SUBMISSION ON EXPOSURE DRAFT - FAMILY LAW AMENDMENT BILL 2023

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INTRODUCTION

I appreciate the opportunity to comment on the Exposure Draft.

I have had the benefit of reading the insightful and important submission by Professor Patrick Parkinson, and I refer to it at many points. I agree with the ALRC and Professor Parkinson that it is desirable to simplify the Act. In particular, it is clear that the existing version of s 60B, the linking of parental responsibility with the need to consider equal time, and the division of relevant considerations into the categories "primary" and "additional", all need to be changed, essentially for the reasons in the Australian Law Reform Commission (ALRC) report.[2]

An appendix to this submission provides a discussion of the relevant legislation in a number of jurisdictions somewhat comparable to that of Australia: the UK, Canada, New Zealand, and two states of the USA, Illinois and California. This allows for a quick comparison of the way parenting law has been dealt with in these jurisdictions. It shows, overall, that the provisions of the current law that were criticised by the Australian Law Reform Commission and would be repealed or modified by the Exposure Draft were not to be found elsewhere, and that generally speaking the proposed amendments would tend to bring Australian law into line with other jurisdictions.

IN A NUTSHELL

This submission welcomes the Exposure Draft as being a significant improvement to family law, but suggests a number of improvements. In particular it suggests some ways in which the Exposure Draft could give greater emphasis to the importance, for most children, of a continuing involvement with both parents, while avoiding the disadvantages of the present law. It concludes with brief answers to some of the questions posed in the Consultation Paper.

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2 Family Law For the Future (ALRC 135) 2019.

DOES THE EXPOSURE DRAFT AS DRAFTED SEND A MESSAGE DE-VALUING THE CHILD-PARENT RELATIONSHIP?

It is necessary to consider Professor Parkinson's concern that the Exposure Draft might be taken to indicate that the law was now "in favour of primary care of a child with one parent, and the maintenance of a relationship with the other parent in the child's life only if it is safe to do so".[3]

Especially since 1995, the Act has contained provisions that are intended not only to guide courts in making parenting decisions, but to guide parents and their advisers in planning post-separation arrangements for children. This may or may not have been a good idea - another option would have been to maintain the brevity of the original provisions, and use educational measures to assist parents planning for the children - but sending "messages" now seems to be an inevitable function of the legislation.

I am not aware of good evidence on how influential the legislation is in this respect: no doubt to some extent the legislative messages reflect values that are already widespread in the community and are stated in human rights documents such as the Convention on the Rights of the Child. However, it seems likely that the legislative messages will be adopted and adapted by lawyers, counsellors and other family law practitioners, and will thereby influence parents in designing arrangements for their children (and making assumptions about what orders the court might make if they cannot agree between themselves). Thus it is right to consider the appropriateness of the "messages" the legislation sends.

Professor Parkinson discusses in particular messages sent, implicitly, by removing provisions from the Act. Focussing on s 60B, he writes that omitting what is currently in that provision would indicate that the government is

"saying that it no longer believes it is important:

- *To ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the child's best interests*
- *That children have the right to know and be cared for by both their parents;*

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[3] Professor Parkinson submission p 5.

- *That children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives);*
- *That parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and*
- *That parents should agree about the future parenting of their children."*

It would be surprising if people took the repeal of s 60B to mean this. Those principles are widely accepted in the community, and to a large extent they are embodied in the Convention on the Rights of the Child, to which Australia is a party. The Convention would actually have greater prominence if the Exposure Draft came into effect: it would be one of two provisions in s 60B, rather than being a mere 'additional' consideration, as it is in the current s 60B.

To take an example, the existing s 60B also refers to "ensuring that children receive adequate and proper parenting to help them achieve their full potential" (s 60B(1)(c). It does not seem likely that repealing s 60B will be taken to mean that the government, or the parliament, now thinks it unimportant that children should receive adequate and proper parenting. Also, the amending legislation would be read against the background of an Explanatory Paper, which would, no doubt, refer to the Convention, to the problems with the existing wording of s 60B (including its duplication of some of the content of s 60CC) and, if it were thought necessary, could point out that repeal of those provisions did not mean that the government now believed the opposite of what the old s 60B had said.

A number of other provisions omitting previous material in the Act could (and should) also be satisfactorily explained in the Explanatory Paper, or in some other way. For example, the Exposure Draft would omit the direction to take into account a child's maturity when considering the significance of the child's wishes. Nobody would think that this omission means that the government had suddenly decided that the child's maturity was irrelevant to how much weight should be given to the child's wishes: everyone would realise (especially if it were expressly stated in the Explanatory Paper), that this was part of the objective of shortening and simplifying the Act - in this instance by removing words that stated the obvious.

Nevertheless, Professor Parkinson is right to draw attention to the possible consequences of omitting provisions from the Act. His essential concern here is the omission of words that emphasise the importance of children's relationship with their parents. He worries that this might indicate that parents are no longer to be valued, or valued as much as previously.

This matter deserves careful attention. Although the evidence seems mainly anecdotal, it does seem likely that before 1995 the practice in family law had somewhat marginalised fathers. In more recent times, there has been plenty of evidence that most children benefit greatly from the active involvement of loving and competent parents, and the law and practice has rightly moved away from the assumption that the most satisfactory arrangement is likely to be that the children live with the mother and spend only alternate weekends and part of school holidays with their fathers (the so called "80:20" outcome). That formula should not be a default option; and surely would not be treated as a default option by competent family law practitioners and advisers today.

Professor Parkinson's submission, however, raises the possibility that omitting the various references to the parent-child relationship may inadvertently bring back the old 80:20 default option. I say 'inadvertently', because there is no indication in the ALRC or the Exposure Draft documents that this was anybody's intention. Like Professor Parkinson, I would not want anyone to think that the legislative intent of the Exposure Draft was "in favour of primary care of a child with one parent, and the maintenance of a relationship with the other parent in the child's life only if it is safe to do so".[4]

I agree that the Exposure Draft needs to be modified to avoid the risk that it might be interpreted in a way that undervalues the importance of children's relationships with both parents. The following discussion explores how best this might be done.

REDRAFT OF OBJECTS: S 60B

The ALRC was correct to find the existing s 60B unsatisfactory. It has the potential to compete with the sections listing the factors the courts should consider in making parenting orders.[5] It is clumsy - for example the existence of "objects" and "principles underlying these objects" is unnecessarily complex and unhelpful. Its paragraphs pick out some provisions of the UN Convention on the Rights of the Child but not others such as the child's right to participate

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4 Professor Parkinson submission p 5.

5 The Full Court considered it in *B and B* (1997) and again in 2014 (*Maldera v Orbel*), when it said in effect that the section should have no impact on the making of parenting orders:

(Art 12); yet it seeks to give effect to the whole Convention as an "additional object": subs (4). The ALRC was right to recommend that it be repealed.

