HOW JUDICIAL OFFICERS ARE APPLYING NEW PART VII of the
FAMILY LAW ACT:

A GUIDE TO APPLICATION AND INTERPRETATION

Zoe Rathus

Introduction

In this year’s national family law moot competition organised by the Family Law Section of the Law Council of Australia, law students were presented with Reasons for Judgment of a rather grumpy fictional Justice O’Roold. His Honour had ‘241 days until [his] retirement with full superannuation benefits’ and bemoaned the complexity of new Part VII of the Family Law Act 1975 (C’th).\(^1\) I suspect that his complaint reflects how many judicial officers and practitioners feel about the legislation:

This Court is a very busy Court with a significant backlog of cases. It astounds me that the judges of this Court are expected to go through in minute detail, each of the provisions in the Act as amended and consider them in each case. Frankly, if this happened for each children’s case before each judge, the court would grind to a halt.\(^3\)

This article endeavours to provide legal practitioners with a practical guide to how the new Part VII is being applied by the Family Courts and offers examples of some interpretations which have been given to some of the new sections. These examples will be useful for providing advice to clients about settling, preparing material for litigation and developing submissions.

The information gathered should also be valuable for family dispute resolution practitioners, Family Relationship Centre managers and staff, family consultants and judicial officers in all the varied roles they play within the family law system.\(^4\)

Application: In what order are judicial officers applying sections?

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\(^2\) I wish to thank Ms Donna Cooper (QUT) for suggesting I turn my ‘flow’ into an article. I also thank Dr Rae Kaspiew, Assoc Prof Helen Rhoades and Prof Richard Chisholm for their comments and Justices Strickland and Carmody for leads on some useful cases.

\(^3\) hereafter called the FLA


\(^5\) I hope to publish a ‘companion’ piece to this article which will involve a deeper critical analysis of the socio-legal consequences of the new Part VII, its application and interpretation.
Annexed to this article is a ‘flow’\textsuperscript{5}. It represents a synthesis of the order in which judicial officers appear to be applying the sections and draws from the Full Court of the Family Court, single judge interim and final hearings in the Family Court, decisions of Federal Magistrates and appeals there-from to the Full Court of the Family Court.

It is vital for practitioners to be aware that there are many steps taken before consideration is given to the amount of time children should be spending with each of their parents. This means that all these matters should be properly canvassed with clients as relevant to decision-making when providing initial advice under s63DA or referring clients to family dispute resolution.

The general approach of the Courts commences with a statement that the best interests of the child remain paramount as dictated by s60CA. Judicial officers then explain that the objects and principles contained in s60B provide the ‘context’\textsuperscript{6} (or ‘backdrop’\textsuperscript{7}) for considering those best interests. After this the courts tend to examine the evidence relevant to the s60CC checklist and often make findings of fact or credibility\textsuperscript{8}. Only after this has been done do the courts look at the s61DA presumption of equal shared parental responsibility and use the findings arrived at under the s60CC examination to decide whether or not the presumption should be applied, not applied or rebutted. Similarly these findings are returned to when determining what actual order should be made under s64B and / or s65DAA. The proposals of the parties are examined as part of this final process, although they are sometimes also discussed earlier during the analysis of the s60CC evidence.

**Interpretation: What has been said about the sections?**

**Section s60CA – Best Interests of Child Paramount**

Section 60CA is identical to the old section 65E – that in making a parenting order ‘a court must regard the best interests of the child as the paramount consideration’.

**Section 60B – Objects and Principles**

Interesting, the new s60B, the objects and principles section, has received limited judicial attention. This may be because very similar (but slightly different) words are used in section s60CC(2) – the ‘primary considerations’ relating to the best interests of children. The interpretation of s60B tends to be linked to the primary considerations and its role seems to be one of

\textsuperscript{5} I tried very hard to create a ‘flow chart’ but simply could not find a way – so I created a ‘flow’

\textsuperscript{6} See Goode and Goode [2006] Fam CA 1346, para 10 – to be discussed later

\textsuperscript{7} A term used by Brewster FM and seemingly accepted recently by the Full Court in its first relocation decision, Taylor and Barker [2007] FamCA 1247 at para 24

\textsuperscript{8} The logic of considering the s60CC provisions early was discussed in Taylor and Barker at para 62
emphasis. It is radically different from the old section. The objects now include:

(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; …

One of the few judicial statements about its meaning or purpose was made in the leading Full Court decision on the new law, *Goode and Goode*, in which the Full Court said:

The objects and principles contained in s60B provide the context in which the factors in s60CC are to be examined, weighed and applied in the individual case.

In a relocation case decided a few days after *Goode*, Dessau J explored the intersections of s60B, the primary considerations set out in s60CC(2) and the presumption contained in s61DA. Drawing on the Revised Explanatory Memorandum she noted that:

... the object [set out in s60B(1)(a)] was consistent with the introduction of a presumption in favour of equal shared parental responsibility ...

and that the significance of the objects is emphasised by their reflection in the primary considerations.

From my reading of the cases, the interpretation of the actual words used in s60B(1) has occurred mostly in connection with their use in s60CC(2). But it is clearly important that practitioners present their clients’ cases in a way which recognises that these words will be seen as providing a context for the examination and weighing of the evidence presented under s60CC.

**Section 60CC – Best Interests Considerations**
As noted in the introduction and ‘flow’, the courts appear to first examine evidence relevant to the ss60CC(2) and (3) considerations and then use those findings in all of the places in Part VII in which there is a legislative directive to determine the best interests of the child. This approach has very recently been given voice by the Full Court of the Family Court in Taylor and Barker.\(^\text{18}\) Having commented that the legislation gives ‘no express direction or guidance’ to the order in which to apply the sections Bryant CJ and Finn J explain, logically:

\[
\ldots \text{given that the concept of the child’s best interests is the determinative factor in the application of so many of the provisions of Part VII, and given that s60CC(1) provides that in determining what is in the child’s best interests, the Court must consider the matters set out in subsection (2) ("primary consideration") and subsection (3) ("additional considerations") of that section, it would seem only logical that the Court make findings regarding the matters contained in those subsections (so far as they are relevant in a particular case) before attempting to apply any other provision in Part VII in which the determinative factor is the subject child’s best interests.}^{19}
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**Section 60CC(2) – Primary Considerations**

Section 60CC replaces the old s68F(2) and sets out considerations which have to be taken into account in determining a child best interests.

