



**Murdoch**  
UNIVERSITY

**MURDOCH RESEARCH REPOSITORY**

<http://researchrepository.murdoch.edu.au>

**Young, L. (1996) Parenting disputes under the Family Law Act 1975: The new regime. *Sister in Law*, 1 .  
pp. 93-103.**

<http://researchrepository.murdoch.edu.au/21796>

## PARENTING DISPUTES UNDER THE FAMILY LAW ACT 1975: THE NEW REGIME

LISA YOUNG

*Lisa Young is a lecturer in the School of Law at Murdoch University. She teaches in the areas of family law, child law and torts. Lisa's family law research interests centre around women and children. Her current projects include child sexual abuse allegations, access to information in the Family Court and mobility of residential parents.*

---

On 11 June 1996 the *Family Law Reform Act 1995* (Cth) ("the Reform Act") came into effect, bringing with it dramatic changes to the resolution of parenting disputes under the *Family Law Act 1975* ("the Act"). The Reform Act essentially reworks Part VII of the Act, which deals exclusively with children. While changes have also been made in the areas of family violence (the new terminology for domestic violence)<sup>1</sup> and primary dispute resolution (the phrase adopted in place of alternative dispute resolution),<sup>2</sup> it is the abolition of the guardianship/custody/access regime and the introduction of parenting plans that form the centrepiece of the new regime. This comment outlines briefly those aspects of Part VII and looks at how women might be affected by these changes.

---

<sup>1</sup> In particular, see Division 11 of Part VII.

<sup>2</sup> While this is dealt with in Part III of the Act, it clearly has significant implications for matters arising under Part VII.

### THE OBJECT OF THE EXERCISE

To understand this new regime, one must start by considering the objects section inserted at the commencement of Part VII. Section 60B(1) states that the

“object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.”<sup>3</sup>

The principles underlying these objects are also made explicit, namely, that

- children have a right to know, and be cared for, by both parents,
- children have a right to regular contact with both parents and with other significant people
- parents share their duties and responsibilities towards their children, and
- parents should agree on the future parenting of their children<sup>4</sup>

In framing this section, the drafters have drawn heavily on certain articles in the United Nations’ Convention on the Rights of the Child (“the Convention”).<sup>5</sup> In fact, the Convention was specifically referred to in an early draft of the Reform Act.

Despite the Act being silent on the question, it has been suggested that all other sections in Part VII must be read subject to s60B.<sup>6</sup> There are, however, compelling arguments against this interpretation. For example, the legislative

---

<sup>3</sup> s 60B(1). All sections referred to are from the *Family Law Act* unless specified otherwise.

<sup>4</sup> s 60B(2).

<sup>5</sup> In particular, see Articles 7.1 and 9.3.

<sup>6</sup> Family Law Council, *National Seminar Series on the Family Law Reform Act Handbook*, March 1996 at 26.

failure to make s60B a mandatory consideration is in stark contrast to the approach taken to, say, s68T.<sup>7</sup> It is also hard to see how the best interests principle<sup>8</sup> can be subject to the new objects section.<sup>9</sup> The 'underlying principles' (which really provide the meat on the bones of s 60B) are expressly made subject to the child's best interests. Moreover, s65E states the general principle that the child's best interests are the *paramount*<sup>10</sup> consideration in the making of any parenting order. Thus, in the exceptional instances where this is *not* to be the case, that is where s65E does not apply, this has been made explicit.<sup>11</sup>

To some extent this new objects section really makes patent principles that were already being applied by the Family Court in determining what was in a child's best interests. For example, the notion that contact with both parents is a right of the child (not the parent), and that such contact should be promoted, is well established in the caselaw.<sup>12</sup> Judicial recognition of the important role that the wider family can play in a child's upbringing has also been a feature of recent cases, particularly in relation to grandparents.<sup>13</sup> In a more general sense, however, the objects section will no doubt provide a useful tool for legislative interpretation and will promote the already emerging trend towards the protection of children's rights in the Family Court. Whether it will form the basis for any revolution is less certain.

---

<sup>7</sup> This section makes it mandatory to consider the stated purposes of Division 11 when making an order under s 68T.

<sup>8</sup> This is the principle that the paramount consideration in the making of all parenting orders shall be the best interests of the child: s 65E. Prior to the Reform Act, this was phrased in terms of the child's 'welfare', rather than 'best interests'. This change in terminology brings the Act into line with the Convention.

<sup>9</sup> Family Law Council, *supra*, n 6, at 26.

<sup>10</sup> The word "paramount" has previously been interpreted to mean "overriding": see the discussion in Dickey, A., *Family Law*, Law Book Co., Sydney, 1990 at 344-346.

