8

CHILD RELATED DISPUTES: THE LEGISLATIVE FRAMEWORK

Introduction

8.1 We have seen in earlier chapters how Australia adopted its family laws from the UK, and that these were initially administered in state courts. With the passage of the Family Law Act 1975 (Cth) (FLA) a new system of (mostly) federal family courts evolved with a view to developing a model of service delivery that was particularly suited to families and their disputes. At the heart of this approach was the desire to protect children and to advance their interests. In the next two chapters we will look at the role the court plays in helping to resolve disputes that not only concern children, but which are essentially *about* those children. Most obviously this includes disputes between parents about where their children will live, who they will have contact with and how they will be raised. As we shall see, however, the court's powers go beyond simply making a determination between disputing parents.

In this chapter, a broad overview will be given of the current legislative framework which is contained in Pt VII of the Act. Particular aspects of Pt VII have been the subject of much controversy and public debate; this has played an important role in shaping the current provisions which have undergone considerable reform. We have therefore included a brief consideration of the background to the current legislative regime, including the reason for reforms which commenced on 7 June 2012 as a result of the passage of the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011.[1] To avoid confusion, and unless otherwise stated, we have referred to the provisions of the FLA as amended by that Act. To put the significant changes to family law in the last two decades into perspective, a very brief summary of the key aspects of parenting law as it applied before 1996 is also included. By the end of this chapter, it will be obvious that, as in other areas of family law, a very broad discretion is given to decision-makers. The exercise of that discretion will be considered in

1. Further detail on the history of reforms to Pt VII can be found in the previous edition of this book, L Young and G Monahan, *Family Law in Australia*, 7th ed, LexisNexis Butterworths, Sydney, 2009, [8.7]–[8.20].

more detail in the next chapter. This chapter also deals with the question of the abduction of children out of, or into, Australia.

Before turning to these matters, however, it is instructive to revisit the United Nations Convention on the Rights of the Child and consider its role in shaping family law legislation in Australia.

The United Nations Convention on the Rights of the Child

8.2 Australia's ratification (on 17 December 1990) of the United Nations Convention on the Rights of the Child was a very significant development for family law. The Convention represents the most comprehensive statement of children's rights ever drawn up at the international level.[2] It covers a wide range of matters encompassing economic, social, cultural, civil and political rights for children.

While the Convention does not, upon ratification, operate of its own force in domestic law, by ratifying the Convention Australia has given a commitment to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention. In practice, this means that the Commonwealth Government must examine existing laws and policies in Australia, at Commonwealth, state and territory levels, to ascertain whether they comply with the Convention's articles. Where necessary, the Commonwealth Government should introduce legislation to ensure compliance with the Convention and also encourage the states and territories to make necessary changes. The Convention has been declared an 'international instrument relating to human rights and freedoms' under s 47(1) of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) thereby imposing an obligation on the Commission to examine whether existing laws and practices comply with the obligations under the Convention, and where they do not, to make recommendations to the Minister.

8.3 Australia's compliance with its obligations under the Convention is being monitored at an international level. Practically speaking, the enforcement provisions of the Convention are weak, in that the only sanction which exists is the possibility of an unfavourable report from the Commission. To date, Australia's responsiveness to its obligation to implement the Convention has been variable: while there clearly has been compliance in some areas, including some implementation in the family law area, in other areas concerns continue to be expressed about the lack of appropriate action to meet Australia's commitments under the Convention.[3]

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2. See P Alston (foreword) in P Alston and G Brennan (eds), *The UN Children's Convention and Australia,* Human Rights and Equal Opportunity Commission, ANU Centre for International and Public Law, Canberra, 1991, p iii.
3. See Australian Human Rights Commission, *Information Concerning Australia and the*

8.4 The United Nations Convention on the Rights of the Child has been of particular significance in shaping the reforms to Pt VII of the FLA. The areas in which the influence of the Convention can be seen will be examined in the course of the discussion of Pt VII. Where relevant, attention will also be drawn to aspects of the Convention that have arguably not been adequately reflected in the FLA as amended, for example, in relation to Art 12 dealing with the child's right to be heard in proceedings affecting it, either directly, or indirectly through a representative or appropriate body.

Shortly after major reforms were introduced in 1996, the Full Court of the Family Court handed down its decision in the case of *B and B: Family Law Reform Act 1995*.[4] In this important decision, the Full Court took the opportunity to comment on the relevance of the Convention in interpreting Pt VII of the FLA. Both the Attorney-General and the Human Rights and Equal Opportunity Commission intervened in this case, the facts of which centred on the issue of relocation; for further discussion of this topic, see **9.115ff**. In contrast to all other parties to these proceedings, the Attorney-General argued that the new provisions of the FLA provided a code, were unambiguous and that, therefore, it was unnecessary to refer to the Convention in interpreting these provisions. Conversely, the Commission submitted:

> … that the relevance of UNCROC was substantial — it is part of the platform providing the underlying principles of the Reform Act. Its legal relevance is that because the Act does not clearly create a precedence of rights (other than that the best interests of the child are paramount), the Convention assists by providing a basis for construction that is consistent with international norms — something that is to be preferred, legitimately open to the Court. That is to say, s 60B, s 65E and s 65F are to be interpreted within the context of international human rights principles, insofar as that interpretation is compatible with Parliament's express intention in the Reform Act.[5]

Though not relevant to the outcome of the case at hand, the Full Court reviewed the authorities in this area in detail, and listed numerous bases upon which it rejected the Attorney-General's submissions. Indeed, it considered the Convention:

> … must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the

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Convention on the Rights of the Child: Australian Human Rights Commission Submission to the Committee on the Rights of the Child, August 2011, available at <http://www.hreoc.gov.au/legal/index> (accessed 25 April 2012); J Tobin, 'The Development of Children's Rights' in G Monahan and L Young (eds), *Children and the Law in Australia*, LexisNexis Butterworths, Sydney, 2008, pp 29–31.

4. (1997) 21 Fam LR 676; FLC ¶92-755.
5. ibid, at [6.45].

purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends.[6]

Having found that the Convention could be referred to in the interpretation of Pt VII, the Full Court noted that nothing in the Convention was inconsistent with the approach the court (or indeed earlier courts) had adopted in deciding relocation cases.[7]

The relationship between the Convention and the FLA has been raised, if not resolved, more recently in High Court proceedings, in the context of the mandatory detention of immigrant children. Proceedings were brought under Pt VII seeking the release of two boys from detention. The Chief Judge of the Family Court of Australia has described the majority decision of the Full Court in this case[8] as follows:

> … [T]he majority held that [the Convention] had been incorporated into the Family Law Act by the Family Law Reform Act through its external affairs power. Thus … the Family Court did have jurisdiction to make orders releasing children from detention centres.
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> … [T]he majority … agreed with the Full Court of the Federal Court in the decision of *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [(2003) 197 ALR 241] that the relevant section of the Migration Act should be interpreted and applied in a manner consistent with established rules of international law and in a manner which accords with Australia's treaty obligations. Nicholson CJ and O'Ryan J stated that the principle enunciated in Al Masri "gains even greater strength in relation to children".
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> Their Honours considered the possible effect of [the Convention] as a matter highly relevant to the proceedings and concluded that they found it "inconceivable" that the Federal Parliament, in enacting the Migration Act 1958 (Cth), would have contemplated the lengthy detention of children … The majority … referred in particular to paragraphs (b), (c) and (d) of Article 37 of [the Convention] and found that the indefinite detention of children is incompatible with the Article and constituted a "serious breach of Australia's obligations under the Convention".
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> The court held that the Migration Act was no bar to the Court exercising its welfare jurisdiction and ordering the release of children from detention.[9]

6. ibid, at [10.19].
7. ibid, at [10.27].
8. *B and B and Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 30 Fam LR 181; FLC ¶93-141.
9. D Bryant, 'Care and Protection of Children: Australian and New Zealand Experience', paper delivered at 4th World Congress on Family Law and Children's Rights, Cape Town, South Africa, March 2005, pp 20–1.

The High Court[10] unanimously disagreed with the Full Court on the last point, finding instead that the Family Court had no jurisdiction either to order the release of children from detention or indeed to make general orders concerning the welfare of detained children. This is discussed further in relation to the Family Court's welfare power: see **8.125**.

Given the lack of jurisdiction, the High Court did not need to address the question of the incorporation of the Convention into the FLA. Callinan J, the only High Court judge to consider the matter, disagreed with the Full Court on this point also; however, the Chief Judge of the Family Court of Australia has pointed out his Honour's limited consideration of the materials relied on by the Full Court in reaching their decision.[11] It has been argued, therefore, that the Full Court's decision on the incorporation of the Convention into the FLA remains relevant.[12]

Proceedings in respect of children under the Family Law Act 1975

Background to the current legislative regime

8.5 Since its inception, courts exercising jurisdiction under the FLA have had a broad discretionary power to make orders to resolve parenting disputes. In a dispute between two biological parents, the court would typically make three types of orders: a guardianship order dealt with who had decision-making power in relation to long-term matters (schooling, religion, major medical matters, etc); a custody order dealt with where the child was to live on a day-to-day basis; and an access order permitted someone who did not have custody to have contact with the child (this could include those other than parents, such as grandparents). Most commonly, guardianship would have been joint between parents, custody would have been allocated to one parent, and the other parent would have had an order permitting access. Parents who were in agreement as to these things, but wanted them formalised, could lodge consent orders with the court or register a child agreement. In the absence of any contrary order or registered agreement, parents were joint guardians and custodians of their children, though they could exercise these powers individually: see **8.25ff**.

10. *Minister for Immigration and Multicultural and Indigenous Affairs v B (No 3)* (2004) 31 Fam LR 339; FLC ¶93-174.
11. See note 9 above, p 21.
12. L Ruddle and S Nicholes, 'B *and B and the Minister for Immigration and Multicultural and Indigenous Affairs:* Can International Treaties Release Children from Immigration Detention Centres?' (2004) 5(1) *MJIL* 256, p 257. For consideration of the influence of the Convention in other areas, see *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353. See also 'The High Court's Decision in *Minister of State for Immigration and Ethnic Affairs v Teoh* and the Government's Response' (1995) 9 *AJFL* 89.

If the parents were in disagreement, the court was directed to have regard to the child's 'welfare' as the paramount consideration (commonly known as the paramountcy principle) in determining what orders to make. For many years, the only other guide in the FLA as to how to determine how a child's welfare would be best promoted, was the mandatory and extensive 'best interests checklist': then s 68F(2). Having considered the required matters, the court could make any order it thought appropriate in the circumstances. For reasons that are discussed in the next chapter, it was common at this time to see orders where the pre-separation primary caregiver to the child was awarded custody with the other parent (usually the father) having access, with a typical access pattern being every second weekend and half the school holidays.

8.6 The Family Law Council was instrumental in raising concerns about the way the system was operating. It argued that the prevailing custody and access model tended to create a mentality in which separating parties were encouraged to think of themselves as winners and losers in the custody battle. Coupled with this was a prevailing belief that parents had a prima facie right to have access to their children.[13] The Council observed that there was a tendency by the court to award access as something of a consolation prize for the 'losing parent', brought about, to a large extent, by the fact that the same considerations were stated to apply to custody and access: thus a parent unsuccessful in a closely fought custody dispute would almost automatically be granted access to the child, without a full examination of whether, in all the circumstances, that was really in the child's best interests. The Council recommended amendments to address this and expressed its support for legislative amendment to promote joint custody or joint parenting.

8.7 In another report,[14] the Council recognised the importance for children of maintaining contact with both parents after the parents' separation and the detrimental effects resulting from the long-term or permanent absence of a parent from their lives. It was found that, in practice, contact between access parents and their children often diminished over time and that the division of post-separation parental roles into custody versus access reinforced the win/lose attitude and discouraged ongoing parental responsibility. Cooperative parenting after separation was strongly endorsed and the Council concluded that this objective would be enhanced by the use of terminology that discouraged ideas of ownership of children. There were a number of other significant reports[15] and there was

13. Family Law Council, *Access — Some Options for Reform,* AGPS, Canberra, 1987, para 1.1.
14. Family Law Council*, Patterns of Parenting after Separation*, AGPS, Canberra 1992.
15. Australian Law Reform Commission, *Report No 57, Multiculturalism and the Law*, AGPS, Canberra, 1992; *The Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975*, AGPS, Canberra, 1993; *Family Law Act 1975 Directions for Amendment: Government Response to the Report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law*

consideration of whether a model similar to that adopted in the Children Act 1989 (UK) should be adopted.

8.8 Against this background, the government proceeded with the most substantial reforms to the FLA since its inception. The Family Law Reform Act 1995 (Cth) (the 1995 Reform Act), which came into force on 11 June 1996, introduced the concept of 'parental responsibility' (a term drawn from the Children Act 1989 (UK)); this replaced the concepts of guardianship, custody and access. There was a new focus on 'parenting plans' for parents who could agree on matters. Where parties did not agree, courts could make 'parenting orders' which covered 'residence' (that is, where the child was to live) and 'contact' between the child and the other parent or other persons. Parenting orders could also deal with any other aspect of parental responsibility not covered by any residence or contact orders and these were badged 'specific issues orders'. While the paramountcy principle remained, the term 'best interests' replaced 'welfare'.

8.9 The 1995 Reform Act also introduced s 60B, a statement of the object of Pt VII and the principles underlying that object. A number of key themes were seen to arise from s 60B (most particularly the underlying principles), which were further developed in the substantive provisions of the new Pt VII of the Act.[16] They include: the shift from parental rights to parental responsibility; recognition of rights on the part of children — the right to know and be cared for by both parents and the right of contact on a regular basis with both parents; and the model of joint parenting, irrespective of the breakdown, or even non-existence, of the parents' relationship. Linked with the preceding theme was the encouragement of agreement between the parents with regard to parenting arrangements based on an ideology of family autonomy, that is, that the family is usually best able to determine and promote children's interests.

8.10 However, the 1996 reforms did not see the dramatic shift in family law decision-making that was desired by some and complaints continued. For example, parenting orders, though named differently, still very much resembled, in form, the types of orders that were made before the reforms, though it was more common to see mid-week contact. Many were calling for a shift towards more shared parenting orders and there was sustained, and very vocal, criticism of parenting laws (and child support). Indeed, family law (including child support) is now often said to be the matter raised the most by the public with their local MP. In response to this pressure, the federal government of the day instituted a review with the specific goal of considering whether, in parenting disputes, the starting position ought to be a presumption of joint physical custody — that

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Act 1975, AGPS, Canberra, 1993; Family Law Council, *Letter of Advice to the Attorney-General on the Operation of the (UK) Children Act 1989*, March 1994.

16. See also R Bailey-Harris, 'The Family Law Reform Act 1995 (Cth): A New Approach to the Parent/Child Relationship' (1996) 18 *Adel L Rev* 83, p 84.

is, equal shared care. The Committee set up to consider the matter rejected this proposition (in the 'Every Picture' report),[17] recommending instead a rebuttable presumption 'in favour of equal shared parental responsibility, as the first tier in post-separation decision making' (rec 1), effectively meaning joint guardianship. Such a presumption was, however, recognised to be inappropriate, where there was 'entrenched conflict, family violence, substance abuse, or established child abuse, including sexual abuse': rec 2. Another significant recommendation (rec 12) was that the government establish a new specialist federal tribunal to determine parenting matters, which would have social science as well as legal professionals on the decision-making panel.

Then the government signalled its intention to implement most of the recommendations of the Committee, noting this would mean parents would share key decisions about their children's lives, regardless of the amount of time spent with each parent. The Prime Minister also indicated that courts would generally be required to consider equal parenting time even if this was not sought by the parents,[18] though this was not one of the 'Every Picture' recommendations. However, the (perhaps rather expensive) idea of a new tribunal was not embraced by the federal government.

8.11 A raft of enormously complex changes were proposed, and submissions critical of some of the proposed changes were received. At the two extremes were submissions to the effect that the changes did not go far enough in promoting shared care, and submissions which argued that the pro-contact flavour of the changes would further endanger victims of family violence. Nonetheless, the Bill was passed and took effect on 1 July 2006.

8.12 The detail of the key changes effected by this Act will be obvious from the text that follows in this and the next chapter and it would be repetitive to set out in detail even the major changes here, as they are considerable. However, a few general comments can be made.

First, not unlike the 1996 reforms, while terminology has changed again (residence, contact and specific issues orders were abandoned), many of the fundamentals remain the same. Most notably, the child's best interests are still the paramount consideration when making any parenting order: s 60CA. Second, in spite of the discussions leading up to these changes and public misconceptions on the issue, there is no presumption in favour of equal shared physical care of children; however, there is now a presumption in favour of joint 'guardianship' (this is called 'equal shared parental responsibility'). Third,

17. House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*, CanPrint, Canberra, 2003.
18. J Howard, 'Framework Statement on Reforms to the Family Law System', Press Release, 29 July 2004, available at: <http://www.aph.gov.au> (accessed 13 July 2012).

when exercising their discretion in making parenting orders, decision-makers must generally now follow a highly prescribed path. Perhaps most importantly, this includes: a requirement that where there is a joint 'guardianship' order, the decision-maker must essentially work backwards from equal shared physical care in looking at parenting proposals; and the division of the best interests checklist into two tiers. The best interests checklist was divided into 'primary' considerations (the promotion of the child–parent relationship and protection of the child from violence) and 'additional considerations' (all the remaining matters from the checklist). Fourth, the likely outcome of these changes would be that decision-makers would move away from what might have been seen as the standard pattern of parenting orders (not least because this was the specific intent of prescribing the process for considering parenting options). Fifth, the emphasis on non-judicial resolution of disputes has been intensified, both with the introduction of the compulsory pre-action procedures (discussed at **2.18–2.19**) and the creation of Family Relationship Centres to provide free family dispute resolution for couples: see **Chapter 2**. Although these Centres do not actually feature in Pt VII, they were an integral part of the overall reform package. This is further reinforced with the attempted reinvigoration of parenting agreements, which to this point have not been used greatly: see **8.40–8.41**. Finally, in line with the ongoing tradition of trying to tailor service delivery to family law clients, there has been a very significant move away from the traditional adversarial trial model: see **8.69ff**.

8.13 At the time of the 2006 reforms, it was foreshadowed that some of the particular provisions, and the generally increased emphasis on shared parenting, could compromise the protection of children from violence.[19] The 2012 reforms are predominantly aimed at addressing issues relating to family violence and child-related disputes. We discuss family violence as a separate topic in **Chapter 3**, but as we outlined in **Chapter 1**, family violence is of broad general relevance to family law. In the next chapter, as part of the discussion of how the court exercises its discretion, we have considered the key changes made by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 in context. At this point, it is important to note the problems identified with the 2006 version of Pt VII and the major changes that have been made as a result.

8.14 There has been considerable research undertaken to evaluate the impact of the 2006 reforms: see further **3.1–3.3**. The findings have indicated that some provisions may not be operating in a way that maximises the best interests of children, and in

19. B Fehlberg, B Smyth, M Maclean and C Roberts, 'Legislating for Shared Time Parenting after Separation: A Research Review' (2011) 25(3) *Int J Law Policy Family* 318, p 329.

particular that the increased emphasis on shared parenting might be undermining the protection of children from violence.[20] The research indicates that:

- Cases which come to court commonly include allegations of violence.
- Many of these families use [family dispute resolution] but often victims of violence do not disclose violence; if they do, they are very often not screened out, and these families are just as likely to end up with shared care arrangements as families who disclose no violence concerns.
- Professionals working in the system are sometimes confused as to whether the presumption of [equal shared parental responsibility] applies when there are grounds to believe violence is an issue.
- Professionals in the family law system need better training in relation to family violence.
- People working in the family law system consider it is better at delivering shared care than protection from violence.[21]

8.15 There were a number of provisions identified by the research as contributing to the problems and it is these that have been reformed:[22]

- The 2006 reforms introduced two primary considerations: one which promoted shared parenting and another which promoted protection of children from violence. However, there was no legislative guidance as to which prevailed when they were in conflict. This has been remedied by the introduction of a provision to ensure that protection from violence will be given greater weight in that situation (s 60CC(2A)): see **9.27**.
- A 'friendly parent' provision was included in the 2006 version of the mandatory additional considerations relevant to a child's best interests; this required the court to consider the extent to which a parent facilitated contact with the other parent. This provision had the potential both to discourage true claims of violence and to encourage decision-makers to place greater weight on contact than protection from violence, and so this has been removed.
- Another additional consideration altered in the 2006 reforms was that requiring consideration of family violence orders; only final and contested orders could be taken into account. The 2012 amendments have ensured that the court can take into account any inferences that can be drawn from past or present family violence orders: see **9.27**.

20. For a summary of key findings of the major reports, see D Higgins and R Kaspiew, *Child Protection and Family Law … Joining the Dots*, National Child Protection Clearinghouse Issues Paper No 34, 2011.
21. L Young, 'Australia: Reflections on the Shared Parenting Experience' forthcoming in B Atkin (ed), *International Survey of Family Law 2012 Edition*, Jordans Publishing, Bristol, 2012.
22. For further discussion of these provisions, see L Young and G Monahan, *Family Law in Australia*, 7th ed, Sydney, LexisNexis Butterworths, 2009, [16.6].

- The 2006 introduction of a mandatory costs order for false allegations — aimed squarely at false allegations of family violence — also discouraged victims of violence from bringing forward their stories, and has therefore been removed.

The 2012 reforms are not of the scale of the two waves preceding them. However, they are significant as they wind back some of the 2006 reforms in important ways and provide a better balance between the sometimes competing interests of shared parenting and protection of children from violence. As we shall see in the next chapter, the research undertaken so far on the impact of shared parenting on children suggests further reforms may yet be appropriate: see **9.18**.

Scope of operation of Pt VII of the Family Law Act 1975

8.16 As a result of the referral of powers by all states (with the exception of Western Australia, see **4.xx–4.xx**), an expansive version of the FLA applies to all children in both territories and all but one state: see Subdiv F. In Western Australia, a restricted version of the Act confined to 'children of the marriage' (defined in s 60F) applies.[23]

Pursuant to s 69ZJ of the FLA, the Family Court has extended jurisdiction over all children in Western Australia in circumstances where parties to the dispute are resident in different states or in a different state or territory.[24]

The states excluded their jurisdiction in the areas of adoption and child welfare from the reference of power to the Commonwealth. It is clear from the terms of s 69ZK that a court cannot make an order in respect of a child in the care of the state under child welfare laws (unless that order is expressed to come into effect when the child ceases to be in state care; see also s 69ZK(1)(b)).[25]

Key features of Pt VII

8.17 An important feature of Pt VII is s 60B. Section 60B(1) originally stated that the object of this Part was to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children. This was expanded in 2006 and now includes ensuring that 'the best interests of the child' are met by:

23. However, due to the relevant provisions of the Family Court Act 1997 (WA) applying to children not of a marriage, and to those provisions being essentially the same as those found in the FLA, the practical significance of this is limited (for example, it affects where appeal paths lie).
24. *OHB and MTM* (2007) FLC ¶93-338.
25. As to whether the Family Court can join the state to parenting proceedings and make parenting orders giving a child up into state care without the consent of the state, see *Secretary of Department of Health and Human Services & Ray* (2010) FLC ¶93-457. This decision also discusses the meaning of some of the phrases in s 69ZK.

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
(b) protecting children from physical or psychological harm from being subjected to or exposed to, abuse, neglect or family violence, …[26]

There is a subtle, but not insignificant, change in the way these aspirations have been framed since 2006. Before, the section spoke of ensuring children receive adequate parenting and parents meet their responsibilities, with no particular model prescribed. The current section essentially prescribes a model: it says that Pt VII is aiming to ensure that the best interests of a child are met by having maximum possible involvement with both parents, protecting children from violence, and so on. The clear message (and this is reflected in other sections discussed later) is that, while shared care is not presumptive, the underlying philosophy of the Part is that the best interests of a child are advanced by the child seeing as much as possible of both parents.

8.18 Section 60B(2) states that the principles underlying these objects, except when it is or would be contrary to a child's best interests, are that:

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
(d) parents should agree about the future parenting of their children; and
(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Subsection 60B(2)(e) is strengthened by s 60B(3) which explains in more detail what specific rights are included in a right to enjoy Aboriginal or Torres Strait Islander culture. The specific reference to grandparents in subsection (b) is consistent with a clear intent to underscore the value placed on children spending time with their wider family.

The genesis of s 60B is seen in the United Nations Convention on the Rights of the Child[27] and this is reinforced by the inclusion of an additional object in 2012, 'to give effect to the Convention of the Rights of the Child': s 60B(4).

26. The inclusion of a provision relating to protection from harm followed a recommendation in Family Law Council, *Letter of Advice to the Attorney-General, Review of Div 11 — Family Violence,* 16 November 2004.
27. See, in particular, Arts 2, 7, 9.3 and 18 of the Convention.

Parental responsibility

8.19 'Parental responsibility' is defined in s 61B as meaning, in relation to a child, all the duties, powers and responsibilities, and authority which, by law, parents have in relation to children.

The definition in s 61B is, in a sense, a 'non-definition' as there is no statement of the specific duties and powers that parents have in respect of their children — it merely refers to the general law (that is, common law and statute law) to reveal the content of parental responsibility.

Content of parental responsibility

8.20 The Full Court has acknowledged that there is little Australian statutory guidance as to the content of this concept.[28] Some insight into the meaning of 'parental responsibility' may be gleaned from other sources. In Scotland, the legislature saw fit to provide a statement of parental responsibility in the Children (Scotland) Act 1995.[29]

Drawing from this, commentary on the UK legislation[30] and judicial statements from the UK dealing generally with the issue of parental rights and responsibilities,[31] the notion of parental responsibility clearly covers a wide range of matters including the obligation to have regular contact with the child, and to provide appropriate direction and guidance to the child in the course of the child's upbringing.

8.21 In view of the nature of the definition of 'parental responsibility' in s 61B, an understanding of the former concepts of custody and guardianship under the FLA is still of assistance. Pursuant to the definitions in the former s 63E, a person having custody had responsibility for day-to-day decisions in respect of the child, whereas long-term decisions, such as schooling or religion, were to be made by the child's guardian(s). The newer concept of parental responsibility encompasses decisions relating to both the long-term and day-to-day care, welfare and development of the child.

8.22 The FLA makes no reference to parental 'rights'. This represents a departure from the United Nations Convention on the Rights of the Child which, notwithstanding its focus on the rights of the child, does nevertheless refer in places to parental rights, for example, Art 5. The approach taken under the FLA is generally seen as a reflection of the commitment to counter the notion of

28. *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 at 729; FLC ¶92-755.
29. See ss 1 and 2.
30. See, for example, P Bromley and N Lowe, *Bromley's Family Law,* 8th ed, Butterworths, Sydney, 1992, p 301.
31. See, for example, Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 at 420–1.

proprietary rights in respect of children which had been pervasive. The definition of parental responsibility in s 61B includes reference to the 'powers' and 'authority' that parents have in respect of children; however, this is not the same as the recognition of parental rights.

8.23 As indicated above, the old concept of guardianship will often now be encompassed by an order for 'equal shared parental responsibility' or, where it is not to be shared, orders allocating responsibility for 'major long-term issues' in relation to a child. Section 4(1) provides a non-exhaustive definition of 'major long term-issues' (see **8.45** further) and in doing so the legislation identifies some aspects of parental responsibility.[32]

As Boland J has noted, 'the legislature has not attempted to constrain the concept of parental responsibility by strictly defining the limits of its ambit'.[33] Generally, the lack of precision and the broad scope of this concept have not presented any particular problems for the court.

Who has parental responsibility?

8.24 The next matter that needs to be addressed is: who has parental responsibility? Under s 61C, each of the parents of a child who is not 18 has parental responsibility for the child[34] and this is the case despite any changes in the nature of the relationship of the child's parents. The section specifically states, '[i]t is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying'.[35] This is one of the main provisions to give effect to the model of joint parenting referred to earlier, irrespective of marital status of the parents or the nature of their current relationship.

Joint or several responsibility?

8.25 An important practical issue concerns the nature of the grant of parental responsibility under the FLA and, in particular, whether it is exercisable jointly or severally where it is held jointly. The answer is potentially different for parental responsibility for major long-term issues (what was guardianship) and responsibility for day-to-day decisions (being exercised by parents who were previously described as having 'custody/residence' and 'access/contact').

Section 61C refers to all parental responsibility. The reference in that section to 'each of the parents' having parental responsibility would tend to suggest that the parties' responsibility can be exercised severally, that is, independently of the other parent, in the absence of a court order to the contrary: see s 61C(3). However,

32. *Director-General of the Department of Human Services & Tran* (2010) 44 Fam LR 1; FLC ¶93-433 at [194] per Boland J.
33. ibid, at [199].
34. See s 61C(1).
35. See s 61C(2).

other provisions could be used to support the view that parental responsibilities under the Act are shared responsibilities (see s 60B) and are to be exercised by the parents jointly.