The proposed s 60B does not have these faults. The amended first object is unproblematic: it emphasises the focus on the child's best interests without competing with the list of factors in s 60CC. In a sense it is repetitious, but s 60CC is specifically about the matters the court should consider and the proposed s 60B is about the purpose of Part VII as a whole.

The second object retains the old subsection (4), although it gives the Convention greater prominence, because it is now one of only two objects. I am not aware of any decisions or other evidence showing that the Convention has had much impact on court orders, or much impact on those affected by family law. Because many of the Convention's provisions relate to matters outside family law, and because many of them unavoidably use general language, it seems unlikely to have much impact on decisions in particular matters - those decisions are essentially controlled by other provisions, such as s 60CC. However it may be useful, and will do no harm, to give the Convention greater visibility in the Act, as the proposed s 60B does.

Overall, therefore, my view is that the repeal of the existing s 60B is a necessary and valuable reform. The proposed s 60B could do some good, and probably won't do any harm. I therefore support this proposed amendment, and I would have supported the simple repeal of the current s 60B.

As previously indicated, it would be useful if the Explanatory Paper to the legislation clearly explained the reasons for repealing the existing s 60B, to avoid any risk that otherwise the repeal might be wrongly understood to mean that the government, or the parliament, no longer thought those matters were important.

Finally, I should mention that in an earlier discussion I proposed a statement of principles that would replace s 60B:[6] I refer to it now because, it might be thought to address the issue raised by Professor Parkinson and yet avoid the problems caused by the current s 60B:

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[6] Richard Chisholm, 'Rewriting Part VII of the Family Law Act: A Modest Proposal' 24 (3) Australian Family Lawyer (2015), 1-22.

Principles Relating to Making Parenting Arrangements

A. *Parenting arrangements should be designed to advance the child's best interests, and should be appropriate to each child's age and stage of development.*

B. *Children will ordinarily benefit by maintaining relationships with parents and other family members who are important to them. In particular, children who have formed a close relationship with both parents before their parents' separation will ordinarily benefit from having the substantial involvement of both parents in their lives, where such involvement does not expose them to inadequate parenting, abuse, violence or continuing conflict.*

C. *Parenting arrangements for children should not expose a child, parent or other family member to abuse or violence.*

D. *Parenting arrangements should respect the rights of children as set out in the United Nations Convention on the Rights of the Child.*

It is suggested below that such a statement of principles might help solve some of the problems in drafting the list of factors relevant to the child's best interests, s 60CC.

SHARED PARENTAL RESPONSIBILITY

The problem with the existing provisions about equal shared parental responsibility mainly arises from the way the existing Act links orders for equal shared parental responsibility with the requirement that courts consider the children spending equal time, or 'substantial and significant' time, with both parents. The word "equal", used in both provisions, probably contributed to the earlier misunderstanding that the current legislation creates a presumption favouring equal time. By removing this link, the Exposure Draft would help remove this misunderstanding, even if the provision for equal shared parental responsibility remained in the Act.

In the proposed re-draft some years ago that was intended to minimise changes from the existing law (cited above), I suggested the following substitute for the presumption of equal shared parental responsibility:

> *The court shall presume that it is in the child's best interests that both parents continue to have parental responsibility, unless it considers that this would not be in the child's best interests in the circumstances of the case.*

I still favour this approach (which would go some way to address Professor Parkinson's concerns), although I can see the attraction of simply repealing the presumption of equal

shared parental responsibility (s 61DA) as suggested by the ALRC and effected by the Exposure Draft.

If s 61DA were deleted, I suggest it would be appropriate to reconsider s 61C.

I note Professor Parkinson's suggestion that because of the 'emotional freight' attached to the words, it might be wise to amend s 61C to read

> *Each of the parents of a child who is not 18 has equal shared parental responsibility for the child.*

No doubt this might make the change more palatable to some, as Professor Parkinson argues. But it might suggest that parents are legally required to act jointly. Under s 61C at present, they are probably not: the section says "each parent has" parental responsibility. I think this is important: or example either parent, should be able to authorise medical treatment for a child, and the legislative language should not cast doubt on this. The word 'shared' in s 61C might be understood (rightly or wrongly) to mean that the powers needed to be exercised jointly.

Of course the word 'shared' would be valuable in encouraging parents to work together. But if it were omitted, as I suggest it should be, this idea could still be conveyed by combining s 61C with s 63B (which is not repealed by the Exposure Draft).

I therefore suggest that if the presumption of equal shared parental responsibility is to be removed, s 61C could be usefully amended to read somewhat as follows:

> ***Section 61C.***
>
> *(1) Each parent has parental responsibility (and continues to have it despite the parents having separated, divorced or re-married, or any other changes in their relationship), unless this is expressly changed by a court order.*
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> *(2) Parents are encouraged:*
>
> *(a) to agree about matters concerning the child; and*
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> *(b) to take responsibility for their parenting arrangements and for resolving parental conflict; and*
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> *(c) to use the legal system as a last resort rather than a first resort; and*
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> *(d) to minimise the possibility of present and future conflict by using or reaching an agreement; and*

(e) in reaching their agreement, to regard the best interests of the child as the paramount consideration.

SECTION 60CC

The opening words

It is not a matter of great importance, but I support Professor Parkinson's suggestion to tweak the opening words and dispense with a separate subsection dealing with consent orders (subsection (4) in the Exposure Draft):

> *"If the court is considering whether to make an order other than with the consent of all the parties to the proceedings, the court must consider …"*

The safety factor: proposed para (a)

I agree with the focus on safety in para (a). Doing so continues the emphasis that was reinforced by the 2011 amendments. While safety may not be the first thing one would consider for children in general, it is clear that allegations of various threats to the children's safety are very common in cases that are fully contested. In particular, the evidence indicates that where there is family violence, the period before and after separation is particularly risky. It is good that the proposed paragraph includes neglect, and recognises that keeping children safe also means protecting those who care for them.

As to the drafting of this paragraph, I generally agree with Professor Parkinson's submission. It would be better simply to list this as one of the factors - making it the first on the list would give it sufficient prominence, especially as the Exposure Draft would retain s 60CG. Thus I support wording such as Professor Parkinson suggests:

"In determining the best interests of the child, the court must consider the following matters:

(a) the need to promote the safety of:

(i) the child; and

(ii) each person who has, or is proposed to have, parental responsibility for the child (the carer);

from family violence, abuse, neglect, or other harm."

The child's views: proposed paragraph (b)

The child's views deserve their prominent place on the proposed s 60CC list. I notice that the provision does not spell out the need to take into account matters such as the child's maturity.

As mentioned above, this is consistent with the admirable concern of the ALRC and the Exposure Draft to make the law shorter and simpler. It is obvious that the weight to be given to the child's views will depend on various circumstances. It would be desirable for the Explanatory Paper to state explicitly that such matters as the child's maturity will obviously be relevant, but a drafting decision was made to omit such details in the interests of simplicity.

