

# SHARED CARE AND CHILDREN'S BEST INTERESTS: WORKING WITH THE AMENDMENTS OF 2006<sup>1</sup>

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## 1. Introduction

We have now had just over two years experience with the Family Law Amendment (Shared Parental Responsibility) Act 2006. In this paper I want to review some of the issues that seem important. I hope readers will forgive me for citing my own work, but I will try to keep the paper to a reasonable size by referring to publications where I have discussed the issues in more detail than is possible here.

## 2. The key elements of the new provisions

I'll start with a reminder about the basics of the new provisions. I'll state them in broad terms to bring out the structure.

The child's best interests must still be treated as the paramount consideration.<sup>3</sup> This is important, for at least two reasons. Firstly, it means that ultimately each case must be a search for what is the best available outcome for the child, based on the evidence. I stress this because people sometimes seem to think or assume that the legislation requires a particular outcome. Secondly, it means that anything that is really significant to determining the child's best interests should be taken into account. I stress this because it seems that there is a tendency for some people to think that if something is not a 'primary' consideration, it is not relevant.<sup>4</sup>

There are, however, more detailed provisions about how to determine what is best for children. They are somewhat intricate, but I think the gist is clear enough.

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<sup>3</sup> Section 60CA.

<sup>4</sup> See 'The harmful impact of parental conflict on children (and the harmful impact of legislative complexity on people trying to help children): A brief reply to Max Wright' (AJFL, forthcoming), responding to Max Wright, Best Interests, conflict and harm – a response to Chisholm and Parkinson" (2008) 22 AJFL 72-77.

First, the provisions of s 60B and s 60CC give special emphasis to two matters, the benefit to children of a meaningful relationship with both parents, and protection from abuse, neglect or family violence. The ‘primary considerations’ should be given particular importance, although they do not necessarily prevail over or trump the ‘additional’ ones.<sup>5</sup> Indeed, the two sets of considerations are entangled, because many of the things listed in the additional considerations need to be considered in order to determine what is the benefit to the child of a meaningful relationship with the parents. As Thackray CJ<sup>6</sup> put it:

*The primary considerations, especially paragraph (a), cannot in fact be determined without reference to the additional considerations. A holistic approach is not only desirable, but logically necessary.*

Second, the public debate about whether there should be a presumption of equal time led, eventually, to a curious link between decision-making and time. The amendments introduced a presumption that in general<sup>7</sup> children would benefit if the parents had equal shared parental responsibility. This probably involves a presumption favouring an *order* for equal shared parental responsibility, because the legislation does not change the starting point, namely that ‘each parent has’ parental responsibility.<sup>8</sup>

Then, if there is an order for equal shared parental responsibility (or if one is about to be made) the court comes under an obligation to ‘consider’ whether equal time, or if not ‘substantial and significant’ time, would be practicable and in the child’s best

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<sup>5</sup> Paragraph 51 of the Explanatory Memorandum states ‘There may be some instances where these secondary (sic) considerations may outweigh the primary considerations.’

<sup>6</sup> *G and A* [2007] FCWA 11, paragraph 21. See also his Honour’s decision in *T and M* [2006] FCWA 108, and *Claribold & James* [2007] FamCA 1032 at [226] (Bennett J) (‘I interpret s 60CC(2)(a) of the Act as requiring an evaluation of the nature and quality of the relationship between the parents and [the child] by reference to additional considerations...’).

<sup>7</sup> The exceptions relate essentially to cases involving allegations of violence or abuse; and of course the presumption can be rebutted by evidence that equal shared parental responsibility would not be in the best interests of the child: see s 61DA. The provisions reflect the thinking of the Hull Committee (2003), which was to focus on ‘the majority of families’, treating separately cases of family violence, abuse and neglect. For a detailed account, see Chisholm, ‘Making it work: Family Law Amendment (Shared Parental Responsibility) Act 2006’ (2007) 21 AJFL 143.

<sup>8</sup> This argument is spelled out in the commentary to ss 61DA, 61C and 65DAC in Butterworths/LexisNexis *Australian Family Law*, Vol 1.

interests.<sup>9</sup> ‘Substantial and significant time’ is defined to mean, essentially, weekdays and weekends and holidays, times that allow the parent to be involved in the child’s daily routine as well as occasions and events that are of particular significance to the child or the parent.<sup>10</sup>

This is an important provision, but falls short of establishing a presumption that it is better for children to spend equal time, or substantial and significant time, with each parent. One obvious intention was to challenge any assumption that it is normally satisfactory for children to see one parent only for limited purposes, such as being entertained at weekends, which would make it difficult for that parent to be fully involved as a parent, and difficult for the child to maintain or consolidate a secure attachment with a parent whose behaviour is oriented only to visiting rather than care-giving.

