

Creating Exceptional Outcomes

Changes to the Family Law Act: guidance for family law practitioners

Webinar for Community Legal Centres Queensland

/ Wednesday 27 November 2024

Hamish Mulcahy, Associate

+61 7 3024 0166

Chiara Falzon, Associate

+61 7 3024 0459

 HopgoodGanim
LAWYERS

Agenda

- **Part 1 of 2**

- Part VII of the *Family Law Act 1975* (Cth)
 - Parental responsibility
 - The elimination of the legislative pathway for considering time arrangements
 - New 60CC 'best interests' factors
 - Practical drafting tips

- **Part 2 of 2**

- Conditional time arrangements
 - *Lainhart & Ellinson* (2023) FLC 94-166
 - *Miyajima & Mikkelsen* [2024] FedCFamC1A 208
- The introduction of 65DAAA
 - *Rasheem & Rasheem* [2024] FedCFamC1F 595
 - *Whitehill & Talaska* [2024] FedCFamC2F 768
 - *Babic & Taccini* [2024] FCWA 203

Parental responsibility and the legislative pathway

Parental responsibility

- **PREVIOUSLY:**
 - ‘Sole parental responsibility’ does not appear as a term in the Act
 - Section 61DA applies a rebuttable presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility
- **NOW:**
 - Section 61DA has been repealed
 - Section 61D expressly differentiates between an order for joint or sole decision making in relation to **all** or **specified** major long-term issues
- **Court is still making a decision about parental responsibility – it is the form of the order that is different**

Examples

- **Previously:**
 - *The mother have sole parental responsibility for major long-term issues relating to [X] and [Y].*
 - *The parents have equal shared parental responsibility for major long-term issues relating to [X] and [Y].*
- **Now:**
 - *The mother have sole **decision-making responsibility** for major long-term issues relating to [X] and [Y].*
 - *The parents have joint **decision-making responsibility** for major long-term issues relating to [X] and [Y].*
- **Not:**
 - *The parents have joint decision-making responsibility for major long-term issues relating to [X] and [Y] including, but not limited to issues of that nature about:*
 - *the child's education (both current and future);*
 - *the child's religious and cultural upbringing;*
 - *the child's health;*
 - *...(etc)*

Time orders

- **Amendments do not change how time orders are drafted**
- **Drafting should be clear, concise and practicable – go through with your client what the order would look like in real life**
- **Be consistent – an order for sole decision-making responsibility is not usually compatible with an order requiring parents to coordinate complex and varied changeovers, for example**
- **The practicality of a parent’s proposal may reflect on their capacity to provide for the children’s needs as much, if not more than, their evidence**
 - See, for example *Pickford & Pickford (No 2)* [2024] FedCFamC1F 500 at [153] (determined under the pre-amendment Act).

Section 60CC – best interests

Best interests

60CC How a court determines what is in a child's best interests

Determining child's best interests

- (1) Subject to subsection (4), in determining what is in the child's best interests, the court must:
 - (a) consider the matters set out in subsection (2); and
 - (b) if the child is an Aboriginal or Torres Strait Islander child—also consider the matters set out in subsection (3).

General considerations

- (2) For the purposes of paragraph (1)(a), the court must consider the following matters:
 - (a) what arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of:
 - (i) the child; and
 - (ii) each person who has care of the child (whether or not a person has parental responsibility for the child);
 - (b) any views expressed by the child;
 - (c) the developmental, psychological, emotional and cultural needs of the child;
 - (d) the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs;
 - (e) the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so;
 - (f) anything else that is relevant to the particular circumstances of the child.
- (2A) In considering the matters set out in paragraph (2)(a), the court must include consideration of:
 - (a) any history of family violence, abuse or neglect involving the child or a person caring for the child (whether or not the person had parental responsibility for the child); and
 - (b) any family violence order that applies or has applied to the child or a member of the child's family.

Additional considerations—right to enjoy Aboriginal or Torres Strait Islander culture

- (3) For the purposes of paragraph (1)(b), the court must consider the following matters:
 - (a) the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary:
 - (i) to connect with, and maintain their connection with, members of their family and with their community, culture, country and language; and
 - (ii) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (iii) to develop a positive appreciation of that culture; and
 - (b) the likely impact any proposed parenting order under this Part will have on that right.

