IS THERE STILL A PLACE FOR SHARED PARENTING? INTERPRETING THE FAMILY LAW AMENDMENT ACT 2023

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This paper considers how to interpret the Family Law Amendment Act 2023 in the light of the radical changes it makes to the pre-existing law. It is far from clear that Parliament intended to abandon the previous emphasis on the importance of retaining the involvement of both parents in children's lives after a relationship breakdown, where it is safe to do so. On the contrary, the Attorney-General, both in his Second Reading Speech and in the Explanatory Memorandum, went out of his way to emphasise the Government's continuing support for the social policy reflected in the 2006 and 2011 amendments to Part VII.

However, the new legislation does not provide the same guidance to lawyers, mediators and family report writers to help them explore the range of options for parenting arrangements. Given this, it will be important for professionals working in the family law system not to forget all that we have learned about what, in the absence of specific concerns to the contrary, is likely to be in the best interests of children after parental separation. In circumstances where there is not a threat to the safety of children or their primary caregivers, children are likely to do best by continuing to have two parents actively involved in their lives, spending 'substantial and significant' time with each parent if this is feasible in the circumstances.

Introduction

The commencement of the *Family Law Amendment Act 2023* on 6 May 2024 brings the law of parenting after separation into a new era. Experienced practitioners may, as a result, be suffering whiplash. Changes were enacted on a bipartisan basis in 2006 which emphasised the importance of two parents in children's lives despite the parents' separation when there are not issues of violence or abuse that present a risk in the present or future. These reforms largely implemented the recommendations of a unanimous Parliamentary committee, after one of the largest and most intensive inquiries ever conducted on social policy in Australia.

Lingering controversies concerning the weight to be given to family violence led to further changes to the Act introduced by then Attorney-General Robert McClelland in 2011. For the

[1] This Paper is open access and available on SSRN: https://ssrn.com/abstract=4813059 and on the UQ eSpace website: https://espace.library.uq.edu.au/view/UQ:d95e5a0.

most part, they represented fine tuning. Despite coming under a lot of pressure from advocacy groups to reverse the 2006 reforms to which it had previously agreed, the then Labor government kept the basic philosophy of the reforms intact. It made no changes to those aspects of the law that encouraged consideration of a shared parenting arrangement.

Then these major social policy reforms were, it seems, almost completely discarded in the *Family Law Amendment Act* 2023.

Or were they? That is one of the key questions that the Court will have to answer in the coming months and years.

The interpretative problem with the 2023 amendments

Did Parliament intend a complete reversal of the consensus that had been achieved by parliamentarians only a few years ago, or just a little bit of simplification of the rather voluminous set of considerations and convoluted processes required by Part VII as it stood?

A complete reversal?

The case for saying that the Parliament intended in 2023 a complete reversal of the social policies embedded in the 2006 and 2011 reforms to the Act lies in just how much was deleted from the legislation and what was put in its place.

The *Family Law Amendment Act 2023* does not only delete the presumption of equal shared parental responsibility. It makes it explicit that parents have no need to consult with one another even on major long term issues in the absence of a specific court order for joint decision-making.[2]

The 2023 Act does not only abolish the requirement – always misconceived – to consider an equal time arrangement even if neither party seeks it.[3] It removes any requirement for lawyers, mediators and other professionals even to raise with the parents the possibility that they might consider a parenting arrangement other than one in which the non-resident parent sees the children no more than every other weekend and for up to half the school holidays.[4] There is no longer a duty to consider equal time or 'substantial and significant time'. This discards the reforms, central to the thinking of the Parliamentary Committee which initiated those reforms

[2] Section 61CA. Prior to this, the courts interpreted s.61C as giving rise to a duty to consult on major long-term issues, albeit not a readily enforceable duty: *B and B: Family Law Reform Act 1995* [1997] FamCA 33 at 9.27-9.30. Instead, the new s.61CA says: "If it is safe to do so, and subject to any court orders, the parents of a child who is not yet 18 are encouraged: (a) to consult each other about major long-term issues in relation to the child; and (b) in doing so, to have regard to the best interests of the child as the paramount consideration." With respect, that is a meaningless provision.

[3] Section 65DAA.

[4] The 2023 Act deletes s.63DA.

in its 2003 report,[5] that lawyers, mediators and courts should not default to an approach where the non-residential parent sees the children for no more than about 20% of the time.[6] The duty on advisers in section 60D remains, but it is now devoid of substantive content as to what kind of parenting arrangement is likely to be in the best interests of the children.