Clearly, the question of how parental responsibility is to be exercised has significant practical implications. If parental responsibility is exercisable severally, that is, independently of the other parent, it would give each parent a much greater degree of latitude in decision-making in respect of the child, subject only to orders of the court. If, on the other hand, the legislation requires parental responsibility to be exercised jointly, consultation between parents will be required in all cases and the jurisdiction of the court is likely to be invoked more often and at an earlier stage to resolve parental disagreements.[36]

8.26 Commenting on the position before the 2006 reforms, the Full Court in *B and B: Family Law Reform Act 1995*[37] said:

> … [W]e think it unlikely that the Parliament intended that separated parents could only exercise all or any of their powers or discharge all or any of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day to day matters, and the impracticability of such a requirement when they are living separately only has to be stated to be appreciated.
>
> As a matter of practical necessity either the resident parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children.
>
> On the other hand, consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like. We believe that this accords with the intention of the legislation.

What was not resolved by this statement, however, was whether a parent could enforce the duty to consult that arose from this interpretation.[38] Dewar and Parker characterised the form of decision-making envisaged under the Act as it stood in 1996 (in the absence of any order to the contrary) as a 'weak consultative' model and noted the potential for uncertainty and increased conflict that might be caused by a system that 'promises one thing but actually delivers another'.[39]

Leaving aside for the moment the question of consultation, the Full Court in *B and B* did not make a definitive statement that parental responsibility for major long-term issues could only be exercised jointly. The later decision of the Full

36. See J Dewar, 'The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared — Twins or Distant Cousins?' (1996) 10 *AJFL* 18, p 27.
37. (1997) 21 Fam LR 676; FLC ¶92-755.
38. *Vlug* v *Poulos* (1997) 22 Fam LR 324 at 336; FLC ¶92-778.
39. J Dewar and S Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *AJFL* 96, p 109.

Court in *Goode v Goode*, which was addressing the effect of the 2006 amendments, said that in the absence of a court order the effect of s 61C remains that parents both have full parental responsibility, and this can be exercised either jointly or independently.[40] Thus, it seems accepted now that the effect of s 61C is to bestow joint and several decision-making power. This can be changed by court order, but any such order would need to be specific as to its effect.

The 2006 amendments did not alter s 61C, but new provisions were enacted in relation to the issue of consultation and the effect of certain orders on the power to make unilateral decisions about major long-term issues: ss 65DAC and 65DAE. The first of these sections provides that if, under a parenting order, two or more persons share parental responsibility in respect of major long-term issues (defined in s 4(1)), the order is taken to require that the parties must consult each other and make a genuine effort to come to a joint decision: s 65DAC(1) and (3). The section also says the parenting order 'is taken to require the decision to be made jointly by those persons': s 65DAC(2) (emphasis added). What is not explained is what happens if the parties cannot agree on a decision — say, for example, in relation to schooling. The terms of s 65DAC(2) do not seem to allow one parent to make the decision, even where agreement cannot be reached after good faith consultation. In practice, no doubt, rather than going to court to resolve the issue, one parent may well just make the decision and wait to see whether it is challenged in court by the other parent. However, it must be noted that where a parent breaches a parenting order, specific enforcement provisions apply: see **8.126ff**. A failure to consult will plainly amount to a breach of a parenting order and it may be that making a decision about a major long-term issue without the other party's agreement also triggers the enforcement provisions.

However, s 65DAC only applies where there is an order for joint parental responsibility for major long-term issues. Where there is no order, as pointed out in *Goode and Goode*, the matter is still governed by s 61C.

8.27 What about parental responsibility for day-to-day matters — is this joint or several? We discussed in detail in the previous edition of this book why there is some ambiguity surrounding this question under the legislation as currently drafted.[41] While nothing has changed in that regard, the reality is that in practical terms it is accepted that the responsibility for day-to-day decision-making rests solely with the person who has care of the child at any given time — in particular see the note to s 65DAC(2). This is reflected in the Full Court's decision in *B and B: Family Law Reform Act 1995* (referred to above). To avoid any doubt over who has the right to make day-to-day decisions, a parenting order dealing with that matter ought to be included as a matter of course. Certainly, there is no reason not to include such orders, and they make the situation clear for the parties who

40. (2006) 36 Fam LR 422; FLC ¶93-286 at [37].
41. L Young and G Monahan, *Family Law in Australia*, 7th ed, LexisNexis Butterworths, Sydney, 2009, [7.31].

have to implement those orders, rather than expecting parents to understand the technical nuances of what is now very complicated legislation.

Scope of parental responsibility

8.28 What then is the scope of parental responsibility? How long does it last and in what circumstances does it come to an end? It is clear from the terms of s 61C(1) that parental responsibility ends when a child turns 18. It also ceases upon the adoption of the child. Aside from the possibility of an express order of the court removing or limiting parental responsibility — whether made in contested proceedings or by consent — the only other situation where parental responsibility can be affected is by a parenting agreement reached between the parties. Although parenting plans can no longer be registered with the court (see **8.40ff**), s 64D makes parenting orders subject to later parenting plans, unless the order contains an express provision to the contrary (such a provision only being available in exceptional circumstances).

8.29 Thus, parental responsibility exists until the child reaches the age of 18. This raises the question: to what extent can parental authority be exercised in respect of a maturing minor? According to early case law, parental rights were fully exercisable until the child reached the age of majority.[42] However, this interpretation was strongly rejected by Lord Denning in *Hewer v Bryant*[43] where he described custody as a dwindling right which courts will hesitate to enforce against the wishes of the child the older he or she is. It starts with a right of control and ends with little more than advice.

8.30 The modern view, which stems from the landmark House of Lords decision in *Gillick v West Norfolk and Wisbech Area Health Authority*,[44] is that parental rights of control are not absolute but only exist insofar as they are necessary for the benefit and protection of the child, and must be exercised in a manner consistent with the child's welfare. As children become more mature and develop the capacity to make their own decisions, the scope of parental authority and control diminishes accordingly. The specific matter at issue in the *Gillick* case concerned the capacity of a minor to consent to contraceptive treatment; however, the decision is widely believed to have a much broader reach, irreparably denting the doctrine of parental rights.[45]

8.31 The House of Lords decision in *Gillick* has been approved by the High Court of Australia as a correct statement of the common law on the nature of parental powers, which diminish as the individual child's capacities and maturity

42. *Re Agar v Ellis* (1883) 24 Ch D 337.
43. [1970] 1 QB 357.
44. [1985] 3 All ER 402.
45. M Freeman, 'England: The Trumping of Parental Rights' (1986–87) 25 *J Fam L* 91, p 92.

grow: *Secretary, Department of Health and Community Services v JWB and SMB* (often known as *Re Marion*).[46] Thus, in spite of the terms of the FLA which (at the time) referred to parental rights of guardianship and custody continuing until the child reaches 18 years of age (s 63F; see now s 61C, dealing with the scope of parental responsibility), the High Court was of the view that parental authority does, both in fact and law, diminish as the child gains sufficient maturity and understanding to make his or her own decisions. The issues were clearly outlined by Deane J. After rejecting the 'extreme view that parental authority persists unabated until a child attains full adulthood', his Honour commented:

> The most important influence in making it inevitable that the extreme view of parental authority would yield to the common law's traditional recognition of the gradual development of the legal capacity of a young person to decide things for herself or himself has, however, undoubtedly been the social fact of the increasing independence of the young. In times when it is not unusual for fifteen and sixteen- year-olds to be supporting themselves as members of the workforce, to insist upon complete parental authority up until the age of eighteen would be to propagate social anachronism as legal principle …
>
> … The effect of the foregoing is that the extent of the legal capacity of a young person to make decisions for herself or himself is not susceptible of precise abstract definition. Pending the attainment of full adulthood, legal capacity varies according to the gravity of the particular matter and the maturity and understanding of the particular young person. Conversely, the authority of parents with respect to a young person of less than eighteen years is limited, controlled and varying.[47]

8.32 After the *Gillick* case, there were a number of decisions of the UK Court of Appeal which sought to limit the effect of that decision, at least in the context of medical treatment. In *Re R (A Minor)*[48] Lord Donaldson put forward the view that the presence of '*Gillick* competence' in a child does not preclude the parents' right to consent to (as opposed to veto) treatment on behalf of the child. This view, which was later endorsed by the Court of Appeal in *Re W (A minor) (medical treatment)*,[49] was justified by Lord Donaldson on the grounds that doctors would otherwise be faced with an intolerable dilemma when dealing with maturing minors, having no way of establishing in whom the right to consent to treatment resided at that time. Whatever its status in England, the decision in *Re R (A Minor)* does not represent the law in Australia. In *Re Marion* (**8.31**), the case was relegated

46. (1992) 15 Fam LR 392 at 401; FLC ¶92-293 per Mason CJ, Dawson, Toohey and Gaudron JJ. See also *A and A* (1981) 7 Fam LR 439; FLC ¶90-070 and *J v Leishke* [1987] ALJR 143 at 147–8 per Brennan J for earlier support for this view in Australia.
47. (1992) 15 Fam LR 392 at 441.
48. [1991] 4 All ER 177.
49. [1992] 4 All ER 627.

to a footnote.[50] McHugh J was more forthright, holding that insofar as this decision was contrary to the proposition that parental authority is at an end when the child gains sufficient intellectual and emotional maturity to make an informed decision on the matter in question, it is inconsistent with the *Gillick* case which has been approved by the High Court.[51]

8.33 As was noted in *B (Infants) and B (Intervener)* and *Minister for Immigration & Multicultural & Indigenous Affairs*[52] (a case about the detention of immigrant minors), *Gillick*-like tests of competency for minors exist in other areas of law. As to what factors are relevant to that competency, Nicholson CJ and O'Ryan J noted that a child's competency depends on the circumstances and this may involve a much broader consideration than just the child's age.[53]

8.34 The right of a mature minor to make his or her own decisions is, however, subject to the best interests principle. Fogarty and Kay JJ in their joint judgment in *Harrison and Woollard*,[54] after referring to the so-called '*Gillick*-competent' test, and the decision in *Re W (A minor) (medical treatment)* (8.32) (a case in which the court overrode the refusal by a minor of treatment for anorexia, where that was necessary in the minor's interests), continued: '… where a court is concerned with the welfare of a child, no question of "self-determination" by a mature child can arise.'[55] This was not to suggest that a child's wishes would necessarily be overruled but rather to explain that, in some circumstances, determination of the child's best interests requires the court to reject the child's wishes.

Reallocation of parental responsibility

8.35 Section 65D(1) empowers the court to make such parenting orders as it thinks proper, and such orders may have the effect of reallocating parental responsibility as between the parents, or possibly in favour of another person(s). This power is subject to s 61DA (the presumption in favour of equal shared parental responsibility — joint 'guardianship') and s 65DAB (the obligation to consider parenting plans when making orders). However, the broad discretionary power granted by s 65D(1) has always been subject to any specific obligations placed on decision-makers under Pt VII, for example, the obligation to make the decision that is in the child's best interests and the obligation in reaching that decision to take account of mandatory considerations. In essence, s 65D(1) permits the court a very broad discretion to make the orders it thinks proper, taking account of the various other provisions set out in Pt VII.

50. (1992) 15 Fam LR 392 at 401.
51. ibid, at 458.
52. (2003) 30 Fam LR 181; FLC ¶93-141.
53. ibid, at [376]–[379].
54. (1995) 18 Fam LR 788; FLC ¶92-598.
55. (1995) 18 Fam LR 788 at 800.

8.36 One question that has arisen for consideration is, in what circumstances should a court be prepared to intervene with the legislative allocation of parental responsibility (which lies equally with both parents) and make orders reallocating such responsibility (in some cases to non-parents)? The reason that this arises as an issue stems from the background to the legislation. Reforms introduced under the Family Law Reform Act 1995 (Cth) were, to a large extent, based on the Children Act 1989 (UK). One aspect of the English legislation which has not been followed in Australia is the 'no-order principle', that is, the court is expressly discouraged from making an order 'unless it considers that doing so would be better for the child than no order at all'. Questions nevertheless were raised as to whether the 1996 reforms heralded a new policy of non-intervention.

8.37 Despite the absence of a 'no-order' rule, after the 1996 reforms the Full Court supported restraint in the making of orders that unnecessarily interfere with parental responsibility:

> … [I]n our view it is clear from the legislative scheme that any intervention by the Court in the due performance of an aspect of parental responsibility, that seeks to interfere with or diminish the responsibility of either parent to care for the child in the manner that parent deems appropriate, should be made only where the Court is of the view that the welfare of the child will be clearly advanced by that order being made.
>
> … [I]t is not the role of the Court to identify and then seek to determine every matter that is in issue between two estranged parents who cannot agree on the way their child is to be raised. The Court should only interfere in the way in which a parent proposes to raise a child to the extent that the welfare of the child requires interference.[56]

8.38 Notably, this statement is directed at the court interfering with 'particular aspects' of parental responsibility. In other words, the Full Court is advising against micro-management of parenting and using court orders to resolve minor day-to-day matters of parenting.

8.39 It might be said that the introduction of a presumption of equal shared parental responsibility effected by s 61DA strengthens the notion that shared parental responsibility should not be interfered with lightly by court order — that is, it should generally be left as joint. However, practically, there is now a very good reason why court orders may be preferred over no court orders. The power to decide major long-term issues is usually shared. If there is no court order about this matter, the effect of s 61C is that these decisions can be made independently: see **8.25–8.27**. Conversely, if an order for equal shared parental responsibility in

56. *VR v RR* (2002) 29 Fam LR 39 at 44; FLC ¶93-099. See also *W and G (No 2)* (2006) 35 Fam LR 39; (2005) FLC ¶93-248 at [123].

relation to major long-term issues is made, then the effect is that the parties can only exercise this power jointly and they must consult about the issue: s 65DAC. As discussed at **8.25**, on its face the effect of this section is that a decision cannot be taken without the consent of the other parent. This could be significant for many parents as it would cover things like schooling choices, religion and major medical decisions.

Parenting agreements

8.40 A central theme underlying Pt VII of the FLA is that parents are encouraged to reach agreement with regard to parenting arrangements: see s 60B(2)(d). This principle is reinforced by s 63B, which states:

> The parents of a child are encouraged:
>
> (a) to agree about matters concerning the child; and
> (b) to take responsibility for their parenting arrangements and for resolving parental conflict; and
> (c) to use the legal system as a last resort rather than a first resort; and
> (d) to minimise the possibility of present and future conflict by using or reaching an agreement; and
> (e) in reaching their agreement, to regard the best interests of the child as the paramount consideration.

The FLA has historically favoured the use of agreements between parties which can be registered with the court so that they can be enforced as if they were a court order; this has always been a feature of the provisions dealing with alteration of property interests and spousal maintenance under the FLA. Before 1996 there were 'child agreements'; the 1996 amendments replaced these with 'parenting plans'. Superficially, at least, there was some similarity between the two forms of agreement, as both provided a mechanism by which agreements reached between the parties relating to their children could be registered with the court, thereby acquiring legal force as if they were an order of the court.

Parenting plans were intended to provide a simple, informal process for formalising agreements. The model that eventuated was quite different and they have never been widely used. The legislative scheme adopted made them a more expensive and time-consuming option than obtaining consent court orders. They were also difficult to vary. In 2004 the registration process for parenting plans was abandoned. Parents can now enter into a written parenting plan that deals with any aspect of parental responsibility (s 63C), though to deal with child support the document must be a combined parenting plan and child support agreement: ss 63C and 63CAA. Parenting plans may be varied or revoked by later written agreement of the parents: s 63D. As they cannot now be registered, provisions of a parenting plan do not have the force of a court order, and so cannot be

enforced as such. Section 63DA imposes an obligation on lawyers, family dispute resolution practitioners (see **2.8**), family consultants (see **2.46**) and counsellors to advise parents that they can consider a parenting plan. If they advise on such a plan, there is a long list of compulsory information that must be given to parents, which includes the obligation to explain, in simple language, the availability of programs designed to help parents if they experience compliance difficulties.

Registered parenting plans entered into before 14 January 2004 continue to have effect;[57] however, they cannot be varied.[58] Parties may revoke the plan by consent, but to do so they must register a written revocation agreement with the court.[59]

8.41 Section 64D has the effect of making parenting orders subject to the terms of any later parenting plan, unless the parenting order specifically provides this is not to be the case. However, there must be 'exceptional circumstances' for a court to make that provision. Section 64D(3) defines 'exceptional circumstances' to include those that give rise to a need to protect a child from harm and 'the existence of substantial evidence that one of the child's parents is likely to seek to use coercion or duress to gain the agreement of the other parent'.

Thus, parenting plans that are inconsistent with prior court orders will effectively revoke those orders, but the new agreement in the parenting plan will be unenforceable.[60] Parents who find themselves in disagreement after making a parenting plan can still litigate. Under s 65DAB a court, when making parenting orders, must have regard to the most recent parenting plan, if doing so would be in the best interests of the child.

Given that parenting plans can be entered into without legal advice, and that they will override prior inconsistent orders, the government agreed to amend the relevant Bill to the effect that such plans must be made free of any threat, duress or coercion: s 63C(1A). For the same reasons, the then opposition also suggested a cooling-off period be included, but the Federal Attorney-General took the view that, as the agreements are not enforceable, that was not required. Arguably, that overlooks the serious consequences of a plan effectively discharging inconsistent orders. The environment in which court orders are made — which includes compulsory pre-filing dispute resolution and some degree of oversight of the actual orders made — may be very different to the circumstances under which a parenting agreement is struck. One concern here must be that victims of violence, who have secured court orders, may be coerced into new agreements, overriding those orders. The onus will then effectively lie on the victim to take the matter back to court to later prove coercion or threats.

57. See s 63DB(2).
58. See s 63DB(3).
59. See s 63DB(4) and (5), and s 63E.
60. A further effect of this is that penalties for contraventions do not apply to parenting plans: see the terms of Div 13A.

There is another issue of concern in this regard. Despite the government's aim of simplifying procedure, each round of amendments makes Pt VII more technical and difficult to interpret for a non-lawyer. This is very relevant for parenting plans, as many will be drafted by non-lawyers and they are often long and complex. As parenting plans now have the effect of overriding orders to the extent of any inconsistency, obtaining legal advice — at least as to the operation of the plan — would appear to be a wise precaution for parties.[61] In the absence of such advice, there is the distinct possibility of confusion as to the application of the orders and the plan.

Institution of proceedings and procedure

Who may institute proceedings?

8.42 Section 69C sets out who may institute proceedings under the FLA in relation to children. The section is in two parts. Subsection (1) sets out the provisions located elsewhere in the Act expressly dealing with who may institute particular kinds of proceedings in relation to children: s 65C (parenting orders); s 66F (child maintenance orders); s 67F (child bearing expenses); s 67K (location orders); and s 67T (recovery orders).[62]

By virtue of s 69C(2), any other kind of proceedings under the Act in relation to a child may, unless a contrary intention appears, be instituted by: (a) either or both of the child's parents; or (b) the child; or (c) a grandparent of the child; or (d) any other person concerned with the care, welfare or development of the child. In view of the matters dealt with elsewhere by virtue of s 69C(1) (including the all-important parenting orders under s 65C), this provision is of limited operation, applying, for example, to proceedings for orders in relation to the welfare of a child (s 67ZC) or for orders or injunctions under s 68B.

It is clear, therefore, that the category of potential applicants is broad. This may beg the question of why grandparents are specifically named. As mentioned at **8.18**, the references to grandparents (which came with the 1996 and 2006 reforms) serve to emphasise the benefit to children of having contact with their wider family. Notably, grandparents are named as potential applicants for parenting orders under s 65C(ba); however, even prior to the insertion of this subsection, a grandparent could bring proceedings in respect of parenting orders under s 65C, on the basis that they were 'concerned with the care, welfare and development of the child'.[63]

8.43 Any party wishing to file an application seeking an order under Pt VII in relation to a child must also file (at the same time) a certificate from a family

61. For an example of the impact of ambiguity in a parenting plan, see *Morgan and Miles* (2007) 38 Fam LR 275; FLC ¶93-343.
62. Section 68T(4) is also referred to; however, this is an oversight, as that subsection has been repealed.
63. See ss 66F(1)(c), 67K(1)(ca) and 67T(ca) which now all name grandparents.

dispute resolution practitioner: s 60I(7). As the purpose of this is to encourage the non-judicial resolution of disputes, this is discussed in more detail under the topic of dispute resolution: see **2.18ff**.

Required jurisdictional connection

8.44 The jurisdictional connection required for the institution of proceedings relating to children under the FLA is set out in s 69E. The court will have jurisdiction if the child, a parent of the child, or a party to the proceedings is (i) present in Australia on the relevant day; or (ii) an Australian citizen; or (iii) ordinarily resident in Australia on the relevant day. There will also be jurisdiction where it would be in accordance with either a treaty arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings. The term 'relevant day' means, in relation to proceedings: (a) if the application instituting the proceedings is filed in a court, the day on which the application is filed; or (b) in any other case, the day on which the application instituting the proceedings is made: s 69E(2).

As is clear from the terms of s 69E, and as was confirmed in *JJT v CCT*,[64] Australian family courts have jurisdiction under Pt VII, even if none of the children in question is ordinarily resident in Australia.

Parenting orders

8.45 A parenting order is, in essence, an order that deals with any aspect of parental responsibility for a child. Parenting orders are addressed in Div 5 of Pt VII of the FLA[65] and can deal with any of the following matters (s 64B(2)):

(a) the person or persons with whom a child is to live;
(b) the time a child is to spend with another person or other persons;
(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;
(e) the communication a child is to have with another person or other persons;[66]
(f) maintenance of a child;
(g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
    (i) a child to whom the order relates; or
    (ii) the parties to the proceedings in which the order is made;

64. (2004) FLC ¶93-198.
65. For more detail on earlier versions of Div 5, see previous editions of this book.
66. See s 64B(4) in relation to the meaning of 'communication'.

(h) the process to be used for resolving disputes about the terms or operation of the order;
(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

Paragraphs (c) and (i) ensure that parenting orders can cover all aspects of parental responsibility.

Section 64B(3) points out, somewhat obviously, that parenting orders include orders allocating the responsibility to make 'major long-term issues'. As we have already indicated, the latter phrase describes matters that were historically under the umbrella of 'guardianship'. Section 4(1) defines 'major long-term issues' to include education, religious and cultural upbringing, health, the child's name and 'changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent'. Due to concern expressed at the breadth of this provision (raised in consultations over the Bill introducing this amendment), this definition was extended to make it clear that a parent's decision to form a new relationship does not, on its own, fall within the definition. However, where that would result in the child moving, then that could turn it into a major long-term issue. This provision does not effect a change in the context of the making of orders, however, as it was always the case that the court could make an order about such a matter. It may, however, be significant in other contexts, such as the requirement to consult: see **8.25**. This issue is discussed further in relation to relocation cases: see **9.115** generally.

Subsection (4A) makes it clear that a parenting order can include an order requiring the parties to 'consult with a family dispute resolution practitioner to assist with: (a) resolving any dispute about the terms or operation of the order; or (b) reaching an agreement about changes to be made to the order'.

A 2012 addition to the end of s 64B(1) states that declarations or orders as to parentage (in other words, under Pt VII, Div 12, Subdiv E) are not parenting orders.[67] This was to clarify some confusion as to whether, in deciding whether to order parentage testing, the child's best interests were 'a' consideration, or the 'primary consideration'.[68]

8.46 What is the significance of deciding whether a particular court order is a 'parenting order'? First, pursuant to s 60CA, in proceedings in respect of parenting orders, the best interests of the child are the paramount consideration. Second, breaches of 'parenting orders' attract the operation of Div 13A.[69] This Division

67. Inserted by the Family Law Legislation Amendment (Family Violence and Other Measures) Act (Cth) 2011.
68. See *Tryon v Clutterbuck* (2007) 211 FLR 1; FLC ¶93-332 and then *Brianna v Brianna* (2010) 43 FamLR 309; FLC ¶93-437.
69. See s 70NCA and the definitions in s 4(1) of 'primary order' and 'order under this Act affecting children'.

deals with the penalties for contravening orders that 'affect' children, which are defined in s 4(1) to include parenting orders.

Orders dealing with where a child lives

8.47 Section 64B(2)(a) says an order can deal with the individual(s) with whom a child is to live (formerly known as a custody order and more recently a residence order).

8.48 As with all forms of parenting orders, such an order may be made in favour of a parent or a third party: s 64C. However, s 65G applies to consent orders where: (a) the child will live with a non-relative (s 65G(1)); or (b) no relative will be allocated parental responsibility for the child: s 65G(1A). The definition of 'relative of a child' in Pt VII includes step-parents and step-siblings. If s 65G applies, before the court can make the consent order sought, it must be satisfied either that the parties have discussed the matter with a family consultant, or that there are circumstances that make it appropriate to make the order even though no such discussion has taken place: s 65G(2).[70]

This provision is clearly aimed at avoiding 'de-facto' adoptions of children without some court scrutiny. An example of the application of this provision is seen in *Beck v Whitby*,[71] where Watts J approved a consent order (on the basis that it was in the child's interests) which effectively 'gave' the child in question to an unrelated couple, in accordance with a traditional Torres Strait Islander adoption practice, known as 'Kupai Omasker'.[72] Usually, this section will be considered in situations where parents come to court asking for a surrogacy arrangement to be given legal recognition through consent parenting orders;[73] surrogacy is discussed further at **7.35**.

8.49 One of the advantages of abandoning the terminology of custody/access orders and replacing them first with 'residence' and now 'live with' orders, is that it is open to a court to grant both parents 'live with' orders, specifying the time ratio to be allocated between them. Such an approach is consistent with the strong emphasis in the legislation on shared parental responsibilities and helps avoid the win/lose mentality associated with having one type of order being considered superior to the other. The court's response to this matter is discussed further at **8.52**.

70. For an example where the requirement was waived, see *King v Phanphumong* [2010] FamCA 1206.
71. [2012] FamCA 129.
72. Note the discussion at of this practice in the recent Family Law Council report, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, 2012, [5.10], available at <http://www.ag.gov.au> (accessed 23 May 2012).
73. See for example *Dudley v Chedi* [2011] FamCA 502.

8.50 In *Cales v Cales*,[74] the Full Court was asked to consider whether the court could, in effect, make an order determining the place of residence of a parent; this is discussed further in the context of relocation: **9.115**. As part of oral submissions on this point, the mother argued that the trial judge fell into error:

> … by determining the application on the basis of where the children should live, not with whom the children should live. [It was] submitted that there was no power to make an order which dictated where the children should live, but rather s 64B(2) dictated that a court could only make an order about with whom a child should live.[75]

In considering the matter, the Full Court referred to *Director-General of the Department of Human Services v Tran*,[76] and in particular the statement by May J that:

> … [i]t is clear that parental responsibility does not include where the child will live. This of course is not surprising as orders usually separately provide for where and when children will live with parents.[77]

This statement, and indeed the discussion in that case, highlight the difficulty with the current terminology in Pt VII: see further **8.62** and **9.26**. In fact, May J is not referring here to the general concept of parental responsibility — this clearly does include where the child will live. May J is referring to that part of parental responsibility that deals with major long-term issues. The Full Court also referred to Boland J's comment in *Department of Human Services v Tran*, where, in a discussion about the lack of definition of the term 'parental responsibility', her Honour notes that the FLA does not explicitly 'define as an incident of parental responsibility the responsibility to determine where a child shall live…'.[78] Accepting that the broad concept of parental responsibility does include responsibility for deciding where a child will live, the question for the Full Court in *Cales v Cales* was whether, having decided with whom the child was to live, there was power to make an order about where that child would live.[79] Unsurprisingly, the Full Court answered this question in the affirmative and held that an order restraining the movement of a child from a particular location was within the court's power,[80] though the appeal was ultimately upheld on other grounds.

74. (2010) 44 Fam LR 376; FLC ¶93-459.
75. ibid, at [63].
76. (2010) 44 Fam LR 1; FLC ¶93-433.
77. ibid, at [86].
78. ibid, at [194].
79. The relevance of this argument to relocation cases is discussed at **9.115**.
80. ibid, at [90].

Orders dealing with children spending time, or communicating, with another person

8.51 When the terminology in the FLA changed from 'access' to 'contact' orders, it is fair to say the change was pretty much in name only. Contact orders were substantially similar to the access orders they replaced. Now, courts may make orders that children 'spend time with', or 'communicate with', other people. While the terminology is different, it is hard to see that this effects any great legal change. In other words, what were once contact (or access) orders, are now cast in the new terminology.

A child may be ordered to spend time with a parent or a grandparent or any other third party such as a former step-parent or other relative: see s 64C. Whereas the old term 'contact' (which was not defined in the Act) was considered sufficiently wide to encompass both physical contact and contact by more indirect means such as by letter, telephone or email, now those forms of contact are broken into two categories. Physical contact will be 'spending time with' a person and communication orders will relate to other types of contact.