### **3. A ‘meaningful’ relationship<sup>11</sup>**

One of the key concepts in the amendments of the 2006 amendments is that of a ‘meaningful’ relationship between parent and child. It occurs twice:

Section 60B (emphasis added):

- (1) *The objects of this Part are to ensure that the best interests of children are met by:*
  - (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...*

Section 60CC:

- (1) *... in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).*

*Primary considerations*

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<sup>9</sup> Section 65DAA. A separate consequence of an order for equal shared parental responsibility is that the parents acquire an obligation to consult about important decisions relating to the child: see s 65DAC.

<sup>10</sup> The court must consider whether equal time would be in the child’s best interests; and whether it would be practicable; and, if it is, consider making an order for equal time: s 65DAA(1). If not, then the court must consider the same issues in relation to ‘substantial and significant’ time: s 65DAA(2).

<sup>11</sup> This discussion is a brief summary of a paper ‘The meaning of meaningful: musings on some key provisions of the Family Law Act amendments of 2006’, prepared for the Queensland Family Law Residential, Gold Coast, August 2008.

- (2) *The primary considerations are:*
- (a) *the benefit to the child of having a meaningful relationship with both of the child's parents...*

These terms have been considered in a number of first instance decisions, although the Full Court has not discussed them in any detail. They are of course ordinary English words, and the starting point is to go to the dictionaries. But the meaning of the term emerges more clearly from an examination of several contexts: the Act itself, the Explanatory Memorandum, the seminal Hull Report of 2003, the evidence given to that Committee by Professors Parkinson and Cashmore;<sup>12</sup> and also judicial statements prior to 2006, and statements by social scientists. That context shows, I think that the legislative term has a fairly clear meaning, along the lines that Brown J indicated when she said that the expression means ‘important, significant and valuable to the child’.<sup>13</sup>

One can pursue the matter a little further by considering what would *not* be a meaningful relationship between a parent and child. Having regard to the context, I think we could say that the term excludes a relationship that is superficial, constrained, tokenistic, trivial, artificial, or (of course) abusive; and also a relationship that was significant to a parent but not to the child.

It is important to be clear about the legal significance of the term. The legislature has said, in effect, that special importance should be given to the benefit to a child of a meaningful relationship with each parent. If the relationship is meaningful, the benefit flowing from it should therefore be given that particular importance.

This does not mean that the court cannot consider the benefits (and detriments, for that matter) flowing from a relationship that is not ‘meaningful’. The provisions about a meaningful relationship do not limit what is relevant to assessing the child’s best interests. Take, for example, the situation in which a child has no knowledge of her father, but the father (in prison) wants the child to know his identity, to be able to test for inherited medical conditions, and to know that he has put money aside for her

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<sup>12</sup> Hansard, House of Representatives Standing Committee on Family and Community Affairs, Child custody inquiry, Monday, 13 October 2003.

<sup>13</sup> *Mazorski v Albright* (2007) 37 Fam LR 518, at 526.

in a trust fund. On an application to re-introduce the child and the father, there is nothing to stop the court from taking these and other matters into account, even though, let us assume, there is not and will never be a ‘meaningful relationship’ between the father and child. The only legal consequence of the lack of such a relationship is that any benefit from it, while of course relevant, does not get the particular importance that derives from the status of a consideration as ‘primary’ under s 60CC, and as part of the object in s 60B.

Having regard to all this, in my view it is unhelpful and distracting to distinguish between relationships that are ‘optimal’ and those that are merely ‘meaningful’. Kay J did so in *Godfrey v Sanders*,<sup>14</sup> and, with respect, this seems to have led him to the mistaken view that the legislation ‘aspires’ only to a medium-level child-parent relationship.<sup>15</sup> This is misleading because the legislation does not ‘aspire’ to any kind of relationship: it says that special importance should be given to the benefit to the child from relationships that are meaningful. In practice, in most cases, including many relocation cases, the relationship will continue to be meaningful whatever the outcome, and the court should not be distracted from its task under the legislation. That task is to weigh up all the matters relevant to the child’s best interests, giving particular weight to the benefit from the meaningful relationship with the parent (and also, of course, to the need to protect the child from violence, abuse and neglect, but that is not my present topic).

