

Submission
No 26

**INQUIRY INTO IMPACT OF THE *FAMILY LAW
AMENDMENT (SHARED PARENTAL RESPONSIBILITY)
ACT 2006 (CTH)***

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Date Received: 25/10/2006



**The Law Society
of New South Wales**

ACN 000 000 699

Our Ref: JMcP:MAP:fam2006:649

Direct Line: 9926 0212

Your Ref: Simon Johnston

24 October 2006

Hon Christine Robertson MLC
Committee Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Robertson

Re: *Inquiry into the impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006*

Thank you for your letter dated 27 September 2006 inviting comment on the impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

The Family Issues Committee of the Law Society of New South Wales, which comprises practitioners with extensive expertise in family law, has considered the terms of reference and forwards its submission for your assistance and consideration.

I confirm that Mr John Longworth, Mr Glenn Thompson and Ms Olivia Conolly will be representing the Family Issues Committee at the public hearing on Tuesday 31 October 2006 at 3.15 p.m. to 4.00 p.m. at Parliament House.

For anything further, please contact Maryanne Plastiras on 9926 0212.

Yours faithfully

June McPhie
President

Encl.

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***INQUIRY INTO THE
IMPACT OF THE FAMILY LAW AMENDMENT
(SHARED PARENTAL RESPONSIBILITY) ACT 2006***

**Submission to the Standing Committee on Law and Justice
by the Family Issues Committee
of the Law Society of New South Wales
October 2006**

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INTRODUCTION AND OVERVIEW OF LEGISLATION

The Family Issues Committee (the Committee) indicates that the views contained are preliminary and as the legislation only came in to force on 1 July 2006, it is premature to have formed final views and opinions. Whilst there have been numerous first instance decisions, the Committee is awaiting the outcome of several appeals which, once handed down by the Full Court of the Family Court, may impact upon the relevant matters.

Paramountcy principle: s60CA

Under the new legislation, the child's best interests remains the paramount consideration in making a parenting order. The old section 68E has become s60CA. It has not changed.

Objects: s60B

Section 60B, the objects section of Part VII (Children), now includes two additional objects:

- (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.*

Determining what is in a child's best interests: s60CC

Section 60CC is the equivalent of the old s68F(2). It sets out how a Court is to determine what is in a child's best interests. The object of "*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*" is reiterated in section 60CC.

Section 60CC introduces the concept of "primary" and "additional" considerations into the process of determining what is in a child's best interests.

The primary considerations are:

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

As the "note" to section 60CC states, "making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b)".

Additional considerations which were not present in the old legislation include sections s60CC(3)(k) (which modifies the old s68F(2)(j)) and s60CC(4):

s60CC(3)(k):

any family violence order that applies to the child or a member of the child's family, if:

- (i) *the order is a final order; or*
- (ii) *the making of the order was contested by a person*

s60CC(4):

.....the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

- (a) *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; and*
- (b) *has facilitated, or failed to facilitate, the other parent:*
 - (i) *participating in making decisions about major long-term issues in relation to the child; and*
 - (ii) *spending time with the child; and*
 - (iii) *communicating with the child; and*
- (c) *has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.*

Presumption of equal shared parental responsibility: s61DA

Section 61DA of the Act introduces a presumption of equal shared parental responsibility when making parenting orders. Section 61DA(2) provides that the presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with the parent) has engaged in child abuse of the child who is the subject of the proceedings or another child who, at the time, was a member of the parent's family (or that other person's family). Section 61DA(4) provides that the presumption may be rebutted "*by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child*".

Court is to consider the child spending "equal time" or "substantial and significant time" with each parent: s65DAA

Section 65DAA of the Act provides that the Court is to consider the child spending "*equal time*" or "*substantial and significant time*" with each parent in certain circumstances. Notes included in this section state that the effect of section 60CA (the section providing for the paramountcy of the best interests of the child) is that in deciding whether to make a parenting order for the child to spend equal time or substantial and significant time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

TERMS OF REFERENCE

(a) **The impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* on women and children in NSW:**

The Committee submits that the Act has had an impact on women and children in NSW in the following ways:

- (i) It would now seem more difficult for mothers to be given permission by the Court to relocate for any great distance from their initial place of abode.
- (ii) Mothers are receiving less by way of child support as a result of more fathers spending greater time with the children. Many expenses associated with the raising of children do not greatly reduce when children spend more time with their father.
- (iii) The reaction of most mothers ranges from concern to fear when the new legislation is interpreted as leading to the possibility of equal shared time.
- (iv) Anecdotally, it appears that the average person thinks the legislation mandates an equal sharing of time between parents. This can result in fathers putting pressure on mothers by demanding equal time and attempting to use it as a potential lever in property proceedings.