There are now two tiers of considerations; primary and additional. The primary considerations are contained in s60CC(2):

(a) the benefit of 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 can be seen these are very similar to the words used in the objects section (s60B(1)) but the term ‘meaningful relationship’ in this section has attracted more judicial consideration than the expression ‘meaningful involvement in their lives’ in s60B(1)(a).

Most judicial officers now seem to examine the primary considerations first and then to go the additional considerations. Sometimes findings made under the primary considerations may be relied upon again under some of the additional considerations. In *N and M*\(^\text{20}\) Rose J described the additional considerations as ‘the substratum of facts of factual platform for the purpose

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18 [2007] FamCA 1247
19 *Taylor and Barker* [2007] FamCA 1247 at para 62
20 [2006] FamCA 958
of the "primary considerations". For example, findings under s60CC(3)((b) and (f) in relation to:

... the nature of the relationship that a child has with each parent and the parental capacity of each of the parties to provide for the needs of the child are surely in a given case necessary factual findings for the purpose of reaching a conclusion regarding the benefit to the child of having a meaningful relationship with both parents [s60CC(2)(a)].

21 I think this is a sensible and realistic approach to s60CC(2) and (3) but it does not seem to have been replicated in many judgments. It certainly aptly demonstrates the links and repetitions in the drafting of the new Part VII. It is possible that the frequency with which judgments require consideration of the same legislative directive in different places and contexts will lead to inconsistencies in reasoning, confusion for parties in understanding the orders made, increasing numbers of appeals (particularly from the Federal Magistrates Court) and difficulty in advising clients when and for what to settle.

It is impossible to predict what fall-out from these same issues may occur in the conduct of family dispute resolution but I suspect the complexities of interpretation will also have an influence on those processes.

Practitioners need to be aware of this and to be able to use the evidence in different ways. It can be seen from the 'flow' just how often the issue of what is in the best interests of the children has to be canvassed in arriving at any particular proposed arrangement.

**Interpretation of benefit of child having a meaningful relationship with both parents**

**Active interpretation of 'benefit'**

Perhaps a surprising interpretation of the primary considerations was outlined by Bennett J in an unreported decision of *C and G*. Bennett J identifies two possible interpretations:

- ‘that the court must take the benefit to the child of having a meaningful relationship with both parents as a given; or

- ‘that the court most evaluate the nature and quality of the relationship to establish whether any “benefit” or meaningful relationship exists’.

21 *N and M* [2006] FamCA 958 at para 35

22 eg. Consideration has to be given to the best interests of children in s60B, ss60CC(2) and (3) and s65DAA in conjunction with the notion of reasonable practicability.

23 which I have only been able to find discussed in other cases – eg. Elspeth and Peter [2006] FamCA 1385 at para 48.
Given that this was new legislation the judge permitted herself regard to the Explanatory Memorandum (EM)\textsuperscript{24}. Although she noted that part of the EM ‘is generally expressed to support the suggestion that the benefit of the child having a meaningful is intended to be understood as a “given”,’ she also made these remarks:

- Had the legislature intended to build in a presumption that there is a benefit to every child in every circumstance the legislature would have made such a presumption clear.

- The section calls for an evaluation of the best interests of the child in order to achieve appropriate compliance with the object [ie s60B(1)(a)]. It would be illogical to then require the court in establishing what is in a child’s best interest under s60CC to accept as a presumption the very issue which will have an effect (in either a positive or negative way) on the attainment of the object.

Her Honour then adopted the second possible interpretation and continued:

I am therefore required to evaluate the extent to which a meaningful or significant relationship with both of his parents is going to be beneficial and of advantage to [the subject child] into the future.

Benjamin J agreed with this approach in \textit{Elspeth and Peter}\textsuperscript{25} and the idea has been echoed in many other cases.

In a relocation case (as so many of the available decisions seem to be), Strickland J again noted the connections between s60B and s60CC and s60CA. Stating that ‘the objects and principles in s60B guide the interpretation of s60CC and … s60CA’,\textsuperscript{26} His Honour went on to explain that s60CC(1)(a) ‘clearly operates at the level of general principle’. It requires the court to take into account the benefits to a child of having a meaningful relationship with each parent:

... but leaves the additional considerations in s60CC to determine whether those benefits can be achieved in each individual case consistent with the best interests of the child involved.\textsuperscript{27}

\textbf{What is a ‘meaningful relationship’?}

What factors are relevant?

\textsuperscript{24} See ‘Revised Explanatory Memorandum’ to Family Law Amendment (Shared Parental Responsibility) Bill 2005
\textsuperscript{25} \textit{Elspeth and Peter} [2006] FamCA 1385 at para 48
\textsuperscript{26} \textit{Bryans and Franks-Bryans} [2007] FamCA 377 at para 120
\textsuperscript{27} at para 121
Commenting that there is ‘no statutory guidance as to what factors’ should be considered ‘in determining what constitutes a ‘meaningful relationship’ 28, Benjamin J provided a thoughtful list of considerations which he considered relevant in Cave and Cave. 29 Some reflect the s60CC(3) checklist, s60CC(4) and s60CC(4A). Practitioners may find some of the ideas on his list useful in preparing material and making submissions. 30

- the attitude of the parent in question to the children, their primary carer and other significant persons in their lives;

- the general social behaviour of and the role model which would be provided for the children by the parent in question;

- the personal disposition of the parent in question, that is, is he or she able to engage in a meaningful relationship with the children and for the benefit of the children; and

- if orders are not made as sought by a parent, what would be missing from the lives of the children at present and into the future. 31

The link with time

The cases demonstrate that judicial officers perceive the new legislation as recognising a clear link between the time a child is to spend with a parent and the likely meaningfulness of the relationship. Brown FM put the idea in this way in P and P: 32

The practical underpinning of how a relationship for a child with one or either of his or her parents is to be rendered "meaningful", in the context of a parenting order, is provided by section 65DAA 33. The emphasis is on time, but not merely on the extent of that time, but rather on its quality and the manner of its utilisation with the child or children concerned. …