The child's needs and the capacity of parents and others to provide for them (with support if necessary) - paras (c) and (d)

Paras (c) and (d) are also excellent and uncontroversial: the child's needs and the capacity of the relevant adults to provide for them. The current legislation, with its emphasis on the "twin pillars" of safety and a meaningful relationship with parents, perhaps gives too little emphasis to these critical matters. To take an example, suppose a case involves a very young child, a baby. If one parent is much better than the other in providing support and nurturing for the child, the child might be better off spending more time with that parent (while of course maintaining a close relationship with the other parent): notions of equal time would be a distraction from having an arrangement that would be best for the baby at that stage of the child's life.

It might be arguable that these paragraphs should be listed before the child's views, because paragraphs (c) and (d) are relevant to all cases, and the child's views are relevant only to children old enough to have views. However it is right to give prominence to the child's views, and I am content with the sequence of matters listed in the Exposure Draft.

As to the wording of this paragraph, I agree with Professor Parkinson's comment that the reference to seeking help could be misunderstood. As he suggests, it might be better to insert a separate provision along the following lines:

> *In determining the capacity of a parent to provide for the child's developmental, psychological and emotional needs, account may be taken of the parent's ability and willingness to accept support to assist them with caring, where their capacity would otherwise be impaired.*

The child-parent relationship: para (e)

Para (e) raises difficult issues.

On the subject of parental involvement, the Exposure Draft would certainly make a striking change. The strong statement in the old s 60B has gone, and while parental involvement continues to feature in the list of considerations relevant to assessing the child's best interests, it is a steep fall from the giddy heights of the being first of two "primary consideration" to being a cautiously-worded fifth item of a list of six. As indicated above, I agree with Professor Parkinson that the Exposure Draft could usefully do more to emphasise the value (to most children) of maintaining a good (the Act uses the word "meaningful") relationship with both parents.

But how should this be done?

Professor Parkinson favours raising this item to second on the list, as paragraph (b), and maintaining the current wording: '*(b) the benefit to the child of having a meaningful relationship with both of the child's parents and other people who are significant to the child'.*

This proposal deserves careful consideration. The following paragraphs deal particularly with the place of this item in the s 60CC list, whether the list should refer to children 'having' or 'maintaining' a relationship with both parents, and whether the Act should continue to refer to a 'meaningful' relationship.

General

Ideally, the new legislation should acknowledge the importance of parental involvement to most children. It should do so on the basis that this will normally be in the child's best interests - the paramount consideration under s 60CA - and not on the basis that it is a parental right.

On the other hand, the law should not imply that a parental relationship is *always* desirable. Unfortunately, sometimes it is not. Cases of violence and abuse are obviously situations in which parental involvement may not be in the child's interests. But those are not the only such situations. Sometimes the relationship between the parents is so toxic that it is hard to preserve the child's relationship with both parents without putting them at risk.[7] And

[7] The Hull Committee of 2003 realised that sometimes the stress of entrenched conflict relationship between parents can be such that, for a time at least, the continuing involvement of both parents can be damaging to the child: see Recommendation 2. The Committee referred to parents "for whom conflict is so entrenched they are incapable of agreement about matters affecting their children" (para 2.6). Unfortunately, this important insight was not much reflected in the legislation that was eventually passed.

sometimes parental involvement needs to be limited for other reasons: a parent may not be able to meet the needs of a child with special difficulties; a parent may, because of mental illness, substance abuse, emotional preoccupations arising from the family separation, or other causes, be unable to focus on the child's needs. Fortunately, these are a minority of cases, but they need to be provided for, and we need to be careful that the law does not seems to support arrangements that may be contrary the a child's interests in particular circumstances. As mentioned elsewhere in this submission, in my view it is wrong to take the simplistic view that whenever the is no violence or abuse, it will always be in a child's best Interests to be closely involved with both parents.

On this important and sensitive matter, finding the right language is not easy.

Position

In my view this item is appropriately placed in s 60CC as paragraph (e). It was always a mistake to treat two matters, protection from violence and maintaining parental relationships as having special prominence (notably by making them the 'primary' considerations)'.[8] While it is important to maintain parental involvement in the vast majority of cases, it is, in a sense, a second-order consideration: something that will ordinarily, but not always, be good for the child. By contrast, providing for the child's needs (paras (c) and (d)), and protecting the child from violence (para (a)), are always positive factors in assessing what is best for children.

"Have" or "maintain"?

However the parent-child relationship is to be worded, a significant difference between Professor Parkinson's draft and the Exposure Draft is that the Explanatory Paper says "the benefit to the child of being able to *maintain* a relationship…", while Professor Parkinson's draft refers to "*having*" a relationship.

The history outlined in R Chisholm, 'Making it work: The Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 (2) *Australian Journal of Family Law* 143-172.

8 I understand the argument that our law has featured these two matters since 1995, and that there was a degree of consensus about this then and in 2006, and not reversed in 2011. However in my view giving these two matters equal prominence can be understood as a political accommodation made at the time - being a balance between the two competing views featuring in what Professor Parkinson calls the 'gender wars'. The present exercise in law reform could, and in my view should, move beyond this political balancing to a clear-headed focus on what is best for children.

The difference is perhaps one of emphasis, but seems important. "Maintaining" a relationship has to do with continuity, while "having" does not necessarily do so. Thus on the "having" version, the factor would apply to situations where there has previously been little or no previous relationship; "maintaining" a relationship would limit the factor to cases where there has been some kind of continuity of care. (I believe Margaret Mead was once asked what young children need, and said "They need to be looked after by somebody who remembers what they said yesterday"). It also has a valuable child focus, in that it speaks of the child maintaining a relationship with the parent, rather than the other way around.

Arguably, the word "maintaining" is more child-centred, and would tend to reinforce the importance of both parents being involved with the child during the period before the family separation. In cases of controlling family violence, parents might believe that the law gave equal value to the child's relationship with both parents, even where the violent parent had no previous good relationship with the child. If so, this wording might assist the violent parent in continuing to dominate and coerce the non-violent parent.

It is important to remember that many matters that do not feature in the earlier paragraphs will be included in the catch-all provision of para (f). Thus in a case where for some reason there has not been a relationship between a parent and a child before separation, those negotiating parenting arrangements, and courts making parenting orders, could of course take into account that it might be beneficial to the child, especially in the longer term, in effect to create a parent-child relation in the future.

I accept that the case for the word "maintain" was not fully developed in the ALRC Report, but on balance I prefer the word "maintain", as in the Exposure Draft.

'Meaningful'

There is certainly a case for retaining 'meaningful' as a word that is now familiar and, perhaps, accepted. [9] As Professor Parkinson points out, the ALRC didn't make a case for devaluing the child-parent relationship, and that is not expressed to be a purpose of the Exposure Draft. Using the existing wording would suggest that where was to be no change in this respect, and

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[9] See Donna Cooper, *Continuing the critical analysis of 'meaningful relationships' in the context of the 'twin pillars'* (2011) 25 AJFL 33; R Chisholm, 'The meaning of "meaningful": Exploring a key term in the Family Law Act amendments of 2006' (2008) 22(3) *Australian Journal of Family Law* 175-196.

could reduce uncertainty and - a point Professor Parkinson stresses - avoid the costs of adjusting to any change in the legislation.

