

# **SOCIAL SCIENCE OR ‘LEGO-SCIENCE’? PRESUMPTIONS, POLITICS, PARENTING AND THE NEW FAMILY LAW**

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*This article argues that the introduction of a presumption that equal shared parental responsibility is in the best interests of children into the Family Law Act in 2006 has contributed to inappropriate, and even damaging, post-separation parenting arrangements for some children. The author suggests that the presumption and its legislative link to equal and substantially shared care time orders have created a ‘lego-science’ that shared parenting is almost always good for children, but this lego-science is a pseudo science which is not consistent with the complex reported social science about shared parenting. The foundation of the lego-science is the presumption, but expressions like ‘meaningful relationships’ contained in other sections build a legislative or ‘lego-bridge’ to the time provisions. This lego-bridge has been reinforced by the case law. This article argues that a presumption was an inappropriate legal tool to use in the discretionary culture of family law decision-making because it encourages a ‘one size fits all’ approach. Further, presumptions are legal fictions that become dangerous when believed. The fact that the reforms were driven by fathers’ rights groups provided a charged socio-political climate in which legal fictions were more likely to acquire the aura of truth. It also seems that the safeguards against the application of the presumption and the making of share care time orders were drafted in a manner that has allowed them to be ignored, creating a gap between the apparent legislative intent – to provide exceptions – and how the law actually plays out in the courts and the community – with the safeguards by-passed at times. The article concludes that fundamental reform of the Family Law Act is required again.*

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## I INTRODUCTION

In 2006 the Australian Parliament introduced major amendments to the parenting law provisions of the *Family Law Act 1975* (Cth) (*FLA*), by way of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (the '2006 Act'). A key aspect of the reforms was the insertion of a rebuttable presumption that it is in the best interests of children for their parents to have 'equal shared parental responsibility'.<sup>1</sup> Notably the application of this presumption was legislatively linked to specific parenting time outcomes, including equal time and the concept of 'substantial and significant'<sup>2</sup> time. This article argues that the presumption, with its legislative connections to shared care time outcomes, has created what the author has called a 'lego-science' about shared parenting.<sup>3</sup> The term 'lego-science'<sup>4</sup> plays on two ideas. Firstly, by way of the presumption, the *leg*-islation appears to express a social science fact or 'truth' that sharing responsibilities and duties between parents after separation is in children's best interests, whereas this is not a simple truth. Secondly, a series of sections<sup>5</sup> operate like 'lego' bricks, interlocking with each other in a 'lego-bridge' towards shared care time outcomes. This article argues that the lego-science and lego-bridge facilitate an almost irresistible shift from the presumption of equal shared parental responsibility to shared care time and there has been an increasing number of shared care time orders and arrangements implemented in post-separation families since the 2006 Act.<sup>6</sup>

Part I of this article examines the contemporary social science literature and shows that much of the relevant research suggests that shared parenting, in particular shared care time, is only appropriate for some separated families and can be damaging for children in others. The author argues that there is a gap between the complex and nuanced social science research on when shared care time actually works and the 'lego-science' of the 2006 Act.

Part II analyses the actual amendments and demonstrates the *prescriptive* nature of the provisions which lean towards shared parenting outcomes as compared to the *discretionary* language used in the exceptions and exemptions. The lego-bridge between the presumption<sup>7</sup> and the time provision which it triggers<sup>8</sup> is described. It is built by the objects section<sup>9</sup> and the first 'primary consideration' in the best interests' checklist,<sup>10</sup> which both draw on the idea of the 'benefit' of 'meaningful' relationships between parents and their children. The case law which has followed has reinforced this lego-bridge.

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<sup>1</sup> Similar to 'joint guardianship' in the old language – see pt II of this article for the definition.

<sup>2</sup> This is statutorily defined in the *Family Law Act 1975* (Cth) s 65DAA(3).

<sup>3</sup> When I use the expression 'shared parenting' I am referring to both shared decision-making and shared parenting time as will be shortly outlined in the section on terminology.

<sup>4</sup> This invented word can either be pronounced with a soft 'g' as in 'legislation' or a hard 'g' as in *lego*, the internationally known interlocking toy building bricks.

<sup>5</sup> In particular *Family Law Act 1975* (Cth) ss 60B(1)(a), 60CC(2)(a).

<sup>6</sup> This post-reform increase in the incidence of shared care time orders and arrangements will be discussed in pt V of the article.

<sup>7</sup> *Family Law Act 1975* (Cth) s 61DA.

<sup>8</sup> *Ibid* s 65DAA.

<sup>9</sup> *Ibid* s 60B.

<sup>10</sup> *Ibid* s 60CC(2)(a).

In Part III the socio-political environment of the 2006 Act is considered and the influence of fathers' rights groups on the language and structure of the reforms exposed. Their calls for equal time were not quite met, but the introduction of a *presumption* answered one of their demands and the author suggests that the link to shared care time provisions was a deliberate compromise by a government seeking to pacify this powerful lobby group.<sup>11</sup> The author suggests that this background permeates the community's understanding of the law, while its philosophical impact even effects judicial interpretation.

Part IV traces the concept of presumptions as legal devices. A legal presumption suggests a state of affairs that is so generally true that effort should not be wasted arguing about it. This article contends that a presumption was an inappropriate legal tool to use in the vastly various and individually specific decision-making needed for family law. A presumption is also a powerful device, intended to draw decision-makers towards its application. But a presumption is a legal fiction and legal fictions become dangerous when their fictitious nature is forgotten.

Finally pt V explores the gap between the presumption as implemented, which included legislative safeguards, and what has actually occurred in the courts and in some families. Despite legislative exceptions to shared parenting where there is a history of family violence, empirical research since the reforms shows equal shared parental responsibility and substantially shared time orders are still made in families where there has been abuse. Further this article refers to two case studies<sup>12</sup> to demonstrate how other factors such as parental conflict and the ages of the children are also ignored as relevant, although the social science literature suggests that these are critical matters to consider.

The article concludes by recommending fundamental reform (again) of the *FLA*, with the removal of the presumption, the creation of legislative contra-indicators to shared care time and a carefully developed list of best interest factors which genuinely reflect the social science research about post-separation parenting with no mention of any particular pattern of care.

## PART I – THE SOCIAL SCIENCE RESEARCH ABOUT SHARED CARE

### A *Shared Parenting*

It is not possible to explore the literature about shared parental *responsibility* in any detail in this article, although it is clear that for some families, particularly where there is violence or high conflict, shared decision-making is contra-indicated.<sup>13</sup> The main focus of this review of the social science research in Part I will be on shared care *time*.

<sup>11</sup> See M Flood, "Fathers' Rights" and the Defense of Paternal Authority in Australia' (2009) 16(3) *Violence Against Women* 328. It is not surprising that about 70% of family law system professionals believe that the reforms have favoured fathers. See R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) 219.

<sup>12</sup> *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008); *Rosa and Rosa* [2008] FMCAfam 427 (1 April 2008) (original trial in the Federal Magistrates Court); *Rosa and Rosa* [2009] FamCAFC 81 (15 May 2009) (appellate decision of the Full Court of the Family Court); and *MRR v GR* [2010] HCA 4 (3 March 2010) (High Court Decision).

<sup>13</sup> As will be discussed in pt III the Inquiry that led to the 2006 reforms recommended a presumption against shared parental responsibility where there is 'entrenched conflict, family violence, substance abuse or established child abuse'. See: House of Representatives Standing Committee on Family and

There is a profusion of terms used to describe the various types of shared care time. The Australian Institute of Family Studies' evaluation of the 2006 Act (the 'AIFS Evaluation'), which was set in train when the reforms were implemented, created 11 categories to describe post-separation care time arrangements in which children live in Australia.<sup>14</sup> Subsection 65DAA(3) of the *FLA* provides a statutory definition of 'substantial and significant' time which must include weekdays, weekends, holidays, daily routine and special events. The expression 'shared care time' is used throughout this article to mean anything from equal time to something similar to substantial and significant time – regimes where children spent quite a lot of time with each parent, usually with transfers between homes at least once per week. The expression 'shared parenting' is used in this article to refer to parenting arrangements which include both shared parental responsibility (decision-making) and shared care time.

### B *What We Knew Before the Reform Process Began*

The social science research about when shared care time works for children is not straight forward and its complex and contested nature belies the rather simplistic lego-science of the 2006 Act. In 2003, at a conference held in Sydney, 13 days after the federal government announced its Inquiry into 'Joint Custody' which led to the reforms under discussion,<sup>15</sup> a team of researchers from the AIFS noted that in Australia 'little is known about parents who opt for shared care of their children, how these arrangements are structured, and how well they work.'<sup>16</sup> This was a matter of concern considering the existing social-political impetus for reform with a shared parenting approach.<sup>17</sup>

Although there was little Australian research at the time, there was an emerging array of literature on shared care around the world by the early 2000s. The work of Carol Smart in the United Kingdom was well known in Australia from the mid to late 1990s. Her extensive studies into post-separation care arrangements found that what works for one child may not work for another. Interviews with children in shared care time revealed stark differences in their responses:

- some found a regular routine positive while for others 'it meant an unbearable and inflexible regime';
- some 'relished' being loved by both parents and saw shared care as a 'manifestation' of this but others felt it was a 'terrible burden because they became responsible for the emotional well-being of their parents';

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Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of a Family Separation* (2003) 27, 41–2. See also, for example, M Elkin, 'Joint Custody: In the Best Interest of the Family' in J Folberg (ed), *Joint Custody and Shared Parenting* (The Guilford Press, 1991) 14.

<sup>14</sup> Kaspiew et al, above n 11, 119.