The rationale of section 65DAA is that children benefit, in an emotional and developmental sense, from feeling that their parents are involved in all aspects of their care, which flows from them being exposed to their parents in a variety of settings. 34

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28 Cave and Cave [2007] FamCA 860 at para 101
29 [2007] FamCA 860. This is a case in which a father, who was serving a prison sentence for the manslaughter of his brother and had a generally serious history of violence, sought to communicate with his children. The judge ordered that there be no communication nor time.
30 This is not His Honour’s complete list
31 Cave and Cave [2007] FamCA 860 at para 101
32 [2006] FMCAfam 518
33 The judgment incorrectly says ‘s65DA’
34 P and P [2006] FMCAfam 518 at paras 257 - 258
This connection with time can work both ways and time may be limited for parents with problematic or dysfunctional relationships with their children. In *Charles and Charles* the family consultant’s evidence suggested that the husband was ‘stifling the children’s overall development’. Cronin J decided that the children would ‘benefit from having less time than they have had until now but time which includes both school-related activities as well as leisure time on weekends’.

The importance of history

Altobelli FM noted the importance of the history of the parent-child relationship in a judgment which explored some of the social science literature on fathering and post-separation fathering. After quoting from Brown FM’s judgment in *P and P* he added his ‘own observations about the concept of meaningful involvement or meaningful relationship’:

> It is a multi-faceted concept, spanning more than one dimension. … [It] … needs to not only take into account the capacity, developmentally and otherwise, of a child to receive the benefits of meaningful relationships and involvement, but the capacity of a parent to actually provide the same as well. Accordingly, the concept also takes into account the history and quality of the relationship between parent and child, and the quality of parenting. The past and present are often the only reliable indicators of the future.

This highly active interpretation of the words ‘benefit’ and ‘meaningful’ in s60CC(2)(a) may be a key feature in allowing courts to properly explore the past before turning to consider the future. If the benefit of the relationship were to be taken as a ‘given’, it could seem less important to explore the past, as I have noted in a recent critique of the new legislation. By separately examining both whether there is a ‘benefit’ and whether the relationship is ‘meaningful’, the past must be properly scrutinised.

Practitioners should be aware of this interpretation of s60CC(2)(a), obtain and present relevant evidence and make appropriate submissions. It is also an interpretation that may be relevant to family dispute resolution practitioners when discussing possible arrangements with clients, and for family consultants when interviewing relevant people, gathering information and preparing family reports.

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35 [2007] FamCA 124
36 Charles and Charles [2007] FamCA 124 at para 134
37 at para 134 – thereby importing concepts from s65DAA(3) about substantial and significant time noted above
38 M and K [2007] FMCAFam 26 at para 48. This judgment has been cited with approval by Le Poer Trench J in Blair and Blair [2007] FamCA 253
39 Z Rathus, ‘Shifting the Gaze: Will past violence be silenced by a further shift of the gaze to the future under the new family law system?’ (2007) 21 *Australian Journal of Family Law,* 87
Interpretation and application of s60CC(2)(b)

Section 60CC(2)(b) is discussed at the end of the article where I examine cases where orders have been made for no time or communication. Interestingly it seems that this section is interpreted in close conjunction with s60CC(2)(a) – the benefit (or not) of a meaningful relationship, and has perhaps meant that s60C(3)(j) and (k) are rarely specifically relied upon.

Section 60C(3) checklist

This article does not allow scope to examine the use of the s60CC(3) checklist. Practitioners should note the use of the new concepts by judicial officers – s60CC(3)(a), s60CC(4) and s60CC(4A). To date these sub-sections seem to have mainly provided formal headings under which judges discuss evidence that has always been relevant in deciding family law cases.

Section 61DA – Presumption of Equal Shared Parental Responsibility

S61DA(1) courts to apply a presumption that it is in the best interests of children for parents to have equal shared parental responsibility

After applying s60CC to the facts, judicial officers then turn to s61DA(1) which provides for a presumption that it is in the best interests of children for their parents to have equal shared parental responsibility. It can be not applied, found to be not appropriate or rebutted in circumstances outlined in subsections (2), (3) and (4) respectively. Judges rely on the findings they have made under s60CC to determine how to proceed with the presumption.

A vital and practical consequence of the s61DA presumption is that it acts as a trigger for the application of the time provisions, s65DAA, which will be discussed below.

S61DA(2) – presumption does not apply where child abuse or family violence

Subsection 61DA(2) provides an exception to the presumption in circumstances of child abuse or family violence. This exception is sometimes being relied upon but there are also problems.

At an interim hearing judicial officers usually feel unable to make findings about these issues so that allegations of abuse or violence remain undetermined. The court may then turn to s61DA(3) and find that the presumption is not appropriate because of the unresolved serious issues involved in the case.

For example, in Goode and Goode, quite serious allegations of family violence of physical abuse were made by the mother, including an incident of being
pushed when pregnant. At the initial interim hearing (which occurred 6 weeks after the commencement of the amendments), Collier J commented on the difficulty of being able to be ‘satisfied on reasonable grounds to believe’ that family violence may have occurred. He suggested that perhaps subsection (3) was inserted to deal with situations where there are disputed allegations of violence and employed s61DA(3) to not apply the presumption.

*W and P* is a case in which the presumption was rebutted under s61DA(2). It demonstrates how the complexities created when this legislation makes the court look at the same evidence in different ways. The father was 42 years of age and the mother 26. The boy in question was just under 3 years. Both parents were somewhat troubled and had a history of drug abuse; the mother heroin and the father marijuana, speed and ecstasy. Both parents had cared for the child, but the father had undoubtedly committed acts of family violence including smashing up the mother’s car and sending aggressive and denigrating text messages.

Burchardt FM made these decisions/findings:

- the child will benefit from a meaningful relationship with both parents - s60CC(2)(a);
- the father has engaged in family violence— s60CC(2)(b);
- the father is unlikely to facilitate a relationship with the mother – s60CC(3)(c);
- the presumption is rebutted under s61DA(2); and
- sole parental responsibility to the mother.