8.52 Due to the philosophy underlying the changes in 1996 — including avoiding the win/lose mentality — the question quickly arose as to the use of residence–residence, as opposed to residence–contact, orders. This is not a question of when there should be equal shared physical care — clearly in such a case the orders would be framed as 'live with' orders for both parents. The question was when one parent had more care, how should the order for the parent with less care be styled? This was commented on by the Full Court in *B and B: Family Law Reform Act 1995*.[81] Agreement was expressed with the submissions of the Attorney-General that it is open to the court in an appropriate case to make a residence–residence order. The Full Court commented that there are many cases where such orders are desirable, reinforcing as they do the shared parenting responsibility concept contained in the legislation. Their Honours did, however, wish to avoid residence–contact orders being seen as a second best option. It was their view that residence–contact orders should be used in circumstances where the contact is of relatively short duration, particularly where there is no overnight contact.[82] This is particularly pertinent with the latest change in terminology and it is submitted that this case applies equally to the current provisions. Where a child is spending nights at a parent's house, it is appropriate for the order to be framed so that the child is said to be living with the parent at that time. Where the child does not stay overnight, then 'spending time with' is the more appropriate form for the order.

81. (1997) 21 Fam LR 676; FLC ¶92-755.
82. (1997) 21 Fam LR 676 at 731–2.

Proceedings in respect of parenting orders

8.53 The procedure for applying for, and the making of, parenting orders (other than child maintenance orders: s 65B) is dealt with in Subdiv B of Div 6 in Pt VII. Pursuant to s 65C, a parenting order may be applied for by either or both of the child's parents, the child, a grandparent of the child or any other person concerned with the care, welfare and development of the child. A parenting order in relation to a child may be made in favour of a parent of the child or some other person: s 64C. (The special conditions applicable for making a parenting order by consent that a child live with a non-relative, or where parental responsibility is not given to a relative, have been outlined above.) The court's power to make a parenting order is derived from s 65D which states that, in proceedings for a parenting order, the court may, subject to ss 61DA and 65DAB and Div 6, make such parenting order as it thinks proper: s 65D(1). In deciding whether to make a particular parenting order, the court must regard the best interests of the child as the paramount consideration: s 60CA. The best interests principle is dealt with further below. In addition to the pre-action procedures required before an application for parenting orders can be filed (see **2.18ff**), counselling is usually required before a court can make a parenting order in defended proceedings: s 65F(2).[83]

A parenting order cannot be made in relation to a child who is 18 years or over, is or has been married, or is in a de facto relationship: s 65H(1). Any existing parenting order in relation to a child stops being in force if the child turns 18, marries or enters a de facto relationship: s 65H(2). 'De facto relationship' is defined in s 4AA, and s 65H(3) provides the court with the power to make a declaration as to whether the child is in a de facto relationship.

8.54 There is some scope for the court to take account of the fact that parenting is ongoing and to recognise that simply making an order will not necessarily resolve parenting difficulties. The court therefore has a discretion to make a supervision order. This order requires compliance with the parenting order to be supervised by a family consultant, and/or requires a consultant to give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the order: s 65L(1). In determining whether to make an order under subs (1), the court must regard the best interests of the child as the paramount consideration: s 65L(2).[84] Further, under s 65LA, in proceedings for a parenting order the court may order a party to attend a post-separation parenting program.[85]

83. Note that the court can, at any time, order the parties to attend counselling: FLA s 13C(1).
84. Apparently such orders are not frequently made: CCH, *Family Law and Practice*, [14-225].
85. See s 4(1) for the definition of a 'post-separation parenting program'.

Exercise of the court's jurisdiction: the best interests of the child as the paramount consideration

8.55 Like many jurisdictions around the world, the FLA embraces what has become known as 'the paramountcy principle'. Broadly speaking, this means that when making a decision concerning a child, the child's best interests will be the paramount consideration.[86] This principle constitutes the legislative basis for making decisions in respect of children under a wide range of statutes in Australia, for example, in adoption, and care and protection legislation. It is generally accepted that this approach reflects the influence of the United Nations Convention on the Rights of the Child, in particular Art 3.1. This article, however, states the principle somewhat differently:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

We have discussed elsewhere the particular significance of the FLA making children's interests 'the paramount', as opposed to 'a primary', consideration: see the discussion at **9.115ff**.

8.56 Under s 60CA, the court must regard the best interests of the child as the paramount consideration in making a parenting order, and this paramountcy principle also applies in a number of other specified contexts under the legislation: see further **8.64**. The term 'interests' is defined in this context in s 4(1) as including matters related to the care, welfare or development of the child. Thus, it is clearly intended to be a concept of broad application, encompassing all matters relevant to a child's upbringing.

There is only one situation in which the FLA gives positive guidance on what the best interests of a child will be and this arises from the 2006 reforms. When a court is considering who will have parental responsibility in respect of major long-term issues, it is now presumed to be the case that the child's best interests will be served by this being shared equally between the parents (s 61DA): see **8.61**. While this presumption may be rebutted — that is, it can be shown that this is not in the child's best interests — in the absence of such proof the presumption must be applied. Other than in this situation, the best interests of a child are a matter for the court's discretion. However, since 2006 there has been considerable prescription in the FLA as to the process to be adopted in exercising that discretion, and this is discussed further at **8.61ff**.

86. Originally the FLA referred to the 'welfare' of the child as the paramount consideration. This was changed to the current formulation in the 1996 reforms. There is no legal significance to the change in terminology: *Re Z* (1996) 20 Fam LR 651; FLC ¶92-694. See also *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 at 730; FLC ¶92-755.

8.57 Section 60CC(1) requires the court to take into account certain considerations in determining what is in the child's best interests. Since 2006, this mandatory 'best interests checklist' has been divided into two categories. Section 60CC(2) sets outs what are termed 'primary' considerations:

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

It is clear that the purpose of the addition in 2006 of these primary considerations was to emphasise the objects set out in s 60B and to try to embed them more into the decision-making process. The impact this has had on the way discretion is exercised is discussed in the next chapter.

Section 60CC(3) goes on to provide a lengthy list of 'additional' considerations that must also be considered by the court. Given the significance of this section to decision-making in children's cases, the full text of s 60CC(3) is set out below:

Additional considerations are:

(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
(b) the nature of the relationship of the child with:
  (i) each of the child's parents; and
  (ii) other persons (including any grandparent or other relative of the child);
(c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:
  (i) to participate in making decisions about major long-term issues in relation to the child; and
  (ii) to spend time with the child; and
  (iii) to communicate with the child;
(ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;
(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
  (i) either of his or her parents; or
  (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
(e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(f) the capacity of:
  (i) each of the child's parents; and
  (ii) any other person (including any grandparent or other relative of the child);

to provide for the needs of the child, including emotional and intellectual needs;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
(h) if the child is an Aboriginal child or a Torres Strait Islander child:
  (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
  (ii) the likely impact any proposed parenting order under this Part will have on that right;
(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
(j) any family violence involving the child or a member of the child's family;
(k) if a family violence order applies, or has applied, to the child or a member of the child's family — any relevant inferences that can be drawn from the order, taking into account the following:
  (i) the nature of the order;
  (ii) the circumstances in which the order was made;
  (iii) any evidence admitted in proceedings for the order;
  (iv) any findings made by the court in, or in proceedings for, the order;
  (v) any other relevant matter;
(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
(m) any other fact or circumstance that the court thinks is relevant.

There is no indication in the Act as to the relationship between the primary and additional considerations, nor, initially, was there any statement as to how the two primary considerations interact. The latter issue was addressed in 2012 with the introduction of s 60CC(2A) which requires that, when applying these two primary considerations, the court must give greater weight to the second of the listed considerations: the protection of children from harm.

Where the court is considering making a consent order, pursuant to s 60CC(5) the court may, but does not have to, take account of the matters in s 60CC(2) and (3).

Apart from the demarcation of considerations as either 'primary' or 'additional', there is no indication of the respective weighting to be attached to the many specified matters: this ultimately comes down to an exercise of discretion based on the circumstances of the particular case. While these sections have been amended in recent years, many of the factors in the best interests checklist have remained

constant, and so earlier decisions of the Family Court decided prior to the various reforms are of continued relevance.

8.58 The paramountcy principle is deceptively simple. Its practical application is, however, very challenging to explain. Thus, for the most part, it is possible to do little more than find case examples by way of illustration. The correct approach to the application of the principle was explained by the Full Court in *Marriage of Smythe*,[87] endorsing the view of Demack J in *Jurss and Jurss*:[88]

> … the welfare of a child in any particular case must be determined on the facts of the particular case … The inquiry is essentially a positive one designed to promote the interests of the child, not to demote the claims of either parent.

This highlights the point that, in the exercise of this discretion, limited use can be made of precedents. Each case will turn on its own facts and so factual 'precedents' are useful only in giving some indication of how a court might approach a factual matrix, not as a basis for arguing the outcome in a particular case.[89]

8.59 One issue that arises is the appropriate test or standard by which to evaluate what course is in the child's best interests. In *Marriage of Horman*,[90] Fogarty J held that the test is to be determined having regard to contemporary social standards, not from the point of view of the standards of the individual parent. In his Honour's view, the test must be objective, 'at least in the sense of falling within the wide range of existing social standards'.[91] Consideration has also been given to whether it is the long or short-term welfare of the child that needs to be considered. The approach of the courts has been that, to the extent that it is both possible and reasonable in the circumstances, the court should have regard to the long-term welfare of the child.[92] Inevitably, there will be cases where short-term considerations may dominate, for example, because of the extreme youth of the child or where illness or temporary separation requires an order geared to the short term.[93]

With regard to the meaning of the term 'paramount', it is now well established that it does not mean that it is the sole consideration or the first of a list of factors to consider, rather that it is the overriding consideration.[94]

87. (1983) 8 Fam LR 1029; FLC ¶91-337.
88. (1976) 1 Fam LR 11,203 at 11,206; FLC ¶90-041.
89. This is in line with the general position that when a judge exercises a statutory discretion a precedent is not created.
90. (1976) 5 Fam LR 796; FLC ¶90-024.
91. (1976) 5 Fam LR 796 at 797.
92. For example, *Mathieson and Mathieson* (1977) FLC ¶90-230; *Marriage of Hall* (1979) 5 Fam LR 609; FLC ¶90-679; *Brown and Brown* (1980) 6 Fam LR 352; FLC ¶90-875.
93. *Marriage of Raby* (1976) 2 Fam LR 11,348; FLC ¶90-104.
94. *Marriage of Kress* (1976) 2 Fam LR 11,330; FLC ¶90-126.

8.60 The paramountcy principle has for a long time been a pivotal concept in the law dealing with children; however, it has been the subject of some criticism. Some of the suggested problems have been characterised as ones of indeterminacy, fairness and cost efficiency.

There have, from time to time, been comments by writers who have put forward alternative approaches. An influential work of the 1970s was a book entitled *Beyond the Best Interests of the Child* by Goldstein, Freud and Solnit.[95] The authors propose, instead of the standard of the best interests of the child, an alternative approach which they call 'the least detrimental alternative'. This, they explain, is intended to refer to 'that placement which is the least detrimental among available alternatives for the child'. By this shift in emphasis, they wish to focus on the inadequacy of many of the possible arrangements that may offer themselves when one is considering the placement of children who have been disturbed in the pristine or 'natural' environment of their original parental home. They say:

> The concept of "available alternative" should press into focus how limited is the capacity of decision makers to make valid predictions and how limited are the choices generally open to them for helping a child in trouble. The proposed standard is less awesome and grandiose, more realistic, and thus more amenable to relevant data-gathering than "best interest". It should facilitate weighing the advantages and the disadvantages of the actual options.

In addition to the problems that Goldstein et al identify, one aspect of the paramountcy principle that has generated criticism is that it does not allow for sufficient regard to be had to the complex interaction of interests that exist in any family. Intact families do not operate on the basis that children's interests always override those of other family members, and indeed it is arguable that children's interests are advanced by appropriate weight and consideration being given to the interests of other family members. This is reflected in Art 3(1) of the United Nations of the Convention of the Rights of the Child, which makes the child's bests interests 'a primary', not 'the paramount', consideration. Rhoades has argued for a 'relational' approach to decision-making.[96] This, she suggests, would permit judges to consider the web of relationships within which children are raised, allow for consideration of parental interests and needs, and facilitate the attainment of post-separation environments that are healthier and promote individual autonomy.

Whether or not one agrees with these alternatives, there has been considerable reform in the area of family law and it has not resulted in any significant retreat

95. Free Press, New York, 1973.

96. For further discussion of alternatives to the paramountcy principle see H Rhoades, 'Revising Australia's Parenting Laws: A Plea for a Relational Approach to Children's Best Interests' (2010) 22 *Child and Family Law Quarterly* 172, pp 180–3 and the references referred to in it.

from the traditional position. As we shall see in the next chapter, modern interpretations of the best interests principle require decision-makers to identify the various relevant parenting options, weigh their advantages and disadvantages in the context of the child's best interests and make the order that best promotes the welfare of the child. Parental interests must, if necessary, give way.

The mandatory process for determining best interests

8.61 While there have long been mandatory considerations for a court in determining what is in a child's best interests, the 2006 reforms introduced a prescriptive process for approaching this exercise. In a sense, if the child's best interests were, and remain, the paramount consideration one should not expect to see fundamentally different decision-making as a result of these reforms. However, this was precisely the intent of these changes, reflecting a view that the courts were reluctant to depart from traditional patterns of allocating parental responsibility; patterns which were perceived to result in too little real shared care. The way the court has interpreted the current provisions, and their impact on decision-making, are discussed in the next chapter. Here we will set out the legislatively prescribed process for determining parenting disputes.

8.62 Section 61DA provides the starting point, by requiring the application of a presumption in favour of 'equal shared parental responsibility' (ESPR) when a court is making a parenting order in relation to a child. Even though the presumption of ESPR is relatively new, courts have typically favoured this division for quite some time. It is obvious from the terms of the section that the presumption will only apply where the dispute is between parents; that is, a grandparent, for example, will not be the beneficiary of this provision.[97]

As the note to this section spells out, and as the Full Court reiterated in *Goode v Goode*[98] (see **9.3**), s 61DA is not a presumption relating to the amount of time a child spends with each parent, though no doubt the way this section is worded is partly to blame for a widespread misconception on that point.[99] We have already indicated this is a presumption as to how parental responsibility should be allocated in relation to major long-term issues (that is, it is equivalent to a presumption in favour of joint guardianship). It is not immediately apparent from s 61DA, however, why this is so. This can be deduced from the following. First, the presumption applies only when parenting orders are being made, but is not a

97. *Aldridge v Keaton* (2009) 42 Fam LR 369; FLC ¶93-421 at [62]; *Donnell v Dovey* (2010) 42 Fam LR 559; FLC ¶93-428 at [121]–[122].
98. (2006) 36 Fam LR 422; FLC ¶93-286.
99. See R Chisholm, *Family Courts Violence Review: A Report by Professor Richard Chisholm*, Australian Government Attorney-General's Department, Canberra, 2009, p 120; R Kaspiew, M Gray, R Weston, L Moloney, K Hand, L Qu and the Family Law Evaluation Team, 'The AIFS Evaluation of the 2006 Family Law Reforms' (2011) 86 *Family Matters* 8, p 14.

presumption that the child will live equally with both parents (see above). Second, it seems that day-to-day decision-making, another significant aspect of parental responsibility, lies with the person who has care of a child at any given time: see **8.25** further on this point. This is true even if there is an order for ESPR. By a process of elimination, this means that an order for ESPR will relate to the remaining aspects of parental responsibility, which means major long-term issues. It is technically possible of course that no orders are made concerning where a child lives and so on, in which case the effect of making an order of ESPR would be to replicate the already existing position under s 61C; that is, parental responsibility in respect of all matters would be joint. Note, however, that obligations as to decision-making for major long-term issues would be different: see **8.25**. The normal situation where a matter is litigated, however, is that orders as to the living arrangements of the child are made, and so the normal effect of an order for ESPR will be to grant joint responsibility for major long-term decision-making.

The presumption in favour of ESPR does not arise if 'there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in' abuse or family violence: see s 61DA(2). According to Benjamin J, this objective test should not present 'an onerous evidentiary hurdle'.[100]

The presumption applies both to final and interim orders, though in respect of the latter, s 61DA(3) permits the court to find that applying the presumption 'would not be appropriate in the circumstances'. It was held in *Goode v Goode* that the discretion not to apply the presumption is not 'to be exercised in a broad exclusionary manner, but only in circumstances where limited evidence may make the application of the presumption, or its rebuttal, difficult'.[101] The Full Court added in *Marvel v Marvel*[102] that s 61DA(3) will be more relevant:

> … where a narrow issue is in dispute in interim proceedings, particularly if equal time or substantial time orders are not in issue. The exclusion may also be relevant where there are numerous and complex factual issues which are incapable of determination at an interim hearing. The practical effect of the application of s 61DA(3) is that the task and complexity of decision making on a narrow issue is reduced.[103]

The presumption may be rebutted where the evidence satisfies the court that it is not in the child's best interests for the parents to have ESPR: s 61DA(4). Benjamin J has held that, even where the presumption did not apply, given the legislative intent behind the amendments, decision-makers should, when making

100. *Elspeth v Peter* [2006] FamCA 1385 at [30].
101. (2006) 36 Fam LR 422 at [78]; FLC ¶93-286. See also *Gainforth v Gainforth* [2012] FamCAFC 24 at [18]–[19] as to the interaction of s 61DA(2) and (3).
102. (2010) 43 Fam LR 348.
103. ibid, at [107].

a parenting order, still consider whether there should be equal shared parental responsibility.[104]

8.63 As the Full Court puts it, making an order for ESPR 'triggers' the application of s 65DAA.[105] The court must then consider three things: whether it is in the child's best interests to spend equal time with each parent; whether that is reasonably practicable; and, if the answer to both questions is yes,[106] the court must consider making an order to that effect: s 65DAA(1). In *Goode and Goode*, the Full Court discussed what it means to 'consider' making an order: 'a consideration tending to a result, or the need to consider positively the making of an order.'[107] If the court decides not to make that order, then under s 65DAA(2) the court must go through the same process but consider the child spending 'substantial and significant time' with both parents.

In terms of what is 'reasonably practicable' in the way of a parenting order, s 65DAA(5) provides a mandatory list of relevant considerations (physical proximity of the parents, parental capacity to implement such an arrangement and to communicate and resolve issues, and the impact on the child) as well as the catch-all, 'such other matters as the court considers relevant'. The High Court in *MRR v GR* said that there must be a 'practical assessment of whether equal time parenting is feasible' as the requirement to consider this matter under s 65DAA(1)(b) 'is concerned with the reality of the situation of the parents and the child'.[108] In *Collu v Rinaldo*[109] the Full Court emphasised the need to pay close attention to the reasonable practicability of proposals put by both parties.

The meaning of 'substantial and significant time' is also fleshed out in s 65DAA(3). It means arrangements that, at a minimum, include time over weekends, holidays and weekdays, and that allow the parent to be involved both in the daily routines for the child and events significant to the child, and that also allow the child to be involved in events significant to the parent.

It is apparent from statements made by the Full Court in *Goode and Goode* that, even where an order for ESPR is not made, the court may still consider equal parenting time, either because one parent seeks that arrangement, or, despite neither parent seeking it, the best interests of the child might require it.[110]

104. *Elspeth v Peter* [2006] FamCA 1385 at [32].
105. *Goode and Goode* (2006) 36 Fam LR 422; FLC ¶93-286 at [13].
106. That a positive answer is required to both questions before turning to the third was confirmed by the High Court in *MMR v GR* (2010) 240 CLR 461; 42 Fam LR 531 at [13]. Of course, if the court finds that equal shared physical care is not in the best interests of the child, it does not need to consider whether, in fact, that would be practicable: *Taylor v Barker* (2007) 37 Fam LR 461; FLC ¶93-345 at [73]–[74].
107. *Goode and Goode* (2006) 36 Fam LR 422; FLC ¶93-286 at [64].
108. (2010) 240 CLR 461; 42 Fam LR 531 at [15].
109. [2010] FamCAFC 53 at [374]–[382].
110. ibid, at [46]–[47].

Finally, s 65DAB provides that, where it is in the child's best interests, the court must have regard to the terms of the parties' most recent parenting plan, if any.

When actually deciding what order to make, the paramount consideration is the best interests of the child: s 60CA. To determine a child's best interests, the court must give consideration to both the primary and additional considerations set out in s 60CC, as well as the objects and principles of Pt VII as set out in s 60B. In *Taylor and Barker*[111] the Full Court clarified how to put this process into practice. They held that the first step is to make findings on the matters set out in s 60CC, then the court can begin applying the process set out above. This makes sense, as it would be difficult to follow the process without having made such findings. However, the Full Court also pointed out that a failure to adopt this specific order of consideration would not of itself amount to an appealable error 'unless such error arose from a failure to give adequate reasons or to have regard to the matters which the legislation requires must be considered'.[112] In *Collu v Rinaldo* (above) the Full Court confirmed this process, noting however that a finding that the presumption of ESPR applied early in a judge's reasons was not fatal, so long as it was clear that the conclusion was based on a consideration of the s 60CC factors.[113] The actual exercise of this discretion by the court is explored in **Chapter 9**.

Scope of operation of the best interests of the child principle under the Family Law Act 1975

8.64 Since the Family Law Reform Act 1995 (Cth), the approach taken under the FLA is to specify those circumstances in which the 'best interests of the child' are to be the paramount consideration.[114] Thus, there are other provisions where the best interests principle is referred to, but is not the paramount consideration.[115] Prior to these amendments, the only reference in the FLA to the paramountcy principle (then expressed as the 'welfare of the child' principle) was contained in s 64(1)(a) which provided that 'in proceedings in relation to the custody, guardianship or welfare of, or access to, a child the court must regard the welfare of the child as the paramount consideration'. There had been occasions, however, where there had been some doubt as to the scope of the operation of the paramountcy principle. For example, in *Monticelli v McTiernan*[116] the applicability of that principle was considered in the context of granting an injunction under s 70C; Nicholson CJ and Fogarty J held that it applied, whereas Chisholm J held that it did not.

111. (2007) 37 Fam LR 461; FLC ¶93-345.
112. ibid, at [63].
113. At [140].
114. See ss 60CA, 63H(2), 65L(2), 67L, 67V, 67ZC(2), 69ZX(4) and 70NBA(2). See also sections such as ss 70NDB(2) and 70NEB(5) which prohibit the making of an order where it is not in a child's best interests to make the order.
115. For example, s 68S(1)(e).
116. (1995) 19 Fam LR 108; FLC ¶92-617.

8.65 The approach of specifying when the best interests of the child are paramount does not prevent the court from taking into account children's best interests in other contexts. Indeed, the legislation suggests that this is appropriate either by referring in some contexts to the best interests principle or, more generally, by virtue of s 43(1)(c) which requires the court, in the exercise of jurisdiction under the Act, to have regard to the need to protect the rights of children and to promote their welfare. Clearly, however, in these circumstances, the best interests principle is not the paramount consideration.

8.66 Although the 1996 amendments provided considerable clarification as to the application of the principle, there remained some areas of doubt. One area where there was obviously still some considerable confusion was the admission of privileged information.

Prior to 1996, the approach taken by the Family Court was that in circumstances where a conflict arose, the court must engage in a balancing exercise which involved consideration of the child's welfare and the policy underlying the exclusionary rule in question: *Hutchings v Clarke*.[117] That case raised the question of the admissibility of disclosures made in the course of pre-trial negotiations. In *Hutchings* the evidence was ruled to be admissible as non-disclosure would adversely impact on the child's welfare.[118] In *Reynolds and Kilpatrick*,[119] Finn J endorsed the view that a jurisdiction which has as its paramount consideration the welfare of children, carries with it the jurisdiction to ensure that the rules of procedure and evidence applied within the jurisdiction serve the paramount purpose of the jurisdiction. Her Honour held that the paramountcy principle should prevail in circumstances where the evidence sought to be withheld would assist the court in its determination of what order would best promote and protect the interests of the child.

Not long after the 1996 amendments, this decision was expressly approved by a majority of the Full Court of the Family Court (Nicholson CJ and Frederico J) in *Re Z*[120], which involved a conflict between the confidentiality provisions of the Community Welfare Act 1983 (NT) and the paramountcy principle. *Re Z* went on appeal, under the name *Northern Territory of Australia v GPAO*.[121] In the words of the Australian Law Reform Commission, the majority of the High Court held:

> … the paramountcy principle has no overriding effect on the rules of procedure and evidence, as these are not part of the "ultimate issue" of deciding whether to make a particular parenting order. McHugh J and Callinan J stated that the paramountcy principle is to be applied when the evidence is complete and is "not an injunction to disregard the rules concerning the production or admissibility

117. (1993) 16 Fam LR 452; FLC ¶92-373.
118. *Hutchings* was distinguished in *Marriage of Day* (1994) FLC ¶92-505.
119. (1992) 16 Fam LR 601; (1993) FLC ¶92-351.
120. (1996) 20 Fam LR 743; FLC ¶92-708.
121. (1999) 24 Fam LR 253; FLC ¶92-838.

> of evidence". Kirby J, in dissent, queried how confining the operation of the principle to the "ultimate issue" could accord with the need for a court to have all necessary and relevant evidence before it in order to make a decision based on the best interests of the child.[122]

While the general principle stated by the High Court in this case remains, note the effect of s 69ZX(4),[123] introduced after this case, which says that, in proceedings in which the paramountcy principle applies, if the child's best interests require it, the court cannot direct relevant evidence not be adduced due to state confidentiality provisions. The Explanatory Memorandum to the Bill that introduced this change makes it clear that the intention was to apply the paramountcy principle to the question of whether otherwise confidential communications should be disclosed in disputes concerning children. This overcomes the particular problem encountered in *Northern Territory of Australia v GPAO*.

In *CDJ v VAJ (No 1)*[124] the High Court again had to consider the application of the paramountcy principle, this time in the context of the admission of further evidence on an appeal concerning a parenting order. It had been submitted that, as an order to admit further evidence was not a parenting order, it was not subject to the best interests of the child. This time, a majority of the High Court disagreed (per McHugh, Gummow and Callinan JJ):

> … [In] an appeal in which the upholding, varying or setting aside of a parenting order is the ultimate matter in issue, the principles which govern the resolution of that issue are the same for the Full Court as they are for the judge at first instance. Consequently, the Full Court is bound to have regard to the best interests of the child as the paramount consideration when determining the appeal. It necessarily follows that, in exercising its discretion to hear further evidence in respect of an appeal concerning a parenting order, the Full Court must have regard to the effect that the further evidence may have in determining whether the best interests of the child require the upholding, varying or setting aside of the parenting order.
>
> It is not to the point that the Full Court in this case was not asked to make a parenting order as such. An order admitting or rejecting further evidence is part of the appeal process in which the best interests of the child are the paramount consideration. In determining whether or not to admit that evidence, the effect that it may have in determining what are the best interests of the child is a factor of great weight. It will be one of the most important discretionary considerations to which the Full Court must have regard.[125]

122. Australian Law Reform Commission, *Issues Paper 28: Review of the Evidence Act 1995*, AGPS, Canberra, 2004, para 15.65.
123. Inserted in 2007 by the Evidence Amendment (Journalists' Privilege) Act 2007 (Cth).
124. (1998) 23 Fam LR 755; FLC ¶92-828.
125. (1998) 23 Fam LR 755 at 773.

Both decisions were referred to in *B and B (Jurisdiction)*[126] where it was said that the clear intention of the 1996 amendments was to 'limit the reach of the paramountcy principle'. The Full Court approached the matter before it in this case (stay proceedings) by first deciding whether the paramountcy principle applied to the proceedings and then asking whether, in any event, the best interests of the children were a relevant consideration. After answering those questions 'no' and 'yes' respectively, it said:

> In general, therefore, it may be said that the best interests principle does not govern various procedural and jurisdictional matters that arise prior to and in the course of parenting proceedings but that the child's interests will normally be a relevant matter in exercising discretion on such matters and may, in many situations, be the most important matter.[127]

8.67 Another area that has caused some confusion involves orders and declarations relating to parentage: Div 12, Subdiv E. If an order, for example, requiring a parent or child to undergo a parentage test is a parenting order, then the paramountcy principle would apply. As spelled out by the Chief Judge in *Brianna v Brianna*,[128] it was unclear after the 2006 reforms whether orders relating to parentage testing were parenting orders.[129] In that case, Finn and Thakray JJ went on to say that, even if the child's interests were not paramount, they were a relevant consideration.[130] The matter was resolved by the insertion in 2012 of a sentence at the end of s 64B(1) stating that orders and declarations made under Div 12, Subdiv E are not parenting orders.

