

CREATING BEST PRACTICE SHARED PARENTING ORDERS¹

Mark MacDiarmid
Accredited Specialist, Family Law
Coleman Greig Lawyers

¹ The contents of this paper are not intended to constitute legal advice and are not to be used or relied upon as such.

Contents

Working on children’s matters: wise guide versus hired gun	3
Thinking the matter through: what really needs to happen in this matter to foster the best interests of the child?	4
Significant concepts	5
Engaging with the social science literature	5
Attachment.....	6
Family violence	8
Unacceptable risk: the balance of safety <i>versus</i> the meaningful relationship.....	11
Live with <i>versus</i> spend time with	12
Parental responsibility.....	13
Are orders appropriate in this matter?	14
Orders carry obligations: they require someone to do something or to refrain from doing something.....	15
Who is being asked to do what (are the orders sought directed to a party?).....	15
Are all necessary parties joined?.....	15
Do the orders need to deal with the allocation of parental responsibility?.....	16
Appointment of Part 15 expert: what questions are asked (don’t just mirror s 60CC(3))	18
If in doubt and without a reliable precedent, look for a relevant judgement, (preferably approved by the Full Court) for sample orders	18
Specific types of order.....	19
Orders relating to contact centres	19
Airport Watch List	19
Be prepared to amend the orders sought in your client’s Application or Response as the case unfolds	20
Appendix 1: An example of thoughtful parenting orders in a complex matter.....	21

Working on children's matters: wise guide versus hired gun

It was long ago recognised that in the conflict between the law as high social vocation and the law as business, mercantile concerns inevitably sing the sweeter song, and that this challenging inequality holds the potential to skew the administration of justice. This danger applies equally where the temptation to accept unquestioningly the client's perspective (because they are *our* client) leads us to an unfortunate blindness to the shortcomings of their case. It is certainly possible never to pause and wonder why all of the good, honest people come through one's own door, while all the lying, cheating child-abusers seek out other practitioners, but this is not an indulgence any of us should allow ourselves. No doubt everyone needs to make a dollar and keep their customers satisfied. Nevertheless, as practitioners we all know that we are not mere agents of our clients, but above all officers of the court, and therefore have an obligation periodically to stuff wax in our ears and sail past the sirens.

And in no other area of legal practice is the imperative to conduct ourselves according to the highest ethical standards more pressing than in matters involving children.

The Court itself must, according to s 60CA of the FLA,

[i]n deciding whether to make a particular parenting order in relation to a child... regard the best interests of the child as the paramount consideration.

To me, this gives us the clearest possible guidance to the appropriate stance to adopt in the conduct of matters involving children: we all owe a duty as officers of the court to ensure that our management of these matters supports the court in its ambitious endeavour of giving effect to the paramountcy principle, even if this brings us into conflict with the aspirations of our clients. Note I speak of a conflict with clients' aspirations, not with clients themselves. Our role is educative as much as anything else, and by assisting our clients to focus on the best interests of their children as seen through the twin lenses of law and social science, parents can potentially shift their gaze and outcomes can be improved for children.

The practice of family law, and in particular the management of parenting disputes, makes special demands on lawyers, and navigating these waters requires a level of maturity, wisdom, compassion and emotional resilience that can be extremely taxing to those of us who value simplicity in life. Nevertheless, the consequences for children of poor parenting arrangements are so great, that

if we are not prepared to refine our skills and knowledge base to a very high degree, we ought not to be practising in this area.

Thinking the matter through: what really needs to happen in this matter to foster the best interests of the child?

Since we are speaking about parenting orders, it is important to be clear about what is and what isn't covered in a parenting order. According to s 64B(2):

A parenting order may deal with one or more of the following:

- (a) the person or persons with whom a child is to live;
- (b) the time a child is to spend with another person or other persons;
- (c) the allocation of parental responsibility for a child;
- (d) if 2 or more persons are to share parental responsibility for a child—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
- (e) the communication a child is to have with another person or other persons;
- (f) maintenance of a child;
- (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
 - (i) a child to whom the order relates; or
 - (ii) the parties to the proceedings in which the order is made;
- (h) the process to be used for resolving disputes about the terms or operation of the order;
- (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

Note: Paragraph (f)—a parenting order cannot deal with the maintenance of a child if the Child Support (Assessment) Act 1989 applies.

Clearly, leaving aside child support, there is a broad range of orders to choose from. Not every issue is necessary to address in every matter. The best place to start is with the problems that clients are presenting with. Map those issues out and, with the client, decide what solutions you both think might work practically for the child. It is very important to keep an overall view of the child's current life and his or her trajectory

through time. The remainder of this paper invites you to consider a number of issues that will hopefully assist you in working with your clients to evolve practical, child-focused strategies.