The practical outcome of the case was that the mother was permitted to relocate from Victoria to Tasmania where her ‘sincere and loving parents’ parents lived. In the circumstances His Honour could not make an order for substantial and significant time for the father but he ordered that the child fly from Burnie to Melbourne every second weekend from Friday evening to Saturday evening.

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41 *Goode and Goode* [2006] FamCA1346 at para 105. The father had no opportunity to formally deny the allegations but it was accepted by the Court and conceded by the mother that he did.
42 See *Goode and Goode (No 1)* [2006] FamCA 819 at paras 5 – 8, a view held to have been correctly applied by the Full Court in *Goode and Goode* [2006] FamCA1346 at para 78
43 [2007] FMCAfam 105
44 As will be seen from other cases, text messages frequently seem to provide evidence of family violence.
45 para 46
46 para 48
47 para 51
48 para 63
49 para 73
Sunday evening which in his view was the 'best practicable result that can be imposed. The order is to continue for 2 years.

His Honour was obviously troubled by the violence and wanted to give the mother the best chance of rehabilitation and new healthier life style, but I wonder how that travel regime will impact on all concerned -- its cost, regimentality and the sheer physical and psychological exhaustion it may engender.

In Blair and Blair Le Poer Trench J rebutted the presumption on the basis of family violence but still made an order for equal shared parental responsibility in circumstances where both parties submitted that such an order would be appropriate.

In Goode and Goode Ryan J did a similar thing at the second interim hearing. It seems that the father wanted an order for equal shared parental responsibility while the mother opposed it. Her Honour decided that the presumption did not apply on the basis that ‘there are reasonable grounds … to find that during cohabitation there has been family violence’. However, there had been no allegations of family violence since separation, and Her Honour concluded that:

From the children’s perspective, I can only see good will come from their parents jointly exercising parental responsibility.

Where there are problems with ascertaining the facts at an interim hearing, the s61DA(3) exception becomes relevant.

Section 61DA(3) – presumption may not be appropriated in some circumstances at an interim hearing

This exception is certainly relied on, and can provide an ‘escape valve’ for cases involving unproved allegations of family violence. A good example is Leslie and Arbuthnot where Stevenson J concluded that it was not appropriate to apply the presumption where there were disputed matters of fact about ‘the wife’s allegations of physical and emotional abuse of her by

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50 para 79
51 I doubt that this mother has been a fortnightly airline commuter before.
52 Blair and Blair [2007] FamCA 253
53 Goode and Goode [2007] FamCA 253, paras 114 – 115
54 Blair and Blair [2007] FamCA 315
55 paras 61 - 63
56 para 61
57 para 63
58 my words
59 Leslie and Arbuthnot [2007] FamCA 118
the husband\textsuperscript{60} and ‘a real issue as to the husband’s psychological state and emotional stability\textsuperscript{61}. 

In my opinion, \textit{Skelton and Donaldson}\textsuperscript{62} is an unfortunate example of the intertwining of subsections (2) and (3). At an interim hearing, Jarrett FM allowed the inability to make factual findings mask the relevance of quite serious allegations of family violence and other forms of dysfunction. Certainly both parents made allegations against the other – the mother alleging drug abuse and violence by the father\textsuperscript{63} and the father alleging mental instability in the mother.

His Honour applied the presumption of equal shared parental responsibility and ultimately ordered ‘that the child spend equal time with the parents on a rotating roster of three days and three nights’.\textsuperscript{64} This was a boy aged 1 year and 4 months whose mother had obtained an order for recovery of the child from the father 25 days before this hearing. Quite frankly, I cannot imagine how a rotating roster of three days between two rather dysfunctional parents, one with an alleged propensity towards violence, is likely to advance the best interests of this infant.\textsuperscript{65}

Perhaps if a Form 4\textsuperscript{66} had been filed a different journey may have been taken.

\textbf{Section 61DA(4) – Presumption may be rebutted if not in best interests of children}

Again little specific judicial comment seems to have been made about what may be contemplated by the ‘catch-all’ subsection that the presumption may be rebutted if it is not in best interests of the children.\textsuperscript{67} In the case of \textit{Murphy and Murphy}\textsuperscript{68} Carmody J turned to an article by Professor Parkinson\textsuperscript{69} in which he:

suggests that as well as violence and abuse there are four other situations in which equal (or any) parenting time or even a meaningful relationship with a parent may not be possible: when the child is

\begin{itemize}
  \item para 34
  \item para 35
  \item [2007] FamCA 35
  \item The father acknowledged that he had been sentenced to 5 years imprisonment for armed robbery in 1999, was using heroine at the time and has used marijuana and alcohol (para 18).
  \item para 3. Of course, this particular rotation ignores the usual division of time into weeks – thereby making the development of a routine extremely difficult for these already complex parents. Finding no appealable error, Warnick J dismissed the appeal.
  \item I have heard, anecdotally, that these short period rotating rosters are quite frequent orders and agreements for young children. Great care needs to be taken with the development of such trends when there may not be social science evidence to support these arrangements as ‘good’ for children.
  \item See later discussion about how the Family Courts are dealing with family violence.
  \item At first blush this is a difficult subsection to interpret in the face of subsection(1) which provides not simply that the presumption should be applied but that it is in the best interests of children.
  \item [2007] FamCA 795
  \item Parkinson, P, ‘Decision-making about the best interests of the child: the impact of the two tiers’ (2006) 20 AJFL 179
\end{itemize}
oppositional; where the parent rejects (or neglects) the child or is emotionally unavailable (eg. due, for example to mental illness or alcoholism) and, finally, where there is entrenched or intractable parental conflict or communication breakdown.\textsuperscript{70}

The judge ultimately relied on ‘best interest reasons that displace the presumption in s 61DA’ to leave the general operation of s61C in place. The reasons included ‘the mutual distrust and conflict between the parents and the mother’s unshakeable belief of abuse’.\textsuperscript{71}

**Section 65DAA – equal time and substantial and significant time orders**

**Time trigger**

The operation of s61DA has an actual and practical manifestation in the daily lives of many separated families, because it is the trigger for the operation of the time provision – s65DAA.