8.68 Due to the uncertainty over precisely when the best interests principle applied, the matter was referred to the Family Law Council, which released an initial Discussion Paper in 2004. As the question often arises in the context of the admission of evidence, the Council queried whether legislative changes should be made to amend the operation of the Evidence Act 1995 (Cth) in certain circumstances.[131] The Australian Law Reform Commission recommended that if any changes were to be made, they should be housed in the FLA.[132] The Family Law Council delivered its final Letter of Advice to the Federal Attorney-General

126. (2003) 31 Fam LR 7 at 15; FLC ¶93-136.
127. (2003) 31 Fam LR 7 at 17.
128. (2010) 43 FamLR 309; FLC ¶93-437.
129. ibid, at [92]. See also the discussion of Finn and Thakray JJ at [151]–[158].
130. ibid, at [159].
131. Family Law Council, *The 'Child Paramountcy Principle' in the Family Law Act,* AGPS, Canberra, 2004, p 31.
132. Australian Law Reform Commission (ALRC), *Review of the Uniform Evidence Acts,* ALRC Discussion Paper 69, 2004, para 18.80; Australian Law Reform Commission, *Uniform Evidence Law,* ALRC Report 112, 2005, [20.53]–[20.70].

in January 2006[133] and this provides a good summary of when the best interests principle is paramount. (However, note this was delivered before the 2006 reforms.) The Council chose not to make recommendations as to whether or not the principle should apply in various situations where it currently did not (as was recommended in some submissions), but rather focused on what it considered the correct process for resolving the issue. In relation to the question of uncertainty as to the application of the principle, the Council accepted a view put in submissions that, ideally, the FLA should be amended to express a single principle of application and then enumerate the exceptions. These exceptions should include any principles derived from case law. The simple reason for this position is that it is very difficult to work out from the FLA when the paramountcy principle applies, and users of the Act should not have to refer to case law to work this question out.

However, the Council recognised this might require a (further) re-write of Pt VII and was therefore not practicable at that time. Not surprisingly, the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) did not include the changes necessary to give effect to the Council's desired option. Therefore, the process of investigation to determine whether the paramountcy principle applies in a given case remains unchanged.

The less adversarial trial

8.69 A very significant feature of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) came about with the enactment of Div 12A, which introduced what is known as the 'less adversarial trial' (LAT). This innovation reflects the federal government's intention to mitigate the adversarial nature of child proceedings and to make them more child-focused, less formal, more flexible and potentially less costly.[134] The provisions in Div 12A deal with the conduct of 'child-related proceedings', which are defined in s 69ZM to be essentially those proceedings wholly or partly under Pt VII. Section 69ZN then sets out five 'principles' that the court must give effect to, in performing duties and exercising powers in child-related proceedings, and in deciding how to conduct such proceedings. The principles are:

- the court is to consider the needs of the child concerned and the impact the conduct of the proceedings may have on the child;
- the court is to actively direct, control and manage the conduct of proceedings;
- proceedings are to be conducted in a way that safeguards the child and parties against family violence, and protects the child from child abuse and neglect;

133. Family Law Council, *Letter of Advice on the 'Child Paramountcy Principle'*, 17 January 2006, available on the Council's website, <www.ag.gov.au/FLC> (accessed 23 August 2012).
134. For a brief summary of the background to these changes, see *Truman and Truman*(2008) 38 Fam LR 614; FLC ¶93-360.

- as far as possible, proceedings are conducted in a way that will promote cooperative and child-focused parenting; and
- proceedings are to be conducted without undue delay and with as little formality and legal technicality as possible.

Section 69ZQ prescribes duties imposed on the court in giving effect to the principles, including narrowing of issues, using appropriate technology, encouraging where appropriate the use of family dispute resolution and counselling, and dealing with matters without the physical presence of the parties where possible.

Section 69ZT exempts child-related proceedings from various parts of the Evidence Act 1995 (Cth) (including provisions on the giving of evidence, hearsay, opinion, admissions, credibility and character) but leaves it to the court to apply those provisions in exceptional circumstances and to decide what weight to give evidence admitted due to these exemptions. Section 69ZV protects the admission of hearsay evidence of children; this is not a new provision: see former s 100A.

8.70 The provisions in the Act are supplemented by Ch 16A of the Family Law Rules 2004 (Cth). One of the features of the LAT is that it will most likely be spread out over a period of months, with the potential for orders to be made as the case progresses. In *Truman* (**8.69**) the Full Court set out what they described as the 'salient features' of the LAT, which gives a sense of how the revamped trial procedure looks.[135]

8.71 By giving the court greater control over how parenting cases are run, questions of procedural fairness have arisen. Judges in LATs now have much greater control over what evidence will be presented: s 69ZX. In *Truman* (**8.69**) it was confirmed that the normal requirements of procedural fairness apply to LATs. One particular question raised in that case was what was required of the trial judge, in terms of procedural fairness, if the judge intended to ignore affidavit evidence filed in relation to interim proceedings, when determining those interim matters at the start of the LAT. In this case, the trial judge had made it clear from the outset that: this material would not be considered; he had taken oral evidence from both parties and the family consultant; and counsel for both parties had made submissions on the day about the exclusion of this evidence. The Full Court found this satisfied the requirements of procedural fairness.

However, the trial judge had failed to afford procedural fairness to the father in another respect. The trial judge had concluded that the mother had changed her position on the orders she sought. The father was entitled to be advised of this conclusion so that he could be heard on the matter.

The Full Court in *Truman* also considered the requirement to give reasons for orders made as the LAT proceeds. Neither written nor lengthy reasons are required,

135. (2008) FLC ¶93-360 at [9].

but the grounds leading to the conclusions must be explained and the findings on the principal contested issues listed.

Shortly after *Truman*, this issue was raised again in *Crestin and Crestin*.[136] Here the trial judge did not meet the required standard; he failed to identify what evidence was relied on; he did not address key issues raised by the mother, namely violence allegations and the child's ability to cope with a change to the parenting arrangements;[137] and he failed to explain what weight, if any, was placed on unsworn statements of the family consultant.

Representation of children's interests: The independent children's lawyer

8.72 Article 12 of the United Nations Convention on the Rights of the Child requires signatory nations to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child', with the child's age and maturity determining the weight to be given to those views. It continues:

> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial … proceedings affecting the child, either directly, or through a representative or an appropriate body …

There are different ways that children can be heard in judicial proceedings, and the nature of the matter being decided will impact on the model of child representation adopted. Even prior to the FLA it was recognised that children may need some form of legal representation in family court disputes. The model of representing children separately in a family court has been described as a 'best interests' model. Rather than acting on a child's instructions, the lawyer is there to advocate for the child's best interests,[138] one part of which is ensuring that the views of the child are taken into account where appropriate.

8.73 Prior to 2006, the lawyers who were appointed to fulfill this role have been variously called 'separate representatives' and 'child representatives'; now they are known as 'independent children's lawyers' (ICLs) (for ease of reference we have referred to these lawyers as ICLs throughout this discussion). The current provision dealing with the separate representation of children is s 68L of the FLA, which applies to proceedings in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration: s 68L(1). A broad power

136. (2008) 39 Fam LR 420; FLC ¶93-368.
137. In fact, the paternal grandparents were the original applicants and the parents the respondents, but as the father was to see the child at his parents' home, it was in essence an application about the time he would spend with the child.
138. N Ross, 'Legal Representation of Children' in G Monahan and L Young (eds), *Children and the Law in Australia,* LexisNexis Butterworths, Sydney, 2008, pp 551–3.

is invested in the court to order that a child be independently represented where it appears to the court that such an order should be made: s 68L(2). However, where the proceedings relate to international child abduction, the court may only order separate representation where there are exceptional circumstances. These circumstances must be specified: s 68L(3). The court is also empowered under s 68L to make such other orders as it considers necessary to secure that independent representation. An order for independent representation can be made by the court on its own initiative, or on the application of the child, an organisation concerned with the welfare of children or any other person: s 68L(4).

8.74 Since the inclusion of the original version of this provision in the FLA, considerable attention has been given by the courts, commentators and various law reform and other bodies to the question of when it is appropriate to appoint a separate lawyer for a child and what role that lawyer should play. As a result of the ongoing debate, the Act, which previously laid down no guidelines, was substantially amended by the 2006 reforms to clarify the situation, and in December 2007 the Family Court of Australia issued new and detailed guidelines for ICLs.[139] Further information about the history leading up to these initiatives can be found in earlier editions of this book, most recently the seventh edition.[140]

Circumstances in which the court may appoint an independent children's lawyer

8.75 In a number of cases, the Family Court has taken the opportunity to comment on the circumstances in which appointment of an ICL would be appropriate. In the most important of those cases, *Re K*,[141] the Full Court gave its support to the broad general rule that the court will appointment an ICL when it considers that the child's interests require independent representation. Their Honours went on to lay down guidelines with regard to appointments encompassing some 13 categories of cases[142] in order to provide some assistance in the application of the general rule. These included: cases involving allegations of child abuse; cases where there is intractable conflict between parents, or where a child is alienated from one or both of the parents; and any case in which a child of mature years is expressing strong views the effect of which would involve changing a long-standing custodial arrangement or a complete denial of contact to one parent.

139. *Guidelines for Independent Children's Lawyers*, 2007, available at <http://www.familylawcourts.gov.au> (accessed 28 April 2012). Note also Family Law Rules 2004, r 8.02.
140. L Young and G Monahan, *Family Law in Australia*, 7th ed, LexisNexis Butterworths, Sydney, 2009, [7.80]–[7.89].
141. (1994) 17 Fam LR 537; FLC ¶92-461.
142. (1994) 17 Fam LR 537 at 555–8.

In 2004, the Family Law Council noted[143] the significant increase in appointments of ICLs since *Re K* was decided (in about 10 per cent of all applications for legal aid funding, an independent child representative was being appointed).[144]

In developing these guidelines, the Full Court had paid regard to the provisions of the United Nations Convention on the Rights of the Child and, in particular, to Arts 9 and 12. While acknowledging that on one view it could be argued that the Convention requires that a child be separately represented in any proceedings about where a child should live, or with whom they should spend time, it was unnecessary for the court to express a concluded view on the matter. Their Honours commented that, regardless of the outcomes on these questions, they were 'satisfied that all of the guidelines that [they] proposed are not only consistent with the requirements of Articles 9 and 12 of the Convention on the Rights of the Child, but further these objects'.[145]

On the issue of the rights contained in Art 12 of the Convention on the Rights of the Child, this is clearly one area where important Convention principles have not been directly incorporated under recent reforms. While there is provision under the Act for wishes of children to be taken into account (s 60CC(3)(a): see **9.39–9.47**) and for an ICL to be appointed at the discretion of the court, as the Full Court acknowledged in *Re K*, above, the terms of Art 12 arguably require the opportunity for representation in all proceedings affecting a child (which would clearly include child proceedings contested between the parents) either through a representative or, alternatively, through an appropriate body such as an independent children's legal service.[146]

The appointment of an ICL in international child abduction cases has also been considered by the High Court, in *DvL v Director-General, NSW Dept of Community Services*:[147] see **8.158**. It was held that in cases where return of an abducted child is being defended on the basis of a mature child's objection, separate representation ought usually to be ordered. Similarly, the Full Court has commented that in international relocation cases involving young children, the appointment of an ICL (especially where no expert evidence was called) should be considered.[148]

143. Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law,* AGPS, Canberra, 2004.
144. ibid, p 28.
145. ibid, p 559.
146. For analysis of the requirements of Art 12 and assessment of the provisions of the Family Law Act, see M Otlowski and M Tsamenyi, *An Australian Family Law Perspective on the United Nations Convention on the Rights of the Child,* Unitas Law Press, Hobart, 1993, pp 86–94 (this article was published before the Family Law Reform Act 1995 (Cth), but the essence of the provisions regarding children's wishes and separate representation remains the same).
147. (1996) 20 Fam LR 390; FLC ¶92-706.
148. *McCall v Clark* (2009) 41 Fam LR 483; FLC ¶93-045 at [149].

8.76 The question of when to appoint an ICL has implications for legal aid expenditure.[149] In *Heard and De Laine; Crown Solicitor for the State of South Australia (Intervener)*,[150] an appeal was brought from the decision of the trial judge on the grounds that the trial judge had erred in not making orders to secure separate representation for the child and to ensure that the necessary funds were made available. Legal aid funding for the ICL had been withdrawn in that case after the trial had already proceeded for 39 days with over $105,000 expended on legal fees for the husband, wife and child.

On appeal, the Full Court rejected the argument put on behalf of the husband to the effect that the Family Court can, pursuant to s 65 (the precursor to s 68L), make orders to ensure the necessary funds are available for independent representation. It was held that the court has no power to order the Legal Services Commission to fund the independent representation of a child and that the court is not empowered to review administrative decisions of a legal aid body such as the Legal Services Commission.

Nicholson CJ expressed reservations about the breadth of this decision in *S v S*[151] and a year later the issue was before the High Court in *JJT; Ex parte Victoria Legal Aid*.[152] A majority of the High Court held that an order requiring Victoria Legal Aid to fund an ICL in the future was not a costs order under s 117, not permitted under s 68L(2) and therefore not open to the trial judge. The High Court in *JJT* did note, though, that spousal maintenance and interim property orders might be made to ensure a child is properly represented where public funding is not available.[153]

Another costs-related issue that has arisen is whether the costs of the ICL can be sought from the parties and, in particular, to what extent funding from a legal aid commission is relevant in the exercise of this discretion.[154] As from 14 January 2004,[155] the matter is beyond doubt as s 117(3) of the FLA now provides for precisely this type of costs order and s 117(5) directs the decision-maker to disregard legal aid funding.[156]

149. Note in this regard the recommendations of the Family Law Council for ensuring adequate legal aid funding for separate representation in its 1996 report (para 7.80).
150. (1996) 20 Fam LR 315; FLC ¶92-675.
151. (1997) 22 Fam LR; FLC ¶92-762.
152. (1998) 23 Fam LR 1; 195 CLR 155; 155 ALR 251; FLC ¶92-812.
153. (1998) 23 Fam LR 1 at 29–30.
154. See *Telfer* v *Telfer* (1996) 20 Fam LR 619; FLC ¶92-688; *S v S* (1997) 22 Fam LR; FLC ¶92-762; *Re David (No 2) (costs)* (1998) 23 Fam LR 139; FLC ¶92-809; *In the marriage of Lyris and Hatziantoniou* (1998) 24 Fam LR 391; (1999) FLC ¶92-840.
155. See *Fitzgerald (As child representative for A (Legal Aid Commission of Tasmania)) v Fish* (2005) 33 Fam LR 123 where it was held that the amendments did not apply to proceedings begun before this date.
156. See also Family Law Rules 2004, r 8.02(2).

Role of an independent children's lawyer

8.77 In *Lyons and Boseley*,[157] one of the earlier pronouncements of the Full Court on the FLA's provisions on separate representation of children, Evatt CJ and Pawley SJ put forward the obiter view that the function of the ICL is to: (a) cross-examine the parties and their witnesses; (b) present direct evidence to the court about the child and matters relevant to the child's welfare;[158] and (c) present, in appropriate cases, evidence of the child's wishes.[159] The court also endorsed the ability of an ICL to interview the child, although where the child was very young, the lawyer might have to depend heavily on a court counsellor for information about the child.

On the interrelationship between a child's legal representative and other contesting parties such as the parents, or any interveners seeking parenting orders, the court held the view that it would not generally be desirable to interview the other parties, nor was the child representative's role that of a conciliator, which was a role more appropriately performed by a court counsellor. The ICL's normal function is to lead evidence from witnesses, to cross-examine parties and to make submissions.

8.78 Following this case, there continued to be some conflicting judicial interpretations of the ICL's role, some of which involved outright disagreement with the views put forward by the Full Court in *Lyons and Boseley*.[160] At the heart of the controversy is the fact that the requirements of such a legal representative are unconventional from an orthodox legal point of view, in that they do not have a client as such, from whom they can obtain instructions. As Mr Broun QC has said:

> … without the essential cornerstone of legal practice for an advocate of having some instructions from the client of an acceptable kind as to what issues are to be raised and what argument is to be advanced and what evidence is appropriate to be adduced, the separate representative has nothing whatever to fall back upon other than his own judgment about the issues and the merits. That makes him, in effect, an advocate without a client or a cause who really has no place in a proceeding of an adversarial kind.

While this may present some practical difficulty for lawyers filling this role, the concept of a separate legal representative for children in contested child matters is nevertheless clearly a valuable one, ensuring that in appropriate cases the child's interests are represented, independently from the parents. There is also an argument in support of such a provision based on the requirements of the United

157. (1978) FLC ¶90-423.
158. See Family Law Rules 2004 Pt 15.5 and in particular r 15.51(2).
159. ibid, at 77,136.
160. For example, *Waghorne and Dempster* (1979) 5 Fam LR 503; FLC ¶90-700 per Treyvaud J.

Nations Convention on the Rights of the Child: see above, in the context of the discussion of *Re K*.[161]

8.79 In *Bennett and Bennett*[162] the role was described by the Full Court as broadly analogous to that of counsel assisting a Royal Commission in the sense that the duty of the ICL is to act impartially but, if thought appropriate, to make submissions suggesting the adoption by the court of a particular course of action, if he or she considers that the adoption of such a course is in the best interests of the child.

The Full Court expressly disapproved of the attempt by the trial judge to limit the role of the ICL by making an appointment at the conclusion of the hearing for the purpose of explaining the custody orders to the children. This purported use of the ICL was held to be unnecessary and inappropriate, the Full Court suggesting that the court had no power to limit the role of the independent lawyer in this way.

8.80 Further guidance regarding the role of the ICL was given by the Full Court of the Family Court in *P and P and Legal Aid Commission of NSW; Human Rights and Equal Opportunity Commission (Intervener)*[163] in which an eight-point guideline was laid down building on earlier understandings of the role of the ICL from previous cases and guidelines. Those guidelines were endorsed by the Full Court in *B and R*[164] with a number of additional matters being included.

8.81 There have been a number of other decisions commenting on specific aspects of an ICL's role. The Full Court of the Family Court in *Separate Representative v JHE and GAW*[165] held that a person appointed to independently represent a child in proceedings under the FLA is empowered to seek orders in proceedings under the Act and, if necessary, to appeal.

Cases on the role of the ICL have highlighted the part they are expected to play in helping the court secure an outcome that is in the child's best interests. In *T v P*[166] it was argued on appeal to the Supreme Court of Western Australia that the trial judge had not taken any, or sufficient, account of the ICL's recommendations and proposed orders. In rejecting this ground of appeal, Pidgeon J noted that the role of the ICL was to present evidence and argue a course of action based on that evidence, not make a judgment (as would an expert) as to the outcome which requires some special consideration by the judge.[167]

161. (1994) 17 Fam LR 537; FLC ¶92-461.
162. (1990) 14 Fam LR 397; (1991) FLC ¶92-191.
163. (1995) 19 Fam LR 1; FLC ¶92-615.
164. (1995) 19 Fam LR 594; FLC ¶92-636.
165. (1993) 16 Fam LR 485.
166. (2000) FLC ¶93-049.
167. ibid, at 87,753.

An example of an ICL's submissions being (properly) disregarded was seen in *T and N*.[168] The trial judge refused to make consent orders giving the father unsupervised contact to the two very young children in this case, in circumstances where the evidence established an unacceptable level of risk to the children from the father. Moore J specifically expressed concern that, in light of the evidence, the ICL would support the parties' proposed orders.[169]

The evidence-gathering role of the ICL was explored in *DS v DS*.[170] The ICL in this case had relied on an expert report as to the wishes of the child and failed to make their own investigations which, in the eyes of the judge, lessened the weight able to be given to the expert's report:

> Drawing from the decided cases it seems clear that the Court is entitled to expect that prior to a matter coming on for trial, the child's representative will play a vital role as an evidence gatherer and negotiator. Throughout the life of the litigation, the child representative will have set about gathering evidence on matters that concern the child's welfare, evidence that will influence the integrity of the outcome in terms of the child's best interests. It is this latter feature that receives support from proponents of the current model of best interest representation. See, for example the Australia Law Reform Commission's "Seen and Heard" Report. It is emphasised in the National Training Scheme for Child Representatives conducted by the Family Law Section of the Law Council in conjunction with all Legal Aid Commissions and the Family Court. It is an essential feature in the draft child representation guidelines promoted by the Chief Justice of the Family Court.
>
> Although the Act and case law do not specifically demand it, I have no doubt that those appearing as children representatives in this state and this registry know that the Court and profession expect that a child's representative will have conferred with the children they represent.[171]

8.82 In 2006 the Family Law Amendment (Shared Parental Responsibility) Act inserted s 68LA, which now provides statutory guidance as to the role of the ICL. The definition of the term in s 4(1) makes it clear that these court-appointed lawyers are there to represent the interests of the child, not the child itself. This is reinforced by s 68LA(4).

In keeping with the jurisprudence to date, s 68LA obliges the lawyer to form an independent view of what is in the child's best interests, inform the court of that view and act in the proceedings in the child's best interests: s 68LA(2). The following subsection specifically obliges the lawyer to make a submission suggesting a course of action, where satisfied adopting that course of action would

168. (2003) 31 Fam LR 257; FLC ¶93-172.
169. (2003) 31 Fam LR 257 at 265.
170. (2003) 32 Fam LR 352; FLC ¶93-165.
171. (2003) 32 Fam LR 352 at 360.

be in the child's best interests: see s 68LA(3). Section 68LA(5) then lists specific duties of the lawyer (which are based on those outlined in *P and P*):

(a) to act impartially in dealing with the parties;
(b) to ensure any relevant expressed views of the child are put fully before the court;
(c) if any report or document relating to the child is to be used, to analyse and identify those matters most significant to the child's best interests and bring them to the court's attention;
(d) to try to minimise the trauma to the child associated with the proceedings; and
(e) to the extent it is in the child's best interests, to facilitate an agreed solution to the dispute.

Provisions were also added relating to confidentiality of communications between the lawyer and the child. Under s 68LA(6)–(8), an ICL is not required to disclose to the court information communicated by the child; however, the lawyer may, even where it is against the child's wishes, disclose any such information where they believe it to be in the child's best interests to do so.

8.83 As indicated above, one significant aspect of the role of ICLs is the part they play in permitting the views, and indeed voices, of children to be heard in matters that concern them. This is discussed at **9.44** as the ICL is not the only mechanism for hearing the voices of children in the Family Court. However, it is important to note the terms of s 68LA(5)(b) which casts a positive obligation on ICLs to communicate children's views to the court. It may be that the views of the child are obtained through other means (for example, via a family consultant); however, it is normal and proper practice for an ICL to meet with the child. The Guidelines for Independent Children's Lawyers (see **8.74**) state that it is expected that ICLs will meet with children, unless they are very young, it is geographically difficult or there are exceptional circumstances. In *DS and DS*[172] Ryan FM noted that one of the two main functions of an ICL was giving the child a voice in the proceedings.[173] In this case the ICL did not meet with the child, instead speaking only to the expert who gave evidence of the views of the child. Ryan FM did not consider this acceptable, noting the importance of ICLs meeting with the children they represent so the children can 'provide input into the litigation via their representative, both as to their wishes and about relevant facts'.[174]

8.84 Finally, note should be made of the court's power to make an order on the application by the ICL to make the child available, as specified in the order, for an examination to be undertaken for the purpose of preparing a report about the child for use by the ICL in connection with the proceedings: s 68M. The section specifies

172. (2003) 32 Fam LR 352; FLC ¶93-165.
173. ibid, at [29].
174. ibid, at [31].

that the order may be directed to a parent of the child; or a person with whom a child lives, spends time or communicates, or who has parental responsibility, under a parenting order.

8.85 As stated in their opening paragraph, the Guidelines for Independent Children's Lawyers (see **8.74**) are very much directed at providing guidance to lawyers fulfilling this role. There are therefore sections on:

- the role of ICLs;
- the relationship of the ICL with the child;
- information the ICL should explain to the child;
- limitations of the role of ICLs;
- addressing the views of children;
- making submissions contrary to the child's view;
- meeting with the child;
- meeting with family consultants;
- the relationship with parties and their lawyers; and
- considerations for indigenous children,[175] cultural and religious matters and children with disabilities.

While they do not have statutory force, to some extent they reflect the case law to date, and they are used in training ICLs.

Discharging an independent children's lawyer

8.86 Another issue of some significance concerns the capacity of the court to discharge an ICL. In *Marriage of Pagliarella*,[176] where this question arose indirectly, Hannon J referred with approval to the comments made by Fogarty J in *Marriage of F and R (No 2)*[177] that where an ICL takes steps in proceedings which cannot be justified or which are inappropriate, then the court could order their removal.[178]

Two cases in 2000 considered the grounds for discharging an ICL. In *Lloyd v Lloyd and Child Representative*[179] the parties had resolved the husband's first parenting application by consent orders, an ICL having been appointed. When the father later re-applied, the same lawyer for the child was appointed. The father sought her discharge on the basis of bias towards him. Holden CJ confirmed the power to discharge an ICL before expressing the view that courts should be slow to take this step on the basis of largely unsubstantiated claims by one of the

175. In this regard, note *B and R and the Separate Representative* (1995) 19 Fam LR 594 at 624; FLC 92-636 which held that an ICL should be appointed early in proceedings where the aboriginality of a child is a significant issue.
176. (1993) 16 Fam LR 688; FLC ¶92-400.
177. (1992) 15 Fam LR 662; FLC ¶92-314.
178. (1992) 15 Fam LR 662 at 690.
179. (2000) FLC ¶93-045.

parties.[180] His Honour also listed the circumstances which he found could lead to the discharge of a child representative, namely, where the ICL: acted contrary to the child's interests; acted improperly in a professional sense; lacked professional objectivity; or where to continue to act would breach a fiduciary duty or give rise to a conflict of interest.[181] On the facts of this case, there was held to be no reason to discharge the ICL.

In *T and L*,[182] Chisholm J expressed similar sentiments to Holden CJ as to the discharging of ICLs. However, in this case the father's complaint was that a former judge who had found adversely to the father was 'special counsel' to the law firm of which the ICL was a partner. Chisholm J accepted that, to a reasonable person, this would create the perception of bias against the father, and the lawyer was restrained from further participation in the proceedings.

Reflecting the view in *Lloyd v Lloyd and Child Representative* above that ICLs should not be discharged because one party considers the ICL is not on their side, the Guidelines for Independent Children's Lawyers (**8.74**) state in their Introduction that the 'way in which the ICL acts may not always meet with the approval of the parties or the child, but this does not mean that the ICL has failed in his/her professional responsibilities'.

Expert evidence

8.87 It is common in contested child proceedings for there to be evidence of experts, such as psychiatrists and psychologists, put before the court. In the past, such evidence has been viewed with some suspicion by the courts. This approach is well illustrated by the early case of *Epperson v Dampney*.[183] In that case, both parents were seeking sole custody of the two young children. The children had been interviewed by a child psychologist and psychiatrist on a number of occasions arranged by both the parents. The expert evidence called by both the parties suggested that the children should remain in the custody of the father, with whom they had been living prior to the hearing.

The trial judge, who had found in other respects the circumstances of the parents to be equal, placed considerable reliance on the expert evidence before the court and awarded custody to the father. In a subsequent appeal by the mother, this decision was reversed, a majority of the New South Wales Supreme Court holding that the trial judge had placed excessive weight on the expert evidence before the court and had given insufficient attention to the significant role of the mother: as to the court's support for the so-called 'mother principle', see **9.9–9.14**.

180. ibid, at 87,689. Note however the comment of Murphy J at [40] in *Knibbs and Knibbs* [2009] FamCA 840.
181. ibid, at 87,687.
182. (2000) 27 Fam LR 40; FLC ¶93-056.
183. (1976) 10 ALR 227; FLC ¶90-061.

The essence of the judgment of Street CJ, with whom Glass J agreed, was that the adjudicative function lies with the judge and is not to be relinquished to expert witnesses. His Honour referred to the expert evidence as 'clinical' and 'scientific' to be contrasted sharply with the 'human evaluation of the complex web of parental and filial emotions' which is ultimately left up to the 'conventional and human wisdom of the judge'.[184]

Street CJ did go on to say that in appropriate cases, real assistance can be derived from expert medical opinion, for example, where the physical or mental health of the child is in question. However, he thought it was undesirable that normal healthy children are placed on the 'emotional dissecting table' and felt that judges should therefore discourage the tendering of medical evidence where no question of ill health arises. He stated that if undue weight were given to medical evidence in contests of this nature, it would result in the child being dragged from consulting room to consulting room in search of psychiatric opinion capable of supporting the particular parent who happened to be the custodian at the time.[185]

By contrast, Hutley J was more willing to accept the benefits of non-legal expertise. In a dissenting judgment, he stated that a judge's experience may be very limited in relation to infancy matters and, even if not limited, may be capable of expansion by expert evidence.[186] His Honour commented that he was 'unable to see why the courts in this field should not welcome the assistance of those trained in observing children and analysing their problems'.[187] Hutley J accordingly found that there was no objection to the trial judge giving full weight to the expert evidence in this case.