<sup>15</sup> *Inquiry into Child Custody Arrangements in the Event of Family Separation*, which was referred to the House of Representatives Standing Committee on Family and Community Affairs jointly by the Attorney-General, the Hon Daryl Williams MP and the Minister for Children and Youth Affairs, the Hon Larry Anthony MP on 29 June 2003.

<sup>16</sup> B Smyth, C Caruana and A Ferro, 'Some Whens, Hows and Whys of Shared Care: What Separated Parents who Spend Equal Time with their Children Say about Parenting' (Paper presented at the Australian Social Policy Conference, Social Policy Research Centre, University of NSW, 9-11 July 2003).

<sup>17</sup> This will be discussed in pt III of this article.

- some thought it was ‘excellent’ because it was ‘fair for their parents’ but others thought it was ‘dreadful because it was incredibly unfair on them’.<sup>18</sup>

This overall theme that one size does not fit all is generally consistent in the social science research on post-separation parenting arrangements.

### C (Some of) What We Have Learnt Since

The contested views about shared care time and the controversial nature of the 2006 reforms are evidenced by the extraordinary level of commissioned and independent research which has been conducted since its introduction. Between them, the government which enacted the reforms and the government which followed have commissioned at least seven reports: the major Evaluation conducted by the AIFS,<sup>19</sup> a group of reports by Jennifer McIntosh and colleagues which examine school aged children in high conflict families and infants and young children,<sup>20</sup> a more general investigation into when shared care ‘works well ... and ... works less well’,<sup>21</sup> and four reports focussing on family violence.<sup>22</sup> The independent research includes an empirical study by Fehlberg and colleagues referred to in pt V of this article,<sup>23</sup> and qualitative research about mothers who have experienced family violence.<sup>24</sup>

It is not possible to do justice to the plethora of research now available in regard to children in shared care time however three areas that are of relevance to this article will be discussed:

- families where there is or has been violence or abuse;
- high levels of parental conflict; and
- infants and young children.

<sup>18</sup> B Neal, J Flowerdew and C Smart, ‘Drifting Towards Shared Residence?’ [2003] *Family Law* 904, 905.

<sup>19</sup> Kaspiew et al, above n 11.

<sup>20</sup> J McIntosh et al, *Post-separation Parenting Arrangements and Developmental Outcomes for Infants and Children – Collected Reports* (Family Transitions, 2010).

<sup>21</sup> J Cashmore et al, *Shared Care Parenting Arrangements Since the 2006 Family Law Reforms* (Social Policy Research Centre, University of New South Wales, 2010) (the ‘SPRC Report’).

<sup>22</sup> D Bagshaw et al, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* (Commonwealth of Australia, 2010); R Chisholm, *Family Courts Violence Review* (November 2009) Australian Government, Attorney-General’s Department

<[http://www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_FamilyCourtsViolenceReview](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyCourtsViolenceReview)>; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (December 2009) Australian Government, Attorney-General’s Department

<[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Family\\_Violence\\_Report.pdf/\\$file/Family\\_Violence\\_Report.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Family_Violence_Report.pdf/$file/Family_Violence_Report.pdf)>; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: Improving Legal Frameworks – Consultation Paper* (April 2010) <<http://www.alrc.gov.au/inquiries/current/family-violence/CP1/index.html>>.

<sup>23</sup> See: B Fehlberg, C Millward and M Campo, ‘Shared Post-separation Parenting in 2009: An Empirical Snapshot’ (2009) 23 *Australian Journal of Family Law* 247.

<sup>24</sup> L Laing, *No Way to Live: Women’s Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (June 2010) University of Sydney, NSW Health and Benevolent Society <<http://www.bensoc.org.au/uploads/documents/no-way-to-live-full-report-june2010.pdf>>.

It is noteworthy that the AIFS Evaluation reported ‘no evidence of any differential effect of care-time arrangements on children’s well-being’ due to the presence of any of these three factors.<sup>25</sup> This does not mean that these groups of children were necessarily doing well – just that they did no worse in shared care than children in those circumstances who were in other time care arrangements. Other studies have returned somewhat different results. This exemplifies the contested and varied nature of the social science research on post-separation parenting and partly explains the inappropriateness of using a *presumption* (with its ‘one size fits all’ foundation) when legislating in this area.

Although AIFS Evaluation reported no markedly different effect on the well-being of children in shared care time with a history of family violence, the Evaluation still found an on-going negative impact of family violence on children generally – no matter what their care arrangement.<sup>26</sup> The only circumstance in which shared care registered a statistically significant difference in terms of children’s well-being was when the mother held safety concerns. Then children in shared care fared worse than children who lived with their mother most of the time.<sup>27</sup> Although safety concerns were reported less frequently than family violence,<sup>28</sup> there is an obvious link between current safety concerns and a history of family violence.<sup>29</sup> Despite this 24-25% of mothers who were implementing a shared care regime reported having been physically hurt by the other parent.<sup>30</sup> Presumably some of these mothers were the ones who reported safety concerns and those who did not may well still experience some difficulties trying to implement shared care time with their abusive former partner. The Bagshaw and Brown research, which will be discussed in pt V, found that some mothers felt pressure to agree to shared care time arrangements post-reform despite a history of family violence.<sup>31</sup> It will be seen that the legislative intention to create a family violence exemption is not always observed.

Regarding inter-parental relationships, the AIFS Evaluation found that most parents who shared care had a ‘friendly or cooperative’ relationship, but there was a ‘significant minority’ who experienced high levels of conflict or even fear. In fact mothers with a shared care time arrangement were less likely to report a ‘friendly or cooperative’ relationship with the father than mothers whose children lived with them most of the time.<sup>32</sup> It is of some concern that 21–24% of mothers with shared care time arrangements ‘reported highly conflictual or fearful relationships’ with the other parent<sup>33</sup> - although, as previously stated, AIFS Evaluation found that shared care time was no worse an arrangement than others for the well being of children with conflicted parents. Both case studies discussed in Pt V of this article involve parental conflict which was not seen as disqualifying of an equal time arrangement or even very relevant to consider.

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<sup>25</sup> Kaspiew et al, above n 11, 269.

<sup>26</sup> Ibid 262.

<sup>27</sup> Ibid 270.

<sup>28</sup> Ibid 166.

<sup>29</sup> Ibid 32.

<sup>30</sup> Ibid 165.

<sup>31</sup> Bagshaw et al, above n 22, 72.

<sup>32</sup> Kaspiew et al, above n 11, 162–3.

<sup>33</sup> Ibid 165.

McIntosh's study over four years involving school-aged children in high conflict families found that, both mothers and fathers who had implemented shared care time arrangements throughout the whole period reported higher levels of conflict with the other parent than all other kinds of arrangements.<sup>34</sup> She also identified a particular sense of being 'caught in the middle' which children in shared care can experience. At the beginning of the study, these children reported lower levels of being caught in the middle than children in primary care situations or those whose care patterns changed over the four years. However, by the end of the study, the shared care group had experienced no decrease while all other groups had dropped to much lower levels.<sup>35</sup> Given these findings it is somewhat disturbing to note that lawyers report more shared care time arrangements are occurring where the parents are highly conflicted under the new reforms.<sup>36</sup>

In terms of infants, the AIFS Evaluation reported that parents who had children under three years of age in a shared time care arrangement, suggested that 'the arrangements were working well for their child', although this was an unusual routine for very young children.<sup>37</sup> McIntosh, however, found that infants experiencing regular overnight stays away from their primary carer exhibited irritability and 'vigilant efforts to monitor the presence of the primary parent'.<sup>38</sup> For the 2–3 year olds she found that although the care patterns did not independently predict 'global health status',<sup>39</sup> those in shared care time had 'higher rates of problem behaviours and poor persistence in activities and exploration'.<sup>40</sup> She explained this as partly attributable to 'repeated disruption to the primary attachment relationship whose function is to co-regulate the developing infant while emotional regulatory systems of the brain are at a critical period of establishment'.<sup>41</sup> In the case of *Stuart and Stuart*, which is discussed in Pt V, one of the children is only three, but no reference is made to the relevance of her age in the judgment.

## PART II – THE LAW ABOUT SHARED CARE

### A *The Presumption*

The author suggests that the presumption is the foundation brick of the lego-science. The drafting reveals the strong policy intent to encourage shared parenting and the structure of the relevant sections draws the decision-maker towards shared care time. The presumption is not about parenting *time* but about *parental responsibility* but, as will be seen, the presumption and time sections interact and interlock. Parental responsibility is defined as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.<sup>42</sup> Orders for equal shared parental responsibility require that parents consult about major long-term issues, including

<sup>34</sup> McIntosh et al, above n 20, 40.

<sup>35</sup> Ibid 45. The SPRC Report also touches on children who feel 'caught in the middle', although children in a variety of arrangements reported this sense. See Cashmore et al, above n 21, 133.

<sup>36</sup> Kaspiew et al, above n 11, 219.

<sup>37</sup> Ibid 169. Only 8% of children under 3 were in shared care time.

<sup>38</sup> McIntosh et al, above n 20, 156.

<sup>39</sup> Ibid 137.

<sup>40</sup> Ibid 156.

<sup>41</sup> Ibid.

<sup>42</sup> *Family Law Act 1975* (Cth) s 61B.

education, religion, health and name.<sup>43</sup> Separate parenting orders determine care time arrangements.<sup>44</sup>

An examination of s 61DA demonstrates how compellingly it has been drafted for an outcome where the presumption is applied. Prescriptive drafting (underlined below) is used to promote the shared parenting philosophy which underlies these reforms, while *discretionary* drafting (in italics) is used when providing circumstances in which shared parenting may not be appropriate.