Under a straight forward reading of the amendments, the new provision relating to the consideration of shared parenting arrangements by a court\textsuperscript{72} is triggered where an order for equal shared parental responsibility has been made or is to be made. However, in *Goode* the Full Court asserts that the court is required to consider such arrangements whether or not it has applied the presumption:

\begin{quote}
... whilst the application of the presumption of equal shared parental responsibility may be the trigger for the operation of s 65DAA, it is not the only basis upon which the Court may make an order for equal or substantial and significant time to be spent by the parents with the child.\textsuperscript{73}
\end{quote}

It suggests that ‘[e]ven if the presumption is rebutted or is not to apply in the interests of the child’ equal or substantial and significant time arrangements would have to be considered ‘if one or both of the parties is seeking such an order’.\textsuperscript{74} In fact, according to the Full Court, even if such an application has not been made, the court should always consider arrangements that promote the best interests of a child and a shared parenting order could result ‘if it was in the Court’s view ultimately in the child’s best interests for such an order to be made’.\textsuperscript{75}

\textsuperscript{70} [2007] FamCA 795 at para 41.
\textsuperscript{71} para 616
\textsuperscript{72} s65DAA
\textsuperscript{73} para 48
\textsuperscript{74} para 46
\textsuperscript{75} para 47
I note that some experienced judges have assumed, incorrectly at law apparently, that if the presumption is not applied, ‘there is no need … to consider equal or substantial or significant time’.\textsuperscript{76} This seems logical to me – but could not be said to be correct at law now.

This means that, where the presumption has not been applied or been rebutted, this is a consideration at large.\textsuperscript{77} It is not a consideration which has to comply with the framework of s65DAA. It is ironic that, where the presumption of equal shared parental responsibility has been applied, the court is obliged to comply with ss65DAA(5) and carefully have regard to the legislatively prescribed matters of ‘reasonable practicability’. Where the presumption has not been applied or been rebutted, perhaps because of family violence, there are no specific constraints on the court’s decision-making process for making a shared parenting order.

\textit{Meaning of 'consider'}

The interpretation of the s65DAA provisions involves the task of applying the practicability checklist from s65DAA(5) and drawing on the judge’s earlier findings under s60CC to decide whether such an order is in the best interests of the children. However, there is no question that the legislation seems to push decision-makers in the direction of an equal or substantial or significant time order. The Full Court in \textit{Goode and Goode} spoke of this in terms of the meaning of the word ‘consider’ throughout the section.\textsuperscript{78} It explains that:

\ldots the juxtaposition of ss 65DAA(1)(a), 65DAA(1)(b) and 65DAA(1)(c) suggests a consideration \textit{tending to a result}, or the need to \textit{consider positively}\textsuperscript{79} the making of an order, if the conditions in s 65DAA(1)(a), being the best interests of the child, and s 65DAA(1)(b), reasonable practicability, are met\textsuperscript{80}.

\textit{Making time decisions}

For a judicial discourse on the up to date shared parenting social science literature, see Carmody J’s discussion in \textit{Dylan and Dylan}.\textsuperscript{81} Some of the research he noted includes:

\begin{itemize}
  \item an opinion that ‘parental collaboration’ is not necessary to make shared parenting work;\textsuperscript{82}
\end{itemize}

\textsuperscript{76} See, for example, Stevenson J in \textit{Leslie and Arbuthnot} [2007] FamCA 118 at para 36.
\textsuperscript{77} Z Rathus, op cit at 97
\textsuperscript{78} The section states that when a parenting order gives the parents equal shared parental responsibility, the court ‘must consider’ the equal time type provisions
\textsuperscript{79} emphasis added
\textsuperscript{80} \textit{Goode and Goode} [2006] Fam CA 1346 at para 64
\textsuperscript{81} [2007] FamCA 842, paras 101 - 169
\textsuperscript{82} \textit{Dylan and Dylan} [2007] FamCA 842 at para 127
but that best interests of children generally best served by ‘two complementary rather than competitive parents’;\textsuperscript{83}

that shared parenting works best where:

- the children can adapt to change
- the parents also adapt around the children
- the children have strong attachments to both parents
- the parents can provide predictability and minimise the ‘suitcase’ factor\textsuperscript{84}

He recited some of the pre-requisites normally considered important for equal time to work\textsuperscript{85} and some of the social science which lay behind the concept of the term ‘substantial and significant time’. Of interest is the research of Smyth which shows that ‘equal or near equal care of children after separation is one of the least durable patterns of parenting after separation’\textsuperscript{86}

**Equal Time Order Made**

It seems that equal time orders are sometimes made where the parents have consented to equal shared parental responsibility. An example of this is *Astor and Astor*\textsuperscript{87} in which O’Reilly J ordered equal time despite communication difficulties and the mother’s:

concern that, in her view, a change to equal time would be unsettling for the children and would serve to increase the elder daughter’s anxieties; that the parties’ communication difficulties might impede the implementation of an equal time arrangement …\textsuperscript{88}

Her Honour largely followed the process described in the ‘flow’. She firstly applied s60CC to the evidence, then goes to s65DAA and based her decisions as to best interests of the children on her earlier findings.

In *Eltham and Eltham* Cronin J rebutted the presumption because the father had engaged in family violence. He also took into account that ‘both parties have such a terrible relationship with one another that they cannot make long term decisions in relation to the child’\textsuperscript{89}. Notwithstanding this he found that ‘each parent has a very strong and loving relationship with the child’\textsuperscript{90}. He refused the mother’s application for relocation to Western Australia and made an order for equal time.

\textsuperscript{83} at para 129
\textsuperscript{84} *Dylan and Dylan* [2007] FamCA 842 at para 131 - 132
\textsuperscript{85} Eg. geographical proximity, child focussed arrangements, family-friendly work practices for both parents and reasonable affluence.
\textsuperscript{86} *Dylan and Dylan* [2007] FamCA 842 at para 136
\textsuperscript{87} [2007] FamCA 335
\textsuperscript{88} *Astor and Astor* [2007] FamCA 335 at para 187
\textsuperscript{89} *Eltham and Eltham* [2007] FamCA 658 at para 400
\textsuperscript{90} *Eltham and Eltham* [2007] FamCA 658 at para 391
Equal Time Not Made

By contract, in *Escott and Lowe*[^91^], Rose J decided against an equal time order on the basis of lack of reasonable practicability:

> The parties’ capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement for equal time require substantial improvement …[^92^]

Therefore, for some judges a poor relationship between the parents seems to almost automatically exclude an equal time order, but others are still prepared to make these orders, believing that they can structure a workable package.[^93^] Practitioners should be aware of recent research by McIntosh and others which suggests that shared parenting arrangements are being ordered and agreed to where the background circumstances are inappropriate and this is placing children under ‘psychological strain’[^94^].