I am not sure that the word 'meaningful' was a particularly good choice. It could easily be taken to refer to a relationship that the *parent* considers meaningful. Even if it were taken to refer to the child's perspective, 'meaningful' is not an ideal word. After all, a child might view his or her relationship with an abusive parent as only too meaningful! Lawyers, of course, will understand the law as meaning what the leading cases say it means, and there is a considerable body of case law on the meaning of a 'meaningful' relationship. My reading of the cases is that it means something a relationship in which the parent is actively involved in parenting.[10] It does not mean a relationship that is beneficial to the child. Thus the Full Court has indicated that it is a question of fact whether a meaningful relationship, ie parental involvement, would benefit the child in the particular circumstances.[11] The wording of this provision, therefore, should not indicate that the law assumes that it always benefits a child to have a 'meaningful relationship' with a parent, though of course that will usually be the case.

Most litigants, of course, and perhaps a few lawyers, will not have read the leading cases. If the word 'meaningful' is to be continued, I would recommend that either in the Act itself or in a note, or at least in the Explanatory Paper, there should be some explanation of what it means.

Conclusions on paragraph (e)

It is important for the majority of children to continue the involvement of both parents after family separation. It is right that the legislation should stress this, because, it seems, it was once assumed that it is enough for children to have one involved parent, with the other (typically the father) providing financial support and weekend entertainment.

It is important that the legislation should not be seen to support that assumption. When parents separate, especially when one or both re-partner, it can take a lot of effort and

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10 None of the jurisdictions reviewed in the appendix uses the term 'meaningful'; the UK has the simplet term 'involvement'.

11 *McCall & Clark* (2009) 41 Fam LR 483; (2009). FLC 93-405.

commitment not to drift away from a child of the first relationship,[12] and the law can play a part in helping them make the effort to stay involved as parents. The tricky problem is to have a law that does so, but without leading people to think that any parent-child relationship is necessarily good for children.

In my view the existing wording, which Professor Parkinson would continue, fails adequately to draw attention to the minority of cases where maintaining parental involvement would not be in the child's interests.

One possible solution to this might be for this item on the list to say "*any benefit*… (from parental involvement)". That would solve the problem of apparently treating the parental relationship as necessarily beneficial, but would fail to reflect that for most children, parental involvement is highly desirable, and needs to be encouraged.

Perhaps a solution would be to refer somewhere to the fact that being involved with both parents is normally desirable. As mentioned above, in an earlier discussion, I had suggested a statement of principles that would have replaced s 60B. Those principles would have included a statement to the effect that children ordinarily benefit by the continuing post-separation involvement of both parents.

I still think there is merit in this approach.[13] It refers to an obvious fact, and, without creating a presumption, it reminds us that unless there is some good reason for not doing so it is normally best for parenting arrangements to provide for children to be involved with both parents. Because this language does not create a legal presumption, I would not expect it cause any difficulties of interpretation. If the Act contained such a principle, it would be enough for s 60CC to refer briefly to parent-child involvement, and the precise wording of that item would be less important.

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12 To quote one publication, *'Divorced from the routines, settings and everyday activities of the child's usual life, a visiting relationship with the nonresidential parent quickly becomes constrained and artificial, making it easier for fathers and their children to drift apart as their lives become increasingly independent: see 'The meaning of meaningful', cited above, p 180.*

13 The New Zealand Act, extracted in the Appendix, has an interesting statement of principles, which include "*a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order*', and '*a child should have continuity in his or her care, development, and upbringing*'.

On this approach, the Act could usefully include provisions such as this:

> ***Section 60B Principles Relating to Making Parenting Arrangements***
>
> […] *Children will ordinarily benefit by maintaining relationships with parents and other family members who are important to them. In particular, children who have formed a close relationship with both parents before their parents' separation will ordinarily benefit from having the substantial involvement of both parents in their lives, where such involvement does not expose them to inadequate parenting, abuse, violence or continuing conflict.*
>
> ***Section 60CC***
>
> *… the court must consider …*
>
> *(e) any benefit the child is likely to receive from [a meaningful relationship* or some preferred term*] with both of the child's parents; …*

SHOULD SOME OMITTED PROVISIONS BE RESTORED?

The ALRC's recommendations, and the Exposure Draft, would omit some provisions of the present Act that have not been persuasively criticised. Should they be restored?

The history of parenting?

Professor Parkinson suggests that the deletion of references to the history of parenting may lead to important evidence being overlooked.[14] Of course, such evidence is not *excluded* by the Exposure Draft: it would be important in assessing many of the relevant considerations, such as the parents' capacity (paras (c) and (d), and would anyway fall within the catch-all paragraph (f). Nevertheless, it is probably desirable that the law should stress these matters, and draw people's attention to them: as Professor Parkinson points out, the past is the best indicator of the likely future.

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[14] Pages 15-16.

I therefore agree that that consideration should be given to including reference to the history of parenting. My preferred formulation is slightly different from that of Professor Parkinson, since I see the history of parenting as a type of *evidence about the s 60CC considerations*, rather than further considerations. I would add a subsection to s 60CC along the following lines:

> *(2) In applying subsection (1) the court shall consider any relevant evidence, including evidence about*
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> > *(a) any benefit the child has received from the child's relationship with a parent or other person;*
> >
> > *(b) any harm to the child caused by a parent or other person;*
> >
> > *(c) whether each parent*
> >
> > > *(i) has taken appropriate opportunities to participate in making decisions about the child, and to spend time and communicate with the child;*
> > >
> > > *(ii) has taken appropriate opportunities to facilitate the other parent to participate in making decisions about the child, and spending time and communicating with the child;*
> > >
> > > *(iii) has taken reasonable measures to protect the child from harm by exposure to family violence or child abuse, or other harmful experiences; and*
> > >
> > > *(iv) has fulfilled the parent's obligation to maintain the child.*

Provisions now in s 65DAA relating to 'substantial and significant time'

The ALRC was absolutely right to recommend repeal of s s 65DAA, which created as sort of nudge towards equal time, or 'substantial and significant' time. But it is arguable that there is some value in the way the subsection (3) defined 'substantial and significant' time, drawing attention to some of the things that often need to be considered in formulating parenting arrangements, notably whether the time includes weekends and holidays as well as weekdays, and whether it allows the child to be involved with the parent on days of particular significance such as birthdays and major holidays. Professor Parkinson would draw on these passages in his proposed s 60CD.