60CC(2)(b) – any views expressed by the child

- **Bare assertions of what a child has said are not compelling in isolation**
- **Parents should acknowledge the views of their children, whether or not they assist that parent's case**
- **Do the children hold that view because they have been shielded from conflict? Do they hold a view notwithstanding that they have been shielded from conflict? Are they at risk of negative feelings toward a parent being exacerbated?**

60CC(2)(c) – the developmental, psychological, emotional and cultural needs of the child

- **Highlights the increasing importance of expert evidence**
- **Seek out evidence from the children’s healthcare providers as appropriate**
- **Where relevant, you might consider a cultural expert**
- **Note the additional matters to be considered at 60CC(3) if the child is an Aboriginal or Torres Strait Islander child**

60CC(2)(d) – the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child’s developmental, psychological, emotional and cultural needs

- **The Court wants to see that any concerns are being addressed**
- **Which parent is best-placed to ensure that the child:**
 - Attends school
 - Attends appointments
 - Maintains a relationship with extended family of both parents (where safe to do so)
 - Maintains a healthy relationship with the other parent (where safe to do so)
 - Maintains a connection to culture
- **Work with your client early to ensure they are receiving adequate support – insight cannot be conjured up one month from trial**
- **Use the affidavit to demonstrate that any concerns *have* been addressed**
- **The 60CC assessment is empirical as well as prospective – past and current empirical evidence carries more weight than representations and promises**

60CC(2)(e) – the benefit to the child of being able to have a relationship with the child’s parents, and other people who are significant to the child, where it is safe to do so

- **Where it is safe to do so** – an important qualification in light of 60CC(2)(a)
- The benefit to the child of the relationship between the child and the parent is no longer a primary consideration
- More important now more than ever to demonstrate the parent’s role in the child’s life, alongside that of the parent’s network
- Present empirical evidence where possible, rather than prospective evidence. An affidavit is not the place to draw conclusions.

- **Example 1:**

Benefit to [X] of having a relationship with me

[X] will benefit from continuing to have a relationship with me because if we are not allowed to see each other, nobody will take him to AFL practice, and he will miss out on watching the AFL with my dad and me.

- **Example 2:**

My relationship with [X]

Since he began playing AFL in 2019, I have always taken [X] to AFL practice, and I have attended at all his games. [X] and I have a tradition of staying up a bit later on Saturday night to watch the 7pm game with my father, [X]’s grandfather.

60CC(2)(a) – what arrangements would promote the safety ... of the child; and each person who has care of the child ...

- **Previously:**
 - *the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence*
- **‘Safety’ is not defined but the amendment is clearly broader than the previous consideration**
- **How broad is the term ‘safety’?**
 - No relevant appellate consideration that I am aware of
 - **‘including’** safety from being subjected to, or exposed to, family violence, abuse, neglect or other harm
 - does this imply a broader remit for the Court to impose an order promoting the safety of a child beyond the listed factors?
 - *Molenaar & Molenaar [2024] FedCFamC1F 603 at [148]: “... the mother presented at this Court as an objective and altruistic litigant looking towards some result which would see the children having a relationship with their father but, at the same time, **being kept safe from aspects of their father’s personality, demeanour and behaviour**”*

*On any reading of the Family Law Act 1975 (Cth) (“the Act”) Part VII makes it clear that the legislation is a benevolent one framed to assist and encourage relationships between children and their parents but also **to ensure the safety of the children, physically, psychologically, emotionally, and morally.***

Similarly, my experience in this Court is that the legal representatives of parties and the Judges of these Courts are imbued with a benevolent attitude towards these ends. It is not a strictly adversarial process but one where the fundamental proposition is the best interests of children. Nevertheless, experience shows that there remain litigants, often when unrepresented, who come to this Court with a personal agenda based on “winning” and immersed with an understanding that this is a place of enmity, blame and criticism. It is not, nor should it be.

60CC(2)(a) – what arrangements would promote the safety ... of the child; and each person who has care of the child ...

- **Less adversarial, more inquisitorial process**
- **Have regard to the objectives of the Act**
- **Importance of expert evidence**
- **Safety is a deliberately broader consideration**
- **Sharper focus on the children’s best interests, rather than the child’s relationship with each parent**
- **Practically:**
 - Evidence of the other parent’s attitude towards your client and their network should be brought, if this in issue
 - Factual and specific accounts of family violence remain compelling and important
 - Family violence is not the only ‘safety’ consideration – what if the children have made negative comments about your client after spending time with a parent? Has their attitude to extended family changed? Have they made comments about the Court system?