It is the latter approach adopted by Hutley J which better reflects the modern view: indeed, Street CJ's judgment can be best understood as a policy decision, aimed at avoiding children being exposed to unnecessary and inappropriate examination. This is, no doubt, an object with which many would have sympathy; however, it is now widely accepted that it is not appropriate to seek to give it effect by challenging the relevance of such evidence. As we shall see, the current rules relating to the use of expert evidence in proceedings under Pt VII are aimed at avoiding precisely that problem. Moreover, the rules on the admission of expert evidence have been amended over time as a result of concerns raised about the costs of multiple experts, the use of seemingly partisan experts, and experts exceeding the limits of their expertise. In relation to the particular problems faced in parenting decisions where expert evidence is being called, see Nicholson CJ and O'Ryan J in *Re W and W: Abuse Allegations; Expert Evidence*.[188]

184. (1976) 1 Fam LN No 29, pp 228–9.
185. ibid, p 231.
186. ibid, p 233.
187. ibid, p 234.
188. (2001) 28 Fam LR 45 at 66–7; FLC ¶93-085.

For an interesting discussion by the Full Court of the role of experts, and in particular their conclusions as to a party's veracity, see *Carpenter and Lunn*.[189]

8.88 The Full Court has long recognised the Family Court's jurisdiction to direct that a child undergo a medical, psychiatric or psychological examination in pursuance of its jurisdiction to make orders which relate to the welfare of children: s 67ZC(1).[190] It was held that this section gives the Family Court the widest possible powers to make orders intended to safeguard and advance the welfare of a child and to exercise such control over a child as it deems appropriate for these purposes. These include the power to order that a child undergo medical or paramedical treatment or examination and to make incidental and ancillary orders to ensure the child's attendance.

Their Honours accordingly held that if, for the purposes of the resolution of what was then called an access dispute, the court considers it would be in the child's best interest to undergo psychiatric or like examinations, then it may order them.[191] This remains the case, despite the High Court's recent clarification of the limits to the Family Court's jurisdiction under s 67ZC,[192] provided the dispute before the court is one which intrinsically relates to parenting matters.

8.89 The use of expert evidence under the FLA is governed by Pt 15.5 of the Family Law Rules 2004. The regime for appointing experts is designed to ensure that expert evidence is only called when necessary to resolve significant issues before the court and that generally there will be evidence from only one expert on any given issue: r 15.42. Thus, the rules provide for the appointment by both parties, without the court's leave, of a single expert, whose primary duties are owed to the court, not the parties: see generally Divs 15.5.2 and 15.5.5. The court may also appoint a single expert, either on its own motion or on the application of one of the parties: r 15.45(1).

If a party wishes to adduce evidence from a further expert on the same issue, then leave of the court must be obtained, though it is clear that leave will not be granted where the party is simply hunting for a different expert opinion: r 15.49.[193] Where a single expert has not been appointed, a party must seek leave to adduce expert evidence: r 15.51(1). An independent children's lawyer may, however, tender evidence from one expert on an issue without leave of the court: r 15.51(2).

189. (2008) FLC ¶93-337.
190. *Brown and Pederson* (1988) 12 Fam LR 506; FLC ¶91-967 (the section was then s 64(1)).
191. (1988) 12 Fam LR 506 at 508 per Fogarty and Strauss JJ.
192. *Minister for Immigration, Multicultural & Indigenous Affairs & B (No 3)* (2004) 31 Fam LR 339; FLC ¶93-174.
193. *Bass and Bass* (2008) FLC ¶93-366 provides an example when the mere fact that a report was particularly adverse to one party was not sufficient to warrant a second report being obtained.

The rules governing expert witnesses are expressed not to apply in limited situations: r 15.41. This includes evidence from medical practitioners concerning their treatment of a child or party and experts who have been retained other than for the purposes of giving evidence in the case, such as for psychological treatment. In these cases, the 'expert' would not be able to give general opinion evidence in relation to the matters at issue in a case.

There are also a number of provisions in the FLA which deal with expert evidence. Note should be taken of s 68M which empowers the court to make an order on the application of an independent child lawyer (see **8.72ff**) for a child to be made available for an examination for the purpose of preparing a report about the child for use by that lawyer in connection with the proceedings.

Finally, note should also be made of s 102A which places restrictions on the examination of children in the context of allegations of child abuse. The effect of this provision is to render inadmissible (with some narrow exceptions) the evidence resulting from the examination, unless prior leave of the court is obtained for that examination to proceed. This provision is discussed further at **9.113–9.114**.

Family reports by family consultants

8.90 Family reports,[194] which were previously referred to as 'welfare reports', are provided for under s 62G. Under that provision the court may, in proceedings under the Act where the care, welfare and development of a child is relevant (s 62G(1)), direct a family consultant to give the court a report on such matters relevant to the proceedings as the court thinks desirable: s 62G(2). Section 62G(8) provides that a report given to the court pursuant to a direction under s 62G(2) may be received in evidence in any proceedings under the Act.[195] Thus, the court has a discretion whether to receive a report into evidence: see *Marriage of Hogue*.[196] In that case, Wood J held that such a report can be admitted even though objected to on the grounds of hearsay or some other basis of inadmissibility. The question is not one of admissibility of the report[197] but the weight which is to be given to the material which it contains.[198] Although some differences of view have been

194. This is the term used in the Family Law Rules 2004 (Cth) and see the dictionary definition there of 'family report'.
195. Note also r 15.03 of the Family Law Rules 2004 (Cth).
196. (1977) 3 Fam LR 11,290; FLC ¶90-259.
197. Note *SPS and PLS* (2008) 39 Fam LR 295; FLC ¶93-363 which dealt with the consequences of a family report not being admitted into evidence. However, since that decision FLA s 69ZU has been repealed (Family Law Legislation Amendment (Family Violence and other Measures) Act 2011) and now the court may take into account any opinion of a family consultant, regardless of whether it is given as sworn evidence: Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011, [127]–[128].
198. (1977) 3 Fam LR 11,290 at 11,292. These statements were adopted by the Full Court of

expressed over the years as to the appropriateness of counsellors or welfare officers being subject to cross-examination, the accepted view became that parties were entitled to cross-examine the counsellors or welfare officers who prepared the report.[199]

In *Marriage of Harris*, Fogarty J commented that it would be inimical to the proper workings of the court and to the proper carrying out of the functions of a welfare officer, that it might be thought by practitioners or litigants that welfare officers or their reports were in some privileged or special position. In his Honour's view, it is important that justice is not only done, but seen to be done. Similarly, in *Marriage of Hall*,[200] the Full Court strongly affirmed the right to cross-examine counsellors or welfare officers in respect of their reports:

> To cross-examine a counsellor is to do no more than to test an expert witness in the same way as any other expert witness may be tested or challenged … Where there is a proper reason for cross-examination, the court will be assisted, and we have no doubt, so will be the counsellors. No expert should cavil at any questioning of his role or the foundations of his opinions. We consider that it is always a valuable opportunity for the counsellor himself to examine and test his own methods under critical investigation … Finally and most importantly, and as a matter of public policy, no party should leave the court with a belief that justice has not been done because an opportunity to test part of the evidence has been denied.[201]

These arguments apply with even more force to family consultants, given their different role: see **2.46**. The rules now specifically provide for the oral examination of the person who prepared the report: r 15.04(c).

8.91 The question of the weight to be given to court reports was comprehensively canvassed by the Full Court in *Marriage of Hall*. There, in a joint judgment Evatt CJ, Asche SJ and Hogan J commented that there is no magic in a family report. Whether or not it is accepted will depend on the totality of the evidence before the court. The Full Court observed that:

> While the counsellor's views will normally have weight with the court because of his expertise and experience, the counsellor does not usually have the same opportunity as the trial judge to weigh the evidence, observe the demeanour of the witness in court under examination and cross-examination, and make findings of fact based on evidence before the court which might not have been available to the counsellor.[202]

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the Family Court in *Foster and Foster* (1977) FLC ¶90-281.

199. *Marriage of Harris* (1977) FLC ¶90-276; *Marriage of Hall* (1979) 5 Fam LR 609; FLC ¶90-713. Compare the view of Wood J in *Marriage of McKee* (1977) FLC ¶90-258.
200. (1979) 5 Fam LR 609; FLC ¶90-713.
201. (1979) 5 Fam LR 609 at 615.
202. ibid.

8.92 In *Tryon v Clutterbuck and Attorney-General (Cth) (Intervenor)*[203] the Full Court considered whether parents were entitled to legal representation at interviews undertaken by a family consultant for the purpose of preparing a report under s 62G. Their Honours agreed that the family consultant has an obligation 'to give each of the parties and any other persons interviewed for that purpose a fair and unbiased hearing'; however, they did not consider this gave rise to any right to legal representation.[204] In their Honours' view, parties will be protected from adverse consequences where a family consultant does not conduct a fair and impartial interview by:

> … [t]he nature of the s 62G report, the reality that the expert opinion evidence contained in it may be tested, and that the weight given to it is a matter for the court, combined with the reality that such evidence is only part of the evidence before the court, and that such weight is ultimately likely to be significantly or even decisively influenced by findings made by the court with respect to disputed issues of facts …[205]

The High Court refused special leave to appeal this decision, noting that any perceived procedural defects in a report should be dealt with by cross-examining the author of the report.[206]

8.93 Finally, the court has a discretion under s 55A(2) of the FLA to direct that a family report be prepared in the context of dissolution proceedings where the court is in doubt whether the arrangements made for the care, welfare and development of a child of the marriage are proper in all the circumstances.

Orders that can be made

General

8.94 In the course of the earlier analysis of parenting orders, some consideration has already been given to the form of orders that a court can make (s 64B): see **8.45**. Under s 64C, a parenting order can be made in favour of a parent of the child or some other person. Where a parenting order is made by consent and provides a child is to live with a non-relative or that no parental responsibility is to be given to a relative, then certain preconditions apply before that order can be made (s 65G): see **8.48**.

The paramountcy principle clearly applies equally to consent orders, but where orders are sought by consent (subject to the special requirements in the case of

203. (2010) 44 Fam LR 361; FLC ¶93-453.
204. ibid, at [51].
205. ibid, at [50].
206. See *Tryon v Clutterbuck* [2011] HCATrans 133 (13 May 2011) available at <http://www.austlii.edu.au> (accessed 2 May 2012).

orders to be made in favour of a non-relative), the court is entitled to rely on the material put before the court by the parties to satisfy itself that the order sought is in the best interests of the child. In such a case the court may, but is not required to, have regard to the matters contained in s 60CC(2) and (3): s 60CC(5).

Aside from parenting orders, other major categories of orders that the court can make under Pt VII include orders for the welfare of children under s 67ZC (see **4.xxff** and **8.116ff**), protection orders under s 68B(1)(b) and location and recovery orders (Div 8, Subdiv C): see **8.146–8.148**.

8.95 As noted earlier in the context of parenting orders (**8.54**), pursuant to s 65L the court may make orders for a family consultant to supervise compliance with a parenting order or to provide parties with assistance in relation to compliance. Prior to 2006, this role was filled by counsellors and welfare officers. The non-coercive role of counsellors or welfare officers in connection with parenting orders was emphasised in the reported decisions.[207] In *Marriage of Bainrot*[208] Watson J stressed the fact that the welfare officer was not to police the orders made by the court in the way in which a probation officer or child welfare officer had done in the past, but rather that the officer was to be available as a properly trained resource person to all parties concerned in the arrangements for care and control and access, one to whom they could turn and with whom they should be able to discuss any problems or difficulties that might arise.[209] Historically, such orders have not frequently been made.

Orders least likely to lead to further proceedings

8.96 A further consideration in framing orders is contained in the list of additional relevant factors to be considered in determining a child's best interests, namely whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings: s 60CC(3)(l). This provision is aimed at encouraging finality in proceedings. This is based on recognition of the problems flowing from ongoing litigation and the desire to protect children from being exposed to frequent traumatic court proceedings. Strauss J in *Marriage of Cullen*[210] summed up the situation as follows:

> There are few greater evils in family law than recurring litigation about custody and access. It is detrimental to the child, particularly if he is old enough to appreciate that his parents are in legal conflict. It saps the mental, emotional

207. *Watts and Watts* (1976) 1 Fam LR 11,266; FLC ¶90-046; *Rose and Rose* (1976) 2 Fam LR 11,101; FLC ¶90-064.
208. (1976) 1 Fam LN No 2; FLC ¶90-003.
209. Note that Watson J's comments in relation to then ss 62 and 64(5) of the FLA are no longer relevant.
210. (1981) 8 Fam LR 35; FLC ¶91-113.

> and financial resources of the parties. It taxes the resources of the court and of the community.[211]

Crawford v Dean[212] is an example of just such a case. Austin J did not consider that the recommendation of interim orders by the independent children's lawyers paid due regard to the need to finalise a case that had involved seven years of harrowing litigation: 'The children's best interests will not be served by perpetuation of such uncertainty. Nor will the parties'.'[213] Like the parties in this case, Austin J considered final orders to be imperative.

8.97 It is, however, not always easy to achieve finality. This is especially so where the separation occurred relatively recently and the parties have not yet settled into a state of some sort of equilibrium, and their circumstances are still in a state of flux. The Full Court were faced with such a situation in *Marriage of Archbold*.[214] Evatt CJ and Fogarty J said that 'when a custody case comes on for hearing in that situation, there are difficulties about making a final adjudication at that point which is satisfying and likely to be in the long-term interests of the children'.[215] As Murray J, concurring, put it:

> … where it is clear that the welfare of the children will be best served by "allowing the dust to settle", or for the parties' affairs to resolve or acquire some certainty, the court should not hesitate to adjourn for a period and then call back on for further evidence.[216]

Thus, while finality of proceedings is highly desirable, it must always be subordinate to the need to treat the child's best interests as the paramount consideration in the making of parenting orders: s 60CA.

Interim orders

8.98 The legislative authority for making interim orders is contained in s 64B(1)(a) which empowers a court to make a parenting order 'including an order until further order'. It is a question for the court in each case to determine whether it is appropriate to make an interim or a final order and this must be decided by reference to the best interests of the child: s 60CA. Questions of perceived disadvantage to a parent are secondary to the welfare of the child.[217]

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211. (1981) 8 Fam LR 35 at 48.
212. [2012] FamCA 107.
213. ibid, at [146].
214. (1984) 9 Fam LR 798; FLC ¶91-532.
215. (1984) 9 Fam LR 798 at 805.
216. ibid, at 807.
217. *Re K (A Minor: Custody)* (1990) 2 FLR 64.

8.99 We have outlined in earlier editions of this book (most recently the seventh edition)[218] the leading authorities that considered the way in which interim applications were approached by the Family Court prior to the 2006 reforms. *Marriage of Cilento*[219] and *Cowling v Cowling* were of particular importance.[220] The latter case summarises the law on interim parenting orders at that time; if a child was in a settled environment then they would normally be left there until the trial, but if that was not the case a limited consideration of the best interests checklist would be undertaken to determine the matter. In other words, considerable weight was attached to maintaining a stable 'status quo' until the time of trial.

8.100 After 2006 the situation is different. Section 61DA(3) provides that the presumption of equal shared parental responsibility applies when making an interim parenting order unless the court considers it would not be 'appropriate in the circumstances'. Equal shared parental responsibility (joint decision-making in respect of major long-term decisions) will very often be ordered and the effect of this is to require the court to go through the process laid down in s 65DAA (considering equal parenting time and then substantial parenting time: see **8.61ff**) when making parenting orders. Also, considering the benefit to a child of maintaining a meaningful relationship with both parents has been elevated to a primary consideration.[221] Section 60B has also been altered: see **8.17**. After the passage of these amendments, it was suggested that the principles previously used in determining interim parenting applications would require reconsideration.[222]

The matter quickly came before the Full Court in *Goode v Goode*.[223] The parents in this case separated in late May 2006 and the interim hearing was decided by Collier J on 10 August 2006. Due to the timing of the matter, the orders sought by the parties were not framed in terms of the new law. The father sought parenting orders that effectively had the children spending equal time with each parent. The mother sought orders giving her primary residence and the father contact with the children every second weekend and half the school holidays, with some additional mid-week contact for the oldest child. Both parents sought that there be an order for joint responsibility for the long-term care, welfare and development of the children. The mother had been the primary caregiver both before and after separation, though the father's position was that he had effectively been forced to acquiesce to the mother's post-separation proposal.

218. L Young and G Monahan, *Family Law in Australia*, 7th ed, LexisNexis Butterworths, Sydney, 2009, [7.108]–[7.113].
219. (1980) 6 Fam LR 35; FLC ¶90-847.
220. (1998) 22 Fam LR 776; FLC ¶92-801.
221. FLA s 60CC(2)(a).
222. See R Chisholm, 'Interim Proceedings After the Family Law Amendment (Shared Parental Responsibility) Act 2006' (2006) 20 *AJFL* 219.
223. (2006) 36 Fam LR 422; FLC ¶93-286. This decision was confirmed in *Keach and Keach* (2007) FLC ¶93-353.

At first instance, Collier J made orders in line with the mother's proposals but failed to make an order for equal shared parental responsibility. His Honour did not suggest that the approach set out in *Cowling* (see **8.99**) was inappropriate as a result of the new laws and found there was nothing suggesting the status quo was not serving the children's interests. It thus appeared that he applied the approach of maintaining the status quo in the absence of any danger or harm to the children.

The Full Court held that Collier J erred in his fundamental approach and remitted the matter for rehearing. In reaching this conclusion, their Honours took the opportunity to discuss some of the effects of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), and in particular how it impacted on interim parenting applications. They noted that some aspects of interim parenting applications have not changed: the abridged nature of proceedings; the reliance on agreed facts and issues not in dispute (rather than being drawn into consideration of factual disputes); the practice of having regard to the care arrangements prior to separation; the current circumstances of the parties and their children; and the parties' respective proposals for the future.[224] However, they held that the 2006 reforms changed the application of prior case law to interim parenting decisions. Changes to s 60B, the introduction of the presumption of equal shared parental responsibility and the mandatory consideration of equal and substantial parenting time evince an intention to abandon the previous presumption in favour of preserving a well-settled status quo. The decision-maker must now follow the new statutory steps and where there is an order for equal shared parental responsibility this clearly favours substantial involvement of both parents in children's lives (subject to the need to protect children from harm). Maintaining the status quo may nonetheless result if that is in the children's best interests, in particular if controversial evidence is not able to be tested at the interim stage.[225]

Their Honours also considered when it will not be 'appropriate in the circumstances' to apply the presumption of equal shared parental responsibility in interim decisions: s 61DA(3). The discretion not to apply the presumption is not 'to be exercised in a broad exclusionary manner, but only in circumstances where limited evidence may make the application of the presumption, or its rebuttal, difficult'.[226] Even if the presumption is not applied, however, the Full Court held that the other changes to Pt VII (ss 60B(1) (a) and 60CC(2)(a)) required an abandonment of any preference for the status quo at an interim stage.[227] The Full Court went on to set out a format for dealing with interim parenting cases which gives effect to their conclusions on the operation of the various sections.[228]

224. (2006) 36 Fam LR 422; FLC ¶93-286 at [68].
225. ibid, at [72]–[73].
226. ibid, at [78].
227. ibid, at [80].
228. ibid, at [82]. See also *Truman and Truman* (2008) 38 Fam LR 614; FLC ¶93-360.

On the facts of the particular case, the Full Court held that the trial judge was correct in not applying the presumption of equal shared parental responsibility. The wife had alleged violence on the part of the father, and these allegations were untested at the time of the trial. For this reason, Collier J held it was inappropriate to apply a presumption of equal shared parental responsibility (even though both parents had sought joint parental responsibility). However, even though the presumption did not apply, his Honour then fell into error in applying *Cowling*, and not applying ss 60B(1)(a) and 60CC(2)(a). Since the father had sought equal time, the trial judge was bound to consider that option in light of those and other relevant provisions.

8.101 So called 'relocation' cases — usually where one parent proposes to move away with the child — present particular problems on an interim basis; for discussion of the treatment of relocation cases generally, see **9.115ff**. The FLA does not have any special provisions dealing with relocation.

In *Morgan and Miles*[229] a parenting plan provided for the children to live primarily with the mother and to spend time with the father. Before the trial, the mother moved from living in the same town as the father (where the father's family lived), to another country town about 144 km away (where her family lived). It was still possible for the children to spend time with the father under the terms of the parenting plan. The father sought an interim order that the mother return with the children. The magistrate who heard the matter took account of the fact that the children were seeing the father at times other than those provided for in the parenting plan (on appeal the mother was unsuccessful in introducing fresh evidence to challenge this) and ordered the mother to return with the children.

On appeal, Boland J noted this case raised some important questions, including whether the 2006 amendments required a different approach to be applied in relocation cases on an interim basis. She noted that before the amendments the cases focused on maintaining stability until the trial (the natural consequence therefore being that relocation was often not permitted on an interim basis). After reciting the new sections and the findings in *Goode* (**8.100**), Her Honour pointed out that where there was an order for equal shared parental responsibility, then consultation is required on changes to living arrangements that will make it harder for the 'left-behind' parent to spend time with the children (s 65DAC) and that a parent is precluded from making this decision on their own. Her Honour also pointed out that the consideration of equal and then substantial parenting time (which is required where there is an order for equal shared parental responsibility) would be particularly important in relocation cases. Her Honour emphasised that the law was the same for relocation and other cases; however, having said that, she went on to say:

229. (2007) 38 Fam LR 275; FLC ¶93-343.

> It appears to me that the very difficult issues in cases involving a relocation … make it highly desirable that, except in cases of emergency, the arrangements which will be in the child's best interests should not be determined in an abridged interim hearing, and these are the type of cases in which the child's present stability may be extremely relevant on an interim basis.[230]

Boland J's approach is now routinely cited. While it highlights the need for a fuller enquiry, it also emphasises the importance of stability. In this context, the particular concern is that allowing the child to be relocated on an interim basis risks the possibility of two substantial moves in a short period, given that ultimately the relocation may not be permitted. While such an approach is understandable, it is somewhat difficult to reconcile this with the approach adopted in cases which do not involve relocation but are simply about disputed parenting arrangements. In determining, for example, with whom a child shall live, a pre-existing status quo of primary parenting will not necessarily be preserved, simply to maintain stability in that regard. However, relocation cases do involve the added difficulty of the relocation potentially weakening the relationship between the child and the 'left-behind' parent. Maintaining significant relationships is now of primary importance.

As the Family Court has made it clear that orders can be sought restraining the move of parents away from their children (see **9.120**), it should be noted that, in theory, there is no reason why a similar approach would not be adopted in that situation; that is, the move may be restrained in the best interests of the child. However, for the reasons discussed at **9.122**, the court is hardly likely to be troubled with such applications; see also **8.139** in relation to enforcement of contact orders against parents who fail to exercise contact.

8.102 Cases where sexual abuse of a child has been alleged also raise particular problems: see generally **9.98ff**. The Full Family Court has held that the principles in *Goode* (**8.100**) apply in such cases also: see *Vasser and Taylor-Black*.[231]

Variation of orders in respect of children

8.103 In a sense, orders made in proceedings in respect of children are never final, since it is always open to the court to reopen a matter. Walters J in *Dodd and Dodd v Stuart*[232] restated the principle outlined by him in an earlier unreported decision:

> It is well that I should remind the parties that no order for custody is in any sense permanent. Every order is subject to review and if occasion should arise which would justify it, there would be nothing to prevent the [respondent]

230. ibid, at [88].
231. (2007) 37 Fam LR 256; FLC ¶93-329.
232. (1976) 1 Fam LR 11,540 at 11,544.

> hereafter from making [an] application on the ground that the child was not really happy with the [applicants] or not getting sufficient benefit from living with [them].

8.104 The power of the court in relation to variation of orders is set out in s 65D of the FLA. This includes the power to make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order: s 65D(2). This subsection is subject to ss 61DA (presumption of equal shared parental responsibility) and 65DAB (parenting plans).

8.105 Very early in the operation of the FLA, the Family Court responded to attempts by disgruntled litigants to exploit the principle that orders in respect of children are never final by seeking to re-litigate issues that had already been adjudicated upon. In *Marriage of Hayman*[233] the majority of the court held that it is not open to an unsuccessful party to return to court repeatedly in the hope of obtaining a favourable order. For such an application to have any chance of success, it must be shown that there had been a change of circumstances since the previous hearing. This implies that substantial issues not previously traversed had arisen which called for a fresh determination.[234]

In *Marriage of Freeman*[235] the rationale behind the court's approach was explained by Strauss J:

> The welfare of the children is, in this case, as in any others concerning custodial arrangement, the paramount consideration. But once the court, either after a full hearing or by a consent order, has settled the question of custody, it is usually in the interests of the children that the order made by the court is treated as determining the dispute and be given the necessary support. Stability in the lives of children and also in the lives of adults is an essential prerequisite to their well-being. Another important reason for approaching with some care an application to overturn such a recent order is that the proper and orderly administration of the law in the community of which these children are part requires that orders made in this jurisdiction should not be overturned unless sufficiently weighty new facts and circumstances are shown to exist which throw sufficient doubt on the desirability of continuing the custodial arrangements brought about by the order. Each case must depend upon its own facts, but, as a general proposition, it might be said that those new facts and changed

233. (1976) 2 Fam LR 11,558; FLC ¶90-140.
234. See *Rice and Asplund* (1979) 6 Fam LR 570; FLC ¶90-725; *Marriage of Cullen* (1981) 8 Fam LR 35; FLC ¶91-113, particularly Fam LR per Strauss J at 48; *Marriage of Freeman* (1986) 11 Fam LR 293; (1987) FLC ¶91-857; *Marriage of Zabeneh* (1986) 11 Fam LR 167; FLC ¶91-766; *N and R* (1991) 15 Fam LR 39; FLC ¶92-252; *Marriage of L* (1991) 15 Fam LR 157; (1992) FLC ¶92-274.
235. (1986) 11 Fam LR 293; (1987) FLC ¶91-857.

> circumstances should be such as to necessitate a fresh investigation to safeguard the best interests of the children.[236]

8.106 In *Marriage of Langham*[237] the Full Court also stressed the consideration that the court must always regard the children's welfare as the paramount consideration. While this would normally require a change in circumstances for a fresh application to have any chance of success, it may also be the case that some factor was not disclosed at the earlier hearing, which on a fresh application may appear relevant. If so, the court would need to consider it fully in the child's best interest. In other words, the common law rules of pleading and of adversary litigation, and specifically in relation to the introduction of fresh evidence, may have to be modified to take account of the parental jurisdiction of the court in disputes involving a child's welfare.

Where the threshold issue is determined in favour of the applicant, the court would proceed with the application according to established principles. In *Rice and Asplund*,[238] Evatt CJ (with whom Pawley and Fogarty JJ agreed) stated:

> Once the court is satisfied that there is a new factor or a change in circumstances, then the issue of custody is to be determined in the ordinary way. The court must apply the principles of s 64 and weigh up the factors for and against the proposals of each party, having regard to the welfare of the child as the paramount consideration.[239]

8.107 Although one would normally expect the issue of whether changed circumstances have been established to be determined as a preliminary issue, this is not necessarily required.