Significant concepts

Engaging with the social science literature

Children and adults differ significantly. At its simplest, this may be expressed in terms of children being smaller and more dependent, whereas adults are larger and more independent. But there are far more critical differences that we need to be aware of. Most significantly, children are on a developmental trajectory that has largely come to an end for adults. The fact that at different ages children and young people are at different stages of development, means that at different ages the needs of children will differ, and it is reasonable to expect that constructive parenting-after-separation arrangements will match the developmental needs of the children to which they relate. It is therefore important that as lawyers we have some familiarity with the body of literature that has been generated in the social sciences around child and adolescent development in the context of family breakdown. A good place to start is a paper by Dr Jen McIntosh entitled *Children's responses to divorce and parental conflict: A guide for Family Lawyers*, which can be downloaded at <http://www.flerproject.org/doc/000033-Model Discussion Guide Family Lawyers.doc>. This paper contains a number of useful further references.

A word of caution: you would no more expect to become a developmental psychologist from reading one introductory textbook or a few articles than you would expect to become a competent lawyer from reading a couple of cases. The debates that go on in the social sciences are vigorous and often subtle, so it is very important to seek the assistance of appropriately qualified social science professionals on significant issues. This is particularly important given that children at the same developmental stage will differ from each other depending on factors such as their family context, their history of care, and their inherent individuality. One size definitely does not fit all where children are concerned, and we must be alive to potential problems and be prepared to seek the assistance of appropriately qualified professionals if there is any doubt about the effect

an arrangement might have on children. The Court itself is regularly informed by report writers, Part 15 experts and treating health professionals. The conduct of successful parenting matters, particularly where there are challenging issues, is therefore a collaborative effort not just between judicial officers and lawyers, but across professions.

Attachment

One concept that we all need to be aware of is *attachment*. This is of enormous significance in the first 4 to 5 years of life, and since disturbed or insecure attachment has been correlated with poor social and cognitive outcomes, we need to be alive to the possibility that an arrangement, even one that both parents agree with, may not be in a young child's best interests.

Here's one description of the attachment system²:

This system, which at the most concrete level functions to keep the immature young in proximity to care-givers, is believed to have evolved to provide protection from harm of many sorts, including illness, predators, and aggression from others. The analogy of a thermostat is frequently invoked to explain how the attachment system functions. Changes in ambient temperature relative to the setting of a thermostat turn on the furnace until the temperature setting is reached. Analogously, the child's experience of fatigue, illness, anything threatening or frightening, and most especially, separation from the attachment figure results in strenuous efforts to approach the attachment figure or to bring him or her close. *Chronic frustration of this cycle inevitably leads to feelings of anxiety and distress and over time can cause the child to develop both adaptive and maladaptive internal defenses and behavior, which are often described as differences in the security of attachment relationships.* [emphasis added]

An important thing to note is that attachment is not the same as bonding or love. One can be bonded to a child and vice versa, without being an attachment figure for that child. Attachment is a biological need of a child and must be distinguished from less fixed, though nevertheless important, emotional needs of small children.

² Judith Solomon and Zeynep Biringen, 'Another Look at the Developmental Research' (2001) 39(4) *Family Court Review* 355.

The controversy that rages in the social science literature relates to (among other things):

- the possibility of there being more than one attachment figure;
- the effect of more regular, shorter periods of contact, as opposed to longer, less frequent periods of contact with a non residential parent;
- the effect of high conflict;
- age effects;
- gender effects.

One of the few things that is clear in this debate, is that it is difficult to make generalisations. Nevertheless, there do appear to be a number of issues that we need to be on the lookout for and, if they arise, be prepared to think creatively or seek further assistance from an appropriately qualified professional. These are:

- the age of the child: the younger, the more caution should be exercised;
- signs of separation distress in the child (bear in mind here that children often display more distress when they are *returned* to an attachment figure after separation, rather than *during* the period of separation itself);
- the level of involvement each parent has had in the care of the child from a very early age: if a non-live with parent has been highly involved there may be less of a problem with, say, overnight time with a very young child than there would be with a less involved parent; similarly, it may be very important to maintain that relationship by providing for more frequent, shorter periods of time to be spent;
- the existence of violence or high levels of conflict;
- the existence of a pattern of substantially shared care since separation;
- the existence of other people such as half- or step-siblings and grandparents who have had significant involvement with the child from an early age;

- the physical proximity of the two parents' homes.

No matter what the relationship is like between the contact parent³ and the child, understand that *time with* that parent equates to *time away* from the other parent. Much of the heat in the attachment debate as it applies to separated families is centred on the effect on young children of this unavoidable compromise. In acting for parents, particularly fathers who are seeking greater time with very young children, it is important to provide some reassurance that attachment issues are not the same as love, and that if this stage of a child's life can be managed well so that the child is able to build on a foundation of secure attachment, the chances that that child will have the capacity to relate well socially (including with their parents) are greatly increased.