To summarise my argument: The legislation requires the courts to take everything relevant into account when assessing what is most likely to be in the child’s best interests, and also requires them to give particular attention to the benefit to children of a relationship with parents in which parents continue to be actively and positively engaged in parenting following the separation between them (a ‘meaningful relationship’).<sup>16</sup> So, once there is a meaningful relationship - as there is in the majority

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<sup>14</sup> *Godfrey v Sanders* (2007) 208 FLR 287 (Kay J).

<sup>15</sup> In reversing the decision of a Federal Magistrate to prevent a relocation, Kay J said at paragraph 36: ‘if the move results in a diminution of quality of the relationship, what the legislation aspires to promote is a meaningful relationship, not an optimal relationship’ .

<sup>16</sup> And also, of course, to give particular attention to protecting them from harm from abuse and family violence – s 60CC(2)(b), 60B(1)(b) - although that important topic has not been the subject of this paper. While I have not reviewed the case law in detail on this topic, it is my

of cases - it is appropriate to consider in detail what benefit it involves for the child, and it is confusing rather than useful to further categorise the relationship, as being, for example, 'optimal' as distinct from merely meaningful.

#### **4. Research evidence and the two 'primary considerations'**

There is now a huge and rapidly-growing literature about children's needs and the implications of those needs for deciding what post-separation arrangements are likely to be best (or least damaging) for children. While it is impossible for lawyers to stay on top of the detail, there are useful overviews and summaries,<sup>17</sup> even though debate among social scientists continues. What is the relationship between the increasingly specific guidelines in the Family Law Act 1975 and what social science tells us? I can only scratch the surface of this important question, but I will at least try to do that.

The two big themes of the 2006 amendments are that in general it is beneficial for children (1) if both parents continue to be involved in their lives *as parents*, and (2) if they are protected from harm caused by violence, abuse and neglect.

I do not want to say much about the second of these themes, because I don't think anyone has any doubt that it is true and important. There is of course a lot more to be said about what constitutes violence, abuse and neglect, the various forms they take, the particular sorts of harm they do, and what can be done to help the children recover from that harm, and to prevent it happening again. For example, in recent times we have learned a lot about the development of the brain, especially in early infancy and early childhood, and we know a lot about the changes in the brain caused by stress and trauma.

As to the first, the importance of children having what the legislation calls a 'meaningful relationship' with both parents, I don't think there is any real doubt about the truth of this as a general statement. As I understand it, there is a lot of evidence to support the idea that children will generally benefit if they experience a loving and involved relationship with both parents after separation. As Smyth and Wolcott put it:

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impression that judges have made it clear that encouraging continuing parental involvement cannot be allowed to compromise children's safety. See, eg *Adams & Adams (No 8 – Final Orders)* [2007] FamCA 1083 (Bennett J).

<sup>17</sup> The website of the Australian Institute of Family Studies provides a wonderful resource: [www.aifs.gov.au](http://www.aifs.gov.au).

*Most studies indicate that the interests of children-post-divorce are generally best served when children can maintain continuing and frequent contact with both parents who cooperate and communicate and have low levels of conflict.*<sup>18</sup>

There is also evidence that children care a lot about their parents, and generally want to remain closely involved with both of them. Although recent research supports this, and enriches our understanding about what is involved, these generalities are not new. As Thackray CJ has remarked, ‘judges of the Family Court have long considered the relationships children have with their parents to be of utmost importance in determining their best interests’,<sup>19</sup> and phrases similar to the legislature’s ‘meaningful involvement’ can be seen in the pre-2006 case law.<sup>20</sup> A recent statement by a leading scholar, Michael Lamb, is to similar effect:

*‘Extended separations from either parent with whom the child has formed a meaningful attachment are thus undesirable because they unduly stress developing relationships...’*<sup>21</sup>

*‘...active paternal involvement, not simply the number or length of meetings between fathers and children, predicts child adjustment. This suggests that post-divorce arrangements should specifically seek to maximise positive and meaningful parental involvement rather than simply allow minimal levels of visitation. As in non-divorced families, in other words, the quality of continued relationships with the parents - both parents - is crucial (Kelly and Lamb, 200). Stated differently and succinctly, the better (richer, deeper and more secure) the parent-child relationships, the better the children’s adjustment, whether or not the parents live together...’*<sup>22</sup>

In another way, too, there is a fit between the research evidence and the legislation. The parental involvement referred to in s 60B and s 60CC(2)(a) is spelled out to some extent in other sections.<sup>23</sup> The definition of ‘substantial and significant time’ shows that the legislature envisaged the non-resident parent participating in various aspects

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<sup>18</sup> Smyth and Wolcott, ‘Why Study parent-child Contact?’ in B Smyth, ed, *Parent-Child Contact and Post-Separation Parenting Arrangements* (AIFS Research Report No 9, 2004), p 7.