In *Bennett and Bennett*[240] the Full Court stated that it is a matter of discretion as to whether a judge embarks on a full hearing of a matter or determines the threshold question as to a change in circumstances. As their Honours noted (and without wishing to derogate from the general principle expressed in *Rice and Asplund* above, and *Marriage of Zabaneh*,[241] that fresh applications for custody should not be entertained unless there exists a substantial change in circumstances), in some cases it is not easy to determine the threshold question without going into the merits of the matter. Their Honours went on to make it clear that if, in such a case, the trial judge comes to the conclusion that a change of custody is warranted in

236. (1986) 11 Fam LR 293 at 297–8.
237. (1981) 6 Fam LR 862; FLC ¶90-014.
238. (1979) 6 Fam LR 570; FLC ¶90-725.
239. (1979) 6 Fam LR 570 at 572.
240. (1990) 14 Fam LR 397; (1991) FLC ¶92-191; see also *D and Y* (1995) 18 Fam LR 662; FLC ¶92-581.
241. (1986) 11 Fam LR 167; FLC ¶91-766.

the interests of the child, it would be 'unthinkable' not to give effect to such a conclusion on the basis that no change in circumstances had been shown.[242]

The need for there to be a material change in circumstances before a parenting matter can be reheard is now commonly referred to as the rule in *Rice and Asplund*. In *King v Finneran*[243] Collier J, after considering what was required in the way of a change in circumstances, said that the court must be satisfied that, if the changed circumstances were taken into account, there would be a 'real likelihood that a change may follow'.[244] The Full Court in *F and C and Child Representative*[245] later qualified this statement in light of the High Court's comments in *CDJ v VAJ*.[246] There, in relation to the question of admission of further evidence in appeals concerning parenting disputes, the High Court 'expressed the view that further evidence might only be allowed if it would clearly have led to a different conclusion'.[247] While the context was somewhat different, the Full Court was of the view that the underlying rationale was similar, and so the reasoning of the High Court ought to be borne in mind when applying the rule in *Rice and Asplund*.[248]

The 1996 reforms raised the question of whether the rule in *Rice and Asplund* continued to apply after the amendments. This was considered in *King v Finneran*[249] where a father sought to re-litigate recently made parenting orders. In this case, the magistrate who heard the application referred to *Bennett and Bennett* and decided she would treat the issue of change of circumstances as a discrete threshold test. On appeal, the father argued the 1996 amendments to Pt VII of the FLA rendered *Rice and Asplund* irrelevant. Collier J did not agree:

> The rule in *Rice and Asplund* is a rule evolved to protect children from involvement in further unnecessary litigation. To require a court to make a detailed determination of the matters set out in section 68F would defeat the purpose of that protection. It would mean that before the matter could be dealt with, a complete hearing … would have to be undertaken and completed.[250]

The same is true in relation to the latest amendments to Pt VII in 2006, that is, *Rice and Asplund* continues to apply.[251]

242. (1990) 14 Fam LR 397 at 409.
243. (2001) FLC ¶93-079.
244. ibid, at [50].
245. [2004] FamCA 568 at [45]–[47].
246. (1998) 197 CLR 172 at 204.
247. *Re F and C & Child Representative* [2004] FamCA 568 at [46].
248. See the discussion in *Edwards and Edwards* (2006) FLC ¶93-306 at [108]–[116].
249. (2001) FLC ¶93-079.
250. ibid, at 88,367.
251. For examples of its application post-1 July 2006, see *Sandler and Kerrington* (2007) FLC ¶93-323; *Moose and Moose* (2008) FLC ¶93-375.

In *SPS and PLS*[252] Warnick J considered the operation of the rule in *Rice and Asplund* and in particular the consequences of whether the 'threshold test' is determined at the beginning or end of the hearing and the significance of the changes sought. He made seven observations as to the rule, the most important of which are:

> (i) What the application of the rule can achieve if dealt with as a preliminary matter is different from what it can achieve if dealt with at the end of a full hearing.
> (ii) In its original formulation, the rule is directed to application as a preliminary matter.
> (iii) At whatever stage of a hearing the rule is applied, its application should remain merely a manifestation of the "best interests principle".
> (iv) The application of the rule is closely connected with the nature of, and degree of, change sought to the earlier order.
>
> …
>
> (vii) Any application of the rule must now measure the evidence against the principles set out in Part VII of the Act, in particular the objects of the Part, the presumption of equal shared parental responsibility and the steps required by the Act consequent upon an order made or to be made in that regard.[253]

Warnick J said that when the question of change in circumstances was addressed as a preliminary issue, the enquiry remains a determination 'on the merits'. Dismissing an application at an early stage of proceedings — that is, before all the evidence is available — is not the same as a technical dismissal of an application, such as for the failure of a party to appear. Rather, dismissal will be because:

> … there is an insufficient change of circumstance shown to justify embarking on a hearing. Though sometimes unstated, the underlying conclusion will or ought be that the interests of the child in not being the subject of further litigation is more powerfully in the child's welfare than to allow the application to continue.[254]

8.108 Warnick J's comments were endorsed and expanded on by the Full Court in *Marsden v Winch*.[255] Having reiterated the underlying rationale of the rule in *Rice v Asplund*, the Full Court made it clear that the rule is but a manifestation of

252. (2008) 39 Fam LR 295; FLC ¶93-363.
253. ibid, at [48].
254. At [81]. For further discussion of this issue, see *Miller and Harrington* (2008) 39 Fam LR 654; FLC ¶93-383 and the discussion in it of Wilson FM's comments in *Collivas & Cassimatis* [2007] FMCAfam 293.
255. (2009) 42 Fam LR 1 at [47]ff.

the best interests principle and that, in determining the manner in which the rule shall apply, procedural fairness must be provided. In summary, their Honours said there was a two-step process to be followed in applying the rule in *Rice v Asplund*:

> … there is a requirement:
>
> (1) For a prima facie case of changed circumstances that 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.[256]

Interrelationship between parenting orders and family violence orders

8.109 In the next chapter we consider the general provisions in Pt VII of the FLA dealing with family violence as an issue in contested child proceedings: see **9.27–9.38**. Division 11 of Pt VII deals with the very specific question of the interrelationship between 'certain orders, injunctions and arrangements made under [the] Act that provide for a child to spend time with a person' and 'family violence orders'. For reference to the statutory definition of 'family violence' and 'family violence order', see ss 4(1) and 4AB.

8.110 Prior to the 1996 amendments, there had been concerns about the interrelationship between access and protection orders.[257] For example, a court in a state or territory may have granted a protection order preventing a person from coming within a certain distance of the home. This may, however, have conflicted with an existing order for access made by the Family Court permitting the non-custodial parent to collect the child from the home. Alternatively, it may have been the case that at the time that an application for access came before the Family Court, a protection order was in existence under state or territory law of which the Family Court was not aware, and as a result, an access order was made which conflicted with that order. In such a case, the terms of the access order would override those of the state protection order because of the operation of s 109 of the Constitution.[258]

The new Div 11, which was introduced in the 1996 reforms, sought to address these sorts of problems by spelling out the interaction between orders made by the Family Court and protection orders made under state or territory law by a court of

256. ibid, at [58]. Their Honours referred to the following post-2006 cases discussing this rule: *Reid v Lynch* (2010) 44 Fam LR; FLC ¶93-448; *B v J* [2009] FamCAFC 103; *Caracini v Paglietta* [2009] FamCAFC 188; and *Gotch v Gotch* [2009] FamCAFC 3.

257. See *Australian Law Reform Commission Report No 69, Part I Equality Before the Law: Justice for Women,* AGPS, Canberra, 1994, paras 9.31–9.32 and rec 9.3; *Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act,* AGPS, Canberra, 1992, paras 6.43–6.51.

258. Australian Law Reform Commission Report No 69, *Part I Equality Before the Law: Justice for Women,* AGPS, Canberra, 1994, para 9.31.

summary jurisdiction. It was clear from the terms of the provisions that one goal was to promote the protection of victims of violence. However, the Family Law Council raised concerns about the new provisions and the tension created between protection from violence and the promotion of contact. One of the issues it noted was that often protection orders were made subject to any parenting orders, thus when the question of orders giving contact came before the Family Court there would be no inconsistency with the existing family violence order and so the protections built into Div 11 did not work to the benefit of victims of violence (as old s 68P(1) applied only when there would be inconsistency between the two).[259] The terms of Div 11 were recast in the 2006 reforms and it is clear that some of the recommendations of the Family Law Council have been given effect to.

8.111 Section 68N states that the purpose of Div 11 is:

(a) to resolve inconsistencies between:
  (i) family violence orders, and
  (ii) certain orders, injunctions and arrangements made under this Act that provide for a child to spend time with a person or require or authorise a person to spend time with a child; and
(aa) to ensure that orders, injunctions and arrangements of the kind referred to in subparagraph (a)(ii) do not expose people to family violence; and
(b) to achieve the objects and principles in section 60B.

Following on from the recommendations of the Family Law Council, the objects of Pt VII set out in s 60B now include protecting children from harm and family violence (s 60B(1)(b)); the objects also include, however, the maintenance of a meaningful involvement with both parents 'to the extent consistent with the best interests of the child': s 60B(1)(a). Section 60CC(2A), introduced in 2012, elevates the primary consideration of protection of children from harm over maintenance of parent/child relationships in the determination of a child's best interests. This reinforces the fundamental principle that a child's right of contact with its parents is always subject to protecting that child from harm.

8.112 Under s 60CG a court is required, in considering what order to make, to ensure among other things that the order is consistent with any family violence order. This requirement is, however, subject to the paramountcy principle, and there may be circumstances where a court determines it appropriate to make an order inconsistent with a family violence order. In these circumstances, s 68P applies and sets out various requirements that a court must fulfill if it proposes to make an order that will effectively put a child in contact with a person where that is inconsistent with a family violence order. Among other things, the court must ensure that an explanation is given to all persons concerned in understandable

259. Family Law Council, Letter of Advice to the Attorney-General, *Review of Div 11 — Family Violence*, 16 November 2004.

language about the operation of the order: s 68P(2)(c) and (d). The order itself must include a detailed explanation of how the contact provided for in the order is to take place: s 68P(2)(b). The Act also specifies those individuals and office-holders who must be given a copy of the order: s 68P(3). Section 68Q then spells out that the pre-existing family violence order is invalid to the extent that it is inconsistent with the later parenting order.

While these provisions are clearly aimed at the Family Court explicitly taking into account any existing family violence order, it has to be noted that, if the court failed to comply with the terms of s 68P, by virtue of s 68P(4) any order made by the court would not thereby be invalid.[260]

8.113 However, this does not mean a later family violence order cannot override an existing parenting order. Div 11 also makes provision for the variation of a parenting order by a state or territory court making a family violence order. By virtue of s 68R(1), if the relevant state or territory court has jurisdiction in relation to matters arising under Pt VII, the court may, subject to other subsections of s 68R, exercise that jurisdiction in the course of family violence proceedings to revive, vary, discharge or suspend an existing order which permits contact with the child.

8.114 Variation of a parenting order in family violence proceedings may be made by the court on its own initiative or on the application of any person: s 68R(2). The limitations on varying an order are as follows:

- The court must make or vary a family violence order: s 68R(3)(a). This means the court cannot decline to make or vary the family violence order, but go on to vary a parenting (or other listed) order.
- The court must have before it 'material that was not before the court that made that order': s 68R(3)(b). In other words, if the material about family violence now being relied on to seek (or change) a family violence order was before the court that made the parenting order, then the original parenting order cannot be changed.
- The proceedings to make or vary the family violence order must not be interim proceedings: s 68R(4).

The considerations relevant to the court in deciding whether to vary a parenting order are now set out in s 68R(5):

- the purposes of the Division (see s 68N);
- whether contact is in the child's best interests; and
- if changing a parenting (or other listed) order that was inconsistent with a family violence order when it was made, the court has to be satisfied that this is appropriate because someone has been, or is likely to be, exposed to violence as a result of the operation of that parenting order.

260. For an application of that provision, see *Cameron v Walker* (2010) FLC 93-445.

It is clear from s 68S(1)(e) that, in the exercise of the power under s 68R, the paramountcy principle does not apply, though the best interests of the child are a relevant consideration: s 68R(5).

8.115 This difference in focus between the Family Court (where the best interests of the child are the paramount consideration in determining whether a parenting order should be made which is inconsistent with a family violence order (see s 60CG)) and state and territory courts varying parenting orders, enables the latter courts to give primary regard to the protection of the person in whose favour the family violence order was made. What s 68R envisages is a situation where, since the s 68P contact order has been made (that is, an order inconsistent with a family violence order), there have been further developments which give rise to a justified fear of violence.[261]

As Nygh puts it, there is clearly a 'risk of jockeying' between s 68P (the Family Court's jurisdiction to make a parenting order inconsistent with, and which will override, a family violence order) and s 68R (dealing with the power of state and territory courts to vary a parenting order in connection with making or varying a family violence order). In practice, fathers are most likely to be the ones seeking a 'section 68P order', that is, a parenting order which is inconsistent with a family violence order, whereas mothers are most likely to seek to avail themselves of the powers now vested in the state and territory courts to vary a parenting order in connection with proceedings in respect of a family violence order.

Family Court's welfare jurisdiction

8.116 Reference has previously been made to the Family Court's jurisdiction to make orders relating to the welfare of children. This wide jurisdiction is vested in the court by virtue of s 67ZC(1) which makes it clear that this jurisdiction exists in addition to the jurisdiction that a court has under other sections in Pt VII. In deciding whether to make an order under this provision, a court must regard the best interests of the child as the paramount consideration: s 67ZC(2).

The Family Court's jurisdiction under s 69ZC(1) is confined to children of a marriage: see s 69ZH(2). This is because the states' referral of powers in respect of ex-nuptial children under the 1987 referral of powers to the Commonwealth did not extend to 'welfare' matters: see further, discussion of referral of powers at **4.xx–4.xx**. In Western Australia, where the Family Court of Western Australia has jurisdiction over nuptial and ex-nuptial children, s 162 of the Family Court Act 1997 (WA) gives that court 'jurisdiction to make orders relating to the welfare of children'.

261. See the comments of P Nygh, 'The New Part VII: An Overview' (1996) 10 *AJFL* 4, p 15; and s 68R(3)(b).

In *Re Bernadette*[262] the Full Court held that the application of s 67ZC is limited to children under 18 (cf the situation for child maintenance: see **11.18ff**). Thus, the Full Court dismissed an appeal relating to orders in respect of a child who had since turned 18. Another recent case confirms that s 67ZC does not apply to a foetus, and so an injunction restraining the termination of a pregnancy was not granted.[263]

8.117 A potentially wide range of matters can be litigated under s 67ZC.[264] Historically, much of the jurisprudence on this section dealt with the question of whether the parents of an intellectually handicapped minor, in the exercise of their parental responsibility, have the power to authorise a sterilisation operation on non-therapeutic grounds, or whether, as a matter of law, the prior permission of the Family Court is required before such an operation can proceed. The cases have typically involved young girls[265] approaching puberty, who have a moderate to severe intellectual disability and where there are concerns with regard to the child's ability to cope with menstruation, and/or concerns about the risk of pregnancy and the resulting problems that that would entail for the child.

In each case, the matter has been presented to the court on the basis that the operation is necessary in the best interests of the child. In a number of cases, the jurisdiction of the Family Court has been invoked as a result of third party intervention, taken for the purpose of preventing the operation from proceeding.

8.118 There was initially some uncertainty as to the legal position in view of conflicting first instance decisions.[266] The situation was clarified in the High Court's decision in *Re Marion*: see **8.31**. This case came on appeal from the Full Court of the Family Court, where in a split decision it was held that parents could lawfully authorise a non-therapeutic sterilisation, provided that they were acting in the child's best interests.[267] Strauss J, with whom McCall J agreed, held that the parents could lawfully authorise such an operation, provided that they were acting in the child's best interests, although his Honour went on to suggest that Family Court approval should nevertheless be obtained. Nicholson CJ dissented, adhering to the earlier views he had expressed in the case of *Re Jane*[268] to the effect

262. (2011) 45 Fam LR 248; FLC ¶93-463.
263. *Talbot v Norman* (2012) FLC ¶93-504.
264. See, for example, *GDPW and IDPW* (2004) 33 Fam LR 338; FLC ¶93-206, *W and G (No 1)* (2004) 35 FamLR 417; (2005) FLC ¶93-247; and *RS v ALMC* (2006) 35 Fam LR 234.
265. For a discussion of this issue in relation to boys, see G Carlson, M Taylor and J Wilson, 'Sterilisation, Drugs Which Suppress Sexual Drive, and Young Men Who Have Intellectual Disability' (2000) 25 *Journal of Intellectual and Developmental Disability* 91.
266. Compare the decisions *Re a Teenager* (1989) 13 Fam LR 85; FLC ¶92-006 and *Re S* (1989) 13 Fam LR 660; (1990) FLC ¶92-124 with the decisions *Re Jane* (1989) 12 Fam LR 662; FLC ¶92-007 and *Re Elizabeth* (1989) 13 Fam LR 47; FLC ¶92-023.
267. *Re Marion* (1990) 14 Fam LR 427; (1991) FLC ¶92-193.
268. (1988) 12 Fam LR 662; (1989) FLC ¶92-007.

that sterilisation involves interference with the right of bodily inviolability and falls within a category of procedure to which a parent cannot lawfully consent.

8.119 The High Court held, by a majority (Mason CJ, Dawson, Toohey and Gaudron JJ), that the decision to authorise sterilisation of a child, otherwise than as an incidental result of surgery performed to cure a disease or to correct a malfunction, is not within the ordinary scope of parental power to consent to medical treatment, and therefore court authorisation is required. After emphasising that sterilisation requires invasive, irreversible and major surgery, the majority of the court put forward the following justifications for its decision to treat non-therapeutic sterilisation as a special case, going beyond the parents' capacity to consent:

> Court authorisation is required, first, because of the significant risk of making a wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of the child who cannot consent, and secondly, because the consequences of a wrong decision are particularly grave.[269]

Their Honours made it clear that their decision to require court authorisation in such cases was grounded in a fundamental right to personal inviolability existing in the common law. In their view, it is the function of the court to decide whether in the circumstances of the case, it is in the best interests of the child to authorise the sterilisation, always having regard to the exceptional nature of this procedure which is a step of last resort. Of the dissenting judges, Deane and McHugh JJ, delivering separate judgments, were prepared to allow parents to authorise the carrying out of a sterilisation procedure in certain specified circumstances, whereas Brennan J held that neither a parent nor a court may authorise a non-therapeutic sterilisation of a minor.

8.120 From a practical point of view, applications for approval of sterilisation are usually granted, provided adequate evidence is adduced to persuade the court that the operation is in the child's best interests.[270] In *Re Marion* itself,[271] which came before Nicholson CJ, it was held that the proposed procedure (hysterectomy and ovariectomy) was in Marion's best interests.

8.121 The interrelationship between the Family Court's jurisdiction with regard to non-therapeutic sterilisation operations and state legislation enacted in a number of jurisdictions purporting to regulate this area was addressed by the High Court in *P and P*.[272] By a majority (5:2), the High Court held that the Family

269. (1992) 15 Fam LR 392 at 410.
270. For an example of where permission for sterilisation was refused on the grounds that the procedure was not clearly shown to be in the child's best interests, see *L and M: Director General, Department of Family Services and Aboriginal and Islander Affairs* (1993) 17 Fam LR 357; (1994) FLC ¶92-449.
271. *Re Marion (No 2)* (1993) 17 Fam LR 336; (1994) FLC ¶92-448.
272. (1994) 17 Fam LR 457; FLC ¶92-462.

Court has the power to authorise a sterilisation procedure in circumstances where that treatment would be contrary to the Guardianship Act 1987 (NSW), and further, that the legislation would be invalidated under s 109 of the Constitution, but only in so far as it would prohibit treatment authorised by the Family Court. Thus, where specific state legislation exists, the relevant body which has jurisdiction to make determinations under that legislation (for example, a Guardianship Board) can give the necessary authorisation, provided that the Family Court has not made a ruling either granting or prohibiting the procedure. In the event that the Family Court has assumed jurisdiction in respect of the matter, the state body has no power to make the order. Note this is not the case for ex-nuptial children, as the Family Court does not have jurisdiction in this respect: see **4.57**.

8.122 The Family Law Council, in its report, *Sterilisation and Other Medical Procedures on Children*,[273] has advocated that a strict approach be taken to non-therapeutic sterilisations of children, with the imposition of criminal penalties in respect of unauthorised sterilisation procedures. In setting out recommendations as to the circumstances in which it would be appropriate to authorise sterilisation, the Council recommended that authorisation of sterilisation be prohibited in certain circumstances, including: sterilisation purely for contraceptive purposes; sterilisation as a means of masking or avoiding the consequence of sexual abuse; or sterilisations performed on young women prior to the onset of menstruation, based on predictions about future problems that might be encountered with menstruation.

However, in *P and P*[274] the Full Court criticised these recommendations as too inflexible. That case involved an application by the child's mother, supported by the father and the child's separate representative, for the authorisation for the child to undergo a hysterectomy for the prevention of menstruation and the removal of the risk of pregnancy. In a unanimous decision, the Full Court granted the application. Their Honours commented that the case before them highlighted the dangers involved in the Council's approach of laying down categories of circumstances in which sterilisation may never be authorised:

> The danger involved with the Council's approach is that, taken literally, it may lead to the adoption of an approach that these factors are to be ignored in the decision-making process, which in our opinion would make a travesty of it. The other danger is that of compartmentalisation, which may lead a decision maker to lose sight of the overall object, which is that the best interests or welfare of the particular child are paramount.[275]

273. AGPS, Canberra, 1994.
274. (1995) 19 Fam LR 1; FLC ¶92-615.
275. (1995) 19 Fam LR 1 at 18.

8.123 There can be little doubt that the 'best interests' guideline approach, which has been favoured by the Full Court in preference to the more prescriptive approach advocated by the Family Law Council, does vest in the court a great deal of discretion and the approach of the court in *P and P* has attracted criticism from some quarters.[276] The ultimate question is whether court authorisation is necessary to safeguard children's interests particularly in situations where it might be seen that parental interests could conflict with those of the child. One advantage of requiring approval is that there is likely to be an independent children's lawyer appointed to safeguard the child's interests in such cases. Nicholson CJ also set down a list of relevant considerations to be taken into account in such cases which was later referred to by the Full Court of the Family Court as providing a useful practical application of relevant principles.[277] Procedures for the authorisation by the Family Court of such medical procedures for children are set out in Pt 4.2, Div 4.2.3 of the Family Law Rules 2004. These Rules are designed to expedite the hearing of such cases and to reduce costs. They also set out the evidence required (r 4.09(2)) to support an application, which includes expert evidence establishing: the likely long-term effects of carrying out (or not) the procedure; the risk of the procedure; reasons as to why any less invasive treatment is not being used; whether the child consents; and the views of the child's carer or parents.

8.124 For some years now, medical procedures which have been held to require court authorisation have been referred to by judges as 'special medical procedures', though this precise term is not used in the legislation. The Family Law Rules 2004 refer to 'major medical procedures' that are not 'for the purpose of treating a bodily malfunction or disease'; the example of non-therapeutic sterilisation is provided.[278] Whichever term is used, another example that falls squarely within the intended category of procedures would be the removal of a healthy organ for transplant to another child.[279] However, it has become increasingly apparent that deciding whether a procedure or treatment is 'special' — and thus requires court authorisation — is very difficult in some cases. Cases have arisen over the

276. See, for example, H Rhoades, 'Intellectual Disability and Sterilisation — An Inevitable Connection?' (1995) 9 *AJFL* 234. For a discussion of the arguments concerning sterilisation of girls with disabilities, see S Brady, 'Sterilization of Girls and Women with Intellectual Disabilities' (2001) 7 *Violence Against Women* 432. On this topic generally, see further: N Mushin, 'Special Medical Procedures, Sterilisation of Minors and the Role of the Family Court' (2007) 14 *Psychiatry, Psychology and Law* 199; L Steele, 'Making Sense of the Family Court's Decisions on the Non-Therapeutic Sterilisation of Girls with Intellectual Disability' (2008) 22 *AJFL* 1.
277. *P and P* (1995) 19 Fam LR 1; FLC ¶92-615.
278. See the definition of 'Medical Procedure Application' in the Dictionary to the Rules.
279. See the comments of the majority in *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 15 Fam LR 392 at 411, quoting Nicholson CJ with approval.

harvesting of bone marrow from a child to benefit a third party;[280] administration of an unapproved therapeutic drug to an infant with a fatal condition;[281] and most commonly cases dealing with what are increasingly referred to as 'gender affirmation' treatments or procedures.[282] The latter class of cases arise either because the child suffers from what is called 'gender identity disorder' or because of medical conditions where the chromosomal gender of the child differs from the way the child has been raised and/or appears externally.

In an early case, *Re A (a child)*,[283] an application was made seeking authorisation for sex reassignment of a 14-year-old child from female to male to address extreme masculinisation which had resulted from an abnormality in the adrenal gland. In granting the application, it was held by Mushin J that this case came within the principles laid down by the High Court in *Re Marion*: the proposed treatment fell outside the ordinary scope of parental consent and court authorisation was a necessary procedural safeguard to protect the interests of the child.

In *Re Alex (hormonal treatment for gender dysphoria)*[284] it was held that the decision whether to administer hormonal treatment to a 13-year-old girl suffering from gender identity disorder, so as to commence a 'sex-change' process, was one requiring court authorisation. In that case, the authorisation was granted.[285] When 'Alex' was 17 a further application was made to authorise the removal of both of Alex's breasts, a step Alex intended to take once 18 anyway, but by permitting the operation before she turned 18, Alex could access state social services. The application was granted by Bryant CJ.[286]

At the time of writing, the question of whether treatments such as those considered in *Re Alex* are, in fact, 'special medical procedures' was the subject of a pending appeal to the Full Family Court of Australia.[287] At first instance, Dessau

280. *Re GWW and CMW* (1997) 21 Fam LR 612; FLC ¶92-748; *Re Inaya (Special Medical Procedure)* (2007) 38 Fam LR 546. For discussion of the legal and ethical issues surrounding 'saviour siblings', see B Bennett, 'Symbiotic Relationships: Saviour Siblings, Family Rights and Biomedicine' (2005) 19 *AJFL* 195. See also S Then and G Appleby, 'Tissue Transplantation from Children: Difficulties in Navigating State and Federal Systems' (2010) 33 *UNSWLJ* 305.
281. *Re Baby A* [2008] FamCA 417.
282. *Re Brodie (Special Medical Procedures)* [2008] FamCA 334; *Re: O (Special Medical Procedure)* [2010] FamCA 1153; *Re Rosie (Special Medical Procedure)* [2011] FamCA 63; *Re Jamie (special medical procedure)* [2011] FamCA 248; *Re Jamie* (2012) FLC ¶93-497; *Re Sean and Russell (Special Medical Procedure)* (2010) 44 Fam LR 210; *Re: Sally (Special Medical Procedure)* [2010] FamCA 237; *Re Lesley (Special Medical Procedures)* [2008] FamCA 1226.
283. (1993) 16 Fam LR 715; FLC ¶92-402.
284. (2004) 31 Fam LR 503; FLC ¶93-175. See also *Re Brodie (Special Medical Procedure)* [2008] FamCA 334.
285. This was confirmed in *Re Bernadette* (2011) 45 Fam LR 248; FLC ¶93-463.
286. *Re Alex* (2009) 42 Fam LR 645.
287. See *Re Jamie* (2012) FLC ¶93-497 which deals with leave for a public authority and the

J granted approval for the first stage of treatment for gender identity disorder to begin for a child aged just under 11 at the time. The parents are appealing this decision and are specifically challenging the status of treatment for this disorder as a special medical procedure.

The outcome of this appeal may provide further guidance in this area. There has been judicial recognition of the problems being experienced for parents and medical practitioners given the difficulty of ascertaining whether a medical procedure is 'special' or not; it is accepted that applications are made just to be safe. The issues and cases are discussed at some length by Young J in *Re Baby D (No 2)*.[288] That case involved an application to authorise withdrawing artificial life-prolonging treatment being used on an infant. This was held not to be a 'special medical procedure'. It is clear from the case law that, even if the procedure is not 'special', the court has the power to make an appropriate order as an aspect of parental responsibility. In most cases the parties all support the procedure in question and so the court may find itself not being legally required to authorise a procedure, but making the necessary order in any event to provide certainty and protection for those performing the procedure.

For an interesting discussion of some of the further issues raised by these cases, in particular the rights of children, see the 2009 Costello Lecture delivered by Bryant CJ.[289]

8.125 Despite the broad role given to the Family Court in the area of medical treatment of children, the decision of the High Court in *Minister for Immigration and Multicultural and Indigenous Affairs v B (No 3)*[290] establishes that the welfare power has its limits. The issue in this case was whether, utilising the welfare power, the Family Court could order the release of immigrant children in detention centres on the basis that detention was not in their best interests. This is a question of jurisdiction, and has been discussed in that context at **4.65–4.68**. Perhaps not surprisingly, the High Court rejected the notion that the Family Court could make the orders sought. Even under s 67ZC there needs to be some relationship to marriage or parental responsibility before the court can step in and make an order concerning a child.[291] The cases discussed above clearly fall into that category, as

Australian Human Rights Commission to intervene in the proceedings. See further on this issue K Parlett and K Weston-Scheuber, 'Consent to Treatment for Transgender and Intersex Children' (2004) 9 *Deakin LR* 375.