Family violence

The effect of conflict and violence on children is broad, deep and inevitably destructive. Accordingly, over the years social scientists, the Family Law Act, the courts and lawyers have become increasingly focussed on identifying the types of violence that occur in families, the effect on children of that violence, and strategies for protecting children.

In dealing with family violence, it is important to have regard to the different types of violence and the diversity of the players involved, as very different strategies may be called upon depending on what type of violence is presenting. The significant types of violence that we see in families can be categorised as follows (the extracts below are all from an important 2008 American article by Joan Kelly and Michael Johnson⁴, although the references have been removed):

Coercive controlling violence:

This form of 'intimate partner violence' is marked by

'intimidation; emotional abuse; isolation; minimizing, denying, and blaming; use of children; asserting male privilege; economic abuse; and coercion and threats... Because these nonviolent control tactics may be effective without the use of violence (especially if there has been a

³ This is less cumbersome to write, though also less correct, than 'the parent with whom the child is not living', or the 'spending time parent'.

⁴ Joan B. Kelly and Michael P. Johnson, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46(3) *Family Court Review* 476.

history of violence in the past), Coercive Controlling Violence does not necessarily manifest itself in high levels of violence. ... Coercive Controlling Violence is the type of intimate partner violence encountered most frequently in agency settings, such as law enforcement, the courts (criminal, civil, and family), shelters, and hospitals. Johnson, using Frieze's Pittsburgh data, found that 68% of women who filed for Protection from Abuse orders and 79% of women who contacted shelters were experiencing Coercive Controlling Violence. ... Although Coercive Controlling Violence does not always involve frequent and/or severe violence, on average its violence is more frequent and severe than other types of intimate partner violence.'

Violent resistance:

'The research on intimate partner violence has clearly indicated that many women resist Coercive Controlling Violence with violence of their own. ... Much of women's Violent Resistance does not lead to encounters with law enforcement because it is so short-lived. For many violent resisters, the resort to self-protective violence may be almost automatic and surfaces almost as soon as the coercively controlling and violent partner begins to use physical violence himself. But in heterosexual relationships, most women find out quickly that responding with violence is ineffective and may even make matters worse. ... The Violent Resistance that gets the most media attention is that of women who murder their abusive partners. The U.S. Department of Justice reports that, in 2004, 385 women murdered their intimate partners Although some of these murders may have involved Situational Couple Violence that escalated to a homicide, most are committed by women who feel trapped in a relationship with a coercively controlling and violent partner.'

Situational couple violence:

'Situational Couple Violence is the most common type of physical aggression in the general population of married spouses and cohabiting partners, and is perpetrated by both men and women. It is not a more minor version of Coercive Controlling Violence; rather, it is a different type of intimate partner violence with different causes and consequences. Situational Couple Violence is not embedded in a relationship-wide pattern of power, coercion, and control.... Generally, Situational Couple Violence results from situations or arguments between partners that escalate on occasion into physical violence. One

or both partners appear to have poor ability to manage their conflicts and/or poor control of anger Most often, Situational Couple Violence has a lower per-couple frequency of occurrence ... and more often involves minor forms of violence (pushing, shoving, grabbing, etc.) when compared to Coercive Controlling Violence. Fear of the partner is not characteristic of women or men in Situational Couple Violence, whether perpetrator, mutual combatant, or victim. Unlike the misogynistic attitudes toward women characteristic of men who use Coercive Controlling Violence, men who are involved in Situational Couple Violence do not differ from nonviolent men on measures of misogyny.'

Separation instigated violence:

'Of special relevance to those working with separating and divorcing families is violence instigated by the separation where there was no prior history of violence in the intimate partner relationship or in other settings Seen symmetrically in both men and women, these are unexpected and uncharacteristic acts of violence perpetrated by a partner with a history of civilized and contained behavior. Therefore, this is not Coercive Controlling Violence as neither partner reported being intimidated, fearful, or controlled by the other during the marriage. Separation-Instigated Violence is triggered by experiences such as a traumatic separation (e.g., the home emptied and the children taken when the parent is at work), public humiliation of a prominent professional or political figure by a process server, allegations of child or sexual abuse, or the discovery of a lover in the partner's bed. The violence represents an atypical and serious loss of psychological control (sometimes described as "just going nuts"), is typically limited to one or two episodes at the beginning of or during the separation period, and ranges from mild to more severe forms of violence. ...Separation-Instigated Violence is more likely to be perpetrated by the partner who is being left and is shocked by the divorce action. Incidents include sudden lashing out, throwing objects at the partner, destroying property (cherished pictures/heirlooms, throwing clothes into the street), brandishing a weapon, and sideswiping or ramming the partner's car or that of his/her lover. Separation-Instigated Violence is unlikely to occur again and protection orders result in compliance.