**Meaning of ‘substantial and significant’ time**

In *Dylan and Dylan*[^95^] Carmody J examines the concept of substantial and significant time as part of his examination of shared parenting. Drawing a connection between the objects, primary considerations and substantial and significant time, he explains that the concept:

> … is intended to focus the court’s attention not only on how much time but also on the way that time is spent and whether it is conducive to the development or maintenance of the close and meaningful relationship between parent and child envisaged by s60B and s60(2)(a).[^96^]

Judges are showing considerable flexibility about the meaning of ‘substantial and significant’ time[^97^] in the cases. There is frequent discussion about the children’s extra-curricula activities (sport, music etc) family events and religious days (for all Faiths). In *Lavender and Turner*[^98^] the father appealed to the Full Court against an interim parenting order arguing that the effect of the order was to reduce his 93 hours per fortnight agreed to in an informal arrangement to 80 hours[^99^]. Coleman J[^100^] declared that:

[^91^]: [2007] FamCA 307
[^92^]: *Escott and Lowe* [2007] FamCA 307 at para 110
[^93^]: Note here the findings of McIntosh and Long discussed shortly under equal time arrangements.
[^94^]: See discussion of this research towards the end of the article
[^95^]: [2007] FamCA 842
[^96^]: *Dylan and Dylan* [2007] FamCA 842 at para 141
[^97^]: The expression is specifically defined in s65DAA(3)
[^98^]: [2007] FamCA 182
[^99^]: [2007] FamCA 182 at para 31
[^100^]: with whom Kay and Boland JJ agreed
I find it inconceivable that his honour would have approached the matter on the quantitative basis asserted on the behalf of the appellant.\textsuperscript{101}

In dismissing the appeal, His Honour went on to explain that the major reductions in time between the informal agreement and the order related to time when the child would be sleeping - thereby increasing the time and enhancing the likely nature and quality of the weekends together.

In Cartner and Cartner-Ross\textsuperscript{102} the parties were both members of a Christian community that observes ‘the Sabbath’ from sunset on Friday to sunset on Saturday. Watt J employed s65DAA(3)(c) and ensured that his orders accommodated the father being able to share this time with the children every second weekend.

\textit{Examples of ‘no time’ cases}

The cases also provide examples of when the judges are prepared to make orders that there be no communication nor time spent with a parent. It seems that s60CC(2)(b) provides the pivotal role for discussing family violence and its consequences and that ss60CC(3)(j) and (k) get little additional attention.

In Cave and Cave\textsuperscript{103} the father was incarcerated for the manslaughter of his brother. He had a history of both family violence\textsuperscript{104} and general criminal violence. Most of the discussion about this took place under both of the primary considerations and was combined with discussion on whether or not the children would benefit from a relationship with their father.\textsuperscript{105} There was little extra added when Benjamin J considered s60CC(3)(j) and (k) and he largely referred back to his earlier findings. The order made granted the mother sole parental responsibility and the father was given no time nor avenues for communication with his children.

In Noor and Nabil\textsuperscript{106} Carter J made an order for no time nor communication for the father with the children after deciding that the s61DA did not apply because the:

\[
\text{... relationship was one characterised by a high level of family violence directed mainly towards the mother but, further, that the children themselves have also been victims of physical and mental abuse at the hands of the father.} \textsuperscript{107}
\]

\textsuperscript{101} at para 35
\textsuperscript{102} [2007] FamCA 312
\textsuperscript{103} [2007] FamCA 860
\textsuperscript{104} again one of the forms of family violence was text messaging – see para 16
\textsuperscript{105} Cave and Cave [2007] FamCA 860 at paras 112 to 132
\textsuperscript{106} [2007] FamCA 688
\textsuperscript{107} Noor and Nabil [2007] FamCA 688
Her Honour also accepted evidence from the family report writer that the children’s wishes to have no contact with their father were ‘clear and direct’. She made no specific reference to s60CC(2)(b) nor the details of the s60CC(3) checklist but implicitly covered many of the relevant factors in the commenting on the evidence. She ultimately concluded that ‘the tenuous possibility that there might be some benefit to the children’ in contact with the father is ‘not sufficient to displace my thoughts about the need to listen to the children.’

In *Poblano and Millard* Ryan J was faced with a case where the father had engaged in serious family violence including humiliating sexual practices and the seemingly ubiquitous sending of denigrating text messages. Under the heading ‘Family violence and risk assessment’ Her Honour traversed many of the sections of Part VII relevant to family violence including s60B(1)(b), s60CC(2)(b), s60CG, s60K and s60I(9)(b).

It was s60CC(2)(b) which Her Honour described as ‘one of the pivotal issues in the case. … My findings pursuant to this subsection carry significant weight.’ By the time she stepped through the s60CC(3) checklist she stated:

> I have already made findings concerning family violence and do not repeat them. In summary, I am satisfied that establishing contact between the child and the father exposes the mother to an unacceptable risk of family violence.

Ryan J concluded:

> This is one of those exceptional cases where this child’s best interests require that she does not have a relationship with the father. … Establishing contact between [the child and her father] is almost certain to compromise the mother’s psychological and emotion wellbeing, the effects of which will be catastrophic for the child. … The advantages to the child in developmental (identity sense) involved in establishing contact with the father are greatly outweighed by the disadvantages to which I have referred.

**Discussion**

**How are the Family Courts now dealing with family violence?**

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108 at para 59
109 *Noor and Nabil* [2007] FamCA 688 at para 88
110 [2007] FamCA 424
111 relating to certificates to excuse attendance at family dispute resolution.
112 *Poblano and Millard* [2007] FamCA 424 at para 145
113 at para 189
114 at para 194
Importance of presenting evidence of family violence clearly

Given the new structure of decision-making created in the new Part VII, it is important to examine how the Family Courts are dealing with family violence. Clearly there is a focus on the presumption of equal shared parental responsibility in the cases, and once the presumption has been applied there are consequences that follow in terms of the actual orders that might be made.

