous s 65DAA(2)) will arguably make it more difficult for parents and other carers to reach agreement in relation to care arrangements outside of court. In practice, the concept and definition of substantial and significant time provides a useful standard of measurement for parties and professionals. There is a body of case law in which courts have made orders which provide for the non-primary carer parent to have substantial and significant time. The phrase provides a degree of certainty and consistency in the determination of parenting cases, and therefore informs the advice lawyers are able to provide to their clients. It is likely that the removal of the "substantial and significant time" yardstick will it make it harder to settle cases out of court. There is no longer any starting point to assist with negotiations, advice and court determinations on the arrangements which are in a child's best interests.

12. FAMILY REPORTS

Important questions about family reports include: Do they need to be updated? Will family report writers make different recommendations?

The amendments have simplified the best interests considerations for children. This is the change which is likely to most significantly affect family reports and family report writers. Largely, family reports will remain the same, although the questions which practitioners pose to their report writers may change and the references to the FLA factors in the reports will also change. If factors are referred to which are not expressly stated in the FLA, report writers will need to take care to explain how these factors relate to a child's best interests.

Report writers will also need to emphasise safety rather than protection. This may prove to be a particularly fertile ground for cross-examination of report writers.

Parties may decide not to obtain updated reports because of the expense involved. However, report witters should be briefed before a trial by way of a joint letter of instruction that they will need to assess their recommendations and re-frame them to reflect the amendments. If a party is aggrieved by the recommendations - such as a recommendation for sole or equal parental responsibility or equal time, or not for equal time – that party want to obtain an updated report which might be

opposed by the other party. These types of application are presumably being heard but the outcomes are not reported. We may find out when the trial judgments are published.

13. A GUIDE TO THE WAY FORWARD

Unfortunately, the courts are yet to provide direction on a number of key concerns that have arisen from the new parenting pathway. These include the lack of certainty caused by the repeal of the parenting pathway of considering equal time and substantial and significant time. In the future, will equal time, 8/6 or 5/9 orders be made as frequently as in the past?

Some suggestions for practitioners, based on the cases discussed in the paper have been discussed above. For ease of reference, these suggestions are compiled in a simplified list here:

1. Practitioners should continue to present evidence and fact-based arguments as to why their proposed parenting arrangements are in the best interests of the child/ren.
2. The court must consider whether an order is in the best interests of a child, even if it is sought by consent.
3. Whilst it remains the role of the judge to decide parenting arrangements, strong weight may be given to evidence provided by a Family Consultant/Family Report Writer.
4. It is possible, that in the absence of the starting positions which arose under the former s 65DAA, they will remain primary options available to report writers and the courts on the basis of social science and common practice. Similarly, the notion that 50/50 is unable to be an express starting point in property settlement matters (Mallet & Mallet (1984) FLC 91-507) still seems to hover unstated in the background. The Explanatory Memorandum states (at 46) that:

   > *most children will… benefit from allowing each parent to be involved in the child's daily routine and occasions and events that are of particular significance to the child" along with time on the weekends and during school holidays. The "court can continue to make orders for equal time or substantial and significant time in the event that it determines that arrangement is in the best interests of the child.*

5. Whilst the interaction between the terms "parental responsibility" and "long-term decision-making" remains unclear, practitioners should consider seeking orders which recognise long-term decision making as an aspect of parental responsibility.
6. Courts may be reluctant to interpret the codification of *Rice & Asplund* as significantly changing the law.
7. Use care when drafting affidavits and outlines of case to use the new terminology and new provisions.
8. The matters listed in ss 60B, 60CA and 60CC are not intended to be an exhaustive checklist of matters relevant to a child's best interests. The previous versions of ss 60B and 66C may still be used as a checklist but if matter not within the current versions of these sections are raised, the relevance to the best interests of the particular child needs to be explained.
9. Watch out for Full Court decisions.

10. Keep a copy of the UNROC handy.

It is likely that victims of family violence will be better protected, with a reduction in the number of orders made for equal shared parental responsibility, which are often used by an abuser to maintain control over a victim post-separation. This is certainly the aim of the amendments. It is yet to be seen though how the law will settle, and whether any unintended consequences will result in practice. Any allegations of family violence will need to be carefully considered in the context of the child's "safety" and any other matters that are relevant to the child's safety

While there may be uncertainties caused by the simplification of the legislation, it remains clear that the best interests of the child is the paramount consideration. The court will continue to balance the risks involved in situations of family violence, drug and alcohol addiction and mental illness with the benefits associated with a continuing relationship between parents and children. The amendments make a positive addition by prioritising safety considerations including for children involved in such situations.

The likelihood is that when courts are making parenting orders there will be increased uncertainty as to the process to be adopted and the range of possible outcomes. This may accordingly change the approach to settlement negotiations. Whilst the paramount consideration remains the best interests of the child, there is a change of focus. It is possible that the overall end result will be that the law has changed very little, but such a prediction cannot be made at this time.

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