<sup>11</sup> See for example s 68T where the Court is directed to have regard to, rather than to treat as paramount, the child's best interests.

<sup>12</sup> *Brown and Pedersen* (1988) FLC 91-967.

<sup>13</sup> *Bright and Bright v Bright and Mackley* (1995) FLC 92-570.

### **PARENTAL RESPONSIBILITY AND PARENTING ORDERS**

Part VII of the Act now provides that, subject to any contrary court order, both parents of a child have parental responsibility for that child. This joint responsibility endures despite any change in the nature of the parents' relationship (for example, divorce or separation).<sup>14</sup> Parental responsibility is defined to mean "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children".<sup>15</sup>

The court can, however, make parenting orders, that is, orders that effectively rearrange parental responsibility, or some aspect of it.<sup>16</sup> There are three types of parenting orders: residence orders, contact orders and specific issues orders.<sup>17</sup> As their names suggest, the first essentially deals with whom the child shall live and the second with who may have contact with the child. A specific issues order can deal with any other aspect concerning parental responsibility. The important things to note about parenting orders are that:

- they may be sought by anyone<sup>18</sup>
- they replace guardianship, custody and access orders, and
- except to the extent necessary to give effect to the order, they do not diminish the parental responsibility of any other person unless that is expressly stipulated.<sup>19</sup>

So, what does this all mean to parents about to separate or divorce? Firstly, it means that both are intended to have an ongoing role in the rearing of their children. Thus, on separation each retains (in theory) full decision-making powers in respect of, and responsibility for, the children. If the Family Court makes a residence order in favour of one of the parents this decides *only*

---

<sup>15</sup> s 61B.

<sup>16</sup> s 65D.

<sup>17</sup> s 64B(2). Child maintenance is, of course, also included.

<sup>18</sup> s 65C. This was the case under the old Part VII and both the new and the old sections included the child as a potential applicant.

<sup>19</sup> s 61D(2).

where the child shall live: the non-residential parent otherwise retains full parental responsibility. Equally, a contact order does not diminish the parental responsibility of the residential parent during the period of contact. If there is any other matter on which the parents cannot agree, they can obtain a specific issues order to resolve it.

### **PARENTING PLANS**

Under the old Part VII, parties could enter into a child agreement if they wished to put into writing their parenting arrangements. Such agreements could be registered with the Family Court, and would then have had the force of a court order. Typically, child agreements resembled consent orders, that is, they dealt with the legal aspects of parenting: guardianship, custody and access. In place of child agreements the Reform Act has introduced parenting plans.<sup>20</sup> These too can be registered and given the force of a court order.<sup>21</sup> In fact, to the extent that they deal with residence and contact orders they will differ little from child agreements. The question is, however, whether they will take on the role suggested by their name, that is, a plan for the future parenting of the children. In the discussions leading up to the enactment of the final provisions, consideration was given to a style of agreement used by marriage guidance organisations. These detailed plans allow for the inclusion of a whole host of parenting matters, from education decisions to the choice of religion. Technically, these types of decisions *could* have been included in child agreements but generally were not and only time will tell if parenting plans evolve in such a way. Interestingly, the drafters chose not to include any pro forma plan in the new legislation.

### **WHAT'S IN IT FOR WOMEN?**

What, then, do these amendments mean for women involved in parenting disputes? While other issues will undoubtedly arise as time goes on, there are three matters that immediately spring to mind. The first and most obvious cause of concern is the relationship between enduring parental

---

<sup>20</sup> See Division 4 of Part VII.

<sup>21</sup> ss 63E and 63F.

responsibility and residence orders. Will the new regime encourage non-residential parents to use their enduring parental responsibility to disrupt the residential household? Secondly, does the commitment in the objects section to children having regular contact with both parents mean that residential parents will now not be permitted to leave the jurisdiction? Finally, the paper questions the motivation behind the implementation of the Reform Act.

In the past, custodial parents (usually mothers) have assumed the responsibility for the day to day care of the child. They have been legally entitled to decide what the child would wear, eat, do and so on. The non-custodial parent was usually a joint guardian and thereby theoretically only entitled to participate in long-term decision-making in respect of the child. Religion, schooling, major medical decisions and the like fell into this category. In reality, there would always have been some custodians who encouraged the non-custodial parent's participation in the day to day rearing of the child. Conversely, some custodial parents would have resisted tooth and nail any incursion into their decision-making domain, whether for good reason or because of spite. The theory behind the new provisions is that we should encourage the former style of parenting and thus show some sort of public commitment to parental co-operation. While it may well be that the promotion of genuine parenting plans is a useful step down that road, one might justifiably ask whether enduring parental responsibility will in fact be the cause of increased parental friction.