The 2023 Act does not only abolish as one of two primary considerations, the benefit to the child of a meaningful relationship with both parents; it even drops the word 'meaningful', a word which has played a useful role in the interpretation and application of the 2006 legislation.[7]

Of less practical significance, but of some importance in terms of messaging, the Act is amended to remove interpretative principles that had been in the Act since 1995. These principles provided that children have the right to know and be cared for by both their parents and to spend time on a regular basis with, and communicate on a regular basis with, both their parents. The principles also gave importance to the role of grandparents and other people significant to the care, welfare and development of children. Gone too, with the 2023 amendments, is the principle that parents jointly share duties and responsibilities concerning the care, welfare and development of their children.

The removal of statements of children's rights is one of the more surprising aspects of this legislation.[8] The principles now being repealed were based on Article 9.3 of the Convention which states:

> States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

As the Act is amended, there is now nothing whatsoever in Part VII of the Act to indicate that Parliament places any importance at all on children having a relationship with both of his or her parents. There is a duty to consider whether the child will benefit from being able to have a relationship with the child's parents and other people who are significant to the child, where

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[5] The Family and Community Affairs Committee of the House of Representatives, *Every Picture Tells a Story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Parliament of Australia, Dec 2003.

[6] The Committee dubbed the standard arrangement as the 80-20 rule, on the basis that it gave non-resident parents approximately 20% of the time with their children. In the end, the Committee concluded against a legislative presumption of equal time. However, it considered that "the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time" (p.30).

[7] Se e.g. *Mazorski v Albright* (2007) 37 Fam LR 518; *Sigley and Evor* [2011] FamCAFC 22. See also Richard Chisholm, "The Meaning of 'Meaningful': Exploring a Key Term in the Family Law Act Amendments of 2006" (2008) 22 *Australian Journal of Family Law* 175.

[8] There is still an object to give effect to the Convention on the Rights of the Child, but that is vague when it comes to the application of the Convention. It can only make a difference at the very margins of interpretation of the substantive sections of the Act. See Michelle Fernando, "Express Recognition of the UN Convention on the Rights of the Child in the Family Law Act: What Impact for Children's Participation?" (2013) 36 *University of New South Wales Journal* 88.

it is safe to do so;[9] but the law does not assume a benefit.[10] Indeed, the new law might be interpreted as indicating that benefit need only be considered at all once the court is affirmatively satisfied that it is safe for the other parent to be involved in the child's life. This would place an onus on the non-resident parent that will be difficult for him or her to meet on an interim basis if the court is unable to make findings on disputed allegations of violence or abuse.[11] Not infrequently, both parents are making allegations of family violence, abuse or neglect against the other.[12]

The Court is going to need to come up with a sensible approach to this issue about interim orders. As is the case at present, a court in a brief interim hearing where no evidence is tested can neither presume an allegation to be true, nor presume it is untrue.[13] Where that allegation indicates a present or future risk of violence or abuse, the court must do its best to make a decision in the best interests of the child, drawing such support from the filed evidence as is appropriate in the circumstances,[14] and relying on family violence orders or supervised contact pending final determination, as a prevention strategy.

No change intended at all to social policy?

An alternative interpretation is that the Parliament intended no substantive change at all to the social policy of the legislation, other than to remove almost all guidance for the Court, practitioners or parents on what sort of outcomes Part VII is seeking to achieve.

Clearly, Parliament intends a focus on the safety of children and their caregivers, but of course, that has been an emphasis in the law since 1995 when the Parliament first included family violence as a consideration. In that year also, Parliament legislated for the unacceptable risk test in relation to parenting orders where there is a risk of family violence.[15] The 2006 and 2011 amendments to the Act strongly reinforced this focus on safety. Part VII, prior to the commencement of the 2023 amendments, was already chock full of procedural and substantive requirements to consider the safety of children and their caregivers. Whatever can be done should be done to ensure that when parents are unable to agree on parenting arrangements for themselves, the resulting court orders do not leave either the child or a parent in an avoidably

[9] Section 60CC(2)(e) as amended.

[10] This was established early in the jurisprudence concerning the 2006 amendments: *G & C* [2006] FamCA 994; *Champness & Hanson* [2009] FamCAFC 96.

[11] This point was made by Richard Chisholm AM in submissions on the Bill.

[12] See e.g. *Bukari & Bukari (No 2)* [2022] FedCFamC1A 50.