<sup>19</sup> *T and M* [2006] FCWA 108, Paragraph 40.

<sup>20</sup> See eg *Cotton and Cotton* [1983] FLC 91-330 at 78,252 (Nyggh J).

<sup>21</sup> Michael Lamb, ‘Improving the Quality of Parent-child contact in Separating Families’, in Mavis McLean (ed), *Parenting after Partnering: Containing Conflict after Separation* (Hart Publishing, 2007), p 14.

<sup>22</sup> *Id.*, at 17.

<sup>23</sup> Section 60CC(4).

of the child's life,<sup>24</sup> for example being involved in the child's daily routine and events that are of particular significance to the child. In these respects, then, the legislation seems to fit at least reasonably well with what the research tells us.

In some other respects, though, the fit is not so good. This is a large topic, and I will examine just two aspects.

#### **5. Time: more emphasis in the Act than in the research evidence**

First, the legislative provisions about equal time do not, I think, reflect what most expert researchers believe is important for children. The above quotation from Michael Lamb is, I think, fairly representative. What seems to matter most to children, and what seems most important for their healthy development, has more to do with what happens when they are with each parent, and in particular whether they feel loved and cared for. If you asked the researchers to draft guidelines about what is likely to be best for children, I doubt if they would include the idea of equal or near-equal time with each parent. They might well say that some minimum time is necessary, and they would have a lot to say about the pros and cons of overnight stays for young children, and they would emphasise the importance of the child's age, and other particular circumstances. Of course, the idea of equal time makes a lot of sense in terms of adult entitlement, and also some children themselves see it as a fair solution to their parents' conflict; but so far as I can tell it does not reflect what research scholars believe is important for children's development.

#### **6. Exposure to parental conflict: less emphasis in the Act than in the research evidence**

Second, I doubt if research scholars would have suggest the formulaic approach to determining the child's best interests: the two 'primary' considerations, and the 'additional' considerations. This formulation is easy to relate to the political debate that led to the legislation, but in my view it doesn't correspond very closely with what we know about children and their needs. In particular, one thing that emerges very clearly from the research is that children can be seriously distressed and damaged by exposure to parental conflict. This would be at the top, or near the top, or most social scientists' lists of important factors. Of course the legislation does not say that

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<sup>24</sup> Section 63DA(3).

exposure to parental conflict is irrelevant.<sup>25</sup> But it certainly does not reflect the great emphasis that researchers give to the harm that can be caused to children by exposure to parental conflict.

This aspect of the legislation deserves careful consideration. Dr Jenn McIntosh's research has revealed indications that shared parenting arrangements are being made in situations of continuing conflict between parents, and it is possible that in some cases the benefit to the children of a meaningful involvement by both parents might be compromised by the distress and damage caused to them by exposure to the parental conflict.<sup>26</sup> We need to know much more about the nature of such conflict, the extent to which children are being exposed to it, and the extent to which parents, legal and other advisers, and the courts, might be treating the legislation as requiring some form of shared parenting even when it is damaging to children. In so far as the legislation is intended to have an educative effect, or to be some sort of a guide to parents, this is an aspect that may deserve attention when the legislation is reviewed after the current evaluation<sup>27</sup> is completed.

## **7. Dealing with the differences between the Act and the research evidence**

If the legislation does not accurately reflect what the research evidence tells us about children's needs, what are we to do about it?

In my view the important thing is to be good lawyers. This means taking the legislation itself very carefully, looking at what it actually says. This is no easy task these days, because it says so much, but it must be done. I will take each aspect in turn: equal time, and exposure to parental conflict.

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<sup>25</sup> If nothing else, it will always be 'any other fact or circumstance that the court thinks is relevant': s 60CC(3)(m). See the discussion below.