#### **61DA Presumption of equal shared parental responsibility when making parenting orders**

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

As can be seen the introductory subsection that establishes the presumption is couched in mandatory terms (the presumption must be applied) but the following three subsections, which contain the exceptions and rebuttals, are all written in language that requires the exercise of some kind of discretion, therefore always leaving it open to a court to apply the presumption even where there are possible contra-indicators. This style of prescriptive/discretionary drafting recurs later in the time provisions.<sup>45</sup>

#### **B      *The Lego-bridge***

The legislation, through its language and structure, creates a strong link - what is referred to as a '*lego-bridge*' in this article - from the presumption to actual parenting time arrangements for children. The two ends of the bridge are the presumption<sup>46</sup> and the time provision, which is triggered by the application of the presumption.<sup>47</sup> Other

<sup>43</sup> See the interpretation section, *Family Law Act 1975* (Cth) s 4.

<sup>44</sup> Under *Family Law Act 1975* (Cth) s 64B.

<sup>45</sup> *Ibid* s 65DAA.

<sup>46</sup> *Ibid* s 61DA.

<sup>47</sup> *Ibid* s 65DAA.

sections are the *lego*-bricks (or planks) across the bridge - the objects section<sup>48</sup> and the 'primary considerations' subsection in the best interests' checklist<sup>49</sup> - which both use social science related expressions like 'meaningful relationships' and 'meaningful involvement' to strengthen the link between shared parental responsibility and shared parenting time. For example, the objects section states, *inter alia*:

### **60B Objects of part and principles underlying it**

The objects of this Part are to ensure that the best interests of children are met by:

- a) ensuring that children have the *benefit* of both of their parents having a *meaningful involvement* in their lives, to the maximum extent consistent with the best interests of the child.<sup>50</sup>

To continue the analogy, if the objects section and one of the primary considerations are the 'lego-bricks' along the bridge, some key cases have provided the mortar. This jurisprudential bond between shared parental responsibility, parental involvement and shared time outcomes was laid down shortly after the reforms became operative in the first major appellate level decision to consider the 2006 Act. In *Goode and Goode*<sup>51</sup> the Full Court said:

there is a legislative intent evinced in favour of *substantial involvement* of both parents in their children's lives, both as to *parental responsibility* and as to *time* spent with children.<sup>52</sup>

These connections were reinforced the following year in *Mazorski and Albright* where Brown J described the objects' section as being 'consistent with the introduction of the presumption in favour of equal shared parental responsibility'.<sup>53</sup> The presumption, the objects, the best interests' checklist and shared care time are all linked in a shared parenting structure built by the reforms.

## C *The Time Provisions*

The link between the presumption and the time provisions is both automatic and mandatory. Once the presumption has been applied, equal or substantial and significant time orders *must* be considered.

### **65DAA Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances**

Equal time

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<sup>48</sup> Ibid s 60B.

<sup>49</sup> Ibid s 60CC(2)(a).

<sup>50</sup> Author's emphasis. There are other sub-sections including *Family Law Act 1975* (Cth) s 60B(1)(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

<sup>51</sup> (2006) FLC ¶93-286 (15 December 2006).

<sup>52</sup> Ibid [72].

<sup>53</sup> [2007] FamCA 520 (31 May 2007) [13] (Brown J). These words were also used in the Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) [51].

If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:<sup>54</sup>

- a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
- b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
- c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Where an equal time order is not made, the court must consider a 'substantial and significant' time order in the same manner.<sup>55</sup>

As can be seen, in terms of deciding the actual parenting time orders to make, the court must consider two things: whether the particular order is in the best interests of the child and whether it is reasonably practicable. To determine whether such an order is 'reasonably practicable', judicial officers are provided with a legislative checklist to which they must have regard in sub-s 65DAA(5).<sup>56</sup> It reads:

In determining ... whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:

- a) how far apart the parents live from each other; and
- b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- d) the impact that an arrangement of that kind would have on the child; and
- e) such other matters as the court considers relevant.

This article has previously identified the tendency in the 2006 Act for provisions that lean towards shared parenting to be drafted prescriptively, while provisions that provide the checks against such orders seem to allow some amount of discretion. Although the drafting style and intent of sub-s 65DAA(5) is difficult to fathom, the author suggests that it continues this trend. On the one hand, it seems strongly worded. The mandatory nature of the introductory clause *requires* courts to consider the listed factors before making an equal or substantial and significant time order.<sup>57</sup> On the other hand, the

<sup>54</sup> Author's emphasis.

<sup>55</sup> *Family Law Act 1975* (Cth) s 65DAA(2).

<sup>56</sup> A recent High Court decision, *MRR v GR* [2010] HCA 4 (3 March 2010), which suggests a disconnect between *Family Law Act 1975* (Cth) s 65DAA(1)(b) and s 65DAA(5) in relocation cases at least will be discussed in pt V of this article.

<sup>57</sup> The cases of *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008) and *Rosa and Rosa* [2008] FMCAfam 427 (1 April 2008) (original trial in the Federal Magistrates Court) are discussed in Pt V

strength of those factors is somewhat dissipated by the language actually employed which avoids providing direct guidance about their meaning and how the subsections should be interpreted. In exactly what way is ‘the parents’ current and future capacity to communicate with each other’ relevant? It is apparent that different judges take very different messages from that particular subsection. There are cases where equal time has been ordered despite poor communication between the parents,<sup>58</sup> and other cases where poor communication appears to be the basis for not ordering equal time.<sup>59</sup> This issue is illustrated in the two case studies discussed in Pt V.

McIntosh notes that ‘[t]hrough the lens of developmental practice and research, the guideposts within the legislation for identifying children and parents for whom substantially shared parenting does not represent the best way forward are at best vague’.<sup>60</sup> The author proposes that if the legislature had wanted to provide a definite set of prerequisites for equal or substantial and significant time orders, it would have used a more prescriptive approach. Such drafting would, arguably, have better reflected the social science literature and may have led to more scrutiny of arrangements for children in households where there is (or has been) family violence, conflict or other challenges to successful shared care time. For example, the section could say:

An equal time order (or substantial and significant time order) should only be made where:

- The parents live sufficiently close to each for the children to attend ordinary daily activities from both homes; and
- The parents communicate at a sufficient level to effectively implement a shared care time arrangement without regular conflict; and
- There is no past or present serious family violence<sup>61</sup> or conflict.

In a parenting case decided before the reforms, Ryan FM, as she then was, offered a list of factors that provided more useful guidance as to intent and meaning. For example, in terms of proximity she added: ‘Are the homes sufficiently proximate that the child can maintain their friendships in both homes?’ In terms of parental co-operation she asked: ‘Can they address on a continuing basis the practical considerations that arise when a child lives in 2 homes? If the child leaves necessary school work or equipment at the other home will the parents readily rectify the problem?’<sup>62</sup> But the drafting of s

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of this article; *Rosa and Rosa* [2009] CAFC 81 (15 May 2009) (appellate decision of the Full Court of the Family Court) which demonstrate that, despite the mandatory nature of this drafting, these factors are not always considered.

<sup>58</sup> *Astor and Astor* [2007] FamCA 355 (24 April 2007); *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008); *Seaford and Seaford* [2007] FamCA 1460 (17 December 2007). It should be noted that in some of these cases the parents came to court prepared to consent to equal shared parental responsibility despite their poor relationship with each other.

<sup>59</sup> *Calkin and Calkin* [2009] FMCAfam 241 (20 March 2009); *Eltham and Eltham* [2007] FamCA 658 (27 June 2007). In these cases family violence was also an issue.

<sup>60</sup> J McIntosh, ‘Legislating for Shared Parenting: Exploring Some Underlying Assumptions’ (2009) 47(3) *Family Court Review* 389, 390.

<sup>61</sup> This article cannot traverse the issues around categorising family violence.

<sup>62</sup> *H and H* (2003) FLC ¶93-168 (17 April 2003) [47].

65DAA(5) takes a different tone, leaving room for the exercise of discretion by making the listed factors broad and not specifying how to take them into account.

#### D *The Inclusionary Nature*

The author argues that a particular problem with the presumption and its attendant provisions in the 2006 Act is its inclusionary nature and operation. Families are presumed in, unless they are identified as an exception. The state-based family law systems in the United States of America create a kaleidoscope of ‘joint custody’<sup>63</sup> models from which it is possible to discern two significant configurations employed with presumptions. Some statutes start by drawing families into joint custody arrangements and only excluding them if certain circumstances pertain. For example, there are laws which have a joint legal<sup>64</sup> custody presumption with exceptions for circumstances such as family violence,<sup>65</sup> this article refers to these as *inclusionary*. On the other hand, there are statutes which take an *exclusionary* approach. Examples of these include a presumption *against* joint custody where one parent has been violent,<sup>66</sup> or the requirement for there to be parental agreement before a joint custody order can be made.<sup>67</sup> James Dwyer found that ‘in the late 1970s and early 1980s, joint custody became the solution of the day for contentious divorces’,<sup>68</sup> but, what is important for us to be aware of in Australia, is that there has been a ‘retreat’ in these laws. Some states have now removed or explicitly disavowed joint custody presumptions.<sup>69</sup>

The diverse and changing forms of legal models suggest that the ‘right’ approach is very difficult to shape. The exclusionary presumptions that tilt away from making an order for joint custody in certain circumstances, such as high conflict or family violence, may protect some families and children from inappropriate orders.<sup>70</sup> Of more concern is that the inclusionary presumptions, of which the 2006 Act is an example, may co-opt or conscript families into the shared parenting club without checking their membership selection criteria properly and this may pose a risk of inappropriate parenting arrangements for some children.

<sup>63</sup> In the USA this can mean shared decision-making, shared physical custody or both.