[13] *Marvel v Marvel* (2010) 43 Fam LR 348.

[14] *SS v AH* [2010] FamCAFC 13; *Banks & Banks* (2015) FLC 93-637; *Eaby and Speelman* [2015] FamCAFC 104; *Gong & Wei* [2017] FamCAFC 55.

[15] Now in s.60CG: (1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order (a) is consistent with any family violence order; and (b) does not expose a person to an unacceptable risk of family violence.

unsafe situation; but it is not clear that this is achieved just by adding yet more words referring to safety in Part VII.

Whenever one is interpreting an amended law, one of the first questions to ask is why was the law changed? Or in the old language, what was the 'mischief' that the amendment sought to address? When Parliament makes an amendment, the lawyer's assumption has to be that it had a reason to do so, and to try to identify that reason.

That reason seems to be only simplification. A major objective of this Bill, according to the Second Reading Speech, the Explanatory Memorandum (EM), and the most important of the travaux preparatoires (the ALRC report[16]) is to reduce complexity and to simplify the law. The EM (p.3) provides this overview:

> Schedule 1 of the Bill contains significant amendments to streamline the legislative framework for making parenting orders, including changes to the section which covers the factors to be considered when making parenting arrangements in the best interests of the child.

So the purpose is mainly to 'streamline' the law. Such sentiments are scattered throughout the EM. For example, on p.6 it says:

> The Bill will reduce complexity and increase focus on the best interests of children by removing the existing two-tier structure of 'primary' and 'additional' considerations and focusing on a core list of considerations that are likely to be relevant in a majority of matters.

In similar vein, the Second Reading Speech says:

> The bill makes a number of amendments to make it easier to understand the issues to be considered when determining parenting arrangements in the best interests of the child.

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* was not a triumph of legislative drafting, and simplification is a desirable objective.

The Government's support for shared parenting after separation

The Second Reading Speech also indicates the Government's support for the involvement of both parents in children's lives:

> The government recognises that, for most children, it is strongly in their best interests to have a loving and nurturing relationship with both parents after separation.

The word 'strongly' in this sentence suggests a very definite commitment to the principles and values that underpinned the 2006 legislation.

Furthermore, it is a basic principle of statutory interpretation that the Parliament should not be taken to intend to deprive people of their human rights without clear legislative words. So it is reasonable to assume that the Government did not intend, in this legislation, to deprive children

[16] *Family Law for the Future: An Inquiry into the Family Law System* (Report 135, 2019).

of their "right to spend time on a regular basis with, and communicate on a regular basis with, both their parents" subject to their best interests, notwithstanding the deletion of this right from the Act. The Parliament retained implementation of the Convention on the Rights of the Child as an object of Part VII.

A close and nurturing relationship

It also seems that the Government wanted the law to stay the same on the importance of children having more than a distant relationship with both parents. The EM states (p.22):

> Where appropriate and safe, parenting orders that ensure children benefit from a close and nurturing relationship with their parents should be made.

So 'close and nurturing' replaces 'meaningful'. The language is helpful; so it is a pity that the Government decided not to use such language in the Act.

Substantial and significant time with each parent

The Government also indicated its support for the principles in the 2006 Act concerning shared parenting more generally, including in the allocation of time between parents. The EM states (p.22):

> No one particular arrangement will work for all children or all families, whose needs are diverse and will change over time. However, where safe and appropriate, most children benefit from spending time with their parents not only at the weekends and in school holidays, but also during the school week, and will also benefit from allowing each parent to be involved in the child's daily routine and occasions and events that are of particular significance to the child.

In similar vein, the EM states (p.28):

> The court can continue to make orders for equal time or substantial and significant time in the event that it determines that arrangement is in the best interests of the child, however there is no requirement to consider these arrangements if they would not be suitable.

In other words, the Government did not intend for Parliament to take a different view of what is in the best interests of most children from the view it took in 2006 and 2011, other than deleting the requirement to consider specific kinds of parenting arrangements that might optimise the benefit to children of involvement with both parents within the constraints of their existing circumstances.

The importance of grandparents

There is also no indication from the travaux preparatoires or any of the other authoritative sources of interpretation, that the Parliament intended in the 2023 amendments to downgrade the significance of grandparents. This is an effect of abolishing the principles in s.60B, since the generic reference to the Convention does not provide nearly as much support for their important role as the s.60B focus on the child's right to enjoy relationships with "other people significant to their care, welfare and development (such as grandparents and other relatives)". Grandparents still make an implicit appearance in s.60CC at least "where it is safe" for them

to have contact. They were an important constituency seeking improvements to the text of the Act during the parliamentary inquiry in 2003. Their interests do not appear to have been considered much in the 2023 reforms.