Gender

It is regrettable that gender politics has played such a significant role in confusing the debate around family violence. Nevertheless, the picture

does seem to be clearing somewhat, and Joan Kelly and Michael Johnson in the article just cited conclude from an exhaustive examination of the available research that situational couple violence and separation instigated violence are as likely to be perpetrated by men as by women. The major gender difference appears in relation to coercive controlling violence, which appears to be predominantly perpetrated by males. Since violent resistance appears to be a reaction specifically to coercive controlling violence, it appears to be perpetrated more by females.

Unacceptable risk: the balance of safety *versus* the meaningful relationship

The leading case remains the High Court decision in *M & M*⁵. It was in that case that the High Court approved the test of unacceptable risk in evaluating matters where there have been serious allegations of abuse. While *M & M* was concerned with allegations of sexual abuse, the principles laid down by the High Court have equal application to other forms of abuse, including family violence. It is important to understand that in asserting that judicial officers must evaluate whether a particular arrangement poses an unacceptable risk of abuse, the High Court was not suggesting that there is somehow an *acceptable* risk of abuse. As former Family Court Justice John Fogarty pointed out some years ago in an uncompromising article dealing with this issue, a risk of sexual abuse to a child from a particular person may well be deemed unacceptable if it is only marginally greater than the risk posed by any other member of the community.

The essential point to grasp here is that the court is charged with a very delicate balancing of rival considerations, and that the outcome of that exercise can potentially lead to a loss of relationship with significant people in a child's life, or on the other hand expose a child to abuse. It is vitally important therefore that in cases where allegations of serious abuse or neglect become an issue, practitioners fully, and with the gravest self-responsibility, support the court in its challenging endeavour to make orders in children's best interests, rather than being seduced into fighting a tendentious forensic war between parents that may well dangerously obscure the landscape. As the High Court noted in *M & M*:

⁵ (1988) 12 Fam LR 606.

The Family Court's wide-ranging discretion to decide what is in the child's best interests cannot be qualified by requiring the court to try the case as if it were no more than a contest between the parents to be decided solely by reference to the acceptance or rejection of the allegation of sexual abuse on the balance of probabilities⁶.

While the Court was here directly concerned with dispensing with the need to make a finding of sexual abuse, the above comments focus our minds on the need to assess children's best interests overall, rather than limiting the exercise to an investigation (on the *Briginshaw* standard or otherwise) of the likelihood of a particular event having taken place. Significantly, in *M & M* itself, the two appeals which were the subject of the judgment of the High Court were from decisions of judges who, though not satisfied that abuse had taken place as alleged, were nonetheless concerned that an unacceptable risk of abuse existed and made orders accordingly.

Live with *versus* spend time with

Since 1975 we have seen significant changes to the legislative language employed to express the structure of parent-child relationships. We have moved from 'custody' and 'access', through 'residence' and 'contact', now to the grammatically awkward expressions 'live with' and 'spend time with'.

Why?

Predominantly, this linguistic shift expresses the legislature's intent to work against the strongly proprietorial nature of disputes between parents, and in this regard is consistent with the International Convention on the Rights of the Child. The hope is that by describing the living arrangements from the child's perspective, rather than from the parents' perspective, parents may be encouraged to behave like grown-ups. Put simply, 'custody', 'access', 'residence' and 'contact' are very easily seen as *rights that parents have*, whereas 'living with' and 'spending time with' are more easily seen as *things that children do*. Of course, all of this is nothing but semantics if those of us working in the system don't recognise and support the legislative program by drawing parents' focus away from themselves and on to their children.

⁶ Ibid at 611.

Parental responsibility

'Parental responsibility' is defined in s 61B in the following terms:

In this Part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

S 61C(1) provides as follows:

- (1) Each of the parents of a child who is not 18 has parental responsibility for the child.

Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

The note to this subsection is a prompt that, in the context of the Family Law Act as currently drafted, there is a critical difference between parental responsibility as it applies in the absence of orders, and as it applies once a parenting order has been made. According to the Full Court, in the absence of parenting orders, the position is as follows:

we think it unlikely that the Parliament intended that separated parents could only exercise all or any of their powers or discharge all or any of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day to day matters, and the impracticability of such a requirement when they are living separately only has to be stated to be appreciated.

As a matter of practical necessity either the resident parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children. On the other hand, consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like.⁷

Once a parenting order is to be made however, the situation is very different:

We therefore consider it clear that there is a difference between parental responsibility which exists as a result of s 61C and an order for shared parental responsibility, which has the effect set out in s 65DAC. In the former, the parties may still be together or may be separated. There will

⁷ *B v B: Family Law Reform Act 1995* (1997) FLC ¶92-755 at paragraphs 9.29 and following.

be no court order in effect and the parties will exercise the responsibility either independently or jointly. Once the Court has made an order allocating parental responsibility between two or more people, including an order for equal shared parental responsibility, the major decisions for the long-term care and welfare of children must be made jointly, unless the Court otherwise provides.⁸

We will deal with the allocation of parental responsibility below.

Are orders appropriate in this matter?