A useful question could be: In a case where family violence has been found to be an issue, is it less likely that an equal time or substantial and significant time order will be made than in a case where there are no such issues?

Kaspiew’s study of 40 litigated files which proceeded to trial between 1999 and 2000 demonstrated that it is difficult for parties to make family violence relevant to decision-making. She concluded that:

… the violence must be of an extreme nature, and have a very firm evidential basis, before it can be argued to be a ‘disqualifying’ factor in residence or contact applications.115

Altobelli makes this telling observation about the consequence of practitioners not properly addressing issues of family violence raised by their clients’ instructions:

Evidence of family violence that does not present consistently runs the risk of not receiving the weight it otherwise deserves. For example, allegations of family violence in an affidavit which is expressly linked to third parties (complaint to police, attendance at a hospital, witnessed by a friend or relative) but which is then not corroborated by evidence from that third party, or subpoenaed material, will not receive the weight it might otherwise deserve. … If family violence is argued seriously in a parenting case, it will be treated seriously. All too often, however, it is raised as a peripheral issue, almost an after thought, thus exposing the case to robust criticism from the alleged perpetrator of the violence, to the effect that the allegation has been fabricated, or is grossly exaggerated.116

In some ways, although Kaspiew and Altobelli are saying slightly different things, the outcome is the same for practitioners – be serious about how you present and prove allegations of family violence – it is very relevant and

important – but you must do it properly – obtain supporting evidence and present it cogently.

**Use of ‘family violence’ reports**

In cases where the family violence is critical to a client’s case and to the nature of the order she / he desires, practitioners should consider obtaining a ‘family violence’ report from a social worker or other social science practitioner who has the right clinical and professional expertise to assist the court with the following:

- understanding the nature of the violence experienced by the client
- analysing the impact it may have had on the children
- understanding its ongoing impact on the client’s current conduct and decision-making (eg. why the client may wish to restrict the time and circumstances in which the perpetrator has ‘contact’ with the children)
- to what extent are there ongoing protective issues for the children
- considering what orders might be best for the children, taking that history of violence into account.

**Use of s60K**

It is also important not to overlook s60K. According to the heading, section 60K requires a court to ‘take prompt action in relation to allegations of child abuse or family violence’. To activate this provision a Form 4 *Notice of Child Abuse or Family Violence* must be filed. If the Form 4 alleges that ‘there has been family violence by one of the parties to the proceedings’ the court has to consider ‘what interim or procedural orders (if any) should be made’ to gather evidence, protect parties and children and deal with issues raised expeditiously.

It is difficult to find reference to s60K in the decided cases. If s60K is not being used, it seems that a factual vacuum regarding family violence and abuse will occur in interim proceedings where these allegations are made.

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117 It is acknowledged that under s13(3) *Acts Interpretation Act 1901* (C’th), a heading to a section is not taken to be part of the Act, but here it provides a useful summary of the purpose of the purpose of the section.
118 s60K(1)(c)(iii)
119 s60K(2)(a) and (c)
120 In recent research the Australian Institute of Family Studies found the ‘a scarcity of supporting evidentiary material suggests that legal advice and legal decision-making may often be taking place in the context of widespread factual uncertainty: L Moloney, B Smyth, R Weston, N Richardson, L Qu and M Gray, *Allegations of family violence and child abuse in family law proceedings: A pre-reform study*, (2007) Australian Institute of Family Studies, p viii
Practitioners should file Form 4’s in appropriate cases – particularly where critical allegations of family violence may be left undetermined.

**Are more equal time orders being made?**

The powerful aim of the legislature to elicit particular results from the 2006 amendments was clearly stated by the Full Court in *Goode and Goode*:

…it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their child’s lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.

Have the 2006 amendments led to different orders being made than would have been made in, say, 2001? From my selected reading of cases, the answer would appear to be ‘yes’. Judges are making equal time and substantial and significant time orders more frequently than they used to. The follow-up study conducted by McIntosh and Long on outcomes of the ‘child responsive program’ (CPR) in the ‘less adversarial children’s trial’ (LAT) found that there was a significant increase in children in a substantially shared care arrangement. Of the children in their study who entered the system, 28% were in a substantially shared care at the beginning and 46% left in this kind of arrangement.

Are parents also emerging from the family law system with parenting plans and consent arrangements for equal time and substantial and significant time more frequently? Again – the answer seems to be ‘yes’. Apart from the growing anecdotal evidence, 70% of the orders in the McIntosh and Long study were made by consent, either in the CRP or as out of court settlement and only 30% were judicially determined.

So the important question is: Are these new arrangements going to be in the best interests of all the individual children involved? Although in light of the legislative reforms, ‘an increase in shared care can be seen as a mark of

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121 emphasis added
122 Goode and Goode [2006] Fam CA 1346, at para 72, emphasis added
123 Some research suggests that orders were starting to change and drift towards these kinds of outcomes.
125 Five nights per fortnight or more
126 Ibid., at p 9
127 Ibid., at p 18
success’, … a significant proportion of children in the McIntosh and Long study emerged from Court under conditions that meant substantially shared care between their parents posed a psychological strain upon them. The researchers are concerned that the extent of the increase in shared care arrangements suggests that the data ‘offer an important caution within the current climate of obligation upon the court to [consider equal and substantial and significant time orders]. This note of caution should be heeded by all those who are ‘advisers’ to clients in this new family law system under s63DA(5) of the FLA.

It should be noted that the study demonstrated that shared care was not associated with poor outcomes ‘when parents were co-operative, conflict well managed and parent-child relationships were reported to be strong or consistently improved post Court’.

**What this means when advising clients**

It seems that the public has heard the message of equal time loud and clear and many parents assume that this is almost the mandated arrangement. Legal and family dispute resolution practitioners need to wary of this and ensure that clients are not discussing shared parenting arrangements because they think they have to. It is still the case that in most Australian families it is mothers who do most of hands on parenting of children and any real shared parenting is unchartered territory.