Summary

- **No drastic change to how orders and evidence are being drafted**
- **Less of a need to address each individual factor in section 60CC following the amendments**
- **More focus on cohesive, compelling evidence centred around the best interests of the children**
- **Increasing importance of expert evidence to help guide the Court**
- **Parents cannot speak conclusively to the 60CC factors in their evidence – but they can set the evidentiary foundation to support (or refute) expert conclusions or legal submissions**
- **Even if not jointly instructed, some level of expert evidence may be better than no expert evidence**

Conditional time arrangements

Lainhart & Ellinson [2023] FedCFamC1A 200

- **Appeal from the decision of a trial judge who found that the father should have supervised time with a child pending him undertaking cognitive behavioural therapy with a psychologist, upon the completion of which the father's time would graduate to unsupervised time**
- **Found that the order was aspirational and unenforceable**
- **Austin J critical of the decision to confer decision making power on the psychologist**
- **Full Court set aside the suite of orders that gave effect to the conditional time arrangement**
- **Appeal allowed and matters relating to the father's time with the child were remitted for re-hearing**

Lainhart - conditions regulating the father's time with the child set aside by the Full Court

4. [The child] spend time with her Father as follows:

...

(b) Upon the Father engaging in a course of cognitive behavioural therapy with a qualified clinical psychologist and that Father's therapist providing to the Mother a report confirming in the therapist's view that:

(i) The father has understood and accepted that during and after their relationship he had significant anger management problems that led to him perpetrating physical and psychological family violence upon the Mother; and

(ii) The father has gained understanding of the need to manage his anger so as to eliminate any unacceptable risk to [the child] of outbursts of anger by the father while she is in his care for any period of time

then for a period of 3 months ...

Lainhart & Ellinson (2023) FLC 94-166, 13.

Courts exercising jurisdiction under the Act must decide justiciable disputes, by conventional adversarial procedure, between imperfect litigants on the available evidence according to law by making prescriptive and enforceable orders within statutory power to quell the controversy. That is the unique and essential function of judicial power...The judicial function cannot be delegated to others, apart from to registrars in limited circumstances, and only then subject to the right of de novo judicial review...

Courts must take the litigants as they find them when determining causes of action under Pt VII of the Act. Courts are not, and cannot operate like, therapeutic agencies, using litigation as the vehicle to meddle by making aspirational directions about how litigants should improve their parenting capacity in the hope of enhancing their children's familial experiences.

...

[If the Court can find] on the available evidence, [a parent] currently poses a risk of harm to the child which could only be satisfactorily attenuated by professional supervision, then [the Court] ought [to make] orders to that effect and no more.

Application of the principles set out in *Lainhart - Miyajima & Mikkelsen* [2024] FedCFamC1A 208

- ***Miyajima & Mikkelsen* [2024] FedCFamC1A 208**

- Division 1 appellate decision
- 3 children
- Trial judge accepted that the father assaulted the middle child on two separate occasions in front of the other children
- Trial judge made orders for the father’s time with the children to be supervised pending him producing evidence of his completion of certain therapies and courses
- Trial judge indicated - “*I am satisfied that the children will not be placed at an unacceptably high risk of physical and psychological harm if they spend time and communicate with the father with [those] safeguards in place*”
- Citing the principles in *Lainhart*, Justice Aldridge set those orders aside and remitted the matter for further hearing

Application of the principles set out in *Lainhart - Miyajima & Mikkelsen* [2024] FedCFamC1A 208

- ***Miyajima & Mikkelsen* [2024] FedCFamC1A 208, 2 – the conditional time arrangement sought by the mother:**

It is a pre-condition to the children spending any time with the father or communicating with the father pursuant to these Orders that the father will have:

- (a) Engaged in psychological therapy to address and manage his depressive disorder, and for the purposes of this order the father will inform the mother of the name of and contact details for his psychologist, and authorise his psychologist to provide to the mother at her request confirmation that the father is currently undergoing, or no longer requires, psychological therapy; and*
- (b) Completed either an accredited face to face Men's Behavioural Change Program or an accredited face to face Anger Management program provided by either [D Service] or [E Service], and has furnished a certificate or letter of completion of such program to the mother; and*
- (c) Completed for the second time an accredited face to face Parenting after Separation program, with such program to be provided by either [D Service] or [E Service] and has furnished a certificate or letter of completion to the mother.*