The social science literature seems to tell us that the most successful post-separation parenting arrangements (from the child's perspective, that is) are flexible, cooperative, and marked by low levels of conflict. Given this, the inevitable question that arises is, are orders always a good idea? Parenting orders are generally highly prescriptive, and their breach potentially carries quasi-criminal consequences, a fact that in itself can exert a powerful attraction for the chronically wronged. By the same token, there can be little doubt that having structure and clarity is a useful way of reducing the potential for conflict.

So the first question we must ask ourselves in any case is, is there a way of achieving certainty and clarity, while maintaining flexibility and keeping conflict to a minimum? Most separated families are actually able eventually⁹ to achieve this happy medium by simply reducing their parenting arrangements to writing (which may be no more than an email) and proceeding with a degree of goodwill and some respect for the other party's relationship with the child. Lawyers can assist this process by working with parents to think through potential problems, such as how to manage holidays, illness, unexpected events and so on, and then, in suitable cases, encouraging clients to see if they can make a clear written arrangement work without orders.

The temptation is always to take the next step and file the parenting plan in the form of consent orders. However, once orders are in place, even cooperative parents sometimes feel that they can't vary an arrangement for fear that this will affect the orders (and a subsequent written parenting plan does, in fact, supersede orders¹⁰). And in the case of higher conflict or otherwise immature parties (regardless of their age), orders can operate as a trigger for contravention applications even in respect of trivial breaches. So this step to enforceability is not one to take lightly and without great thought directed to the particular needs of the children and their parents.

⁸ *Goode & Goode* [2006] FamCA 1346 at para 39.

⁹ This word is used advisedly.

¹⁰ S 65D(1).

Of course in many cases it is self-evident that orders are necessary, including cases of abuse (including family violence), of high conflict, of sustained withheld time, of abduction, and where there are real concerns a child might be taken out of the jurisdiction. And of course if one party has already commenced proceedings, the prospect of leaving court without parenting orders is remote.

In summary, orders are strong remedies that can in some cases work wonders, and in others simply increase future conflict.

Orders carry obligations: they require someone to do something or to refrain from doing something

In drafting orders it is vital to remember that their purpose is to trigger the coercive powers of the Court. General statements of intent and explanation may have some utility as notations, but on the whole notations should be used sparingly (remember what the road to hell is paved with). Orders themselves ought to be directed at a specific person, and they ought to clearly tell that person what they are to do (or refrain from doing) and when they are to do it. If it is workable to specify the consequences of breach (such as failure to provide a urine sample will lead to a suspension of time until such time... and so on), then they might also be addressed, provided those consequences are not disproportionate to the breach *from the child's perspective*. In this regard, remember that the suspension of time not only punishes the defaulting parent, but also has consequences for the child who loses time with their mum or dad.

Who is being asked to do what (are the orders sought directed to a party?)

As a related matter to the preceding paragraph, if the relevant someone being asked to do the necessary something according to your orders is not a party to the proceedings, you will no doubt attract the raised eyebrows, if not the ire, of the relevant judicial officer. This is a common problem when draft orders seek to impose some obligation on a grandparent or other extended family member, particularly in relation to supervision arrangements or obligations for pick-up and drop-off. Without joining grandma to the proceedings, the most your orders can do is require one of the parties to do all things necessary to ensure that she does or refrains from doing the necessary something. In the case of supervision, written undertakings can, of course, be given to the Court.

Are all necessary parties joined?

Flowing on from the previous point, it is sometimes easy to forget that an entire extended family bloc is not necessarily best dealt with as an undifferentiated extension

of one or other of the parties. Just because, say, a father will let his parents see the kids if and when he gets his orders, doesn't mean that it might not be in the children's best interests for a grandparent to separately join as a party, particularly if there are problems with the father's application, such as allegations of abuse or violence.

Do the orders need to deal with the allocation of parental responsibility?

S 61DA provides as follows:

- (1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

- (2) The presumption ***does not apply*** if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
 - (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
 - (b) family violence.
- (3) When the court is making an interim order, the presumption applies unless the court considers that ***it would not be appropriate in the circumstances for the presumption to be applied*** when making that order.
- (4) The presumption ***may be rebutted*** by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

I have added emphasis in three places in the above extract to highlight the fact that there are three distinct circumstances that affect the presumption. In summary, the presumption *does not apply* in the following circumstances:

1. if there are reasonable grounds to believe that a parent or person who lives with them has engaged in abuse or family violence;
2. in the case of interim orders, if the court considers it would not be appropriate.

The presumption applies, *but is rebutted*, by evidence that equal shared parental responsibility would not be in the child's best interests.