The results of the McIntosh and Long study suggest that some judicial officers and ‘advisers’ may be a little optimistic, making or recommending equal time (or similar) orders when the orthodox pre-requisites are simply not there for the individual children. But the analysis of the cases certainly shows that judges are not opting for equal or substantial and significant time orders as some kind of general default option. They are carefully considering whether such orders may be in the best interests of the particular children, and practitioners should not be advising clients that this is the most likely outcome of litigation.

As former Family Court judge Richard Chisholm warned recently:

> It is important not to allow our perception of what the government wanted to deflect us from the basic task of administering the law …

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128 Ibid at p 18
129 Ibid., p 18
130 This includes legal practitioners, family counsellors, family dispute resolution practitioners and family consultants.
131 Ibid., 19
I think at present there are two difficulties in applying the new law:

- in most families that are litigating there is no history of genuine substantially shared parenting (pre or post separation) to use as a blueprint for predicting such a future for the particular children in the case; and

- there is little social science research to draw from about the long term effects of shared parenting

On the first point, it is obvious that a family who has implemented shared care and found it to work will normally not be litigating nor seeking advice. So the families in the family law system will usually have either found it unsuccessful (at least according to one parent) or they have not tried it. Therefore the family dispute resolution practitioners, legal practitioners, family consultants and judicial officers are all making predictions about an untested life plan.

On the second point, the impact of the long years of rotating houses (the ‘suitcase’ factor) and dual lives of children in shared care is largely unknown. The reality is that the Australian legislation seems to go further on the notion of time than any other legislation in the world. Although increased involvement from fathers post-separation may be positive for some children, any unthinking application of the rhetoric behind the new Part VII could work against the interests of other children.

The law is not this:

If both parents are ‘good’ parents (ie. there are no protective issues and the children have ‘meaningful relationships’ with each) – and they live fairly close to each other → order equal time.

The issue of best interests of the particular child must still be deeply considered.

And substantially shared care should almost always only be ordered or settled upon (whether through family dispute resolution or legal negotiation) where the conditions are right according to the well recognised social science on the issue – arguably much as the case law was prior to the introduction of the 2006 amendments.
Annexure

The ‘flow’ of application of sections

Starting point - best interests of children

s60CA = BIC are paramount
↓
s60B – provides lens or ‘context’ for examining and weighing the s60CC considerations
↓
examine evidence relevant to the s60CC considerations
↓
s60CC (2) and (3) - apply the ‘findings’ made on this evidence
↓

Presumption of ESPR

s61DA(1) – now the presumption that ESPR is BIC is reached
↓
Q: Does it apply, not apply or has it been rebutted?

Where ESPR is not applied or is rebutted

s61DA(2) – Q: Are there ‘reasonable grounds to believe’ there has been child abuse or family violence? → apply s60CC findings → if reasonable grounds → ESPR does not apply → decide BIC by applying s60CC findings → then evaluating the parties’ proposals → any order under s64B

Where allegations of family violence have been made – has a party filed a Form 4 under s60K? If so → follow procedures. If not → consider whether orders should be made to assist with determining the veracity of those allegations promptly

Before making an order where allegations of family violence have been made, consider s60CG – ensure, that, to the extent possible consistent with BIC, any order is consistent with any family violence order and ‘does not expose a person to unacceptable risk of family violence’

OR ↓

134 The abbreviations used in this part are:
• BIC – best interests of children;
• ESPR - equal shared parental responsibility; and
• S and S - substantial and significant.

135 See Goode and Goode [2006] Fam CA 1346, para 10

136 Orders made under s64B include orders for equal time or substantial or significant time - see Goode and Goode[2006] Fam CA , para 48
s61DA(3) – at an interim hearing – Q: Is ESPR ‘not appropriate’ in the circumstances? → apply s60CC findings → if not appropriate → ESPR not applied → decide BIC by applying s60CC findings → then evaluate the parties’ proposals → any order under s64B

OR↓
s61DA(4) – Q: Is there evidence that ESPR would not be BIC? → apply s60CC findings → if not BIC → ESPR rebutted → decide BIC by applying s60CC findings → then evaluating the parties’ proposals → any order under s64B

Where ESPR is evaluated

If ESPR → s65DAA → court must ‘consider positively’\(^{137}\) the time provisions
↓
s65DAA(1)(a) Q: Is equal time BIC? → apply s60CC findings → if BIC → s65DAA(1)(b) → Q: Is equal time ‘reasonably practicable’? → apply s65DAA(5) to facts

If ESPR has been applied and equal time is BIC + reasonably practicable → court must consider making an equal time order which includes evaluating the parties’ proposals → any order under s64B

If equal time not both BIC + reasonably practicable
↓
s65DAA(2) – substantial and significant time (S and S) provision
↓
s65DAA(2)(c) Q: Is S and S time BIC? → apply s60CC findings → if not BIC → evaluate parties’ proposals → any order under s64B

OR↓
If S and S time is BIC → s65DAA(2)(d) → Q: Is S and S time reasonably practicable? → apply s65DAA(5) to facts → if not → evaluate parties’ proposals → any order under s64B

OR↓
If ESPR has been applied (and equal time is not appropriate) but S and S time is BIC + reasonably practicable → court must consider making a S and S time order which includes evaluating the parties’ proposals

If court considers either equal time order or S and S time order but reject → any order under s64B

Effect of ESPR order

\(^{137}\) Goode and Goode [2006] Fam CA 1346 at para 64
s65DAC → each person must ‘consult’\(^{138}\) the other person in relation to ‘major long-term’ issues\(^{139}\) and those persons must ‘make a genuine effort to come to a joint decision’.\(^{140}\)

Where no order made in relation to parental responsibility → the ‘natural’ state of things continues in that each parent has parental responsibility (s61C) – which can be exercised independently as well as jointly.\(^{141}\)

\(^{138}\) s65DAC(3)(a)

\(^{139}\) Defined in s4 FLA

\(^{140}\) s65DAC(3)(b)

\(^{141}\) *Goode and Goode* [2006] Fam CA 1346, para 39. s61C was not amended by the 2006 Act