Further application of the principles set out in *Lainhart*

- ***Dworak & Watts (No 2)* [2024] FedCFamC1F 13**
 - Division 1 first instance decision
 - 11-year-old child
 - Findings made regarding the mother's:
 - impaired level of executive functioning which impacted her parenting capacity
 - engagement in alienating behaviours
 - Deputy Chief Justice McClelland refused the father's application for an indefinite moratorium on the child spending time with the mother until she had addressed issues associated with substance misuse and alienation
 - Order made for child to spend supervised time with mother, gradually increasing to unsupervised time
- ***Frank & Ryker* [2023] FedCFamC2F 1615**
 - Division 2 decision
 - 6-year-old child
 - Finding made regarding the father perpetuating family violence against the mother at changeovers
 - Judge Champion refused the mother's application that the father's time with the child be conditional upon the father's completion of a men's behavioural change program
- ***Payne & East (No 2)* [2024] FedCFamC2F 377**
- ***Bruin & Bruin (No 2)* [2024] FedCFamC2F 176**

Take-aways

- **Consider the practicalities of the enforceability of the orders you are seeking**
- **Avoid drafting orders that tether a parent's time with a child to the completion of tasks**
- **If it is your case that the other parent poses an unacceptable risk of harm to a child that can only be ameliorated by professional supervision, you should consider seeking an order for indefinite supervision**
- **If it is your case that the risk posed by your client can be diminished/ameliorated by the completion of parenting or behavioural courses and/or engagement with therapy, then (where possible) have your client complete those tasks prior to trial**

The interpretation of section 65DAAA

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

Explanatory Memorandum, *Family Law Amendment Bill 2023* (Cth), [97].

...the court would need to be satisfied by the applicant that... there is some changed circumstances which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material...

Rice & Asplund (1979) FLC 90-725, 78, 905.

Section 65DAAA(1)

- (1) If a final parenting order is in force in relation to a child, a court must not reconsider the final parenting order unless:**
 - (a) the court has considered whether there has been a significant change of circumstances since the final parenting order was made; and**
 - (b) the court is satisfied that, in all the circumstances (and taking into account whether there has been a significant change of circumstances since the final parenting order was made), it is in the best interests of the child for the final parenting order to be reconsidered.**

Section 65DAAA(2)-(4)

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

Rasheem & Rasheem [2024] FedCFamC1F 595

- **Division 1 first instance decision – Justice Altobelli**
- **Two children: 6 and 4**
- **Application by the mother to reconsider final parenting orders, seeking:**
 - Vacation of time orders
 - Father to spend supervised time with the children as determined by the mother
 - Father restrained from attending the children’s school or extra-curricular activities, as well as attending the mother’s residence
- **ICL supported mother’s application but sought suspension of time as opposed to vacation of orders**
- **Father opposed the application**
- **Justice Altobelli declined to reconsider the parenting orders, finding that there was not a significant change in circumstances since the making of the final order, nor was it in the best interests of the children to relitigate the matter**

*There is no reading or interpretation of s 65DAAA(1) available to this Court that would align the text with its purported roots in Rice and Asplund. **The Court is now mandated to reconsider final parenting orders even in cases where a significant change of circumstances has not occurred, but it is otherwise in the child's best interests for a reconsideration to occur...** Whilst it [is] acceptable to strain the construction of [the] Act to give effect to its intended purpose...it may be that the words used in the Act simply cannot be construed to give effect to its intended purpose.*

Rasheem & Rasheem [2024] FedCFamC1F 595, 75.

Absent appellate intervention the starting presumption on the commencement of new parenting proceedings must be that the primary orders were correct - that is, that they were in the best interests of the children at the time they were made. That presumption is capable of rebuttal by cogent evidence that a material factor was not disclosed at the primary hearing; failing that, it must follow that it cannot be in the best interests of the children to discharge or vary those orders unless there has been a relevant change in circumstances since they were made.

Babic & Taccini [2024] FCWA 203, 18.

Take-aways

- **When preparing submissions to support a section 65DAAA application, factors in 65DAAA(2) regarding the best interests of the children should be addressed, including to cover off on all relevant factors under section 60CC**
- **Clients should be advised on the current uncertainty on the interpretation of the section, including the prospect of an application pursuant to section 65DAAA being successful even if no significant change in circumstances is found to have occurred provided that the reconsideration of the order is in the best interests of the children**

Thank you



Hamish Mulcahy

Associate

+61 7 3024 0166

LinkedIn: www.linkedin.com/in/hamishmulcahy



Chiara Falzon

Associate

+61 7 3024 0459

LinkedIn: www.linkedin.com/chiarafalzon

Creating Exceptional Outcomes
hopgoodganim.com.au