The UK embraced joint and enduring parental responsibility when it passed the *Children Act*. Interestingly, the approach in that jurisdiction has not been to interpret that concept so as to allow the use of specific issues orders to intervene in the day to day role of the residential parent. That makes practical sense, of course. As Bainham noted in the very early days of that legislation, "[i]n truth, upbringing will be determined and executed for the most part by the residential parent and it requires some intellectual effort to regard the parental responsibility of the non-residential parent as anything

more than symbolic".<sup>22</sup> The upshot is that specific issues orders are used far more commonly in the UK to resolve the matters one would historically have designated as falling within the guardianship area. It seems that practically, then, little has changed in the division of parenting responsibilities in the UK as a direct result of these changes. In fact, if one reads the papers there, one would not even realise that a new system had been introduced, with recent headlines announcing royal arrangements over 'custody' and 'access'.

It is, of course, early days yet in the Australian interpretation of these provisions. If the English experience is anything to go by, we will not see non-residential parents able to use their increased status to make the life of the residential parent difficult. There are, however, a number of factors that might result in a different approach in Australia. The first flows from the legal profession rather than the legislation. Is a practitioner negligent if they fail to advise their client of the 'dangers' of bare residence and contact orders in the face of enduring joint parental responsibility? To avoid any such liability it seems practitioners may be encouraging clients to attach to these orders a string of specific issues orders dealing with all other conceivably contentious issues. Of course, these issues may not have been contentious had they not been raised, or perhaps they could have been satisfactorily negotiated by the parents themselves as they arose. Now, there are two reasons why such orders would probably not be made by a court in the UK. The first is that the UK courts have been very eager to leave to the parents as much of the responsibility as possible. Of course, this privatisation of the law has more to do with cost savings than promoting child welfare. Nonetheless, it accounts for the courts' reluctance to grant specific issues orders concerning matters of the child's day to day care. The second, and related, reason is the no order rule: the court is not permitted to make an order where it considers this would not be in the child's best interests.<sup>23</sup> This has been interpreted at a practical level to mean that if parties consent to an arrangement then there is no need for an order. Again,

---

<sup>22</sup> Bainham, A., *Children - The New Law: The Children Act 1989*, Jordan & Sons Ltd, 1990 at 37.

<sup>23</sup> *Children Act 1989* s 1(5).

this promotes the type of privatisation sought by the UK legislature. The Family Court of Australia has, however, typically adopted a more protective role.<sup>24</sup> It sees itself as the ultimate protector of children's rights<sup>25</sup> and the continued support for registrable parenting plans evidences the legislature's and the Court's willingness to stay in the fray. Given that approach, perhaps the Family Court will feel itself obliged to take seriously the change effected by the new regime. If there really is to be joint and enduring parental responsibility then it may be the judiciary will not want to discourage non-residential parents from pursuing an active parenting role by denying them court access. There is no model to look to, to see where such an approach would lead and one can only hope that lawyers will not be the big winners out of all of this.

Freedom of movement may be another area of concern for women as residential parents. The objects section at the beginning of Part VII talks of the right of children to have regular contact with both parents. Prior to the amendments, if a custodial parent had a *bona fide* and good reason for moving (such as the need to accompany a new spouse to a different work location or the desire to move close to one's family for support) then the Family Court would permit the move.<sup>26</sup> There has been some suggestion that in light of the objects section a different approach is likely to be adopted.<sup>27</sup> As this author has argued elsewhere, there a number of reasons why that should not be the case.<sup>28</sup> As the *only* criterion for making such a decision was and remains the child's best interests, it is hard to see how the Court can make a dramatic about face in this area. Moreover, other jurisdictions with similar (and in some cases even more stringent) legislative provisions have not departed from the test referred to above.<sup>29</sup>

---

<sup>24</sup> Dewar, J., "The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared - Twins or Distant Cousins?" (1996) 10 *AJFL* 18.

<sup>25</sup> *B and B* (1993) FLC 92-357 at 79,780.

<sup>26</sup> *In the Marriage of I and I* (1995) FLC 92-604.

<sup>27</sup> Family Law Council, *supra*, n 6, at 26.

<sup>28</sup> Young, L. "Will Primary Residence Parents be as Free to Move as Custodial Parents Were?" forthcoming in *Australian Family Lawyer*.