I suspect that these things are now so commonly considered the they need not be spelled out in the legislation (and as noted elsewhere, the Explanatory Paper to the legislation should

explain the reasoning that led to the omission of significant provisions). If they were to be mentioned, like the ALRC I would not favour a formulation that nudges the court in any particular direction. Perhaps, however, s 60CC or a note to it could direct attention to the possible benefit to the child of having parents and other significant persons involved in the child's daily routine and in occasions and events that are of particular significance to the child or a family member; and also the possible benefit to the child in spending time with a parent or person at the weekends, in school holidays, and during the school week, taking into account, among other things, how far apart the parents live from one another, and their capacity to co-operate in parenting.[15]

[15] It is unnecessary to add words such as 'if reasonably practicable, since it would obviously not be in a child's interests have an arrangement that was not reasonably practicable. And look what a mess separating out reasonable practicability caused in the existing Act: R Chisholm and P Parkinson, Comment: 'Reasonable practicability as a requirement: The High Court's decision in *MRR v GR*' (2010) 24 *Australian Journal of Family Law* 255.

ANSWERS TO SOME QUESTIONS POSED BY THE CONSULTATION PAPER

Some of the questions are answered by the previous discussion. I add the following brief answers.

4. Do you have any comments on the simplified structure of the section, including the removal of 'primary considerations' and 'additional considerations'?

I strongly support this aspect. The division of matters into those two categories had not been suggested by any expert body such as the Family Law Council, made little sense, and had caused demonstrable problems, as described by the ALRC and others. Ultimately, in my view it is *incoherent* for the Act to say that the child's best interests must be paramount and also that some factors are inherently more important ("primary"): if the court is to do what is best for the child it must necessarily give various factors the significance they have for the child in the particular circumstances.

7. Do you have any comments on the removal of obligations on legal practitioners, family dispute resolution practitioners, family counsellors or family consultants to encourage parents to consider particular time arrangements? Will this amendment have any other consequences and/or significantly impact your work?

I applaud this change, which is of course consistent with the other amendments made by the Exposure Draft It was patronising and tiresome to spell out such matters to professionals. It is important that the legislation should encourage everyone to focus on what is best for the child in the particular situation, and avoid the risk of formulaic responses to these complex human problems.

8. With the removal of the presumption of equal shared parental responsibility, do any elements of section 65DAC (which sets out how an order providing for shared parental responsibility is taken to be required to be made jointly, including the requirement to consult the other person on the issue) need to be retained?

As indicated above, it would be desirable to retain the simplicity of s 61C while adding the encouragement to cooperate that is now in s 63B. Of course when the court makes orders relating to parental responsibility, it can make whatever requirements it thinks appropriate in the particular case.

Reconsideration of final parenting orders (Rice & Asplund)

9. Does the proposed section 65DAAA accurately reflect the common law rule in Rice & Asplund? If not, what are your suggestions for more accurately capturing the rule?

I think this provision is well drafted and broadly reflects the *Rice v Asplund* principle. I agree that it is desirable to put it into the legislation. (I have not reviewed the case law in detail. Doing so might indicate the need for a tweak or two.)

A minor suggestion: I'd be inclined to omit 'new' in (2)(b) - (b) '*whether there is any ~~new~~ material available…*'. There could be fruitless and tiresome legal arguments about what 'new' means; and I don't see why the court couldn't be able to consider important material that was not taken into account, even if it was available at the time of the previous proceedings.

Schedule 2: Enforcement of child-related orders

I consider Schedule 2 as a great improvement on the current law. I hope to review it in more detail in the future.

Schedule 4: Independent Children's Lawyers

Requirement to meet with the child

Do you agree that the proposed requirement in subsection 68LA(5A) that an ICL must meet with a child and provide the child with an opportunity to express a view, and the exceptions in subsections 68LA(5B) and (5C), achieves the objectives of providing certainty of an ICLs role in engaging with children, while retaining ICL discretion in appropriate circumstances?

I am inclined to favour this amendment, but would defer to those who have recent practical experience. However I have a suggestion relating to the following provision of the Exposure Draft:

(5B) The independent children's lawyer is not required to perform a duty if:

- *(a) the child is under 5 years of age; or*
- *(b) the child does not want to meet with the independent children's lawyer, or express their views (as the case requires); or*

(c) there are exceptional circumstances that justify not performing the duty.

The ICL's obligation to meet with the child should perhaps turn on what is known to the ICL. The ICL may not know what the child wants. Thus I'd suggest something like this:

> *"(b) the ICL has reason to believe that child does not want to meet with the independent children's lawyer.*

I'd also suggest omitting the exception to the obligation to give the child an opportunity to express views. I think the ICL should always do that, and not predict whether the child would want to take the opportunity to do so. Exceptional circumstances are covered by (c).

Proposed s 5D(a) seems to assume that it is only exceptional circumstances that allow the ICL not to perform a duty, but the provision about the child not wanting to meet the ICL is not expressed to be an exceptional circumstance. Some tidying up seems necessary.

22. Does the amendment strike the right balance between ensuring children have a say and can exercise their rights to participate, while also protecting those that could be harmed by being subjected to family law proceedings?

The proposed amendment seems good to me, but I'd defer to those who have recent practical experience.

Expansion of the use of Independent Children's Lawyers in cases brought under the 1980 Hague Convention

24. Do you consider there may be adverse or unintended consequences as a result of the proposed repeal of subsection 68L(3)?

As I am not currently in practice, I cannot speak on this topic from recent experience, but I would like to make some comments related to these three questions.

The High Court of Australia said (in a case involving the child's objection) 'Where issues of the kind involved in this case arise, or appear to the Court to arise with respect to a child of the age and degree of maturity spoken of in reg 16(3)(c), there ordinarily should be separate representation'.[16] However this statement was effectively reversed in 2000 by the insertion

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16 *De L v Director-General, New South Wales Dept of Community Services* (1996) 187 CLR 640; (1996) 20 Fam LR 390; FLC 92–706; [1996] HCA 5

of s 69L(3) of the Family Law Act,[17] providing that in Hague proceedings the court can make an order for the child's interests to be independently represented 'only if the court considers there are exceptional circumstances that justify doing so'.[18] I assume that at the time the legislature saw this measure as saving money, or perhaps promoting the rights of children in general by expediting the resolution of Hague cases or maximising the number of return orders.

In my view s 68L(3) muffles the voices of children in ways that appear to be inconsistent with Australia's obligations under the Hague Child Abduction Convention, and under the Convention on the Rights of the Child.[19] There is a strong case for repealing it. In the early days of the Convention it was assumed that child abduction would be committed mainly by a parent or person who did not have the care of the child. For many years it has been known that many abductions are carried out by parents who have the care of the child, and are claiming to be fleeing from violence or abuse. In these circumstances it is important that children should be represented in cases where the court thinks that it appropriate. It should be remembered that where one of the exceptions to a return order is made out, the court has a discretion about what orders to make, and the child's best interests, although not the paramount consideration, will be an important matter to consider. In such cases, the Act should not restrict the court's power to order representation.