<sup>64</sup> In the USA, ‘legal custody’ tends to be roughly equivalent to our idea of parental responsibility.

<sup>65</sup> J Dwyer, ‘A Taxonomy of Children’s Existing Rights in State Decision Making about their Relationships’ (2003) 11 *William and Mary Bill of Rights Journal* 845, 912.

<sup>66</sup> In this form of presumption the ‘basic fact’ is that the parent was violent. If proved, the ‘presumed fact’ is that it is not in the best interests of the child for a shared care regime to be implemented. (See J Bowermaster, ‘Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings’ (2001-2) 40 *Duquesne Law Review* 265, 286).

<sup>67</sup> For example, the *Washington Revised Code* states that the parents must either agree or there must be a ‘satisfactory history of cooperation and shared performance of parenting functions; the parties are available to each other, especially in geographic proximity, to the extent necessary to ensure their ability to share performance of the parenting function’. I suggest that this amounts to a presumption against joint custody in the absence of parental agreement.

<sup>68</sup> Dwyer, above n 65, 911.

<sup>69</sup> *Ibid.*

<sup>70</sup> But see N Robertson et al, *Living at the Cutting Edge: Women’s Experiences of Protection Orders (Vol 2): What’s To Be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (University of Waikato, 2007) ch 10 for a discussion about how judges have avoided the application of an exclusionary presumption under the New Zealand legislation.

## PART III - THE SOCIO-POLITICAL HISTORY OF SHARED CARE

The merging of the ideas of shared parental responsibility and shared care time was, partly at least, driven by fathers' rights groups who started lobbying for a 'joint custody' presumption in Australia at least by the mid-1980s.<sup>71</sup> Joint custody even became a matter for formal investigation at that time with the Family Law Council (FLC) commencing an examination of 'the desirability of making specific provision in the [Family Law] Act for a scheme of joint custody or joint parenting' in 1986.<sup>72</sup> In its final report the FLC rejected any changes to the Act. Although it noted some advantages for the children, it was concerned about the difficulty for children shuffling between two homes and the necessity of on-going spousal interaction.<sup>73</sup> Ideas of joint custody were similarly rejected in the early 1990s.<sup>74</sup>

A decade later the significant amendments introduced by the *Family Law Reform Act* in 1995 were influenced by two agendas - one pushed by fathers' rights groups - that lack of father involvement after separation is damaging for children;<sup>75</sup> and one promoted by women's advocates - the need for explicit legislative recognition of family violence. So the tension between these two positions became manifested in our law.<sup>76</sup> It has been established that the reforms brought a 'pro-contact' culture to family law practice and decision-making in Australia<sup>77</sup> and there were strong indications that the 'recognition by the Family Court of the broad impact of domestic violence upon children's welfare [was] ... superseded by concerns about maintaining contact'.<sup>78</sup>

By 2003, when the 'Joint Custody' Inquiry was established,<sup>79</sup> fathers' rights groups had planted a *legal presumption* as a central tenet of their demands. Representing their position as a 'justice claim' they advocated for an equality presumption which would give men a 'rightful place' in their children's lives.<sup>80</sup> Equal or near equal *time* orders as

<sup>71</sup> Graycar points to lobbying at an Australian Law Reform Commission Inquiry in 1984: R Graycar, 'The Child Custody Debate in Australia' in C Smart and S Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (Routledge, 1989) 158, 168-9.

<sup>72</sup> Family Law Council, *Access – Some Options for Reform* (1987) 11.

<sup>73</sup> Ibid 29.

<sup>74</sup> In 1992 by both the Joint Select Committee's *Report on Certain Aspects of the Operation and Interpretation of the Family Law Act* and the Family Law Council's *Patterns of Parenting After Separation Report*.

<sup>75</sup> R Van Kriecken, 'The "Best Interests of the Child" and Parental Separation: on the "Civilising of Parents"' (2005) 68(1) *Modern Law Review* 25.

<sup>76</sup> See Z Rathus, 'Agitation, Activism and Aggravation: Successes and Failures in Influencing Family Law Reform and Policy' (Paper presented at the 11<sup>th</sup> National Family Law Conference: Explore Family Law in 2004, Gold Coast, 26-30 September 2004).

<sup>77</sup> H Rhoades, R Graycar, and M Harrison, *The Family Law Reform Act 1995: The First Three Years*, (University of Sydney and the Family Court of Australia, 2000); J Dewar et al, *Parenting, Planning and Partnership: The Impact of the New Part VII of the FLA 1975* (Griffith University, Family Law Research Unit, Brisbane, March 1999); and K Rendell, Z Rathus and A Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family* (Women's Legal Service, Brisbane, 2002).

<sup>78</sup> Rhoades, Graycar and Harrison, above 77, 90.

<sup>79</sup> *Inquiry into Child Custody Arrangements in the Event of Family Separation*, which was referred to the House of Representatives Standing Committee on Family and Community Affairs jointly by the Attorney-General, the Hon Daryl Williams MP and the Minister for Children and Youth Affairs, the Hon Larry Anthony MP on 29 June 2003.

<sup>80</sup> H Rhoades, 'Yearning for Law: Fathers' Groups and Family Law Reform in Australia' in R Collier and S Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart

a starting point was also a clear goal.<sup>81</sup> The effectiveness of this lobbying was reflected in the terms of reference for the Inquiry which specifically required investigation into ‘whether there should be a *presumption* that children will spend *equal time* with each parent, and, if so, in what circumstances such a presumption could be rebutted’.<sup>82</sup>

The Committee charged with the Inquiry received well over 2000 submissions from a wide range of individuals and organisations, conducted public hearings and consultations throughout Australia and published its report, *Every Picture Tells a Story*,<sup>83</sup> in December 2003. In the end, after this extensive investigation and despite the vigour of the fathers’ rights campaign, the Committee did not recommend any presumption relating to time. Instead it proposed two presumptions – both relating to parental responsibility. The first was a presumption of equal shared parental responsibility; and the second a presumption *against* shared parental responsibility where there was ‘entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse’.<sup>84</sup> This latter recommendation has never been implemented which has left the surviving presumption without its intended counter-balance. Perhaps this omission has contributed to a failure of the safeguards against shared care time orders being made in some families where there is a history of parental conflict or family violence.<sup>85</sup>

After the release of the Report there were still many stages of consultation, including an Exposure Draft of the Bill, a Bill and more Parliamentary Committees before the 2006 Act was finalised. The use of the word ‘equal’ in both the presumption and the time sections was a result of some astute lobbying by the active and influential Shared Parenting Council of Australia (an umbrella organisation of many fathers’ rights groups),<sup>86</sup> and has potentially added to public confusion. Many cautions against this language were provided to the legislature before the 2006 Act was introduced.<sup>87</sup>

Publishing, 2006) 125, 132: Quoting evidence at the Inquiry from one of the members of a well known fathers’ rights group, *Dads in Distress*.

<sup>81</sup> See, for example, the Submissions to the 2003 ‘Joint Custody’ Inquiry from the Shared Parenting Council of Australia (No 1050); the Loan Fathers’ Association (Aust) Inc (No 1051); and the Men’s Rights Agency (No 909); Parliament of Australia, House of Representatives, *Submissions* (21 October 2004) <<http://www.aph.gov.au/house/committee/fca/childcustody/subs.htm>>.

<sup>82</sup> Standing Committee on Family and Community Affairs, *Terms of Reference* (3 May 2004) Parliament of Australia, House of Representatives <<http://wopared.parl.net/house/committee/fca/childcustody/index.htm>>.

<sup>83</sup> House of Representatives Standing Committee on Family and Community Affairs, above n 13.

<sup>84</sup> *Ibid* rec 2, 41-2.

<sup>85</sup> See Pt V of this article.

<sup>86</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Exposure Draft of the ‘Family Law Amendment (Shared Parental Responsibility) Bill 2005’* (2005) [2.42]. See also: Rhoades, ‘Yearning for Law: Fathers’ Groups and Family Law Reform in Australia’, above n 80, 129.

<sup>87</sup> See for example the evidence of Susan Holmes, CEO, Relationships Australia, Tasmania; Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006) 16: ‘I think the removal of the word “equal” would help to shift the focus back to responsibility, because talking about shares in terms of proportions, such as equal or whatever, gets into the issue of entitlement, in my experience. So, if you are talking about “equal”, the focus ... is on the parents’ entitlement rather than the child’s best interest, whereas “responsibility” has a clear focus on the child’s best interest rather than on the parents’ entitlement’. See also Ian Kennedy of the Family Law Section of the Law Council of Australia who noted in respect of the presumption that ‘[t]he mere inclusion of the word “equal” seems to have led, in the media at least, to the generation of a false expectation as to what is going to

The AIFS Evaluation found that ‘many parents did not understand the distinction between shared parental responsibility and shared time’.<sup>88</sup> True to its origins in fathers’ rights politics, this ‘widespread misunderstanding of the introduction of “equal” shared parenting came with an increase in expectations among fathers and a related perception of disempowerment of women’.<sup>89</sup> Although a presumption of equal time was not won by the fathers’ rights’ lobby, a cultural shift towards that outcome in community understanding and expectations was certainly gained. Some of this cultural shift seems to have also spilt over into the courts.<sup>90</sup>

#### PART IV – THE PROBLEMS WITH PRESUMPTIONS

This article argues that the presumption posits that equal shared parental responsibility is (almost always) in children’s best interests, in contrast to the social science research which presents an ‘overall picture ... of a complex interaction of family dynamics and demographic factors, in varying combinations and degrees of intensity’ as relevant to determining the best interests of an individual child after parental separation.<sup>91</sup> The content of the presumption is not a social science truth - rather it is a legal fiction – that has arguably developed a hue of truth.