<sup>26</sup> Jenn McIntosh and Richard Chisholm, 'Shared care and children's best interests: a cautionary tale from current research', (2007-8) 20(1) *Australian Family Lawyer* 1-16 (and the revised version, 'Cautionary notes on the shared care of children in conflicted parental separation' (2008) 14 *Journal of Family Studies* (2008) 37-52.); Dr Tom Altobelli, "A response to 'A Cautionary Tale': Learning to paint with a fine brush" (Paper for the 8<sup>th</sup> Annual Family Law Intensive, Sydney).

<sup>27</sup> See 'Framework for evaluation and longitudinal research - March 2007' on the Attorney-General's Website.

### ***Equal time***

In relation to equal time (and substantial and significant time), it is important that the legislation only says that the court should *consider* whether it is in the child's best interests and whether it is reasonably practicable. This is readily understandable in the light of the background to the legislation. The Hull Committee seemed to believe that the law was slipping into an 80:20 outcome in an automatic and thoughtless way, treating it as a sort of default position.<sup>28</sup> Whether they were correct in this belief I do not know, but they were certainly correct, in my view, in thinking that if this was happening it should be stopped. And the legislature thought of a good way to stop it, namely to specify that other possibilities, such as equal time, had to be considered. It is important to keep in mind that the legislature deliberately accepted recommendations not to create a presumption favouring equal time. Instead, they said that the courts should consider it.

It is a pity, in my view, that this simple idea, that the courts should consider equal time, is tangled up with other provisions, linked to the idea that it is desirable for parents to share important decisions about their children.<sup>29</sup>

It is also a pity, I think that the drafting problem in the relevant section was not given a more careful analysis in *Goode*. Section 65DAA says, in substance,<sup>30</sup> that the court should

- (a) *consider whether* [equal time is in the child's best interests]; *and*
- (b) *consider whether* [equal time is reasonably practicable]; *and*
- (c) *if it is, consider making an order* [for equal time].

In paragraphs (a) and (b) the word 'consider' has its ordinary meaning – something like to think over, meditate or reflect on, bestow attentive thought upon, or give heed to.<sup>31</sup> There is a problem, however, with paragraph (c). If equal time is in the child's

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<sup>28</sup> For a detailed account, see 'Making it Work', above.

<sup>29</sup> See the brief account of the provisions early in the paper; and for a fuller account, the decision of the Full Court in *Goode v Goode* (2006) 36 Fam LR 422; (2006) FLC 93-286.

<sup>30</sup> I have simplified the non-critical words to reveal the structure more clearly.

<sup>31</sup> *Aboriginal & Torres Strait Island Affairs, Minister for & Norvill v Chapman; sub nom Tickner v Chapman (The Hindmarsh Island Bridge case)* (1995) 57 FCR 451; (1995) 133 ALR 226

best interests, and is reasonably practicable,<sup>32</sup> it is hardly necessary for the court to do any considering – it would obviously make the order, because the child’s best interests is the paramount consideration. How could it do anything else?

The Full Court said that the decisions giving the ordinary meaning of ‘consider’ were not ‘entirely apposite to the meaning of the word in s 65DAA’. This was because:

*... the juxtaposition of [the three paragraphs] suggests a consideration tending to a result, or the need to consider positively 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.*

In my view, with respect, it would have been helpful if the Full Court had focused on the use of the word ‘consider’ only in paragraph (c): there is no problem at all with the ordinary meaning of ‘consider’ in paragraphs (a) and (b). The only problem in the section is that the wording of paragraph (c) implies that if equal time is shown to be in the child’s interests and practicable, the court should then only ‘consider’ making an order for equal time, whereas in truth, since the child’s best interests are paramount, in such a case there should obviously be an order for equal time.

Although the Full Court did not quite identify this problem, and wrongly suggested there was something wrong with the ordinary meaning of ‘consider’ in the section as a whole, the passage I have quoted (note ‘*if the conditions... are met*’) makes it clear that the Full Court is saying that the provisions ‘tend to a result’ (of equal time) only when equal time has been found to be in the child’s best interests and reasonably practicable. That is quite correct, although understated, since it is hard to see how a court could find that equal time is in the child’s best interests, and practicable, but order something different.

The reason that I have laboured over this point is that the passage should not be misunderstood as saying that *the section as a whole* tends towards the result that equal time is in the child’s best interests. The section certainly doesn’t say that, and I am confident that the Full Court did not mean to suggest that it did.