As to the consequences of repealing s 69L(3), I would expect that the court would not make such appointments routinely, but would do so in cases where it is appropriate, for example in cases involving the child's objection. It is possible that such appointments would delay or lengthen proceedings, but this is not necessarily so: in some cases the ICL might help the

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17 Family Law Amendment Act 2000.

18 Section 68L(3).

19 See further Michelle Fernando and Nicola Ross, 'Stifled Voices: Hearing Children's Objections in Hague Child Abduction Convention Cases in Australia' (2018) 32 *International Journal of Law, Policy and The Family* 93; Richard Chisholm and Belinda Fehlberg "The High Court and family law: The Hague child abduction cases" (2022) 35 *Australian Journal of Family Law* 39 – 67, and see Claire Fenton-Glynn, "Participation and Natural Justice: Children's Rights and Interests in Hague Abduction Proceedings" (2014) 9(1) *Journal of Comparative Law* 129-144 (reviewing various jurisdictions' approaches to hearing children's voices in Hague cases).

parties reach agreement, or help narrow the dispute the to key points, and thereby shorten proceedings.

In my view it would be appropriate to repeal s 68L(3), but after a suitable period, such as five years, reconsider the question in the light of experience.

Part XIVB - s 121

Questions 36-39

I have not had the opportunity to consider this closely, but I believe that the answer to all the questions is ‘yes’. A small point: In the simplified outline and s114S, it might be wise to refer to the ‘legitimate interests’ of members of the public.

APPENDIX: SOME OVERSEAS COMPARISONS

INTRODUCTION

This Appendix provides a quick survey of the relevant legislation in six other jurisdictions whose societies and legal systems are to some extent comparable with Australia: the UK, Canada (the national Divorce Act and the relevant legislation in the largest province, Ontario), New Zealand; as well as two states of the USA, Illinois and California (which I have extracted, but not much commented on). I do not suggest that the six chosen here are necessarily representative, but I am not aware of any other jurisdiction that has provisions similar to those that would be removed by the proposed reforms, but I hope this discussion will be of some interest in showing how the current and proposed provisions of the Australian Family Law Act compare with the legislation in comparable countries.

Richard Chisholm
February 2023

SUMMARY OF IMPORTANT FEATURES

The relevant provisions are set out below. The important features appear to be as follows:

The acts all provide that the child's best interests must be paramount

This has been the basic principle in many countries, including Australia for decades. In Canada, it is expressed to be the *only* consideration.

The acts all provide guidelines for determining what the child's best interests are.

It has also been customary in recent times for legislation to provide such guidelines, as in all the jurisdictions examined here.

The acts all refer to the importance of the child's safety

Specifically:

UK: includes among relevant factors "(e) any harm which he has suffered or is at risk of suffering"; does not give explicit priority to safety but (see below) avoids presumption favouring parental involvement where evidence suggests it would risk harm to the child.

Canada: "primary consideration" is to be given to the child's "physical, emotional and psychological safety, security and well-being". And among the relevant matters are any family violence and its impact the ability and willingness of persons to care for and meet the child's needs and to cooperate on issues affecting the child; and any civil or criminal proceeding or measure relevant to the child's safety, security and well-being.

NZ: The first of six listed principles is that "a child's safety must be protected and, in particular, a child must be protected from all forms of violence…" Safety seems to be emphasised, in that it is first on the list and the word "must" is stronger than the word "should", which is used in relation to the other matters on the list.

The acts deal differently with the importance of parents

UK: a rebuttable presumption that "involvement" of that parent in the life of the child concerned will further the child's welfare (s 1(2A)), unless there is evidence to suggest that such involvement would put the child at risk of suffering harm (s 1(6)).

Canada: There is no presumption favouring parents, but among the relevant factors are "**(b)** the nature and strength of the child's relationship with" each spouse, siblings and grandparents and "any other person who plays an important role in the child's life"; **(c)** each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse; **(d)** the history of care of the child; and "**(h)** the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child".

The Canadian legislation excludes any presumption about how much time children should spend with each parent, providing "**(6)** In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child" (Divorce Act s 16(6), Ontario s 24(6).

NZ: After the child's safety (above), the other five principles are, in substance:

> a child's care etc should be primarily the responsibility of the parents or guardians, and
>
> should be facilitated by ongoing consultation and co-operation between parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order.
>
> a child should have continuity in his or her care, development, and upbringing:
>
> a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group etc should be preserved and strengthened:

Overall, then, the UK gives importance to parents as such; the other jurisdictions tend to refer to matters that will typically involve parents, but in some situations might not. In this respect, the proposed reforms would make the Australian provisions a little different from the UK, and a little more similar to Canada and NZ (and, perhaps, a little more similar to the USA jurisdictions).

The acts refer to the child's views

All the legislation, including the existing and proposed Australian legislation, includes the child's views among the matters for consideration.

The acts do not restrict the matters that the court can consider

All the legislation, including the existing and proposed Australian legislation, provides that the court can consider anything else relevant to the child's best interests.

The acts refrain from suggesting that any particular arrangements are likely to be best for the child

None of the six elected jurisdictions contains any presumptions, hints or nudges (such as a requirement that the court must "consider" a specified outcome) favouring any particular arrangements, such as the time children should spend with each parent. Some specifically exclude any such preference or presumption (Canada (s 16(6), Ontario, s 24(6); UK s 1(2B).

CONCLUSIONS: CURRENT AND PROPOSED AUSTRALIAN LEGISLATION COMPARED WITH THE SELECTED OVERSEAS JURISDICTIONS

None of the other jurisdictions creates any presumption or suggestion that any particular time allocation or other arrangement is to be preferred or given special consideration. Australia is currently the only jurisdiction among these six jurisdictions countries that requires the court in some circumstances to "consider" parents having equal time, or "substantial and significant" time with the child. In that respect, the proposed reforms would bring Australia into line with the other jurisdictions examined.

None of the other jurisdictions has any provision dividing relevant matters into "primary" and "additional" consideration. In that respect the proposed reforms would therefore bring Australia into line with the other jurisdictions examined.

None of the other jurisdictions has any provision linking the time children should spend with parents and the allocation of decision-making power between parents. In this respect too the proposed reforms would bring Australia into line with the other jurisdictions examined.

All the laws, including the existing and proposed Australian laws, give emphasis, in different language, to the importance of protecting children from harm.

All laws provide, in substance, that the parents have equal parental responsibility (subject to the court making different orders). Australia is alone in providing for a presumption that in some circumstances children will benefit from having orders for "equal shared parental responsibility" with parents having an obligation to consult, and to make make decisions jointly (although as noted above, UK does have a a rebuttable presumption that "involvement" of parents will further the child's welfare unless there is evidence to suggest that such involvement would put the child at risk of suffering harm). Removing that provision would bring Australia into line with those four jurisdictions[20].