The author suggests that the 2006 Act involves a misuse of the legal device of a presumption - a powerful legal tool which should be used sparingly by legislatures. In other legal contexts, presumptions are devices of pragmatism and efficiency, aimed at saving costs and avoiding time wasting. During the 2003 Joint Custody Inquiry, the Law Council of Australia explained that ‘[t]ypically a legal presumption is applied where a fact is to be established and rather than impose the costs of proving this fact when it is almost certainly the case, the law says “take this fact as a given, subject to proof of facts to the contrary which rebut the presumption”’.<sup>92</sup>

*Cross on Evidence* explains that a presumption usually ‘denotes a conclusion that a fact (conveniently called the “presumed fact”) exists which may or must be drawn if some other fact (conveniently called the “basic fact”) is proved or admitted’.<sup>93</sup> A classic example of a presumption is that when a child is born to a woman during her wedlock, the child is presumed (rebuttably) to be legitimate,<sup>94</sup> and the mother’s husband is presumed to be the father.<sup>95</sup> The ‘basic fact’ – to be proved by production of relevant documentation - is that the parents were married to each other at the time of the child’s

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flow from that’; Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006) 17.

<sup>88</sup> Kaspiew et al, above n 11, E3.

<sup>89</sup> Ibid 245.

<sup>90</sup> This will be discussed in Pt V which examines some empirical data from the courts and some post-reform decisions.

<sup>91</sup> S Gilmore, ‘Contact/Shared Residence and Child Well-being: Research Evidence and its Implications for Legal Decision-making’ (2006) 20 *International Journal of Law, Policy and the Family* 344, 358, explaining why the research evidence ‘does not support adoption of a presumption of contact in court decision-making’.

<sup>92</sup> House of Representatives Standing Committee on Family and Community Affairs, above n 13, 34.

<sup>93</sup> D Byrne and J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 4<sup>th</sup> Australian ed, (online)) ch 2, [7240].

<sup>94</sup> Ibid.

<sup>95</sup> This presumption exists at common law: See E Jackson, ‘What is a Parent?’ in A Diduck and K O’Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish, 2006) 59, 61. It also exists under *Family Law Act 1975* (Cth) s 69P.

birth (or conception), and the ‘presumed fact’ is that the husband is the father. But regarding the presumption in the *FLA*, what is the basic fact and what the presumed fact? Is the basic fact that the parties to the litigation are the child’s parents, and the presumed fact that equal shared parental responsibility is in the child’s best interests? This is a very awkward legal construct: the fact that the court is entitled to presume is the discretionary decision it is supposed to be considering!

It is argued here that in parenting law a presumption is transformed from a pragmatic device to a tool intended to instil government policy goals. It functions to openly reveal the government’s policy objectives and provide a mechanism for their implementation. Therefore it is necessarily prescriptive and constrains discretion. The reality is that under the *FLA*, certainly until 2006, discretion was at the heart of parenting cases. As Juliet Behrens outlined in an exposition of the approach of family law before the reforms, the role of judges was to apply ‘broad standards and some guidelines to make a discretionary decision about what orders should be made in infinitely variable factual scenarios’.<sup>96</sup> A presumption is at the opposite end of the decision-making continuum to discretion. This is why the introduction of the presumption has so changed the family law landscape.

The use of presumptions in parenting cases has waxed and waned over time. Initially the patriarchal structure of society ensured that children were largely treated as their fathers’ property and fathers were named as custodians of their children. The 19<sup>th</sup> century and first half of the 20<sup>th</sup> century slowly reversed this trend with the maternal preference and the ‘tender years’ doctrine’. These preferences meant that children tended to be placed in the care of their mothers who were expected to continue to stay at home and play the nurturing role that they had undertaken prior to separation. Fathers would be given visiting or access rights.<sup>97</sup>

In Australia after the introduction of the *FLA* in 1975 the cases clearly indicated ‘a retreat from the presumption in favour of the mother’.<sup>98</sup> Despite the reality that care of children and household tasks are even today still shouldered more by mothers than fathers,<sup>99</sup> the High Court opined in 1979 that there had been ‘a radical change in the division of responsibilities between parents’ with mothers now out in the workforce and fathers taking up more household duties and made it clear that any mother preference no longer applied.<sup>100</sup>

<sup>96</sup> J Behrens, ‘Interpreting Family Law: A Case for Legislative Principles and Presumptions Regulating the Making of Parenting Orders’ in S Corcoran and S Bottomley (eds), *Interpreting Statutes* (The Federation Press, 2005) 278, 278. In fact the High Court has noted that: ‘Best interests are values, not facts. They involve a discretionary judgment in respect of which judges can come to opposite but reasonable conclusions’. *CDJ v VAJ* [1998] FLC ¶92-828 (22 October 1998) 85,458.

<sup>97</sup> L Elrod and M Dale, ‘Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance’ (2008) 42(3) *Family Law Quarterly* 381, 390-1.

<sup>98</sup> Joint Select Committee on the Family Law Act, Parliament of Australia, *Family Law in Australia: A Report of the Joint Select Committee on the Family Law Act (Vol 1)* (1980) 55.

<sup>99</sup> Although many men now play very different roles in their homes than even their own fathers, mothers still shoulder much of the child care work in intact families. See L Craig, ‘Do Australians Share Parenting? Time-diary Evidence on Fathers’ and Mothers’ Time with Children’ (Paper presented at the 8<sup>th</sup> Australian Institute of Family Studies Conference, Melbourne, 12-14<sup>th</sup> February 2003) available at <<http://www.aifs.org.au/institute/afrc8/craig.pdf>>.

<sup>100</sup> *Gronow v Gronow* (1979) 144 CLR 513, 526-527 (per Mason and Wilson JJ).

This judicial view did not only reflect a *perceived* change in gender roles, it was also an outcome of the new ‘paradigm shift to the gender-neutral best interest of the child standard’,<sup>101</sup> which occurred in many countries in the 1970s, including Australia. This open-ended test dramatically widened judicial discretion with judicial officers ‘suddenly charged with making individualized determinations without presumptions or a clear default position’.<sup>102</sup> But in more recent times it seems that governments have been concerned to circumscribe this broad discretion to enable them to give effect to particular policy objectives. Therefore the exercise of discretion is often curtailed by long lists of factors relevant to best interests<sup>103</sup> and the use of preferences and presumptions.<sup>104</sup>

Presumptions came under judicial scrutiny in a 1984 High Court case within the broad context of family law. In a dissenting judgment Murphy J rejected the relevance of presumptions of resulting trusts or advancement in a *de facto* property settlement. He propounded a view that ‘there is no justification for maintaining a presumption ... if common experience is to the contrary.’<sup>105</sup> With the 2006 Act, a key policy goal was that parents should share parenting after separation<sup>106</sup> and this was translated into the presumption that equal shared parental responsibility is in the best interests of children. But this presumption is out of step with the social science research<sup>107</sup> which suggests that shared parenting does not work for all families and, more importantly, that it is damaging for some children. It is arguable that the presumption in the *FLA* does not reflect ‘common experience’ but rather an experience for some only, and therefore is not justified and may, in fact, be dangerous.

To understand the problem caused by this gap between reality and the presumption it is useful to conceptualise a presumption as a form of legal fiction.<sup>108</sup> Legal fictions are widely used<sup>109</sup> but Brian Bix explains that ‘judges, lawyers and legal commentators allow linguist inventions and conventions to distort their thinking ... like the ancient peoples who built idols out of some stone and wood, named them, and then bowed down to them, asking them for assistance and guidance’.<sup>110</sup> The author suggests that legal fictions can rule thinking, and in this article has substituted the ‘lego-bricks’ of ‘lego-science’ for Bix’s idols of stone and wood. Warnings about the power and danger of legal fictions are well documented in legal scholarship. Felix Cohen, to whose work Bix was referring, strongly expressed his concerns in 1935:

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or

<sup>101</sup> Elrod and Dale, above n 97, 392.

<sup>102</sup> Ibid.

<sup>103</sup> The list of factors in Australia has grown significantly – once in 1983, again in 1995 and finally in 2006. See *Family Law Act 1975* (Cth) ss 60CC(2), (3).

<sup>104</sup> Elrod and Dale, above n 97, 393.

<sup>105</sup> *Calverley v Green* (1984) 155 CLR 242 as cited in Byrne and Heydon, above n 93, [7275].

<sup>106</sup> See Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 1.

<sup>107</sup> See Pt I of this article.

<sup>108</sup> See, for example, N Knauer, ‘Legal Fictions and Juristic Truth’ (2010) 22 *St Thomas Law Review*, forthcoming. In fact the presumption of paternity of a woman’s husband in respect of a child born to her is cited as a legal fiction. See Jackson, above n 95, 62.

<sup>109</sup> Knauer, above n 108.

<sup>110</sup> B Bix, ‘Law and Language: How Words Mislead Us’ (2010) 1 *Jurisprudence* 25, 25.

argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.<sup>111</sup>

Expressed differently, it has been argued that a legal fiction is ‘wholly safe only when it is used with a complete consciousness of its falsity’. It becomes dangerous ‘as recognition that it is in fact false diminishes’.<sup>112</sup> These words seem prophetic. Many parents now expect they will be given equal time,<sup>113</sup> court orders for shared care time have increased<sup>114</sup> and some legal practitioners even believe ‘that the new law reflected the current social science thinking about children’s needs, and that ... the law and the research ... were mutually supporting’.<sup>115</sup> It seems that the presumption and its lego-science may have taken on the hue of a ‘truth’ to be believed, rather than being recognised as a legal fiction – as lego-science - to be applied in carefully weighed circumstances. Perhaps part of the reason for this is the socio-political climate at the time of its formation.