Limiting the purposes of the legislation

How can these two contrasting positions on the purposes of the legislation be reconciled? On the one hand, the Parliament removed almost every reference in Part VII to the importance, subject to safety issues, of having both parents and grandparents involved in children's lives after parental separation. It also removed all references to equal shared parental responsibility, equal time and substantial and significant time. On the other hand, the Government says it did not intend to bring about any societal change consistent with these deletions.

The answer to this conundrum seems to be that the Government did not think the law should be used to convey any messages to parents involved in mediation or negotiation about parenting arrangements other than that arrangements be 'safe'. It took this position notwithstanding its strong belief that it is in the best interests of most children to have a close and nurturing relationship with both parents after separation. The Act now speaks mainly, if not entirely, to how judges should determine the parenting arrangements for that very small group of parents who are unable to settle their disputes by agreement or compromise. The families which end up needing a judicial decision about parenting arrangements are often those where there are issues of violence, abuse, addictions, personality disorders, mental illness and other issues concerning parenting capacity. These cases are also more likely to involve very high levels of conflict.

This focus just on providing guidance to judges in deciding the litigated cases rather than providing guidance to the wider community is arguably the most important change to the law on parenting arrangements made by the 2023 amendments. The Parliamentary Committee in 2003 saw legislation as a means of reaching a wider group than judges. It could also reach those parents who at some level may be influenced by the law in resolving their disputes, but who do not go to trial. It sought to do so in a more direct way than simply relying on normative messages to emanate from judicial decisions. As the Committee wrote:[17]

> Legislation can have an educative effect on the separating population outside the context of court decisions, if its messages are clear, it is accessible to the general public and well understood by those who offer assistance under it.

The 2006 legislation gave effect to this recommendation by requiring lawyers, mediators and counsellors to advise their clients that they should consider the options of equal time, and substantial and significant time: s.63DA. Parliament thus sought to reach the majority of families through their professional advisers and through mediators with the intention that the content of discussions in mediation would be informed by the types of parenting arrangement being promoted in the statute. There is evidence from the AIFS research published in 2009 that

[17] *Every Picture*, above n.5, p.39.

the requirement to consider arrangements for 'substantial and significant' time played a valuable role in shifting community attitudes.[18]

The Government, in the 2023 legislation, sought to delete all such messaging other than in relation to safety. This is somewhat surprising, for the goal of the law in speaking beyond that small number of cases which need to be resolved by judicial decision was recognised by the Attorney-General in his Second Reading Speech:

> [M]ost separated Australian couples are able to settle their own arrangements outside of the family law system, and co-parent successfully. Research by the Australian Institute of Family Studies has found that only three per cent of separating families have their parenting arrangements determined by a court. The parenting provisions in the Family Law Act must therefore serve as a guide to those negotiating their own arrangements, as well as judicial decision-makers.

However, the effect of the 2023 amendments is that the Family Law Act no longer serves as a guide to those negotiating their own arrangements. Parliament voted to remove all such guidance other than in s.60D, which does no more than refer to the s.60CC considerations that would apply were the matter to be litigated to trial. These considerations provide little guidance on what parenting arrangements might be suitable, and nor does the general reference to the Convention on the Rights of the Child.

All normative guidance about the importance of both parents, and the grandparents, in children's lives, subject to safety issues, has been removed. The Act continues to state that the best interests of the child are the paramount consideration, but it offers no legislative understanding about what kinds of parenting arrangement Part VII is intended to promote once the threshold is crossed that it is safe for both parents to have some involvement in childrearing. Even in the litigated cases, it is an uncommon outcome for all face to face contact between a parent and a child to be prohibited. Long-term supervision orders are also quite uncommon.

The assumption which underlies the approach of drafting legislation for judges to decide cases is that others can thereby "bargain in the shadow of the law".[19] However, the cases decided by judges are atypical since so few cases go to trial and need a judgment. Decision-making in children's cases is also highly discretionary and fact-driven. Litigants cannot bargain in the shadow of the law if the law casts no shadow. Lawyers and dispute resolution professionals will need to point parents to accessible summaries of the research literature, rather than judicial decisions.

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[18] Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu et al, *Evaluation of the 2006 Family Law Reforms* (2009), p.365.