288. (2011) 45 Fam LR 313 at [157]ff.
289. Bryant CJ, 'It's My Body Isn't It? Children, Medical Treatment and Human Rights', 2009 Costello Lecture, 23 July 2009, available at <http://www.truecolours.org.au> (accessed 3 May 2012).
290. (2004) 31 Fam LR 339; FLC ¶93-174.
291. See *Secretary of Dept of Health and Human Services v Ray* (2010) 45 Fam LR 1; FLC 93-457 where the Full Court held that the Family Court could not rely on s 67ZC to make an order granting the Secretary of the Tasmanian Department of Health and Human Services parental responsibility for a child, absent the Secretary's consent.

they determine the extent to which parents are able, or not, to make decisions about the medical treatment of their children. Alex's legal guardian, however, was the state and he was in the care of his aunt. The application was therefore initiated by a government department. It has now been confirmed that, in spite of the interposition of the state as guardian in this case, the matter was still within the Family Court's jurisdiction under s 67ZC because it was fundamentally about the exercise of parental responsibility.[292]

Subject to the constitutional limits on the exercise of power under s 67ZC,[293] as the Full Court pointed out in *Jacks v Samson*,[294] this section considerably expands the jurisdiction of the Family Court by virtue of its similarity with the *parens patriae* jurisdiction; though rarely used, the power extends far beyond special medical procedures. It is to be noted that the inherent *parens patriae* jurisdiction of the Supreme Courts is diminished by the Family Court's welfare power. Section 69B of the FLA provides that, where proceedings can be brought under Pt VII, they must not be 'instituted otherwise than under this Part'. As the FLA does not give the Family Court jurisdiction in respect of all matters relating to all children, there remain matters that are able to be dealt with by Supreme Courts utilising their *parens patriae* powers.[295]

Enforcement of orders in relation to children

Background

8.126 The issue of enforcement of orders, particularly in the area of children, has long been a problematic one for the Family Court. Essentially, the dilemma that the Family Court has faced has been to reconcile its enforcement role, and the need to ensure adherence to and respect for its orders, with the objective of being a 'helping court', which seeks to encourage a conciliatory approach between parties. A further factor complicating the situation has been the court's concern to have regard to the welfare of the child, which has generally been perceived as not being promoted by the imposition of strict sanctions on non-compliant parents such as imprisonment. There is concern that a tough approach on sanctions is likely to exacerbate any existing difficulties in the relationship between the parties and may therefore be counterproductive. In practice, it has historically been 'access/contact' orders that have proved especially problematic. In view of the ongoing nature of such arrangements and the potential for changes in circumstances, there is greater potential these orders to be breached.

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292. *Re Alex* (2009) 42 Fam LR 645 at [131].
293. See also *L v T* (1999) 25 Fam LR 590; FLC ¶92-875 at [55]–[60].
294. (2008) 221 FLR 307; FLC ¶93-387.
295. See, for example, the cases discussed in J Eades, 'Parens Patriae Jurisdiction of the Supreme Court is Alive and Kicking' (2000) 38 *LSJ* 52.

8.127 In attempting to resolve this dilemma, for many years the court adopted a position of minimal intervention: where possible to encourage conciliation and the discontinuation of proceedings with regard to the enforcement of sanctions. Where cases did arise for judicial determination, they were generally dealt with very leniently: see *Marriage of Sahari*[296] where it was stated that the punitive powers of contempt should be seen as an exercise of last resort. However, by declining to exercise its powers of enforcement, the court was open to the criticism that it creates the impression of weakness, lacking the authority to enforce its own orders. This, in turn, may give rise to a perception that the court is condoning non-compliance with the result that offenders may believe that they can breach orders with impunity.

8.128 The persistent problem of enforcement led to the Australian Law Reform Commission's report *Contempt*,[297] the broad thrust of which was implemented by the Family Law Amendment Act 1989 (Cth). This inserted a new Pt XIIIA into the FLA, dealing with the enforcement of orders under the Act, including orders in relation to children. The goal was to strengthen enforcement while at the same time recognising parents could have legitimate reasons for breaching orders. However, in 1992 the Joint Select Committee on Family Law[298] expressed concern that the Family Court had not used the enforcement powers given to it, particularly in cases where the non-custodial father had been denied or had been frustrated in contact with his children by the custodial mother: para 8.59 of the report. While endorsing the approach of the court in treating imprisonment as a penalty of last resort, the Committee commented that if the court was to gain public confidence in this regard, then it must demonstrate its readiness to apply the alternative sentencing provisions available under the Act which, in the majority of cases, will be more appropriate than the imposition of a gaol sentence: paras 8.66–8.67 of the report.[299]

Following a further report by the Family Law Council on the matter in 1998,[300] the Family Court of Australia released a joint research paper assessing the impact of changes brought about by the Family Law Reform Act 1995 (Cth) and this provided interesting data on what was happening in the area of enforcement of parenting orders and, in particular, contact orders. The report, *The Family*

296. (1976) 2 Fam LR 11,126; FLC ¶90-086.
297. AGPS, Canberra, 1987.
298. *Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act,* AGPS, Canberra, 1992, para 7.32.
299. Recommendations for further changes were also made by the Australian Law Reform Commission in its report, *For the Sake of the Kids: Complex Contact Cases and the Family Court* Report No 73, AGPS, Canberra, 1995, recs 5.1–5.8.
300. Family Law Council, *Child Contact Orders: Enforcement and Penalties*, 1998, available at <http://www.ag.gov.au> (accessed 24 May 2012).

Law Reform Act 1995: The First Three Years,[301] found that: between 1995–96 and 1999–2000 the rate of applications for enforcement of parenting orders had more than doubled; almost all applications were brought by contact parents about contact; and the majority of applications were found to be either trivial or without merit.[302] However, while the authors of this report were still working on it, the federal government introduced the Family Law Amendment Bill 1999 (Cth) which implemented recommendations made by the Family Law Council. The authors of *The Family Law Reform Act 1995: The First Three Years* made submisions to the government to the effect that the proposed provisions were too rigid and did not account for their research findings about the number of frivolous and trivial enforcement applications being brought. In response, the government amended the Bill to permit the adjournment of enforcement proceedings to allow for the making of modified parenting orders.[303]

In November 2000, the (amended) Family Law Amendment Act 2000 (Cth) was passed. However, the approach adopted by those reforms[304] was then abandoned in the 2006 reforms, the key aim being (again) to expand and strengthen the court's powers when dealing with the failure of a party to comply with orders affecting children.

The current legislative scheme

8.129 The current provisions apply where someone has 'contravened' an 'order under [the] Act affecting children': s 70NAC. The latter phrase is defined in s 4(1) and includes parenting orders, injunctions, registered parenting plans and also certain orders made by way of sanction under Div 13A. The meaning of 'contravene an order' is also defined (in s 70NAC) and means: intentionally[305] failing to comply with an order that binds the person, or making no reasonable attempt to do so, and also preventing a person bound by an order from complying with it or aiding or abetting someone in contravening an order. The note to this section highlights that a contravention will not have occurred where the action in question is consistent with a parenting plan that came after the relevant order: see also s 64D.

8.130 Where in proceedings relating to an order affecting children it is alleged that the order has been contravened, the court can vary the order without a separate application, whether or not the allegation is proved: ss 70NAA(2) and 70NBA.

301. H Rhoades, R Graycar and M Harrison, University of Sydney and Family Court of Australia, 2000.
302. ibid, paras 1.31–1.34.
303. ibid, para 6.32.
304. L Young and G Monahan, *Family Law in Australia*, 7th ed, LexisNexis Butterworths, Sydney, 2009, [7.143].
305. O'Ryan J has held this does not require 'proof of contumacious behaviour': *Jetts v Maker* [2010] FamCAFC 55 at [83].

Generally, the question of the variation will then be determined by the child's best interests; however, note s 70NBA(2) which applies where there has been a serious contravention of an order without reasonable excuse under Subdiv F.

Whether the original order (or 'primary' order as it is called in the Act) is varied, and if so how, will depend on the individual circumstances. There is no limitation in this regard — for example, it may be varied to provide more, less, or different, time with the person who alleged the contravention: see s 70NBA(3).

In *Sandler and Kerrington*[306] the mother was found to have breached parenting orders made some nine months earlier. She did not attend the contravention hearing and the parenting order was reversed in favour of the father. On appeal, she raised the fact that she was not notified that parenting orders would be considered, that the father had not sought care and that the reasons of the trial judge who originally awarded her care of the child were not before the federal magistrate. The reasons of the trial judge showed that evidence had been accepted that it would be harmful to the child to change care. It appears the federal magistrate reversed care with the thought that this would be challenged and there would soon be a fuller hearing.[307]

It is not surprising that Warnick J found this was not a proper basis for making such a decision and that the decision was flawed due to the lack of information before the court. His Honour noted that this section was designed, at least in part, to make it easier for the court to vary a parenting order during contravention proceedings where it became apparent that there was a problem being caused by the form of the orders, such as an ambiguity.[308] A separate application is thereby avoided and in such cases a summary process is appropriate. However, clearly a more significant change can be made, and in that case the normal process (as set out under the terms of Pt VII) is required. If the parenting orders have been made recently, this includes establishing a change in circumstances: see *Rice and Asplund* discussed at **8.108**. This process was not followed here. Moreover, even though the relevant forms pointed out to the mother that care could be changed, given that the father had served on her another application regarding parenting orders, seeking that the child live with the mother in the interim, it was reasonable for her to assume that the federal magistrate would not consider a reversal of care. Thus the mother was denied procedural fairness. However, despite the order reversing care having been made less than two months earlier, and even though his Honour had no evidence before him on the effects on the child of what he presumed was a traumatic move, Warnick J assumed it would not promote the child's best interests to return him to his mother, leaving the matter to be resolved in the pending parenting proceedings.[309]

306. (2007) FLC ¶93-323.
307. ibid, at [39].
308. ibid, at [43].
309. In *Irvin and Carr* (2007) FLC ¶93-322, the Full Court approved Warnick J's comments on the proper process in respect of s 70NBA.

Dobbs and Brayson[310] provides an example of where a federal magistrate imprisoned a mother as a sanction for breaching a parenting order and reversed care. The Full Court allowed the appeal as the federal magistrate failed to consider properly whether this was in the child's best interests.

8.131 In addition to amending existing parenting orders, the court can impose various sanctions but the sanctions available will depend on the type of contravention. There are now four categories of cases: contraventions alleged but not established (Subdiv C); established contraventions for which there was a reasonable excuse (Subdiv D); less serious contraventions without reasonable excuse (Subdiv E); and more serious contraventions without reasonable excuse: Subdiv F.

8.132 Section 70NAE sets out what is meant by a 'reasonable excuse', but it is clear that the circumstances set out there do not provide an exhaustive list: see s 70NAE(1). Failing to understand the obligations created by an order at the time of contravention amounts to a reasonable excuse; however, this is qualified by the rider that the court must still be 'satisfied that the respondent ought to be excused': s 70NAE(2).

Where an order as to where the child shall live, or with whom they shall spend time or communicate, is contravened, a reasonable excuse for the contravention will include where the person believed on reasonable grounds that the contravention was necessary to protect the health or safety of themself, the child or some other person. However, the duration of the contravention must be limited to the period necessary to protect the relevant person: s 70NAE(4), (5) and (6). The same is true of contraventions that interfere with the exercise by a person of parental responsibility: s 70NAE(7).

8.133 Where a contravention is alleged, but not established (Subdiv C), the only additional order the court may make (apart from varying the primary order) is a costs order against the person alleging the contravention. While the power to make a costs order under s 70NCB is discretionary, the court must consider making such an order where there has been a prior allegation of a contravention which was either not established, or was established but no order under (specified) provisions was made: s 70NCB(2).

8.134 Where there is a contravention of a parenting order resulting in the applicant spending less time with the child, but a reasonable excuse is established (see **8.132**), then the court can first order compensatory time with the child. Indeed, the court must consider making such an order, but no compensatory order is to be made where it is contrary to the child's best interests: s 70NDB.[311] It

310. (2007) 38 Fam LR 95; FLC ¶93-346.

311. Note Cronin J's comment that this provision is in fact no different to an order varying the parenting orders in place under s 70NBA: *Ackersley v Rialto* [2009] FamCA 817 at

is notable that the sections referring to 'make-up' time refer to the parent being compensated, not the child, which is not in keeping with the long-standing view of the court that contact is the right of the child, not the parent.[312]

Where there is no compensatory order, then, as with the prior category, the court may make a costs order against the applicant and similar provisions apply mandating consideration of this option in certain circumstances: s 70NDC.

8.135 Where there is no reasonable excuse for a contravention, then as indicated above, different considerations apply depending on whether the contravention is 'less' or 'more' serious. There are a number of relevant factors in determining the seriousness of a contravention. First, where there has been no prior sanction nor any adjournment of a contravention application to allow for new parenting orders to be considered (see s 70NEB(1)(c)), then the matter will be 'less' serious: s 70NEA(2). This will not be the case, however, if the court is satisfied that, in relation to the current contravention, the person in question has 'behaved in a way that showed a serious disregard for his or her obligations under the primary order': s 70NEA(4). If that is the case, the contravention is 'more' serious. The Full Court in *Elspeth and Peter* said:

> The theme that emerges from an examination of several decisions by Federal Magistrates is that 'serious disregard' tends to be found in cases of deliberate, pre-meditated non-compliance with the orders, and continued and protracted breach.[313]

Even if there has been a prior sanction or there are adjourned proceedings, the court may still determine the matter is one which should be treated as 'less' serious: s 70NAE(3).

Having decided the matter is 'less' serious, the court then has the power to make any or all of a range of orders, set out in s 70NEB: requiring attendance at a parenting program; compensating for time lost with the child; adjourning the proceedings to allow for a party to apply for a variation to the primary order (see s 70NEB(6)); requiring the respondent to enter into a bond; requiring repayment of expenses incurred due to the contravention; and costs orders: see s 70NEB(7). Section 70NEB(2) applies to orders made against someone other than the person who committed the contravention. Again, in relation to compensatory time orders, these must be considered where the breach of a parenting order has resulted in lost time, though they will not be made where they are contrary to the child's best interests: s 70NEB(4) and (5).

8.136 Finally, Subdiv F deals with the 'more' serious contraventions that are committed without any reasonable excuse. If no sanction has previously been

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[88].

312. Note also the comment of Murphy J in *McLory v McLory* [2010] FamCA 305 at [54].

313. (2007) 37 Fam LR 696; FLC ¶93-341 at [61].

ordered for a contravention, or if there are no adjourned proceedings pending the variation of parenting orders (see s 70NEB(1)(c)), then this Subdivision will apply if the court is satisfied that the person who contravened the order 'behaved in a way that showed a serious disregard for his or her obligations under the primary order': s 70NFA(2). The Subdivision also applies where there has been a prior sanction (or adjournment), unless the court is satisfied that the contravention should be treated as 'less' serious: s 70NFA(3) and (4).

Thus, we can see that where there is no prior sanction then normally the matter will be classified as 'less' serious; however, the court may, based on the behaviour of the person committing the contravention, decide the breach should be treated as 'more' serious. Conversely, where there has been a prior sanction, the contravention will normally be treated as 'more' serious, unless the court decides otherwise.[314]

The court's powers to make orders where the contravention is more serious are set out in s 70NFB. In addition to time and expense compensation orders, costs orders and bonds (though see the different provisions in these regards), there is the ability to make a community service order, impose a fine and to order a term of imprisonment (maximum 12 months). There are then specific provisions about the conditions under which a community service order can be imposed (s 70NFC), their variation and discharge (s 70NFD), bonds (s 70NFE) and the enforcement of bonds and community service orders: s 70NFF.

Where a contravention is 'less' serious, it is clear from the terms of s 70NEB that the court does not have to impose a sanction. However, in the case of a 'more' serious contravention, under s 70NFB some sanction will have to be imposed by the court. Subsection (1) requires a full costs order against the respondent be made, unless that is not in the child's best interests. Where that costs order is made, the court must consider making at least one more order under s 70NFB(2). Where no costs order is made, the court must make at least one order under that subsection.

8.137 Imprisonment is a very serious matter and so there are further constraints on the making of such an order. First, it is not open where the contravention relates to the non-payment of child maintenance under the Act, unless the failure to pay was intentional or fraudulent: s 70NFB(4). Nor can imprisonment be ordered where the contravention was of an administrative assessment of child support, a child support agreement or a court-ordered departure from the administrative assessment: s 70NFB(5).

This approach could be said to reflect the primacy that the FLA places on the right of children to have contact with their parents. Serious breaches of parenting orders that impinge on that right can be the grounds for imprisonment. However, even the most flagrant failure to provide support for a child cannot. It is worth noting that the most likely category of parent facing imprisonment is a parent with shared or primary care of a child; conversely, it is entirely possible that a

314. See the Full Court's comments in *Gravis v Major* [2010] FamCAFC 239 at [131].

parent paying no child support has little or no contact with their child. Therefore, imprisonment will almost invariably affect the child's right to have contact with the imprisoned parent whereas imprisonment of someone failing to pay child support may in some instances have no significant impact on parent–child contact. It seems difficult to justify, therefore, the different treatment of the payment of child support on the basis of maintaining meaningful parent–child contact.[315] There are, of course, other sanctions applicable for non-payment of child support as well as different mechanisms for enforcement of child support obligations: see **Chapter 11**.

8.138 It is clear from s 70NFG(2) that imprisonment should be considered as a sanction of last resort. Thus, the reasons for choosing imprisonment as the sanction must be stated by the court: s 70NFG(3). An example of the use of imprisonment in relation to denial of what was then called contact can be seen in *D and C (Imprisonment for Breach of Contact Orders)*.[316] The magistrate in this case considered that resorting to imprisonment was necessary as the mother had over a long period been entirely non-compliant, expressed no remorse and expressed no intention of complying with the contact orders.

The Full Court in *McClintock and Levier*[317] suggested that imprisonment under the FLA has a different purpose to its role in dealing with criminal offenders. Brewster FM imprisoned a mother for six months for taking the child out of the state to avoid contact, in circumstances where she claimed there were serious concerns about contact taking place. Applying criminal sentencing principles, the federal magistrate made it clear that the goal of the sentence was to act as a deterrent to other parents. The Full Court upheld the mother's appeal, saying Brewster FM's aim of making an example of the woman was an error of law and the sentence was manifestly unjust.

8.139 One interesting aspect of the enforcement of Family Court orders, in particular those allowing a child contact with a parent, is that the debate always centres on the actions of parents denying the other parent contact, in breach of orders. In this context we have noted the historical, and constant, criticism that the Family Court is weak in this regard. It must be noted, however, that there will be many occasions when contact with a parent is ordered, but that parent fails to exercise that contact.[318] Indeed, the parent may choose to relocate away from the child. Contact is a right of the child. A parent's failure to exercise court-ordered contact is equally a breach of that court order and often not in a child's best

315. This is not a new provision; see its predecessor s 70NJ(6A) inserted by the Family Law Amendment Act 2000 (Cth).
316. (2004) FLC ¶93-193.
317. (2009) FLC ¶93-401.
318. See E McInnes, 'The Attitudes of Separated Resident Mothers in Australia to Children Spending Time with Fathers,' (2007) 21 *AJFL* 20.

interests. Many carer parents may well want the other parent to exercise contact — both for their sake and the sake of the child. However weak enforcement is in relation to carer parents (and note such parents have been imprisoned), it must be acknowledged that enforcement is immeasurably weaker where it is the parent who chooses not to exercise contact. Even if a court were minded to punish a parent for such a breach, there is little incentive for the carer parent to bring an expensive enforcement action. Note the discussion of the equivalent problem in relation to a parent relocating away from a child at **9.122**.

8.140 The standard of proof required under Div 13 A (including what is a reasonable excuse) is generally the lower civil standard of a balance of probabilities, 'having regard to the gravity of the allegation':[319] s 70NAF(1) and (2). There are a few exceptions to this, including where the court is ordering imprisonment: s 70NAF(3). These provisions have caused some problems because the standard of proof depends on the penalty and this cannot be known to the parties during the hearing. The Full Court[320] has commented that:

> … notwithstanding the "oddities" of process that may arise, the effect of s 70NAF(3) is this: before an order of the type referred to in that subsection is made, the court must be satisfied beyond reasonable doubt of all the factual matters that relate to the finding of contravention, to the treatment of the contravention as one to which Subdivision F of Division 13A applies, and … if imprisonment is imposed, the inappropriateness of other available orders.[321]

The only solution, it seems, is for parties to assume from the start that the higher standard is required. Where decision-makers intend making orders requiring the higher standard of care, they should explicitly note that fact.[322]

8.141 In addition to the general power of the Family Court to punish for contempt of its power and authority contained in s 35, the power exists under s 112AP to punish a contempt of court that does not constitute a contravention of an order under the FLA or, where it does constitute a contravention of an order under that Act, where it involves a flagrant challenge to the authority of the court. Thus, the provision is directed to contempt in the nature of a challenge to the court's authority or the interference with the administration of justice rather than a contravention of an order of the court, except where that contravention involves a flagrant challenge to the authority of the court.

Under this provision, the court can impose fines and/or the sanction of imprisonment subject to such terms as the court specifies: s 112AP(4) and (6).

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319. *Jetts v Maker* [2010] FamCAFC 55 at [83], per O'Ryan J.
320. *Dobbs and Brayson* (2007) 215 FLR; FLC ¶93-346.
321. ibid, at [51].
322. ibid, at [66] and the reference there to the approach adopted by Benjamin J in *Elspeth v Peter* [2007] FamCA 254.

In *Ibbotson and Wincen*[323] consideration was given by the Full Court to the interpretation of s 112AP, in particular, the meaning of the phrase 'flagrant challenge to the authority of the court'. It was held that repeated breaches are not required before a flagrant challenge to the authority of the court can be established. Their Honours stated that the use of the term 'flagrant challenge' to the authority of the court is intended to underline the exceptional or striking nature of the contravention in question and thus to differentiate it from what might be described as the general run of breaches which are intended to be dealt with under s 112AD: in each case, it is a question of fact and degree whether the stringent terms of s 112AP(1)(b) are satisfied.

On the facts of that case, in which the husband refused to return the child to Australia after taking the child to the United States for a holiday, it was held that the conduct of the husband was particularly blatant: the husband had made a conscious and deliberate attempt to thwart the orders of the court and acted in complete disregard of the rights of the wife and their child. In these circumstances, his conduct clearly came within the terms of s 112AP(1) and the sentence of 12 months' imprisonment imposed at first instance was found not to be excessive. Although not dealing with a parenting order, the more recent case of *Abduramanoski v Abduramanoska*[324] provides a summary of the law in this area and reiterates that the standard of proof for contempt is beyond reasonable doubt.

Specific legal mechanisms dealing with non-compliance

8.142 Where there has been a breach of obligations created under a parenting order which deals with where a child lives, or with whom they spend time or communicate (see ss 65M, 65N and 65NA), the person in whose favour the relevant parenting order was made can apply to the court for the issue of a warrant for the arrest of the alleged offender: s 65Q. Before this power to issue a warrant can be exercised, the section requires, among other things, that there is an application before the court for the alleged offender to be dealt with under Div 13A for the alleged contravention (s 65Q(1)(c)) and that the court is satisfied that the issue of a warrant is necessary to ensure that the alleged offender will attend before a court to be dealt with under Div 13A: s 65Q(1)(d).

Subject to these preconditions, the court may, where satisfied that there are reasonable grounds for believing that there has been a contravention under any of ss 65M, 65N or 65NA, issue a warrant authorising a person to whom it is addressed to arrest the alleged offender: s 65Q(2). A warrant stops being in force either on the date specified in the warrant if that is a date not later than six months after the issue of the warrant, or otherwise, six months after the issue of the warrant:

323. (1994) 18 Fam LR 164; FLC ¶92-406.

324. (2005) 33 Fam LR 1; FLC ¶93-215. See also *Tate and Tate (No 3)* (2003) 30 Fam LR 427; FLC ¶93-138.

s 65Q(3). Sections 65R–65W regulate how people who have been arrested are to be dealt with.

Legislative restrictions regarding the removal of children from Australia

8.143 Provisions set out in Subdiv E of Div 6 create offences where a child is removed from Australia, in circumstances where that child is the subject of an existing parenting order or where there are proceedings pending in respect of that child with regard to parenting orders: ss 65Y and 65Z. The types of parenting orders included in these provisions are orders determining with whom the child will live, spend time and communicate, and those allocating parental responsibility: s 65X(1). A maximum penalty of three years' imprisonment applies for contravention of these provisions.

8.144 The only exceptions to the scope of this prohibition are contained within ss 65Y(2) and 65Z(2), which permit removal of the child from Australia where it is done with the consent in writing (authenticated as prescribed) of each person in whose favour the Pt VII order was made, or alternatively, if it is done in accordance with an order of a court made under Pt VII or under a law of a state or territory.

Where permission is sought from the Family Court for the temporary removal of the child from the jurisdiction, the court may call for security to ensure the parties return: for example, *Marriage of Kuebler*[325] (wife granted permission to remove the child from Australia on condition of payment of $3000 into the husband's solicitor's trust account as surety for her return).

In *Marriage of Line*,[326] the Full Court held that in exercising the discretion to set a sum for security for return of a child, a court ought to consider:

> … [T]he two-fold purpose [of setting such a sum], namely:
>
> (a) to provide a sum which will realistically entice the person removing the children to return; and
> (b) to provide a sum to adequately provision the party left in Australia to take action and proceedings in Australia and overseas in an endeavour to obtain the return of the children.
>
> The next matter is obviously the degree of risk that the departing parent, once permitted to leave Australia, will, despite assurances to the contrary, choose not to return. In assessing that degree of risk, obvious considerations are the existence (or otherwise) of continuing ties between the departing parent and Australia (such as the ownership of real estate, the existence of business interests, or the residence of close family or friends here), the existence and strength of possible motives not to return (including the level of conflict between the parents, particularly over child related issues) and the existence

325. (1978) 4 Fam LN 4; FLC ¶90-434.
326. (1997) 21 Fam LR 259; FLC ¶92-729.

and strength of possible motives to remain in the other nominated country (such as the ownership of real estate, the existence of business interests, or the residence of close family and/or personal friends there).

We think it will also be relevant, in exercising this discretion, to consider whether the country to which the departing parent intends to travel with the children is or is not a signatory to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (the Convention). However, in considering and deciding what weight to give to this factor, the court would have to bear in mind that, even if the designated destination is a convention country, once the departing parent has left Australia there may be little to prevent him or her deviating from that designated destination to another destination in a non-convention country or, after going to the designated destination, from then travelling on to a non-convention country.

Finally, we think that a relevant consideration in the exercise of this discretion is the financial circumstances of both parties, and in that context the relative hardship which the departing parent would suffer by the imposition of security at a particular level as compared with the hardship which the non-departing parent would suffer if the security were fixed at a lower level. In each case, questions of hardship to the children flowing from any hardship experienced by the relevant parent would also come into consideration.[327]

8.145 Obligations are also cast on captains, owners and charterers of aircraft and vessels in circumstances where the relevant parenting orders have been made (s 65ZA), or where proceedings for such orders are pending: s 65ZB. Under s 67ZD if a court having jurisdiction under Pt VII considers that there is a possibility or threat that a child may be removed from Australia, it may order the passport of the child and of any other person concerned to be delivered up to the court on such conditions as the court considers appropriate.

Location orders

8.146 An important facilitative feature of the legislation is the provision made for location orders and Commonwealth information orders dealt with in Subdiv C of Div 8. As the name suggests, these orders are designed to assist people with parenting orders locate the child the subject of the parenting order, where those whereabouts are unknown to them.

A 'location order' is defined in s 67J(1) as an order made by a court requiring a person to provide the registrar of the court with information that the person has or obtains about the child's location, or alternatively, an order requiring the secretary of a department, or an appropriate authority of a Commonwealth instrumentality, to provide the registrar of the court with information about the

327. (1997) 21 Fam LR 259 at 264–5.

child's location that is contained in, or comes into, the records of the department or instrumentality. This latter form of location order is, in turn, defined as a 'Commonwealth information order': s 67J(2).

8.147 A location order in relation to a child may be applied for by a person in whose favour a parenting order has been made, relating to with whom the child shall live, spend time or communicate, or the allocation of parental responsibility. Further, any other person concerned with the care, welfare and development of a child may apply: s 67K. In deciding whether to make a location order in relation to a child, the court must regard the best interests of the child as the paramount consideration: s 67L.

There are two separate provisions in the Act: one for the making of location orders (other than Commonwealth Information Orders) and one for Commonwealth Information Orders: see ss 67M and 67N respectively. In each case, the effect of the order is to cast a duty on the person to whom it applies to provide the information sought as soon as practicable or as soon as practicable after the information is obtained: ss 67M(5) and 67N(7) (subject only to the qualification that in respect of a Commonwealth Information Order, the records of the department or Commonwealth instrumentality need not be searched more often than once every three months unless specifically ordered by the court: s 67N(9)). Section 67P restricts the disclosure of information provided under a location order, imposing penalties for unauthorised disclosure.

Recovery orders

8.148 In addition to locating children, there are occasions when it is necessary to obtain an order to secure the return of a child. Recovery orders are dealt with under ss 67Q–67Y. The term 'recovery order' is defined in s 67Q as encompassing a range of orders directed at securing the return of the child to a parent or other specified person.[328] A recovery order in relation to a child may be applied for by: a person with whom the child is supposed to be living under a parenting order; a person with whom the child is to spend time or communicate; a person who has parental responsibility for the child; a grandparent, or any other person concerned with the care, welfare and development of the child: s 67T. It seems that the court can also make a recovery order on its own initiative, in facilitation of other orders.[329] In proceedings for a recovery order, the court may make such recovery order as it thinks proper: s 67U.