#### PART V – FAILURES IN THE LEGISLATIVE SAFEGUARDS

This article suggests that the power of the presumption as a successful policy implementer is manifested in the ineffectiveness of legislative safeguards that should prevent its inappropriate application. These are listed in *FLA* ss 61DA(2), (3) and (4).<sup>116</sup> It is clear from the material that the government published at the time of the introduction of the reforms that it expected adherence to these exceptions. The rhetoric advised that families who had experienced violence would not have the presumption applied and therefore equal or substantial and significant time would not come into play.<sup>117</sup> Perhaps the government did not fully appreciate the impact of a presumption on decision-making. But it seems that some judges will argue away the exceptions, drawn into the goodness of shared parenting for children, believing, or at least embracing, the fiction of the lego-science.<sup>118</sup> The empirical and jurisprudential data suggest that the exceptions to the application of the presumption are sometimes being ignored and that this may well be resulting in shared time arrangements that are not in children’s best interests.

<sup>111</sup> F Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35(6) *Columbia Law Review* 809, 812.

<sup>112</sup> P Smith, ‘New Legal Fictions’ (2006-7) 95 *Georgetown Law Journal* 1435 elucidating the work of L Fuller, *Legal Fictions* (Stanford University Press, 1967).

<sup>113</sup> Kaspiew et al, above n 11, 211.

<sup>114</sup> See discussion in Pt V.

<sup>115</sup> H Rhoades, ‘The Case for More Family Law Reform: Shared Care, Parental Conflict and Violence’ (Paper presented at the Women’s Safety and the Law Forum, Women’s Legal Service Victoria, Melbourne, 18-19 March 2009) 69.

<sup>116</sup> See Pt II of the article.

<sup>117</sup> See Australian Government, *Fact Sheet Ten, Dealing with Family Violence and Child Abuse* <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(22D92C3251275720C801B3314F7A9BA2\)~FactSheet\\_10.pdf/\\$file/FactSheet\\_10.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(22D92C3251275720C801B3314F7A9BA2)~FactSheet_10.pdf/$file/FactSheet_10.pdf)> which said: ‘If there has been violence or child abuse or there is a risk of it, the court is not obliged to consider a child spending equal or substantial and significant time with both parents.’ The decisions in *Goode and Goode (No 2)* [2007] FamCA 315 (21 February 2007) have rendered this information inaccurate.

<sup>118</sup> In *Goode and Goode* it was even asserted that all types of care time patterns, including equal time, had to be considered whether or not the presumption was applied. See [2006] FamCA 1346 (15 December 2006) [46]–[8], or *Goode and Goode* (2006) FLC ¶93-286 (15 December 2006)

There has been an overall increase in shared time arrangements being implemented in the Australian community of separated families, up from about 3% in 1997 to 8% in 2007 and 16% after the reforms, although it is not possible to ascribe all of the latest increase to the reforms.<sup>119</sup> Shared care time orders from the family courts have also increased from 4% to 34% (when taken as a proportion of cases when contact hours are specified)<sup>120</sup> and equal shared parental responsibility outcomes have increased from 76.3% to 86.5% post-reform.<sup>121</sup> Of course, these statistics do not prove that the exceptions are being ignored, but they certainly suggest a community and judicial enthusiasm for shared care time that the pre-reform post-separation parenting patterns did not predict.

### A *Family Violence*

The data collected by the AIFS Evaluation shows the extent to which the statutory exemptions to the presumption in respect of violence in the family are ignored or side-stepped. The reality is that equal shared parental responsibility is ordered in most cases – including cases where there are allegations of family violence and/or child abuse. In cases with no such allegations equal shared parental responsibility is ordered almost 90% of the time, but it is also ordered in 75.8% of cases involving allegations of abuse in the family.<sup>122</sup> The report found that the presumption only seems to be rebutted where the violence is ‘quite extreme in a factual sense, often involving high levels of violence, conflict, mental health issues or substance misuse’.<sup>123</sup> This means that in many cases involving less extreme violence the presumption must have been applied. For reasons already outlined, it is suggested that it is partly the choice of a *presumption* as the device for embedding policy that causes this tendency.

The empirical research on family violence and the family law reforms undertaken by the Bagshaw and Brown consortium ‘sought to determine the influence of the presumption in favour of equal shared responsibility [on parents in the study] when making parenting decisions’.<sup>124</sup> It reported that answers from parents were ‘replete with references to “50/50 arrangements”, “equal time” and “50% parenting”’.<sup>125</sup> Women felt pressured to agree to arrangements that were contrary to the best interests of the children.<sup>126</sup> The study concluded that ‘children’s rights to safety had not been prioritised’ over the focus on shared parental responsibility and ‘the rights of parents to have a “meaningful relationship” with their child(ren) with the overriding assumption that spending equal time with both parents is in the best interests of children’.<sup>127</sup>

### B *Parental Conflict and Reasonable Practicability*

The inadequacy of consideration of the qualifying or ‘reasonable practicability’ factors contained in s 65DAA - the time section – is also of concern. It will be recalled from pt

<sup>119</sup> See Kaspiew et al, above n 11, 119.

<sup>120</sup> Ibid 132.

<sup>121</sup> These figures include judicially determined outcomes and consent orders. See Kaspiew et al, above n 11, 187.

<sup>122</sup> Ibid 190.

<sup>123</sup> Ibid 352.

<sup>124</sup> Bagshaw et al, above n 22, 72.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid 93-4.

II of this article, that s 65DAA requires that orders for equal time or substantial and significant time must be both in the best interests of the child and reasonably practicable.<sup>128</sup> Subsections 60CC(2) and (3) set out the considerations relevant to the best interests of the child and s 65DAA(5) contains the factors relevant to reasonable practicability. One family who participated in the Fehlberg study<sup>129</sup> exposed the non-application, or poor application, of s 65DAA(5)(c) (ie the ‘parents’ current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind’). There were two children aged five and six, the parents were in conflict over a consent order that provided for equal time and litigation was commenced to alter this arrangement. The family was subsequently ordered to follow a complex 21 roster:<sup>130</sup>

Week No	Mon	Tues	Wed	Thurs	Fri	Sat	Sun
1	F	M	M	F	F	F	F
2	M	M	M	F	F	F	F
3	M	M	M	M	M	M	M
4	F	M	M	F	F	F	F

The mother’s comments highlight the stress of the arrangement for the family:

[M]y little five year old woke up this morning and she goes, ‘Mummy, whose house are we going to today?’ and that just broke my heart and I sort of just laughed ... I said to her, [I]t’s Daddy’s tonight ... and then you see Mummy the next two nights, and then you go back to Daddy for the rest of the week, okay?’ and it’s just ridiculous saying that to a kid.<sup>131</sup>

One can only assume that the federal magistrate applied the presumption, ordered equal shared parental responsibility and then found himself devising a substantial and significant time arrangement. Although it is possible to understand how His Honour could be led to make such an order when endeavouring to follow the direction of the 2006 reforms, this seems to be a rather rigorous, and perhaps exhausting, regimen for young children who will have to ‘tiptoe through the emotional landscape’ between their conflicted parents.<sup>132</sup>

### C Case Studies

It is also possible to see this apparent failure of the safeguards in the publicly available decisions of the family courts. Following are two cases which exemplify these concerns: *Stuart and Stuart*<sup>133</sup> and *Rosa and Rosa*.<sup>134</sup> In both the cases the federal magistrates

<sup>128</sup> See *Family Law Act 1975* (Cth) ss 65DAA(1)(a), (b), (2)(c), (d).

<sup>129</sup> Fehlberg, Millward and Campo, above n 23, 247.

<sup>130</sup> The author has repeated the first week at the end so that the cycle can be discerned.

<sup>131</sup> Fehlberg, Millward and Campo, above n 23, 267. On the author’s calculations this mother was interviewed for the study on a Monday of week 1 or 4 as represented in the diagram above. On any other morning of the 21 day cycle she would have had to give a different answer.

<sup>132</sup> These words were used by Riley FM quoting the family report writer in *Colton and Hunt* [2008] FMCAfam 644 (31 July 2008) [88]. This was a case which involved parental conflict – but not of a very high level.

<sup>133</sup> *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008).

downplayed the significance of obvious conflict rendering it irrelevant in two aspects of their decisions; firstly about whether the presumption applied and then in respect of whether equal time was reasonably practicable. Although conflict alone is not a factor which rebuts the presumption,<sup>135</sup> *FLA* s 61DA(4) allows the presumption to be rebutted where its application would not be in the best interests of the child, but neither judicial officer gave any consideration to this subsection.<sup>136</sup> Further, neither gave any real consideration to the s 65DAA(5) factors to be considered when making the time orders either.

The facts of the two cases suggest that sub-ss 65DAA(b), (c) and (d) (ie the parents' capacity to implement the arrangement; to communicate and resolve difficulties; and the impact of the arrangement on the child) should have all been raised as important issues for careful deliberation by the judicial officers, however s 65DAA(5) was not mentioned in the judgment in *Stuart and Stuart* and was only given a passing reference in *Rosa and Rosa* at first instance.

#### D *Stuart and Stuart*

*Stuart and Stuart*<sup>137</sup> involved two girls aged six and three at the time of the hearing. It is almost impossible to discern much about the pre-separation parenting of the couple from the judgment, but it seems that the mother was the primary carer and the father was quite involved. At trial the father was self-employed and the mother was studying and working part-time. An important feature of the case was that the parents hold quite different 'world-views'. The mother is an evangelical Christian with an ethos of strong religious adherence while the father is atheistic or agnostic with 'essentially non-existent' religious practice.<sup>138</sup> The father brought an application for equal shared parental responsibility and shared care time, although the exact terms of his application are not set out in the judgment.