We know from the Full Court's decision in *Goode & Goode*¹¹ that the court must turn its mind to this issue and cannot simply make a parenting order, even on an interim basis, without either applying the presumption or dealing with the other parts of the section. While the court can decide it is not appropriate to apply the presumption in interim proceedings (61DA(3)) there must be some reason for this, which can be as simple as that it is not possible to determine rival factual accounts on an interim basis, as Collier J did in *Goode & Goode* at first instance (an approach that was approved of by the Full Court). Some judicial officers take this obligation very seriously and will not make consent orders that do not allocate parental responsibility without hearing extensive argument on the issue; others will take the somewhat pragmatic approach that if parties are at loggerheads on parental responsibility but agree on an interim basis to some time arrangement, that is enough to satisfy them that it is not appropriate to apply the presumption.

Even if the presumption does not apply, the court is nevertheless charged with making the order that is in the best interests of the child, and this in itself can lead to an order for equal shared parental responsibility, as the following extract from Le Poer Trench J's judgment in *Blair & Blair* [2007] FamCA 253 at paras 113 to 116 demonstrates:

Section 61DA requires the Court when making a parenting order to apply a presumption that it is in the best interest of the child for the child's parents to have equal shared parental responsibility for the child.

Section 61DA(2) provides that the presumption does not apply where there are reasonable grounds to believe that a parent has engaged in family violence. There is such a ground in this case.

Notwithstanding that the presumption does not apply it is still open to the Court, as I see it, to make an order for equal shared parental responsibility.

In this case each of the parties has submitted that it is appropriate to make an order for equal shared parental responsibility. I agree with that submission. The parties since the commencement of 2006 appear to have been able to communicate appropriately with each other about the children. They have also been able to attend public functions together for the benefit of their children. Apart from my finding of violence by the father towards the mother it seems to me the parties now have a proper relationship from which to jointly be responsible for their children's future.

¹¹ [2006] FamCA 1346.

Appointment of Part 15 expert: what questions are asked (don't just mirror s 60CC(3))

Orders appointing a Part 15 single expert will typically identify the areas the court would like an opinion on. An expert is venturing an opinion, not generally determining the facts that lead to the formation of that opinion; this is the court's job. Accordingly, it is important to think through the questions that the expert is to be asked to address, and ensure that the expert actually has the expertise to provide a useful opinion. Social workers, psychologists and psychiatrists are very different professions, and so a question relating to the mental health of a party might be appropriate to put to a psychiatrist, but will probably be beyond the expertise of a social worker.

The questions put to experts are typically selected from the matters set out in s60CC(3) (which you will recall are the 'other matters' to be taken into account in determining what is in a child's best interests). Few of them are relevant in every matter, so avoid simply cutting and pasting from the section into draft orders. Additionally, consider any issues which are very specific to your matter and consider seeking a more direct opinion on those issues.

In addition, it should be noted that there are a few issues identified in the subparagraphs of 65DAA(5) which can be very useful to obtain an opinion on, suitably adjusted to the time arrangements being entertained. These include:

...

- (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- (d) the impact that an arrangement of that kind would have on the child...

If in doubt and without a reliable precedent, look for a relevant judgement, (preferably approved by the Full Court) for sample orders

There is incalculable gold to be had in orders set out in the reported judgments. Of course, judgments are sometimes set aside, so it is useful to work back from Full Court decisions dealing with the issue at hand. Another word of caution: Orders are not magic spells. If you are using any document as a precedent (whether a reported judgment or

otherwise) make sure you actually understand everything that is being done and why. You're better off building up an order from scratch than using a ready made, but inappropriate, precedent.

Specific types of order

There are several kinds of order which are directed to, or relate to, third parties, and which should follow a format that has been agreed upon with the relevant agencies. Two of the most commonly encountered types are as follows:

Orders relating to contact centres

The publication *A guideline for Family Law Courts and Children's Contact Services* describes itself as a 'guideline to enhance the relationship between the Family Law Courts and Children's Contact Services and to facilitate the appropriate use of Children's Contact Services by the Family Law Courts' and is the product of a collaboration between the following organisations:

- Children's Contact Services
- The Family Court of Australia
- The Federal Magistrates Court
- Legal Aid Commissions
- The NSW Local Court
- The Law Council of Australia – Family Law Section
- Australian Government Attorney-General's Department

Schedule 2 of the Guide contains the preferred form of orders relating to the use of contact centres. The Guide can be downloaded from the following website:

<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/Children+Contact+Services+hp>.

Airport Watch List

The Australian Federal Police have published a Family Law Guide on their website that specifies their preferred form of order for including a child on the Airport Watch List. See: <http://www.afp.gov.au/policing/family-law/family-law-kit#PuttingChildsNameOnList>.

The preferred order is as follows:

"That until further Order each party, (first name, second name, surname and date of birth of each party) their servants and/or agents be and are hereby restrained from removing or attempting to remove or causing or permitting the removal of the said child/children (first name, second name, surname and date of birth of each party) from the Commonwealth of Australia AND IT IS REQUESTED that the Australian Federal Police give effect to this order by placing the name/names of the said child/children on the Airport Watch List in force at all points of arrival and departure in the Commonwealth of Australia and maintain the child's/children's name/names on the Watch List until the Court orders its removal".