However, this section is stated to be subject to s 67V which directs that in deciding whether to make a recovery order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

328. As to whether a recovery order is a parenting order, see *Hugh v Sawer* [2011] FamCA 48.
329. *Sandler and Kerrington* (2007) FLC ¶93-323.

International child abduction

8.149 Australia has ratified the Hague Convention on the Civil Aspects of International Child Abduction and this forms the cornerstone of the regulation of international child abduction. In 1983, s 111B was inserted into the FLA enabling the enactment of the Family Law (Child Abduction Convention) Regulations which give effect to Australia's obligations under the Convention.

The objects of the Convention are to secure the prompt return of children wrongfully removed to, or retained in, any contracting state and to ensure that the rights of custody and access under the law of one contracting state are effectively respected in other contracting states: see Art 1.[330] A significant consequence of this is that the primary concern of the court is to secure the return of the child to its home jurisdiction: the 'best interests of the child' is not the paramount consideration.[331]

8.150 A central authority has been established in each Convention country[332] whose role it is to secure the return of children who have been wrongfully removed. Applicants seeking assistance under the Convention must deal with these 'Central Authorities'. In Australia, the regulations make provision for the appointment of Commonwealth and state Central Authorities. The Commonwealth Central Authority is currently the International Family Law Section of the Attorney-General's Department.

In the first instance, a person who has 'rights of custody' (see below) will approach the Central Authority in their country: see reg 11(1). In Australia, the Commonwealth Central Authority reviews all applications and then, if they meet the relevant criteria, sends them either to the appropriate state or overseas authority (depending on whether it concerns a child abducted into, or out of, Australia). For an account of the practical operation of the Convention in Australia, see the Full Court decision in *Harris v Harris*.[333]

8.151 The procedures in respect of applications made in Australia are set out in the regulations.[334] The child must be under the age of 16: reg 2(1). Where a child

330. See the comments of the Full Court of the Family Court regarding the purpose of the Child Abduction Convention in *Director General of Family and Community Services and Davis* (1990) 14 Fam LR 381 at 383–4; FLC ¶92-182 and *Marriage of Graziano and Daniels* (1991) 14 Fam LR 697 at 703; FLC ¶92-212. See also Kirby J in *DP v Commonwealth Central Authority; JLM v Director-General, NSW Dept of Community Services* (2001) 27 Fam LR 569 at 599; FLC ¶93-081.
331. For explanation, see *Director General of Family and Community Services and Davis* (1990) 14 Fam LR 381; FLC ¶92-182.
332. See Sch 2 to the Family Law (Child Abduction Convention) Regulations 1986 which sets out the Convention countries and note also reg 10.
333. (2010) 245 FLR; FLC ¶93-454 at [13]ff.
334. For general analysis of the framework underpinning the operation of the Convention,

has been wrongfully removed to or retained in Australia, the Commonwealth Central Authority must, on receipt of a valid application, take action under the Convention to secure the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention: reg 13(1). Under reg 13(4), the action taken may include all or any of the following: seeking the voluntary return of the child; seeking an amicable resolution to the dispute over the child's location between the parties; transferring the request to a responsible Central Authority; and applying for an order (from a court) under Pt 3 of the regulations. While the Central Authority may try to resolve the matter by amicable means, if it cannot the Authority should normally seek a court order under Pt 3. A person, institution or other body having 'rights of custody' is also permitted to bring the relevant application: regs 6 and 14(1).[335]

8.152 Regulation 14 sets out the orders that can be sought, and they include orders for the return of children, issuing of warrants, orders restricting the movement of the child, interim orders placing the child in the care of a particular person, institution or body, and any other order necessary to give effect to the Convention. Obviously, the types of orders for children removed to Australia and for children removed from Australia differ accordingly: cf reg 14(1) and (2).

8.153 'Removal' and/or 'retention' is 'wrongful' in the circumstances set out in Art 3 of the Convention: reg 2(2). In essence, Art 3 says that removal or retention is wrongful where it is in breach of someone's 'rights of custody' in relation to the child under the laws of the place from where the child was removed. Those rights may be joint or sole; however, the person must actually have been exercising those rights prior to the removal/retention. Following the reforms in 1996 and 2006 under which the concepts of custody and access were abolished and replaced with a more general concept of 'parental responsibility', amendments were also made to s 111B of the FLA dealing with the Child Abduction Convention. To resolve any doubt as to the implications of the changes effected under those two rounds of reform, s 111B(4) explains the circumstances in which a person under Australian family law has rights of custody of, or access to, a child for the purposes of the Convention. The terms of that section make the situation relatively clear in Australia. For example, a parent with any degree of parental responsibility has 'rights of custody': s 111B(4)(a).

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see C Martin, 'Abduction of Children — Some National and International Aspects' (1987) 1 *AJFL* 125. For a discussion of how the various articles of the Convention have been interpreted in contracting states, see J Kay, 'The Hague Convention — Order or Chaos?' (2005) 19 *AJFL* 245.

335. Note the amendment to this regulation effected by the Family Law Amendment Act (No 3) 2004 (Cth), to overcome the decision in *Marriage of A and GS* (2004) 32 Fam LR 583; FLC ¶93-199.

However, the matter is not always so clear in relation to the laws of other countries. The term 'rights of custody' is defined in reg 4(2): 'rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child.' Case law has established that this term should be given a broad interpretation in line with the purpose of the Convention and not restricted by specialist domestic terminology.[336] The term has been considered by the Full Court since the 2006 reforms in *J and Director-General, Dept of Community Services*.[337] The definition in reg 4 was described as 'somewhat unsatisfactory'. In this particular case, the father had a right to be consulted but as the orders gave the mother the right to make the final decision if they disagreed, it was held the father did not have 'rights of custody'. As a result, the removal by the mother of the child was not wrongful. This case emphasises that the central authority, which bears the onus of establishing the removal or retention is wrongful, must pay close attention to the precise nature of the orders in the foreign jurisdiction.[338]

8.154 The court will also have to decide whether the child was 'habitually resident' in the place from which they were removed. This term was considered by the High Court in *LK v Director-General, Department of Community Services*.[339] After noting that the term has no technical definition and is a question of fact, their Honours made two points:

> First, application of the expression "habitual residence" permits consideration of a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual. Secondly, the past and present intentions of the person under consideration will often bear upon the significance that is to be attached to particular circumstances like the duration of a person's connections with a particular place of residence.[340]

Their Honours went on to say that this term is deliberately different from the concept of 'domicile'. A person will normally have only one 'habitual residence'; however, they may be nomadic and have none. As the term relates to where the

336. *In the Marriage of McCall; State Central Authority* (1994) 18 Fam LR 307; (1995) FLC ¶92-551.
337. (2007) FLC ¶93-342.
338. For a further example of the need to consider carefully the rights of the parent under the laws of the place of habitual residence, see the High Court decision in *MW and the Director-General of the Dept of Community Services* (2008) 39 Fam LR 1; 82 ALJR 629. See also *Brown* v *Burke* (2007) 39 Fam LR 276.
339. (2009) 237 CLR 582. See also *De Lewinski v Director-General, New South Wales Department of Community Services* (1997) 21 Fam LR 413; FLC ¶92-737; *Kilah v Director-General, Dept of Community Services* (2008) 39 Fam LR 431; FLC ¶93-373*; Zotkiewicz v Commissioner of Police (No 2)* (2011) 252 FLR 139; FLC ¶93-472*; State Central Authority v Camden* [2012] FamCAFC 45.
340. (2009) 237 CLR 582 at [23].

child resides, their Honours also noted the importance of considering the habitual residence of the child's carer.

8.155 The effect of the regulations is that, subject only to reg 16(3) (grounds on which a court may refuse to make an order for the return of the child), the court must order the return of the child where the application was filed within one year after the day on which the child was removed or first retained in Australia, unless the court is satisfied that the child is 'settled in his or her new environment': reg 16(2).

This latter phrase was considered in *Marriage of Graziano and Daniels*.[341] The Full Court held that the test must be more exacting than that the child is happy, secure and adjusted to its surrounding circumstances: in the court's view, the word 'settled' had a physical element of relating to, or being established in, a community and an environment, as well as an emotional element denoting security and stability. It was held that the relevant environment was not constituted by the mother alone — the relevant environment is a community in a geographically defined place, and in order for the child to be settled, that environment must have attained significance for the child. Confirming the approach taken in *Gsponer v Johnstone*,[342] it was held that the burden of establishing that the children are 'settled in their new environment' must rest on the party opposing their return.

Later Full Courts, however, have resiled to an extent from the position taken in *Graziano* on the meaning of the word 'settled': see *Director-General, Dept of Community Services v M and C*[343] (referring to the High Court case of *De L v Director-General, New South Wales Dept of Community Services*)[344] and then *Townsend v Director-General, Dept of Families, Youth and Community Care*.[345] In the latter case it was said that '[t]he test, and the only test to be applied, is whether the children have settled in their new environment'.[346] Although both sides in this case agreed 'settled' should be given its ordinary meaning, the question was whether the oft-quoted passage from *Graziano* did, in fact, depart from this simplified test. The Full Court held *Graziano* did add an unacceptable gloss:

> In our view, while the above-quoted passage from Graziano draws attention to some relevant matters, it has the potential to mislead, in two respects. First, the notion that the abductor "must establish the degree of settlement which is more than mere adjustment to surroundings" suggests that there are degrees of settlement, only some of which satisfy the legislative requirement. It thereby suggests a more exacting test than the regulation actually requires. It may also be taken to imply that matters which would demonstrate adjustment to the

341. (1991) 14 Fam LR 697; FLC ¶92-212.
342. (1988) 12 Fam LR 755 at 766; (1989) FLC ¶92-001.
343. (1998) 24 Fam LR 178; FLC ¶92-829.
344. (1996) 20 Fam LR 390; FLC ¶92-706.
345. (1999) 24 Fam LR 495; FLC ¶92-842.
346. ibid, at 192.

environment are somehow irrelevant or to be discounted. The suggested contrast with "mere adjustment to surroundings" thus tends in our view to complicate the issue and distract the court from the task of determining whether the child is settled in his or her new environment.

Second, it could be misleading to say that "settled" has two constituent elements, one physical and one emotional. While the various matters mentioned in the quoted passages are undoubtedly relevant, the analysis of the term into those two distinct components is unhelpful in our view. There are numerous ways in which the various relevant matters could be categorised. One might, for example, include "educational" as a separate category. The two-component categorisation adopted in Graziano might lead trial judges to approach the task in a way different from that required by the words of the Act. It could, especially in finely-balanced cases, affect the weight to be attached to various matters.[347]

As to the situation where the application is made outside the 12-month period and the child is settled, see *State Central Authority v Ayob*.[348]

8.156 In practice, the interpretation of the exceptions to the court's obligation to order the return of the child (found in reg 16(3)) has been the most litigated area. Regulation 16(3) provides five grounds that permit the court to refuse to return the child. The person opposing the return bears the onus of proof. It is clear from the terms of this regulation that the power to refuse return is discretionary, though there are no statutory guidelines as to how that discretion should be exercised.[349] The first ground is where the rights of custody were not being exercised before the child's removal or wrongful retention (and would not have been exercised): reg 16(3)(a)(i). As to the interpretation of this regulation and whether the person making the application for return of the child was actually exercising rights of custody when the child was wrongfully removed or retained, see *Director General, Department of Community Services and Crowe*[350] where it was held that the mother was exercising rights of custody even though the children had been in the care of their grandparents.

The second ground is where the person seeking the child's return either consented, or subsequently acquiesced, to the removal or wrongful retention: reg 16(3)(a)(ii). For an example of the application of this provision, see *Director-General, Dept of Child Safety v Milson*.[351]

347. (1999) 24 Fam LR 495 at 501–2.
348. (1997) 21 Fam LR 567; FLC ¶92-746. See also the discussion of this point in J Kay, 'The Hague Convention — Order or Chaos?' (2005) 19 *AJFL* 245, pp 259–60.
349. For a discussion of this matter, see *Kilah v Director-General, Dept of Community Services* (2008) 39 Fam LR 431; FLC ¶93-373.
350. (1996) 21 Fam LR 159; FLC ¶92-717.
351. [2008] FamCA 872.

8.157 The third ground arises where 'there is a grave risk that return of the child … would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation': reg 16(3)(b). While these words are not defined, Gleeson CJ indicated that the words 'or otherwise place the child in an intolerable situation' assist in understanding what was contemplated as to the nature and degree of physical or psychological harm required to satisfy this exception.[352]

In some early cases[353] the Family Court took the view that it would be inappropriate for it to assume that a child would not be properly protected by the courts of the other country on its return. However, in *Cooper and Casey*[354] there was some acknowledgment of a problem with the operation of the Convention in that it is not the practice of receiving states to accept direct responsibility for the welfare of children after their return. Nicholson CJ, with whom Kay and Graham JJ agreed, urged receiving states to accept a more positive obligation for the welfare of children returned suggesting that such an obligation can be found in Art 7 of the Hague Convention.

There has since been considerable judicial discussion of the meaning of the words in reg 16(3)(b). In *DP v Commonwealth Central Authority*[355] (heard together with *JLM v Director-General, NSW Dept of Community Services*) the mother, a Greek-born Australian citizen, had returned with the child to Australia after separating from the Greek father, the child having been born and raised in Greece. The child was diagnosed with autism in Australia and the mother argued 'grave risk' on the basis that returning the child to the father's village would mean necessary treatment services would not be available to the child. The mother was unsuccessful both at first instance and on appeal to the Full Court. A majority of the High Court held that the phrase 'grave risk' was not to be given either a narrow or a wide meaning, but rather the meaning demanded by the words themselves.[356] Due to the predictive nature of the exercise, 'clear and compelling evidence' of a 'grave risk of exposure to future harm' is required.[357]

At the time of this decision, reg 16(3)(b) referred specifically to the return of the child to the country in which they habitually resided before the removal. The High Court held that although the regulation did not refer to the return of the child to a place or person, the court must consider the practical consequences of a return.[358] The regulation has now been amended to read 'return of the child under the Convention', which makes it clear that it is the consequences of the

352. *DP v Commonwealth Central Authority* (2001) 27 Fam LR 569 at 573; FLC ¶93-081.
353. *Gsponer v Johnstone* (1988) 12 Fam LR 755; (1989) FLC ¶92-001; *Director General of Family and Community Services and Davis* (1990) 14 Fam LR 381; FLC ¶92-182; *Murray and Tam; Director, Family Services ACT (Intervener)* (1993) 16 Fam LR 982; FLC ¶92-416.
354. (1995) 18 Fam LR 433; FLC ¶92-575.
355. (2001) 27 Fam LR 569; FLC ¶93-081.
356. (2001) 27 Fam LR 569 at 582.
357. ibid, at 582.
358. ibid, at 585.

return that must be assessed when considering this exception. The High Court also held that, in terms of psychological harm, it was necessary to show more than distress on the part of the child at being returned.[359] The mother's appeal in this case was upheld on the bases that the Full Court erred in applying a narrow construction to the words of this regulation, and that the trial judge erred in finding the evidence established no grave risk. However, on rehearing, the child was returned to Greece.[360]

In the companion decision (a special leave application), *JLM v Director-General, NSW Dept of Community Services*, the mother successfully restrained the return of a child to Mexico at first instance on the basis that there was a serious risk of her committing suicide if an order for return were made. On appeal, the Full Court overturned the decision on the basis that the evidence in fact showed that the risk of suicide arose from the possibility of an adverse decision if the parenting dispute were to be heard in Mexico. Obviously, there is a concern in cases such as these that threats will be made to subvert the objective of the Convention, which is to have the matter determined in the child's place of habitual residence.[361] The High Court granted leave and upheld the mother's appeal. Their Honours held that:

> To say that she is the originator of the source of the risk of harm appears to take no account of the fact that the mother is not in command of her situation and it betrays a complete lack of any understanding of the major depressive illness from which she suffers.[362]

The matter was remitted to the Full Court for a rehearing which, consistent with the High Court's finding, found the trial judge had not erred and so dismissed the original appeal.[363]

In *Genish-Grant v Director-General, Dept of Community Services*[364] the two children in question had lived in Israel for about four and a half years with their Australian-born mother and Israeli-born father. Having obtained the father's consent to take the children to Australia for three months, the mother remained in Australia with the children. O'Ryan J held there was no risk to the children in returning them to Israel. On appeal, the mother relied on a government travel warning (issued after the first hearing) advising all Australians to defer travel to Israel. A majority of the Full Court considered that the travel warning did amount

359. ibid, at 582.
360. See the discussion of this point by J Kay, 'The Hague Convention — Order or Chaos?' (2005) 19 *AJFL* 245, pp 270–1 and reference therein to the unreported decision of *SCA v Maynard* [2003] FamCA 911.
361. See also *Director-General, Dept of Families and RSP* (2003) 30 Fam LR 566; FLC ¶93-152.
362. (2003) 30 Fam LR 566 at 589.
363. On the relevance of the removing parent's conduct to the grave risk of harm exception, see also *Director General v Davis* (1990) 14 Fam LR 381; FLC ¶92-182.
364. (2002) 29 Fam LR 51; FLC ¶93-111.

to clear and compelling evidence of a grave risk[365] and noted that in relation to countries at war or subject to civil unrest, it was not necessary to show that the child in question was at any greater risk than any other person in the country. The fact that, at first instance, it had been found that the mother had no intention of returning to Israel when she left highlights that the exception relates to the circumstances of the child, not the parent's motivations.

The approach taken to the interpretation of reg 16(3)(b) has given rise to some criticism, particularly from women's groups who seek to protect female victims of violence.[366] These concerns were long ago outlined in the report of the Australian Law Reform Commission, *Equality Before the Law*,[367] paras 9.39–9.46. In light of the strict interpretation of the regulations adopted by the court, the Commission recommended that reg 16 be amended to provide that in deciding whether there is a grave risk that the child's return would expose the child to physical or psychological harm or an intolerable situation, regard may be had to the harmful effects on the child of past violence or of violence likely to occur in the future towards the abductor by the other parent if the child is returned: rec 9.5. It was further recommended that the regulations should provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has care of the child. This recommendation was not acted on.[368]

For a very thorough discussion of the case law on how past family violence perpetrated in the child's place of habitual residence relates to the assessment of 'grave risk' in reg 16(3)(b), see *Zafiropoulos and the Secretary of the Department of Human Services State Central Authority*.[369] Contrast the outcome in that case (where the risk of violence on returning to Greece was not sufficient to trigger the exception) with the decision in *McDonald & Director General, Dept of Community Services, NSW*.[370] In the latter case it was found that the mother had suffered post-traumatic stress disorder as a result of the violence to which she was subjected by the father, and there was a danger it would resurface if she and the child were sent back. This triggered the exception; however, it is discretionary, and the trial judge was of the view that protection could be provided by ordering that certain conditions be met (as is provided for under reg 15). On this basis, the order for return was made. On appeal, the Full Court held that where conditions are to be

365. *Compare Kilah v Director-General, Dept of Community Services* (2008) 49 Fam LR 431; FLC ¶93-373.
366. For an outline of some US decisions and academic articles considering this issue, see J Morley, 'The Future of the Grave Risk of Harm Defense in Hague Cases' available at <http://www.international-divorce.com> (accessed 3 May 2012).
367. Australian Law Reform Commission, *Equality before the Law: Women's Equality*, ALRC Report 69, 1994, Pt 2.
368. See further J Kay, 'The Hague Convention — Order or Chaos?' (2005) 19 *AJFL* 245, pp 264–7.
369. (2006) 35 Fam LR 489; FLC ¶93-264.
370. (2006) FLC ¶93-297.

attached so as to avoid the 'grave risk', those conditions 'need to be clearly defined and be capable of being objectively measured as to whether or not the conditions have been fulfilled'.[371] The appeal was successful, as the conditions in this case did not meet these criteria. Also see *Harris v Harris* (**8.150**) for discussion of the application of this exemption where family violence has been established in the place of habitual residence.

The Australian Law Reform Commission has recently released another major report on family violence and the law,[372] and again addressed the issue of the application of this defence in cases where family violence has been established. The Commission noted the outcome of a UK study which found that in all six cases in the study where a non-molestation order was made in an abduction case, the order was broken after return to the place of habitual residence.[373] The Commission affirmed the recommendations made in its earlier *Equality Before the Law* report.[374]

A later case provides an example of appropriate conditions being attached to protect a child on return, though in a rather different context. In *Dept of Community Services and Frampton*[375] a Kenyan mother lost her visa to remain in the UK, nearly two years after she separated from the father of the parties' child. The mother returned to Kenya and as it was clear she would not be granted a visa to return to the UK, she asked the father to sign divorce papers, so she could marry her new Scottish partner and move to Scotland. The father refused, apparently saying '[e]njoy your life in Kenya'. The mother then moved to Australia and at this point the father sought the return of the child to the UK. It was agreed that there would be a grave risk to the child if the mother could not return with the child. The trial judge was not satisfied that appropriate conditions could be crafted, but the Full Court disagreed, outlining the minimum conditions required here:

> It seems to us essential that the mother have the legal ability to enter and stay in the United Kingdom pending the outcome of anticipated proceedings about L's future parenting. It further appears essential considering the mother's financial position, that the means of transporting L and the mother to the United Kingdom be provided. Finally it seems essential that some financial arrangement be made to ensure the mother and child have the ability to find accommodation upon their arrival, and have provision for their day to day living expenses, at least until an application for support can be made by the mother to an appropriate court.[376]

371. ibid, at [29].
372. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114, 2010.
373. Reunite International, *The Outcome for Children Returned Following an Abduction*, 2003, p 28, available at <http://www.reunite.org> (accessed 26 May 2012).
374. Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence — A National Legal Response*, ALRC Report 114, 2010, para 17.315.
375. (2007) 37 Fam LR 583; FLC ¶93-340.
376. ibid, at [34].

8.158 The High Court has also had to consider the interpretation of the words in the fourth ground for a court refusing to return a child (reg 16(3)(c)): the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views. Originally, the regulation said nothing about how strongly held the objection had to be to trigger the exception. Thus, in *De L and Director General, NSW Department of Community Services*[377] the High Court held there was 'no particular reason why reg 16(3)(c) should be construed by any strict or narrow reading' of the phrase; no form of words had been employed 'which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition'.[378] Their Honours went on to note the desirability of reports in such cases and the need for separate representation of children.[379]

However, since this decision, reg 16(3)(c)(ii) has been enacted (note also s 111B(1B)). This provision only permits consideration of children's objections which import 'a strength of feeling beyond the mere expression of a preference or of ordinary wishes'. This provision was considered in *Re F (Hague Convention: Child's Objections*).[380] Here, a nine-year-old boy was taken by his mother from the United States to Australia in August 2003 and retained there without the father's consent. In August 2004 it was ordered that the boy be returned to New Orleans. However, for reasons canvassed in the decision (not the least of which was cyclone Katrina), that did not happen. By the time the father tried to remove the child from Australia, the child had developed an implacable opposition to leaving Australia, and refused to board the plane. The trial judge found that the boy did not object to being returned, but rather to leaving his mother (perhaps being under the mistaken impression that he was being moved to the permanent care of his father). After discussing the difficulty in establishing precisely what had to be objected to,[381] the Full Court held that, in the case at hand, the precise basis of the objection was not the key factor, as it was perfectly clear that this 12-year-old child had an extremely strong objection to being forced to go back with his father.

Prior to this decision it had been held that the objection of the child had to be to returning to the other country, not to leaving the care of the parent who abducted them.[382] However, the Full Court had qualified this finding in *De L and Director General NSW Department of Community Services* by saying that 'there may be cases "where the two factors are so inevitably and inextricably linked that

377. (1996) 20 Fam LR 390; FLC ¶92-706.
378. (1996) 20 Fam LR 390 at 399.
379. (1996) 20 Fam LR 390 at 402.
380. (2006) 36 Fam LR 183; FLC ¶93-277.
381. See, for example, *Agee and Agee* (2000) 27 Fam LR 140; FLC ¶93-055.
382. *Director General of Department of Community Services and Crowe* (1996) 21 Fam LR 159; FLC ¶192-717; *De L and Director General NSW Department of Community Services* (1997) 21 Fam LR 413.

they cannot be separated"'.[383] As the discussion in *Re F* highlights, this might seem to give abductors an advantage if they can delay an action for return of the child. In spite of this, the decision in *Re F* affirmed that the child's objection is not to be overridden on the basis that this will unfairly reward the abducting parent.[384]

The exception will only apply where the child has 'attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views'. *Zafiropoulos and the Secretary of the Department of Human Services State Central Authority*[385] provides an example where the strong objection of a very mature child aged just under eight was held to fall outside the exception, on the basis of the child's young age.

8.159 The final ground for a court refusing to return a child (reg 16(3)(d)) is more general: 'the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms' do not permit the return of the child. This does not appear to be frequently relied on.[386]

8.160 The Convention only applies where a child has been removed to, or retained in, an overseas country which has ratified the Convention. There had, however, been cases where it had been strongly suggested that the influence of the Convention should extend to non-Convention countries.[387] In reaching this conclusion, support had been expressed for the general principle of *forum non conveniens* based on the High Court authority of *Voth and Manildra Flour Mills Pty Ltd*,[388] which was applied by the Family Court in *Marriage of Gilmore*.[389]

In *ZP v PS: Re PS: Ex parte ZP*[390] the High Court addressed the question of the significance of the Convention in respect of non-Convention countries. The case concerned the removal of a child from Greece by his mother in breach of a custody order made in her favour by a Greek court. At the time of the removal, Greece was not a party to the Convention. An appeal had been brought from orders made at first instance requiring the parties to submit themselves to a Greek court of competent jurisdiction for the purpose of determining the child matters at issue. The Full Court of the Family Court (Kay and Graham JJ, Nicholson CJ dissenting)

383. (1997) 21 Fam LR 413 at 426.
384. See also the factual background to *Waite and Waite-Hollins* (2007) FLC ¶193-325 and, for a further example, see *Tarritt v Director-General, Dept of Community Services* [2008] FamCAFC 34.
385. (2006) 35 Fam LR 489; FLC ¶93-264.
386. See *Director-General, Dept of Families, Youth and Community Care v Bennett* (2000) 26 Fam LR 71; FLC ¶93-011; *A v GS* (2004) 32 Fam LR 583; FLC 93-199.
387. See *Van Rensburg and Paquay* (1993) 16 Fam LR 680; FLC ¶92-391 building on the earlier views expressed in *Barrios and Sanchez* (1989) 13 Fam LR 477; FLC ¶92-054.
388. (1990) 171 CLR 538.
389. (1993) 16 Fam LR 285; FLC ¶92-353.
390. (1994) 17 Fam LR 600; FLC ¶92-480.

had dismissed the appeal, in spite of objections raised by the wife that she would be unable to return to Greece.

By a majority (Brennan and Dawson JJ, and Deane and Gaudron JJ, delivering two separate joint judgments; Mason CJ, Toohey and McHugh JJ dissenting), the High Court allowed the appeal. Although the court was divided as to the ultimate decision, there was agreement on a number of propositions. All members of the court supported the conclusion that in international child abduction cases falling outside the Convention, the welfare of the child is the paramount consideration: the test of 'clearly inappropriate forum' developed in the administration of the principle of *forum non conveniens* was not an alternative test to the welfare of the child, and Family Court authorities to the contrary must be overruled.

While there was general support among members of the court for the proposition that it is legitimate to take account of the policy underlying the Hague Convention in non-Convention cases, the justices were of the view that the importance previously given to that factor by the Full Court was too great. The issue of the policy of the Convention was most fully canvassed in the joint judgment of Brennan and Dawson JJ where they had this to say:

> The policy of the Convention is not a factor which can displace the paramount consideration of welfare. It is only if welfare factors be evenly balanced that secondary considerations — such as the policy of discouraging the abduction of children across national borders or the desirability of the determination of permanent custody being made in the child's ordinary place of residence — can have any weight in guiding the exercise of the Family Court's powers.[391]

Endorsing the approach taken by Nicholson CJ, a majority of the court (Brennan, Deane, Dawson and Gaudron JJ) held that the issue of the wife's non-return was of central importance to the future welfare of the child, and as this had not been addressed, it was necessary to refer the matter back to a judge of the Family Court to make such orders as were in the best interests of the child.

This decision applies to cases where a child is wrongfully abducted from another jurisdiction and brought into Australia and the application seeks the return of the child to that other jurisdiction; where the application is to stay proceedings brought in Australia, see *EJK v TSL*[392] and the cases referred to in it.

391. (1994) 17 Fam LR 600 at 618–19.
392. (2006) 35 Fam LR 559; FLC ¶93-287.