Parental conflict was clearly in issue in the case. The judgment commences with the federal magistrate noting that he had been referred to a number of 'recent learned'

<sup>134</sup> *Rosa and Rosa* [2008] FMCAfam 427 (1 April 2008) (original trial in the Federal Magistrates Court); *Rosa and Rosa* [2009] FamCAFC 81 (15 May 2009) (appellate decision of the Full Court of the Family Court); and *MRR v GR* [2010] HCA 4 (3 March 2010) (High Court Decision).

<sup>135</sup> See H Rhoades, 'The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform' (2008) 36 *Federal Law Review* 280, particularly 288-9. Rhoades argues that earlier case law and the recommendations of the 2003 Joint Custody Committee suggest that shared parental responsibility is often not best for children where there is parental conflict. Therefore, the omission by the government of 'parental conflict as an explicit reason to question the presumption' ... 'sends a powerful message' that conflict is not a disqualifying factor under the 2006 reforms. Despite this, *Family Law Act 1975* (Cth) s 61DAA(4) allows the presumption to be rebutted where its application would not be in the best interests of the child, but neither judicial officer gave any consideration to this subsection.

<sup>136</sup> It should be mentioned that in *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008) the question of parental responsibility was specifically litigated, whereas in *Rosa and Rosa* [2008] FMCAfam 427 (1 April 2008) (original trial in the Federal Magistrates Court); *Rosa and Rosa* [2009] CAFC 81 (15 May 2009) (appellate decision of the Full Court of the Family Court) the parties consented to that aspect of the orders.

<sup>137</sup> [2008] FMCAfam 177 (5 June 2008). The author is indebted to Tina Osbaldeston, for her discussion of this and other cases in her Honours Paper *In the Best Interests of the Child* (Honours Paper, Charles Darwin University, 2008). Ms Osbaldeston won the Supreme Court Medal for showing 'outstanding professional promise' for her work.

<sup>138</sup> *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008) [10].

articles about shared care and the best interests of children ‘where there is significant conflict between the ... parents’.<sup>139</sup> From the judgment it seems that it was raised as an argument against the application of the presumption with the mother’s counsel submitting that this was a ‘high conflict case’:

If the father has equal shared parental responsibility he will use it to minimise the mother’s ability to raise the children in the values and manner to which she subscribes. The parties do not have a relationship or ability to communicate sufficient for that to be workable.<sup>140</sup>

However, Neville FM refused to accede to the mother’s submission and instead chose to cite social science material to which he was not referred. It was not particularly apt as it related to a study on parental attitudes ‘with particular reference to cases involving violence’ – and quite extreme violence in some instances.<sup>141</sup> The federal magistrate quoted the mother’s evidence of her ‘big concern’ about shared parental responsibility:

because we can’t resolve conflict ... my role is minimised and Mr Stuart, because he asserts his way so much and ends up getting his way, I actually effectively end up with very little say in the goings on of parenting decisions.<sup>142</sup>

Despite having ‘no doubt that Ms Stuart genuinely feels this way’, His Honour decided that this was not a case ‘where the presumption of equal shared parental responsibility [was] displaced’.<sup>143</sup> Without making any specific reference to s 61DA or its provisions he proclaimed: ‘Indeed, I regard its operation and implementation – and its consequences<sup>144</sup> – as being in ... [the] best interests [of the children]’.<sup>145</sup>

Of some note in this case is that the federal magistrate also made absolutely no mention of s 65DAA and the relevance of the s 65DAA(5) factors in determining whether equal time would be reasonably practicable between these two parents with obvious communication difficulties. Suggesting that this case is reflective of a general jurisprudential trend, Neville FM turned to a recent decision of the Family Court to support his ultimate order of equal time. In *Astor v Astor*, O’Reilly J suggested that ‘an equal time order may well serve to alleviate the pressure which the present unequal time plainly has presented’.<sup>146</sup> Neville FM determined to take on board what he described as ‘the basic principle’ of O’Reilly J, ie ‘alleviating pressure on the households by bringing a certainty of routine to family matters’ by suggesting that ‘a shared care arrangement between the parties ... would bring a degree of certainty ... to the day to day living of

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<sup>139</sup> Ibid [1].

<sup>140</sup> Ibid [7].

<sup>141</sup> R Kaspiew, ‘Empirical Insights into Parental Attitudes and Children’s Interests in Family Court Litigation’ (2007) 29 *Sydney Law Review* 131.

<sup>142</sup> *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008) [32].

<sup>143</sup> It is interesting to note that the federal magistrate failed to mention that an incident with the 3 year old had led the mother to bring interlocutory proceedings to re-open the case 10 days after the trial and before the delivery of the judgment. See: *Stuart and Stuart (No 2)* [2008] FMCAfam 191 (29 February 2008). This would seem to add fuel to the conflict argument.

<sup>144</sup> That is equal or substantial and significant time orders.

<sup>145</sup> *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008) [5].

<sup>146</sup> *Astor v Astor* [2007] FamCA 355 (24 April 2007) [155] as cited in *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008) [23].

the parties and to their daughters'.<sup>147</sup> Although the shared care time literature actually suggests that shared care times generally does *not* reduce conflict, and may even exacerbate it,<sup>148</sup> His Honour made a staged order for equal time which would be week about within 12 months of the judgment. He also made no reference of the relevance of the very young ages of the children to the desirability of shared care time.<sup>149</sup>

### E *Rosa and Rosa*

In *Rosa and Rosa*<sup>150</sup> the federal magistrate was so concerned about the possibility of the mother not facilitating the relationship between the five year old daughter and her father that he refused the mother's application to relocate to Sydney from Mt Isa and ordered week about equal time arrangements. This was despite the fact that the parties had been living in Sydney for most of their time together – which had commenced in 1991. They only moved to Mt Isa in 2007 when their daughter was four to advance the father's employment as a newly qualified engineer. The father gave evidence that he would not return to Sydney even if the mother were permitted to relocate there with the child, whereas the mother testified that she would stay in Mt Isa if the daughter were there. The effect of the order was to leave the mother without appropriate accommodation, employment or family support – or her daughter for half of the time.

Although s 65DAA was mentioned in Coker FM's reasons once, he did not methodically consider its provisions. Having stated that 'I of course must consider those matters that arise pursuant to the provisions of section 65DAA', the only subsection he implicitly considered was s 65DAA(5)(a) ('how far apart the parties live'):

If then parties remain in [Mt Isa] as the father suggests, then they are in the same locality. They are proximate to each other and there can be the opportunity for equal time which would be, in my assessment, in the best interests of this child.<sup>151</sup>

So in a case where the father now intended to live 2500 kilometres away from the mother's family, the parties had experienced considerable conflict, the mother would be required to live in difficult conditions and the child would be separated from the maternal family who had surrounded her for most of her short life, none of this evidence was cited as relevant to the making of an equal time order. In terms of family law jurisprudence, this case was not initially considered aberrant or erroneous at law. Although the decision was ultimately set aside by the High Court, the Full Court of the Family Court refused to interfere with the federal magistrate's exercise of discretion.<sup>152</sup>

However, the jurisprudential mortar in the lego-bridge may be cracking. It is arguable that the decision of the High Court in the mother's appeal may break the nexus between the presumption and shared care time in relocation cases at least. In *MRR v GR*<sup>153</sup> the key point made by the High Court was that the federal magistrate had failed to deal with

<sup>147</sup> *Stuart and Stuart* [2008] FMCAfam 177 (5 June 2008) [24]. It is unclear why *shared care* would bring any more certainty than a precise *primary care* arrangement, for example.

<sup>148</sup> See McIntosh et al, above n 20, 45 as discussed in Pt I.

<sup>149</sup> Although arguably some of the most significant research on this point has been published since this judgment.

<sup>150</sup> [2008] FMCAfam 427 (1 April 2008).

<sup>151</sup> *Ibid* [98].

<sup>152</sup> *Rosa and Rosa* [2009] FamCAFC 81 (15 May 2009).

<sup>153</sup> [2010] HCA 4 (3 March 2010).

the ‘imperative’ nature of s 65DAA(1) which *obliges* a court to consider *both* the question of best interests of the child *and* the question of reasonable practicability.<sup>154</sup>

It is only where both questions are answered in the affirmative that consideration may be given ... to the making of an [equal time] order. ... A determination as a question of fact that it is reasonably practicable that equal time be spent with each parent is a statutory condition which must be fulfilled before the Court has power to make a parenting order of that kind.<sup>155</sup>

The High Court found that Coker FM incorrectly treated his finding that the best interests of the child would be served by an equal time order ‘as determinative of whether [such] an order should be made’ and ordered accordingly.<sup>156</sup> However, a quick examination of the circumstances of the mother’s life led the High Court to the conclusion that it was not reasonably practicable for the mother to stay in Mt Isa for economic, social and emotional/psychological reasons.