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<sup>32</sup> These words are strictly unnecessary: if equal time was not reasonably practicable, how could it be in the child’s best interest?

What is to be said, then, about the lack of research support for the legislative reference to equal time? In my view it is not a real problem. It would be a big problem if the legislation had said that equal time should be presumed to be in the interests of children. But instead, the legislation says we have to ‘consider’ equal time. So of course we must, and we must do it properly, giving it real consideration, not pretending to consider it. What we are considering is whether equal time is an outcome that would be in the child’s best interests in the particular facts of the case. On that question, of course we would look to the specific evidence about the child and the situation, and if it is available, any expert evidence about the circumstances in which equal time is likely to be the best arrangement for children.

### ***Exposure to parental conflict***

It is true that the Act does not emphasise the harm to children from exposure to parental conflict in the way that it emphasises the harm from violence, neglect or abuse. To put it another way, nor does it give the benefit to children of harmonious and respectful family interactions as much emphasis as it does to the benefit of parental involvement.

On the other hand, of course in practice exposure to conflict should always be considered: it might fall under several of the ‘considerations’,<sup>33</sup> but would always fall within the catch-all consideration, ‘any other fact or circumstance that the court thinks is relevant’.<sup>34</sup> In some extreme situations, it might be regarded as falling with abuse or family violence, and thus constitute a ‘primary consideration’.<sup>35</sup>

Does the lack of emphasis on exposure to conflict mean that it should not be given much weight? I think the answer is clearly no.

The child’s best interests remain the paramount consideration, and we know that the primary considerations do not necessarily ‘trump’ the additional considerations. Take

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<sup>33</sup> For example s 60CC(3)(c), (f).

<sup>34</sup> Section 60CC(3)(m).

<sup>35</sup> As argued by Max Wright, in ‘Best Interests, conflict and harm – a response to Chisholm and Parkinson’ (2008) 22 AJFL 72-77. Mr Wright’s analysis is flawed, however, because it overlooks the important point that something can still be relevant to determining what is in a child’s best interests even if it falls outside the category of a ‘primary consideration’.

a case where both parents are involved with the child, but in a way that exposes the child to conflict. In my view although the benefit of the meaningful relationship with each parent is a primary consideration, there is no reason to conclude that the legislature would have wanted the court to put in place arrangements where that benefit was, on the evidence, outweighed by the disadvantages and dangers of exposure to conflict. Obviously, the court would look for way to maintain the meaningful relationship while protecting the child from exposure to conflict. But if this cannot be achieved, in my view the court could not properly make an order that on the evidence was detrimental to the child in order to preserve a meaningful relationship with a parent: to do so would be inconsistent with treating the child's best interests as paramount. Although the legislature clearly believed that involving parents would normally be good for children, I can see nothing in the legislation or background papers to indicate that it intended to sacrifice the interests of children to the goal of involving parents.

## **8. Impact on relocation cases**

The topic of the impact of the amendments on relocation cases has been the subject of considerable judicial and academic writing.<sup>36</sup> Here I only want to make a few comments.

Firstly, there is nothing *explicit* about relocation cases in the amendments. The former Government had referred the problem to the Family Law Council, which produced an interesting report, rejecting a legislative presumption either for or against relocation, and suggesting an amendment that would have added more specific guidelines applicable to relocation cases.<sup>37</sup> This has not been taken up, probably because the legislative package is being evaluated, and it makes sense to see what that evaluation tells us before rushing into more legislative activity. It seems unlikely that

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<sup>36</sup> Patrick Parkinson, 'Freedom of movement in an era of shared parenting: the differences in judicial approaches to relocation' (*Federal Law Review*, forthcoming); Patrick Parkinson, 'The realities of relocation: Messages from judicial decisions (2008) 22 *AJFL* 35; article by Patricia Easteal, 'Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act' in *AJFL* (forthcoming); earlier reviews include V. Kordouli, 'Relocation - Balancing the Judicial Tightrope' (2006) 20 *AJFL* 89; P Easteal, J Behrens and L Young, 'Relocation Decisions in Canberra and Perth: A blurry snapshot' (2000) 14 *AJFL* 234.

<sup>37</sup> Family law Council, Report, *Relocation* (May 2006); available on the Council's Website <http://www.law.gov.au/flc>.

we will see amendments dealing with relocation in advance of the report of the evaluation.

Secondly, there have now been quite a few relocation decisions on the amendments, and we have seen detailed commentaries on them, cited above. The reasoning in the cases, especially the Full Court cases, does not seem to indicate that the 2006 amendments require any real change. The courts cheerfully cite and apply the previous leading authorities, as well as referring to the new provisions. And yet the available evidence indicates that the courts are more likely than previously to restrain relocations.

How can we account for these apparently contradictory things? It is possible that the trend is caused, or partly caused, by things other than the legislation itself. For example, parents and their advisers might believe that the legislation makes it hard to relocate, whether this is true or not. Another possibility is that the legislation and the debates about it have led people, including advisers and decision-makers, to reconsider the matter and revise their views about what is best for children in these difficult cases. And it may be that relocations were becoming more difficult even before 1 July 2006. Counting outcomes is a good thing to do, but we would need more fine-grain research to tell us, for example, whether litigants are now more inclined to oppose relocations, whether they present better evidence and argument, or whether judges are changing their approach.

Third, there are a number of research projects going on that might help us learn more about these cases. Some of the fruits of the work are already coming apparent. For example, in a recent article,<sup>38</sup> Parkinson refers to the serious problems entailed for children, especially young children, who have to travel frequently and for long distances to maintain links with both parents. I don't think that research will ever make these cases *easy*, but I hope it will lead to more better-prepared cases, and more informed decision-making.

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<sup>38</sup> 'The realities of relocation', cited above.

## 9. Conclusions

In my view Part VII of the Act is complex and intricate, but for the most part it is not obscure or uncertain. The task is to give real effect to the letter and spirit of the legislation, not to give it lip service.

The key, I suggest, is to focus intently on the precise words of the legislative provisions. It is dangerous to rely on general impressions, because general impressions are likely to reflect assumptions stemming from the political background, rather than what the Act actually says.

I have tried to illustrate this in the above discussion. The points I would emphasise are that although the legislation requires us to consider certain matters, and to treat the primary considerations as having particular importance, it continues to treat the child's best interests as paramount, and does not exclude or minimise the importance of anything that is relevant to determining what is in the child's best interests. It would be bad law, and bad practice, to think that the Act now requires us to engage in a kind of artificial exercise and treat any particular conclusion as mandated, whether or not it is best for the child. If the legislature had intended to do that, it would have substituted something else for the paramount consideration principle, or put in place presumptions about what is best for children. It did not do this, except in relation to decision-making: the presumption of equal shared parental responsibility.

I don't think there is any inherent problem with the detailed list of matters in s 60CC, the objects and principles in s 60B, or the presumption of equal shared parental responsibility and the consequence that the court should 'consider' equal time, or substantial and significant time. It may be, of course, that in practice the provisions are causing trouble; if so, I hope that will be revealed by the current evaluation.

The only real uncertainty, I think, lies in the reference to 'primary' and 'secondary' considerations. How are decisions to be made that give full effect to the requirement to treat the child's best interests as paramount (which seems to require the judge to weigh things according to their importance for the child in the circumstances of each case) and yet give certain things whatever special extra weighting is intended by the word 'primary', and the provisions of s 60B? Patrick Parkinson and I have both

wrestled with the problem, and come to slightly different conclusions.<sup>39</sup> If there is a coherent answer to the question, I don't think either of us has found it, though we have both looked hard, at the legislation and the background documents.

The nature of the decision-making required by the Act remains a difficult conceptual problem. I am not sure whether the Full Court will ever engage with it. The Full Court may be waiting until the issue is properly raised and argued in a case; or it may consider that the issue is too deep and complex to be susceptible to helpful judicial exposition.

As for the legislation itself, we await the results of the current evaluation, and what might come of it. It is important that so far as possible any further changes to the law and related matters should be guided by good evidence about how it is working now, and how it might work better in the future. I hope the focus will be on how it impacts on families, rather than how it impacts on voters and lobby groups. All of those on the front line, including lawyers, can make a big contribution to enhancing our understanding of these things, and thereby improving things for children in the future.

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<sup>39</sup> Patrick Parkinson, 'Decision-making about the best interests of the child: The impact of the two tiers' (2006) 20 *Australian Journal of Family Law* 179; Chisholm, in 'Making it work: the Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 *AJFL* 143; Parkinson, 'The values of parliament and the best interests of children— A response to Professor Chisholm' (2007) 21 *AJFL* 213; Chisholm, 'A brief reply to Professor Parkinson' (2007) 21 *Aust. J Fam Law* 229.