(b) **The impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* on the operation of Court orders that can prevent family violence perpetrators coming into contact with their families:**

A 'Family Violence Order' ("FVO") is defined in s.4 of the Family Law Act ("the Act") and includes an interim or final order made in a State or Territory. Accordingly it includes an Apprehended Domestic Violence Order made in New South Wales.

There are a number of issues throughout the Act. Following are three significant potential implications flowing from the new Division 11, ss68N - 68T. The Committee emphasises however that it is too early to appreciate whether the concerns expressed will be reflected in reality.

- [1] **s.68Q** - In proceedings under the Act, the Court (i.e. the Family Court or Federal Magistrates Court), can render a FVO invalid where there is an inconsistency between a FVO and a 'parenting order'. This has the potential for multiplicity of hearings about the one issue with associated cost and distress for those involved, most particularly the victims of violence.

s.68P - There are significant obligations on the Court to then provide relevant notice of the 'invalidating', such as to the originating State Court and Police Commissioners, however failure to provide notice is of no legal effect in relation to the Order made (and associated invalidated FVO).

It is assumed however that before invalidating an FVO a Court would be under an obligation to consider the evidence which justified the FVO in the first place. This could in some cases lead to an effective re-hearing.

One issue therefore is whether, having experienced the trauma of one hearing, the parties should have to go through the experience again in another Court. Given the statistics as to the experience of women and violence, it is submitted that the burden will fall hardest upon them.

This is particularly the case in matters where one party uses the Court process as a form of harassment in itself [See: “*Domestic Violence and Abuse of Process*” Paxton, B, (2003) 17 Australian Family Lawyer].

- [2] **s.68R** - In proceedings involving the making or variation of a FVO, a State or Territory Court has the power in certain circumstances to “... *revive, vary, discharge or suspend...*” parenting orders and associated instruments such as Recovery Orders, Injunctions and Parenting Plans. This again has the potential for multiplicity of hearings. The evidential burden also has implications for the State Court system, its resources and ultimately the access to and delivery of justice.

The steps to be gone through are onerous. For example:

- the State Court must be satisfied that it is only dealing with material not before the Court which made the original order (s.68(3))
- the State Court must have regard to certain considerations of a sophisticated nature which will expand the degree of inquiry by the Court:
 - (a) *have regard to the purposes of this Division (stated in section 68N); and*
 - (b) *have regard to whether contact with both parents is in the best interests of the child concerned; and*
 - (c) *if varying, discharging or suspending an order or injunction mentioned in paragraph (1)(a), (b) or (c) that, when made or granted, was inconsistent with an existing family violence order—be satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction.*

Once more, this has the potential to expand the ambit of a trial in the State or Territory Court. This will have consequences of pressure on Magistrates, Prosecutors and the Courts generally and the potential for longer trials and delays in the availability and delivery of justice.

Further, as with point [1], there is the trauma of having to effectively experience two hearings on the one issue.

- [3] **s.68S** - the Court is ‘released’ from certain provisions when exercising power under s.68R. Perhaps most significantly, “*any provisions (for example, section 60CA) that would otherwise make the best interests of the child the paramount consideration*”. This has the potential for wide ranging implications, not the least of which is that Parenting Orders for a family might be decided in two different courts with the same facts yet pursuant to different considerations.

At this time it does not appear that the Act has had an impact on the operation of the Court's orders to prevent family violence perpetrators coming into contact with their families. It does not appear to have increased or decreased such contact. The legislative provisions set out in the introduction clearly makes family violence a relevant issue particularly with regard to the presumption of shared parental responsibility.