The Court continued, making significant findings about the function and effect of the presumption which may herald a new emphasis on the importance of s 65DAA(1)(b) in the decision-making trajectory in relocation cases:

Section 65DAA(1) is concerned with the reality of the situation of the parents and the child, not whether it is desirable that there be equal time spent by the child with each parent. **The presumption in s 61DA(1) is not determinative of the questions arising under s 65DAA(1).** Section 65DAA(1)(b) requires a practical assessment of whether equal time parenting is feasible. Since such parenting would only be possible in this case if both parents remained in Mount Isa, Coker FM was obliged to consider the circumstances of the parties, more particularly those of the mother, in determining whether equal time parenting was reasonably practicable.<sup>157</sup>

Although this article cannot canvass the implications of the decision in detail, a brief perusal of some Full Court decisions in relocation cases since *MRR v GR* suggests a possible new trend in some cases.<sup>158</sup> For example, in *Klein v Klein*<sup>159</sup> the Full Court allowed an appeal by a mother against a decision requiring her to return with the children to Bendigo rather than staying in Adelaide where her family lived. The Court was concerned that the federal magistrate at trial had ‘expressed the view that an equal and substantial and significant arrangement was desirable but failed to make a practical assessment of whether ... arrangements [for shared time] were feasible’.<sup>160</sup> According to the Court this required an assessment of the mother’s circumstances if she had to reside in Bendigo, including her need to find accommodation and other practical matters and the loss of support from her family – again for economic, social and emotional/psychological reasons.<sup>161</sup>

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<sup>154</sup> Ibid [13].

<sup>155</sup> Ibid.

<sup>156</sup> Ibid [14].

<sup>157</sup> Ibid [15] author’s emphasis.

<sup>158</sup> See for example: *Klein & Klein* [2010] FamCAFC 150 (18 August 2010); *Collu & Rinaldo* [2010] FamCAFC 53 (25 March 2010); *Foster & Foster* [2010] (27 October 2010) FamCAFC 49 (19 March 2010); *Hepburn & Noble* [2010] FamCAFC 111 (21 June 2010).

<sup>159</sup> [2010] FamCAFC 150 (18 August 2010).

<sup>160</sup> Ibid [227].

<sup>161</sup> Ibid.

The author suggests that this is a new interpretation of how the provisions and structure of s 65DAA operate. One way of reading this interpretation is that the High Court has treated ss 65DAA(1)(b) and (2)(d) as discreet and complete provisions almost disconnected from the s 65DAA(5) checklist, at least in relocation cases.<sup>162</sup> On this approach the first question is whether or not ‘equal time parenting is *feasible*’.<sup>163</sup> If it is not *feasible* for both parents to live in the same general vicinity then shared parenting time simply cannot be considered and, in effect, s 65DAA(5) is never triggered.<sup>164</sup> Richard Chisholm and Patrick Parkinson have proposed another way to understand the High Court’s interpretation suggesting that it must have implicitly relied on ss 65DAA(5)(e), ‘such other matters as the court considers relevant’, to undertake its examination of ‘the practical circumstances of the parents if they are to live in proximity to one another’.<sup>165</sup>

A more detailed consideration of this case can be found elsewhere.<sup>166</sup> For example, it should be noted that, rather extraordinarily, the High Court cited no previous relocation cases, making no reference to the existing jurisprudence in this complex area. However, for the time being it seems that the decision means that, in relocation cases, assiduous attention now has to be paid to the future real circumstances of the parent who wants to move if the move is prohibited. Rather than deciding first whether equal or substantial and significant time would be in the child’s best interests and then making the relocation decision based on that<sup>167</sup> (as arguably occurred in *Rosa* and in the first instance decision in *Klein*), the first decision is whether it is reasonably feasible for the parent wanting to relocate to stay. Although in many of these cases the presumption of equal shared parental responsibility will have been applied, consideration of the shared care time provisions is interrupted, and perhaps obviated, by this assessment of lived reality.

A selective review of some recent cases where relocation is not an issue suggests that *MRR v GR* does not necessarily provide any new direction as to how the s 65DAA(5) factors should be applied. It is a case about the interpretation and application of ss 65DAA(1)(b) or (2)(d). Once there is no overriding question of practical feasibility to be determined in terms of where each of the parents should live, s 65DAA’s function largely reverts to being the checklist of factors relevant to shared care time orders<sup>168</sup> and all of the problems of their ill-defined meanings noted earlier and the inconsistencies and failures of judicial application of the provisions may continue. It can only be hoped that the attention given to s 65DAA in *MRR v GR* may mean a cessation of its total absence from decision-making in some cases.

<sup>162</sup> In fact the High Court makes one reference to ss65 DAA(5) as being relevant to what is ‘reasonably practicable’ in [9] saying that the subsection ‘provides in that respect’, however, it makes no further reference to the provision when discussing how it determined the reasonable practicability of the mother staying in Mt Isa under s65DAA(1)(b).

<sup>163</sup> Ibid [15].

<sup>164</sup> But if equal time is feasible (eg both parents live in Sydney), then s65DAA(5) is employed to work out whether it is reasonably practicable – do the parents live near enough to the same schools? How do they communicate with each other? What would be the impact of shared care time on the child?

<sup>165</sup> R Chisholm and P Parkinson, ‘Reasonable Practicability as a Requirement: The High Court’s Decision in *MRR v GR*’ (2010) 24 *Australian Journal of Family Law* 255, 269-270.

<sup>166</sup> See: A Dickey QC, ‘Reflections on *MRR v GR*’ (2010) 84 *Australian Law Journal* 296; and Z Rathus, ‘Of “Hoods” and “Ships” and Citizens: The Contradictions Confronting Mothers in the New Post-separation Family’ (2010) 19(3) *Griffith Law Review*.

<sup>167</sup> That is, that the parent is not entitled to relocate if equal or substantial and significant time are in the best interests of the child.

<sup>168</sup> Subject to the best interests of the child.

## II CONCLUSION

The amount of research commissioned by this government suggests a willingness to consider reform.<sup>169</sup> The Attorney-General's Media Release that accompanied the publication of three of the reports<sup>170</sup> in January 2010, acknowledged that all of those reviews 'find that the family law system has some way to go in effectively responding to issues relating to family violence'. It goes on to say that the Government 'will carefully consider the findings and recommendations of these reports, as well as other associated research, before outlining its response in due course'.<sup>171</sup>

If the government does consider reform (again), it is possible that the focus will be on those aspects of the legislation that specifically appear to be troublesome in respect of families experiencing violence.<sup>172</sup> Although it is critically important to deal effectively with family violence, there are two problems with restricting reform in this way. Firstly, there are a range of issues which families experience which may render shared care inappropriate or unwise apart from family violence, including the age of the children and the level of on-going inter-parental conflict. As Richard Chisholm cautions:

it may not help in the identification of the child's best interests if the law appears to assume that there are two basic types of case, namely the ordinary case, and the case involving violence or abuse.<sup>173</sup>

Secondly, the foundational nature of the presumption and its pervading influence on the culture of practice in the family law system suggests the need for much broader reform.<sup>174</sup> The tendency of the courts to ignore the exceptions to the application of the presumption and the requirements of the checklist for shared care time orders is an unsurprising outcome of the lego-science created by the policy motivated presumption and the lego-bridge to equal and substantial and significant parenting time orders.

Chisholm recommended amendment of the presumption so that 'it creates a presumption in favour of each parent having "parental responsibility"'.<sup>175</sup> This is a thoughtful and clever formulation that maintains much of the philosophy behind the

<sup>169</sup> Although the AIFS Evaluation was commissioned by the previous administration when the 2006 Act was introduced.

<sup>170</sup> R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009); R Chisholm, *Family Courts Violence Review*, November 2009 <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_FamilyCourtsViolenceReview](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyCourtsViolenceReview)>; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*, December 2009 <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Family\\_Violence\\_Report.pdf/\\$file/Family\\_Violence\\_Report.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Family_Violence_Report.pdf/$file/Family_Violence_Report.pdf)>.

<sup>171</sup> McClelland, 'Release of Family Law Reviews' (Media Release, 28 January 2010) <[http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2010\\_FirstQuarter\\_28January2010-ReleaseofFamilyLawReviews](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_FirstQuarter_28January2010-ReleaseofFamilyLawReviews)>.

<sup>172</sup> *Family Law Act 1975* (Cth) ss 60CC(3)(c), 63DA, 117AB. The author's concern about such an approach was confirmed just prior to publication of this article with the release of the Attorney-General's *Exposure Draft: Family Law Amendment (Family Violence) Bill 2010: Consultation Paper*, (November 2010).

<sup>173</sup> Chisholm, above n 22, 128.

<sup>174</sup> A plea for wide-ranging law reform has come from others: H Rhoades, 'Revising Australia's Parenting Laws: A Plea for a Relational Approach to Children's Best Interests' (2010) *Child and Family Law Quarterly* (forthcoming).

<sup>175</sup> Chisholm, above n 22, 132.

reforms but removes some aspects that have created the greatest confusion. With respect, it is the opinion of the author that there should be no presumptions (or certainly no *inclusionary* presumptions) in the *FLA* and that all parenting orders – those about parental responsibility, as well as those about living arrangements, should be subject to one best interests’ checklist.

Chisholm also recommended the abolition of any reference to specific time outcomes and suggested a new list of best interest factors that would be relevant to any order be made:

the court must not assume that any particular parenting arrangement is more likely than others to be in the child’s best interests, but should seek to identify the arrangements that are most likely to advance the child’s best interests in the circumstances of each case.<sup>176</sup>

The author endorses this view subject only to the possibility that there may be some benefit in making absolutely clear the circumstances in which shared care time orders may be considered. This may mean developing a legislative framework which includes a set of contra-indicators for shared care time - when it should not be ordered - as well as a list of prerequisites to look for before making an order for shared care time.

Unless some fundamental changes are made, tinkering only at the edges with the sections that seem problematic will not produce the shift required to encourage better outcomes for families experiencing complex issues. Although some families have benefited from the 2006 reforms and been able to create flexible and innovative post-separation parenting arrangements, other families have struggled under the influence of the lego-science and implemented inappropriate arrangements. There is a need for a re-think of the basic structure and provisions of the legislation if those families are to be better served.

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<sup>176</sup> Ibid.