None of the other jurisdictions refers to the benefit for children in having a "meaningful relationship" with their parents. The UK legislation has a presumption favouring parents having an "involvement" with the children, except where there is evidence that this would be harmful. There is no similar presumption in the New Zealand or the Canadian legislation, although the importance of family ties and continuity of care is acknowledged. Nor have I found such a provision in the two American jurisdictions mentioned, although I have not been able to review these laws thoroughly. Leaving aside technical matters, removing the presumption that children benefit from equal shared parental responsibility would in substance make Australian law a little different from the UK but more similar to Canada and New Zealand.

[20] I have not reviewed the USA legislation in this regard.

EXTRACTS FROM SELECTED OVERSEAS JURISDICTIONS

CHILDREN ACT 1989 (UK)

1 Welfare of the child.

(1) When a court determines any question with respect to -

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

(2B) In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to —

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that ***[the court is considering making a parenting order]*** -

(a) the court is considering whether to make, vary or discharge a section 8 order [ie a parenting order][21] , and the making, variation or discharge of the order is opposed by any party to the proceedings; or

(b) the court is considering whether to make, vary or discharge a special guardianship order or an order under Part IV.

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

(6) In subsection (2A) “parent” means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned -

(a) is within this paragraph if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm; and

(b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.

(7) The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1)(c) or (5) (parental responsibility of parent other than mother).

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[21] Section 8 defines a “child arrangements order" in a way similar to a “parenting order” under the Family Law Act 1975.

CANADA

DIVORCE ACT 1985

Best interests of child

- 16 **(1)** The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.
- **Primary consideration**

  (2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.
- **Factors to be considered**

  (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

    - **(a)** the child's needs, given the child's age and stage of development, such as the child's need for stability;
    - **(b)** the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
    - **(c)** each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
    - **(d)** the history of care of the child;
    - **(e)** the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
    - **(f)** the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
    - **(g)** any plans for the child's care;
    - **(h)** the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
    - **(i)** the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
    - **(j)** any family violence and its impact on, among other things,
        - **(i)** the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
        - **(ii)** the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

- **(k)** any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

- **Factors relating to family violence**

  (4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

  - **(a)** the nature, seriousness and frequency of the family violence and when it occurred;
  - **(b)** whether there is a pattern of coercive and controlling behaviour in relation to a family member;
  - **(c)** whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
  - **(d)** the physical, emotional and psychological harm or risk of harm to the child;
  - **(e)** any compromise to the safety of the child or other family member;
  - **(f)** whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
  - **(g)** any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
  - **(h)** any other relevant factor.

- **Past conduct**

  (5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.

- **Parenting time consistent with best interests of child**

  (6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

- **Parenting order and contact order**

  (7) In this section, a parenting order includes an interim parenting order and a variation order in respect of a parenting order, and a contact order includes an interim contact order and a variation order in respect of a contact order.

ONTARIO, CANADA

CHILDREN'S LAW REFORM ACT, R.S.O. 1990, C. C.12

(6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

Equal entitlement to decision-making responsibility

20 (1) Except as otherwise provided in this Part, a child's parents are equally entitled to decision-making responsibility with respect to the child.

Rights and responsibilities

(2) A person entitled to decision-making responsibility with respect to a child has the rights and responsibilities of a parent in respect of the child, and must exercise those rights and responsibilities in the best interests of the child.

Authority to act

(3) If more than one person is entitled to decision-making responsibility with respect to a child, any one of them may exercise the rights and accept the responsibilities of a parent on behalf of them in respect of the child.

If parents separate

(4) If the parents of a child live separate and apart and the child lives with one of them with the consent, implied consent or acquiescence of the other, the right of the other to exercise the entitlement to decision-making responsibility with respect to the child, but not the entitlement to parenting time, is suspended until a separation agreement or order provides otherwise..

Parenting time

(5) The entitlement to parenting time with respect to a child includes the right to visit with and be visited by the child, and includes the same right as a parent to make inquiries and to be given information about the child's well-being, including in relation to the child's health and education. […]

Best interests of the child

24 (1) In making a parenting order or contact order with respect to a child, the court shall only take into account the best interests of the child in accordance with this section.

Primary consideration

(2) In determining the best interests of a child, the court shall consider all factors related to the circumstances of the child, and, in doing so, shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Factors

(3) Factors related to the circumstances of a child include,

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(b) the nature and strength of the child's relationship with each parent, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

(c) each parent's willingness to support the development and maintenance of the child's relationship with the other parent;

(d) the history of care of the child;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

(g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and co-operate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to co-operate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child. 2020, c. 25, Sched. 1, s. 6.

Factors relating to family violence

(4) In considering the impact of any family violence under clause (3) (j), the court shall take into account,

(a) the nature, seriousness and frequency of the family violence and when it occurred;

(b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;

(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;

(d) the physical, emotional and psychological harm or risk of harm to the child;

(e) any compromise to the safety of the child or other family member;

(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;

(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve the person's ability to care for and meet the needs of the child; and

(h) any other relevant factor. 2020, c. 25, Sched. 1, s. 6.

Past conduct

(5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person, unless the conduct is relevant to the exercise of the person's decision-making responsibility, parenting time or contact with respect to the child. 2020, c. 25, Sched. 1, s. 6.

Allocation of parenting time

(6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the child. 2020, c. 25, Sched. 1, s. 6.

NEW ZEALAND

CARE OF CHILDREN ACT 2004

https://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html

3 Purpose of this Act

(1) The purpose of this Act is to—

(a) promote children's welfare and best interests, and facilitate their development, by helping to ensure that appropriate arrangements are in place for their guardianship and care; and

(b) recognise certain rights of children.

(2) To that end, this Act—

(a) defines and regulates—

(i) parents' duties, powers, rights, and responsibilities as guardians of their children:

(ii) parents' powers to appoint guardians:

(iii) courts' powers in relation to the guardianship and care of children:

(b) acknowledges the role that other family members may have in the care of children:

(c) respects children's views and, in certain cases, recognises their consents (or refusals to consent) to medical procedures:

(d) encourages agreed arrangements for, and provides for the resolution of disputes about, the care of children:

(e) makes provision for enforcing orders internationally:

(f) implements in New Zealand law the Hague Convention on the Civil Aspects of International Child Abduction:

(g) reforms and replaces the Guardianship Act 1968 (including the Guardianship Amendment Act 1991).

4 Child's welfare and best interests to be paramount

(1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—

(a) in the administration and application of this Act, for example, in proceedings under this Act; and

(b in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

(2) Any person considering the welfare and best interests of a child in his or her particular circumstances -

(a) must take into account—

(i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and

(ii) the principles in section 5; and

(b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.

(3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person's gender.