<sup>29</sup> *ibid.*

Turning, then, from the specific to the general, it is worth pausing to consider the motivation behind the changes contained in the Reform Act. It is generally accepted that the primary reasons for the amendments were disenchantment with the adversarial win/lose model of custody litigation and the perceived disempowerment of non-custodial parents.<sup>30</sup> Children, it was said, were the victims of this ineffective and unfair system. But who was pushing this barrow? Not surprisingly, one often finds that it is the interests of those motivating change that are best served by the changes they covet. In this case, a driving force in effecting these reforms has been the recent and persistent voice of fathers' rights groups.<sup>31</sup> Political will, motivated as it is by the carrot of election votes, has not been immune to the calls for reform generated by these groups. Their impact on recent joint select committees is patent. How long did it take Australia to go from an appalling record of child support payment (and pitiful levels of support being judicially awarded) to one where the vast majority of non-custodial parents were meeting this obligation? Conversely, how long did it take legislators to heed the calls of those who considered themselves disadvantaged by this new system? Before we had time to properly assess the effects of the introduction of the child support scheme we were reassessing the levels of payment. Is this because we are concerned about the children whose interests lie at the heart of child support - or because there are votes to be had in appeasing the complainants? Or perhaps those who make the laws feel some affinity for the 'people' aggrieved by the child support provisions. A cynic might argue, therefore, that there is a connection between the introduction of stricter child support laws and the changes contained in the Reform Act. Given that most non-custodial parents have recently been forced to make a significant contribution to the upkeep of their children, is it surprising that the poor treatment of non-custodial parents was subsequently pushed to the fore? Is

---

<sup>30</sup> See generally Chapter 5, Part 1 of *The Family Law Act 1975: Aspects of its Operation and Interpretation*, AGPS, Canberra, 1992.

<sup>31</sup> For an interesting 'account' of one man's role, see Ian Monk's own publication, *How I Initiated Three Parliamentary Inquiries into Family Law and Reformed our Family Court*.

it mere coincidence that non-custodial parents seemed to find their voices shortly following the discovery of their pockets?

The possibility that the genesis of the Reform Act was anything other than a genuine desire to improve the lot of children should not distract us, however, from the potential for positive change the amendments bring. While it may be that some non-custodial parents saw these changes as advancing their 'rights' in respect of their now rather expensive children (although the changes are framed in terms of children's rights), it is possible that at the same time the interests of children can be well served. As we have seen, one of the clearest objectives of the English reforms has been the privatisation of child law.<sup>32</sup> The goal there seems to have been to delegalise at any cost the process of resolving parenting disputes, which brings with it obvious gains for the state. The objects section in Part VII of the Australian legislation at first glance appears to reflect this trend in that it seeks 'to ensure parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children'.<sup>33</sup> However, this is preceded by another object, that of ensuring 'children receive adequate and proper parenting to help them achieve their full potential'. When these goals are read together, privatisation seems less central to the new Australian philosophy. The prime objective seems rather to improve the developmental environment of children. Improving the quality of a child's parenting is, of course, a crucial factor in achieving this, and part of the responsibility for the quality of parenting lies with the parents themselves. The objects section arguably recognises, however, that the state also plays a role in ensuring children receive 'adequate and proper parenting'. The state can play an important role, for example, in providing parents with the opportunity to parent,<sup>34</sup> in helping parents reach agreement where there is a parenting

---

<sup>32</sup> Family Law Council, *supra*, n 6, at 15.

<sup>33</sup> s 60B.

<sup>34</sup> The continuation of parental responsibility after divorce and the move away from custody/access will hopefully increase the parenting roles of the 'non-custodial' parent.

dispute<sup>35</sup> and in protecting parents from violence and abuse so they can fulfil their parenting duties.<sup>36</sup> So, while the reforms promote active parenting and parenting by agreement, hopefully this is not designed simply to divest the state of its responsibilities but rather reflects the state's recognition of the pivotal role that parents play in a child's development.

While women should welcome a clear commitment by the state to co-operative parenting, as this note has shown, they should at the same time be cautious about its implementation through the Reform Act. The parenting (gender?) war currently being fought through the Family Court focuses on the gains and losses for the parents involved at the time of separation. However, a society that inequitably divides parenting, whether *before* or *after* separation, needs to rethink the fundamentals. One cannot expect the Family Court to independently revolutionise parenting practices. The difficulties that the Court faces in this area stem in part from the fact that cohabiting couples *do not*, as a rule, evenly divide parenting responsibilities - just as they do not evenly divide out-of-home work. So long as State and Commonwealth governments fail to adequately address the inequitable division of parenting *during* cohabitation, the Family Court will continue to be a convenient scapegoat for the problems parents experience in dividing this role after separation.

---

<sup>35</sup> See for example the Act's provisions on counselling, primary dispute resolution and parenting plans.

<sup>36</sup> See for example the Act's provisions on family violence orders and the best interests checklist. Of course, the provision of adequate funding to provide resources for families to avoid, rather than bandaid, family crisis would be a good thing too.