[19] Robert Mnookin and Lewis Kornhauser, 'Bargaining in the shadow of the law: the case of divorce', (1979) 88 Yale Law Journal 950.

Two certainties on the interpretation of the 2023 amendments

Insofar as parenting cases are concerned, there are two things that can be said with certainty about the impact of the amendments.

The first is that they do not alter the paramount consideration, which is the best interests of the child. Changes to the factors the court must consider are important in terms of what evidence is led, how affidavits are structured, and the questions that might be put to a family report writer when ordering a report. They also frame how judgments are written and when a judicial decision might be overturned on appeal.

However, the amendments say nothing about what is actually in the best interests of an individual child; and they change nothing about what we have learned from the available research over the last thirty years on which parenting arrangements are likely to be better for children in different kinds of circumstances.

There is certainly no 'one size fits all'. Only quite a small minority of parents are likely to be able to make and sustain an equal time arrangement. It is especially difficult in our major cities where family breakdown often leads to one or both parents having to move to areas where housing is cheaper, putting considerable distance and travel time between them. Equal time arrangements are also impractical where the demands of one parent's work and commuting time are such that they cannot offer consistent care for a child during the working week. In many families, parents were unequally invested in the work of childcare while the relationship was intact, and that disparity in investment continues after separation.

In general terms it can be said that the overwhelming research evidence[20] and the international consensus, at least in Western countries,[21] is that it is important to children to maintain the involvement of both parents in their lives after separation in the absence of serious and ongoing issues concerning family violence, child abuse, very high conflict or parental incapacity. The 2006 reforms played a useful role in getting lawyers, mediators and counsellors to help parents think creatively about ways to share the parenting burdens and pleasures in a way consistent with their capacities and children's needs. There is nothing in the 2023 amendments which should change that. Indeed, to the extent the Government's opinion matters, its view is that "where safe and appropriate, most children benefit from spending time with their parents not only at the weekends and in school holidays, but also during the school week, and will also benefit from allowing each parent to be involved in the child's daily routine and occasions and

[20] For useful summaries, see J Kelly and R Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives" (2003) 52 *Family Relations* 352; J Kelly, "Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce" (2005) 19 *Journal of the American Academy of Matrimonial Lawyers* 237. On parental conflict and children's wellbeing after separation, see N Mahrer et al, "Does Shared Parenting Help or Hurt Children in High-Conflict Divorced Families?" (2018) 59 *Journal of Divorce and Remarriage* 324.

[21] For a review of that international consensus, see Parkinson, P., *Family Law and the Indissolubility of Parenthood* (Cambridge UP, New York, 2011).

events that are of particular significance to the child."[22] It just didn't think Parliament should say so.

The second certainty is that in the litigated cases, the courts will very often be dealing with serious allegations of family violence, abuse and questions about the parenting capacity of one or both of the parties. The courts will need to make the same difficult judgments about future risk that they have long had to make, taking account of histories of family violence, alcohol or drug addiction and mental illness. These cases will be determined, as they always have been, on the evidence adduced by the parties and how the judge determines issues of credit when it is clear that at least one parent is not telling the truth. Issues of risk will continue to be balanced with the benefits to the children of a continuing relationship with a parent whom they love, despite his or her inadequacies, tendencies towards controlling behaviour or violent ways of dealing with anger.

Litigation will, for most litigants, continue to be as expensive and stressful as it was the week before the 2023 amendments commenced, and many parties will continue to accept compromises that they regard as unsatisfactory because they cannot afford to continue litigating to trial. Litigants will continue to complain about the courts. From time to time, journalists will take sides in telling a story about the failure of the court to address violence properly. Advocacy groups will continue to demand further changes to the legislation. The constant focus on changing the language of Part VII, in inquiry after inquiry, distracts attention from the more difficult issues about improving processes, and how best to allocate taxpayer funds to promote access to justice in parenting disputes. It indulges the fantasy that just changing the legislative text will somehow make women or children safer, or help the courts to do a better job of preventing an injustice to accused fathers.

The additional emphasis on safety in the 2023 amendments will not necessarily change in substance how the courts decide cases compared with last year or last decade, for the 2006 and 2011 amendments had already put the issue of family violence and abuse in big red letters. However, it is positive that judges are reminded even more of the importance of safety as a factor in their decision-making. They must also be reminded of all the other factors that are important in decision-making and that go to the difficult issue of deciding either what is in the best interests of the child, or what is the least worst alternative.

[22] EM, p.22, cited above.