Be prepared to amend the orders sought in your client's Application or Response as the case unfolds

This is particularly important once family or Part 15 experts' reports are released. While it is true that the Court is not involved in trial by expert, it is nonetheless vital that once we receive these important documents we pause to evaluate the arrangements we are proposing for future parenting. If a Part 15 report recommends supervision of a party's time with a child, proposed orders seeking equal time with that party may not be realistic.

Appendix 1: An example of thoughtful parenting orders in a complex matter

Following are the orders made by Murphy J in *Harridge & Harridge* [2010] FamCA 445 in June 2010. The case was complex, and involved not only evidence of a conviction for the use of child pornography on the part of the father, but also evidence of inadequate supervision of time with the father by the paternal grandparents. Nevertheless, His Honour was satisfied on the evidence of the value of these relationships, and sought to manage the otherwise potentially terminal child protection issues (from the perspective of a relationship between the children and these significant people) using the little-employed method of supervision under s65L. This section provides as follows:

65L Family consultants may be required to supervise or assist compliance with parenting orders

- (1) If a court makes a parenting order in relation to a child, the court may also, subject to subsection (2), make either or both of the following orders:
 - (a) an order requiring compliance with the parenting order, as far as practicable, to be supervised by a family consultant;
 - (b) an order requiring a family consultant to give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the parenting order.
- (2) In deciding whether to make a particular order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Note: Sections 60CB to 60CG deal with how a court determines a child's best interests.

The orders His Honour made follow.

Orders

Parental Responsibility

1. IT IS DECLARED THAT the presumption of equal shared parental responsibility prescribed by the *Family Law Act 1975* ("the Act") is rebutted in the best interests of the children A born ... May 2004 and N born ... October, 2005.
2. In respect of all "major long-term issues" as that expression is defined in the Act the mother shall, save as is hereafter specifically ordered, have all the duties, powers,

responsibilities and authority which the mother and father would, save for this order, otherwise have had by law in relation to the children.

Live With

3. The children shall live with their mother.

Section 65L Order

4. Pursuant to s 65L of the Act, the Director Child Dispute services shall appoint a family consultant to supervise compliance with these parenting orders within the meaning of the said section, and to thereby give assistance to the father and paternal grandparents as to compliance with, and the carrying out of, these parenting orders and their obligations pursuant to these orders.
5. Without limiting the generality of this s 65L Order (or the occasions upon which the family consultant might choose to see the children or any or all of the parties), the family consultant appointed pursuant to the previous paragraph of this order shall:
 - (a) As soon as reasonably practicable after the making of these Orders, and prior to the first period of time provided for in these Orders, see the children in the presence of the parties (in such manner as the family consultant shall consider appropriate) for the purpose of explaining the terms of these orders to the children in an age-appropriate way and for the purpose of explaining the obligations cast upon the parties by these orders, and their rationale, as explained in the court's Reasons for Judgment;
 - (b) After the first two periods of time between the children and as proximate to the third occasion as reasonably practicable (being the first occasion upon which the father shall spend time with the children) to again see the children in the presence of the parties (in such manner as the family consultant shall consider appropriate) in preparation for their first period of time with the father and to reinforce the obligations cast upon the parties by these orders.
 - (c) After the period of time in January contemplated by the succeeding paragraph of these orders, to again see the children in the presence of the parties (in such manner as the family consultant shall consider appropriate) for the purposes of assessing the children's progress and the supervision of time by the grandparents.
 - (d) Make and record observations of all matters considered relevant during each and all of such sessions conducted by the family consultant;

- (e) Consult with the Independent Children's Lawyer as considered appropriate;
- (f) Consult with the father's community corrections officer or such psychiatrist, psychologist, therapist or counsellor consulted by the father.

Time With the Father and Paternal Grandparents

- 6. The father shall not spend time with, nor communicate with, the children except in accordance with the succeeding provisions of these orders.
- 7. The paternal grandparents shall not spend time with, nor communicate with, the children save in accordance with the succeeding provisions of these orders.
- 8. Subject to the parties and children participating in the process contemplated by paragraph 5 of these orders, the children shall spend face to face time with the paternal grandparents from 9.00am to 5.00pm on a Saturday (or, in school holiday periods, another day of the week agreed in writing) nominated in writing by the mother not less than 21 days prior to its occurrence:
 - (a) In approximately late February, so as to be an approximate mid-point between the December / January and Easter school holiday periods;
 - (b) In the Easter school holiday period;
 - (c) In approximately late May so as to be an approximate mid-point between the Easter and June / July school holidays periods;
 - (d) Except in 2010, in the June / July school holiday period;
 - (e) In approximately mid-August, so as to be an approximate mid-point between the June/July and September / October school holidays;
 - (f) In the September / October school holidays;
 - (g) In approximately early November, so as to be an approximate mid-point between the September / October and December / January school holidays;
 - (h) In the first week of the December / January school holidays;
 - (i) In the last week of the December / January school holidays
- 7. Subject to the parties and children participating in the process contemplated by paragraph 5 of these orders the children shall in addition, spend face to face time with the paternal grandparents from 3.00pm until 6.00pm on Christmas Day in 2010 and between those hours each alternate year thereafter and from 9.00am to 12.00pm on Christmas Day in 2011 and between those hours each alternate year thereafter.