(4) This section does not—

(a) limit section 6 or 83, or subpart 4 of Part 2; or

(b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

(a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:

(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:

(c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:

(d) a child should have continuity in his or her care, development, and upbringing:

(e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:

(f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

5A Family violence to be taken into account

(1) This section applies if—

(a) an application is made to the court for—

(i) a guardianship order under section 19 or 27; or

(ii) a direction under section 46R in relation to a guardianship dispute; or

(iii) a parenting order under section 48 (whether an interim parenting order or a final parenting order); or

(iv) a variation of a parenting order, under section 56; and

(b) 1 or both of the following kinds of orders made under section 79 of the Family Violence Act 2018 is or are, or at any time has or have been, in force against 1 or more parties to the application:

(i) a temporary protection order:

(ii) a final protection order.

(2) In taking into account the principle in section 5(a), the court must have regard in particular to the following matters:

(a) whether a temporary protection order, or final protection order, is still in force:

(b) the circumstances in which that order was made:

(c) any written reasons, given by the Judge who made that order, for that Judge's decision to make that order.

(3) In taking into account the principle in section 5(a), the court must, if practicable, have regard in particular to—

(a) all relevant convictions (if any), of 1 or more parties to the application, for an offence against section 112 of the Family Violence Act 2018 (breaching a protection order or related property order), or for any other family violence offence:

(b) all relevant safety concerns (if any) that an assessor or a service provider has notified or advised under section 185 or 204 of the Family Violence Act 2018.

(4) In this section, family violence offence means an offence—

(a) against any enactment (including the Family Violence Act 2018); and

(b) involving family violence (as defined in section 9 of that Act).

6. Child's views

(1) This subsection applies to proceedings involving—

(a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or

(b) the administration of property belonging to, or held in trust for, a child; or

(c) the application of the income of property of that kind.

(2) In proceedings to which subsection (1) applies,—

(a) a child must be given reasonable opportunities to express views on matters affecting the child; and

(b) any views the child expresses (either directly or through a representative) must be taken into account.

THE UNITED STATES: ILLINOIS

(750 ILCS 5/) Illinois Marriage and Dissolution of Marriage Act.

Sec. 602.5. Allocation of parental responsibilities: decision-making.

Generally. The court shall allocate decision-making responsibilities according to the child's best interests. Nothing in this Act requires that each parent be allocated decision-making responsibilities. […]

Sec. 602.7. Allocation of parental responsibilities: parenting time.

Best interests. The court shall allocate parenting time according to the child's best interests.

(b) Allocation of parenting time. Unless the parents present a mutually agreed written parenting plan and that plan is approved by the court, the court shall allocate parenting time. It is presumed both parents are fit and the court shall not place any restrictions on parenting time as defined in Section 600 and described in Section 603.10, unless it finds by a preponderance of the evidence that a parent's exercise of parenting time would seriously endanger the child's physical, mental, moral, or emotional health.

In determining the child's best interests for purposes of allocating parenting time, the court shall consider all relevant factors, including, without limitation, the following:

(1) the wishes of each parent seeking parenting time

(2) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to parenting time;

(3) the amount of time each parent spent performing caretaking functions with respect to the child in the 24 months preceding the filing of any petition for allocation of parental responsibilities or, if the child is under 2 years of age, since the child's birth

(4) any prior agreement or course of conduct between the parents relating to caretaking functions with respect to the child;

(5) the interaction and interrelationship of the child with his or her parents and siblings and with any other person who may significantly affect the child's best interests;

(6) the child's adjustment to his or her home, school, and community;

(7) the mental and physical health of all individuals involved;

(8) the child's needs;

(9) the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement;

(10) whether a restriction on parenting time is appropriate;

(11) the physical violence or threat of physical violence by the child's parent directed against the child or other member of the child's household;

(12) the willingness and ability of each parent to place the needs of the child ahead of his or her own needs(13) the willingness and ability of each parent to; facilitate and encourage a close and continuing relationship between the other parent and the child;

(14) the occurrence of abuse against the child or other member of the child's household;

(15) whether one of the parents is a convicted sex offender or lives with a convicted sex offender and, if so, the exact nature of the offense and what if any treatment the offender has successfully participated in; the parties are entitled to a hearing on the issues raised in this paragraph (15)

(16) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed; and

(17) any other factor that the court expressly finds to be relevant.

[https://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=075000050HPt%2E+VI&ActID=2086&ChapterID=59&SeqStart=8675000&SeqEnd=12200000}

THE UNITED STATES: CALIFORNIA

CALIFORNIA FAMILY CODE

Note: the list of factors most corresponding to s 60CC of the Family Law Act 1975 (Cth) is s 3011. Other sections of possible relevance are also set out below: s 3040 (order of preference), 3042 (child's wishes) and 3044 (family violence).

Sec. 3011

In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, consider all of the following:

(a) The health, safety, and welfare of the child.

(b) Any history of abuse by one parent or any other person seeking custody against any of the following:

> (1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.

(2) The other parent.

(3) A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.

As a prerequisite to considering allegations of abuse, the court may require substantial independent corroboration […]

(c) The nature and amount of contact with both parents, except as provided in Section 3046.

(d) The habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent. […]

Sec. 3040

(a) Custody should be granted in the following order of preference according to the best interest of the child as provided in Sections 3011 and 3020:

(1) To both parents jointly pursuant to Chapter 4 (commencing with Section 3080) or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, consistent with Sections 3011 and 3020, and shall not prefer a parent as custodian because of that parent's sex. The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(b) The immigration status of a parent, legal guardian, or relative shall not disqualify the parent, legal guardian, or relative from receiving custody under subdivision (a).

(c) This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

(d) In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child as provided in Sections 3011 and 3020.

Sec. 3042

(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation.

(b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interests of the child.

(c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests. In that case, the court shall state its reasons for that finding on the record.

(d) Nothing in this section shall be interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child's best interests.

(e) If the court precludes the calling of any child as a witness, the court shall provide alternative means of obtaining input from the child and other information regarding the child's preferences.

(f) To assist the court in determining whether the child wishes to express his or her preference or to provide other input regarding custody or visitation to the court, a minor's counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge pursuant to Section 3183 shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A party or a party's attorney may also indicate to the judge that the child wishes to address the court or judge.

(g) Nothing in this section shall be construed to require the child to express to the court his or her preference or to provide other input regarding custody or visitation. […]

Sec. 3044

(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.

(b) In determining whether the presumption set forth in subdivision (a) has been overcome, the court shall consider all of the following factors:

(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial

parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.

(2) Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

(3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.

(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.

(5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.

(6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.

(7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

(c) For purposes of this section, a person has "perpetrated domestic violence" when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings.

(d) (1)For purposes of this section, the requirement of a finding by the court shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of any crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code.

(2) The requirement of a finding by the court shall also be satisfied if any court, whether that court hears or has heard the child custody proceedings or not, has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.

(e) When a court makes a finding that a party has perpetrated domestic violence, the court may not base its findings solely on conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff, but shall consider any relevant, admissible evidence submitted by the parties.

(f) In any custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with the terms of this section, the court

shall inform the parties of the existence of this section and shall give them a copy of this section prior to any custody mediation in the case.

https://california.public.law/codes/ca_fam_code_section_3011