8. Subject to the parties and children participating in the process contemplated by paragraph 5 of these orders, the children shall spend face to face time with the father on the third and subsequent occasions provided for in paragraph 6 of these orders, and the occasions specified in paragraph 7 of these orders, with the whole of each and all such periods of time to be supervised by the paternal grandparents, who shall both be present for the whole of each and all such periods of time.

Communication

9. The father and grandparents shall be at liberty to send to the children by pre-paid post all such letters and cards as they might choose, provided that each and all are sent to the mother at the mother and children's residence and the mother who shall be at liberty to read any and all such communications.
10. The father shall be at liberty to communicate by telephone with the children between 6.30 pm and 7.00pm each Wednesday (or such other day as might be agreed), but subsequent to the s65L consultation contemplated by paragraph 5(a) of these orders.
11. The paternal grandparents shall be at liberty to communicate by telephone with the children between 6.30pm and 7.00pm each third Wednesday subsequent to the s65L consultation contemplated by paragraph 5(a) of these orders.
12. Neither the father nor grandparents shall communicate with the children by e-mail, facebook® or other form of computer communication, or by text message.

Mandatory Injunctions

13. Pursuant to s 68B of the Act and so as to give better effect to the parenting orders hereby made, each of the parties shall do all such things, sign all such documents and pay all such reasonable fees as might be required to:
 - (a) Participate in the s 65L process contemplated by paragraph 5 of these orders;
 - (b) Provide to the Independent Children's Lawyer, the name and other identifying details of any and all courses undertaken by any of them having as their focus sexual offending involving children (including offences involving child pornography) or which seek to provide an understanding of the nature of such offending;
 - (c) Authorise the family consultant undertaking the process required by paragraph 5 of these orders and/or the Independent Children's Lawyer to discuss with, and receive information from, any psychiatrist, psychologist, counsellor or therapist consulted by any of the parties with reference to sexual offending involving

children (including offences involving child pornography) or which seek to provide an understanding of the nature of such offending.

14. Pursuant to s 68B of the Act and so as to give better effect to the parenting orders hereby made, the father shall do all such things, sign all such documents and pay all such reasonable fees as might be required to authorise and request the community corrections officer monitoring his probation (or parole as the case may be) to provide to the family consultant undertaking the process required by paragraph 5 of these orders and/or the Independent Children's Lawyer details of all courses, treatment or counselling required of the father as a condition of his parole.
15. The mother shall keep each of the father and the paternal grandparents apprised of:
 - (a) The children's residential address;
 - (b) A telephone number upon which paragraphs 10 and 11 of these orders can be facilitated;
 - (c) The name of any child care centre, kindergarten or school as the case may be at which the children or either of them is enrolled
16. The mother shall authorise any child care centre, kindergarten or school as the case may be to provide to the father all such information as to the progress of the children as the father might reasonably request and, failing the provision of any such specific authority by the mother, this order shall, of itself, be authority for the father to receive all such information.
17. That, at the earliest possible time or within 4 hours, each party shall inform the other party of:
 - a) Any serious accident or the diagnosis of any significant medical condition suffered by either child;
 - b) Surgery or the potential for same; hospitalisation or treatment for any serious injury, illness or disability pertaining to either child.

Authorisation of Publication

18. Pursuant to s 121(9)(g) of the Act an account of the proceedings in this case, namely these orders and the court's Reasons for Judgment accompanying same be authorised for publication, via the Independent Children's Lawyer, to:
 - (a) The community corrections officer responsible for the father's probation (or parole as the case may be) or his or her duly authorised delegate;

- (b) Any appropriately qualified person conducting any course or engaging in any treatment of, or consultation with, the father as a requirement of his parole;
- (c) Any psychiatrist, psychologist, counsellor or therapist consulted by any of the parties with reference to sexual offending involving children (including offences involving child pornography) or which seek to provide an understanding of the nature of such offending.

The Independent Children's Lawyer

19. The Independent Children's Lawyer be discharged 12 months from the date of these orders.

Liberty to Apply

20. The Independent Children's Lawyer have liberty to relist this matter on the giving of 5 days notice in writing and, if reasonably practicable, any such further application be heard by Murphy J.

IT IS NOTED that publication of this judgment under the pseudonym *Harridge & Harridge* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth)