

ROSA: REASONABLE PRACTICABILITY AND A CHILD'S BEST INTERESTS

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Four years on from the shared parenting amendments to the Family Law Act 1975 (Cth) ('FLA') debate continues about the effect of the reforms. In 2009, the High Court of Australia, for the first time since these changes, considered key provisions of the legislation concerning equal time arrangements. The appeal was from a decision of the Full Court of the Family Court of Australia, published as Rosa v Rosa ('Rosa').² The reasons for judgment of the High Court were delivered in March 2010, and published as MRR v GR ('MRR').³

The High Court was asked to determine, on this occasion, the construction of s 65DAA FLA. This section requires a court to examine the 'reasonable practicability' of proposed parenting arrangements. The High Court's judgment is not without controversy.

Key comments by the High Court indicate that, previously, Family Law Courts have made decisions potentially contrary to the intent of the legislation. Moreover, it seems the High Court's reasons go further, and suggest that courts may have made orders they did not have the power to make. This reasoning, on the face of it, is at odds with others, particularly those that affirm the 'paramountcy' of a child's best interests.

The High Court has, in its interpretation of s 65DAA, concluded that the circumstances in which a court should order an equal time arrangement are much narrower than previously thought. It will be suggested that the legislation, in its current form, is confusing, contradictory, and difficult to explain.

Post MRR, the High Court has been the subject of some criticism. This article discusses those comments, and also looks to a series of Full Court decisions made since.

This article advances the proposition that the existing legislation is misunderstood; a proper interpretation of the existing provisions (together with the High Court's reasons)

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² *Rosa v Rosa* [2009] FamCAFC 81 (15 May 2009).

³ *MRR v GR* (2010) 84 ALJR 220.

effectively sets out a clear (if slightly convoluted) pathway for determining parenting orders applications.

Finally, potential, further legislative reform is considered. In part, the suggested changes are designed to more simply reflect the law as it currently is, but also are intended to enable a court to more fully consider new evidence about the impact on children if shared parenting arrangements do not work.

I SECTION 65DAA AND ITS CONTEXT IN PART VII

The particular focus of the High Court was ss 65DAA (1), (2) and (5). Because the construction and precise wording of these subsections was examined by the High Court it is necessary to set them out in full. The relevant subsections are:

- (1) 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:
 - (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.
- (2) If:
 - (a) A parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and
 - (b) The court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and
 The court must:
 - (c) Consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
 - (d) Consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
 - (e) If it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.
- (5) In determining for the purposes of subsections (1) and (2) 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 section sits within a complex network of provisions in part VII *FLA* Children. These sections prescribe, amongst other things, that in deciding whether to make a particular parenting order in relation to a child a court must regard the best interests of the child as the paramount consideration.⁴

A Parenting Order includes orders about the person or persons with whom a child is to live; the time a child is to spend with another person; the allocation of parental responsibility for a child; and the communication a child is to have with another person.⁵

Equal time is not defined. Substantial and significant time is defined as all of (but not limited to) days that fall on weekends and holidays; days that do not fall on weekends or holidays; and time that allows the parent to be involved in the child's daily routine and, occasions special to both the child and the parent.⁶

Parents are presumed to have equal shared parental responsibility.⁷ The presumption applies except where there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of a child), has engaged in abuse;⁸ or family violence;⁹ or is otherwise rebutted by evidence.¹⁰

There are primary and additional considerations in determining a child's best interests. The primary considerations in determining a child's best interests are the benefit to the child of having a meaningful relationship with both of the child's parents¹¹ and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.¹²

The additional considerations include (but are not limited to) the views expressed by the child;¹³ the nature of the relationship between the child and each of the child's parents;¹⁴ the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;¹⁵ and, a number of other matters.¹⁶ A court must also consider the extent to which a parent has fulfilled that parent's responsibilities.¹⁷

II THE DEVELOPMENT OF THE 2006 AMENDMENTS TO THE *FAMILY LAW ACT*

Section 65DAA was added to the *FLA* in 2006¹⁸ along with a number of other amendments. In interpretation of legislation it is open to consider the reports,

⁴ *Family Law Act 1975* (Cth) s 60CA.

⁵ *Ibid* s 64B(2).

⁶ *Ibid* s 65DAA(3).

⁷ *Ibid* s 61DA(1).

⁸ *Ibid* s 61DA(2)(a).

⁹ *Ibid* s 61DA(2)(b).

¹⁰ *Ibid* s 61DA(3).

¹¹ *Ibid* s 60CC(2)(a).

¹² *Ibid* s 60CC(2)(b).

¹³ *Ibid* s 60CC(3)(a).

¹⁴ *Ibid* s 60CC(3)(b).

¹⁵ *Ibid* s 60CC(3)(c).

¹⁶ *Ibid* s 60CC(3)(d) – (3)(m).

¹⁷ *Ibid* s 60CC(4).

¹⁸ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) ('*SPR Act*').

explanatory memoranda, and other relevant documents.¹⁹ In this particular case the process of development of these amendments commenced with a report by the standing committee on Family and Community affairs ('The Hull report').²⁰

The committee's view was '50/50 shared residence (or "physical custody") should be considered as a starting point for discussion and negotiation',²¹ and 'In the end, how much time a child should spend with each parent after separation, should be a decision made, either by parents or by other on their behalf, in the best interests of the child concerned and on the basis of what arrangement works for that family.'²²

A key recommendation was that part VII be amended to 'first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer.'²³

In its response²⁴ the government adopted the recommendations, saying:

Changes to the Act will also require courts to first consider substantially shared parenting time when making orders in cases where there is joint parental responsibility and each parent wishes to be primary carer. Whether substantially shared parenting time is ordered will depend on the best interests of the child.²⁵

An exposure draft of the proposed bill²⁶ had a draft s 65DAA that simply required a court to consider substantial time with each of the parents.²⁷

The Committee recommended that '[proposed] section 65DAA be amended to provide that the court shall, in making parenting orders in situations where there is equally shared parental responsibility, consider whether equal time with both parents is in the best interests of the child *and* [my emphasis] reasonably practicable.'²⁸

In response, the government adopted the above recommendation, saying:

Courts will be required to first consider substantially shared parenting time when making orders in cases where there is joint parental responsibility and each parent wishes to spend substantial time with the child. Whether substantially shared parenting time is

¹⁹ *Acts Interpretation Act 1901* (Cth) s 15AB.

²⁰ House of Representatives Standing Committee on Family and Community Affairs, Australian Parliament, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) ('The Hull report').

²¹ *Ibid* 32.

²² *Ibid*.

²³ *Ibid* 43.

²⁴ Commonwealth, *A New Family Law System - Government Response to Every Picture Tells a Story; Response to the Report of the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child Custody Arrangements in the Event of Family Separation* (2005).

²⁵ *Ibid* 7.

²⁶ House of Representatives, Australian Parliament, *Exposure Draft, Family Law Amendment, Shared Parental Responsibility Bill 2005*, 23 June 2005 ('SPR Exposure Draft').

²⁷ *Ibid* 16-17.

²⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, Australian Parliament, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2005).

ordered will depend on the best interests of the child. Substantially shared parenting time does not preclude the equal sharing of the child's time.²⁹

The explanatory memorandum to the bill set out that the factors contained in s 65DAA(5) 'originate from case law, including the case of *T v N (2001)* FMCAfam 222'.³⁰ It was also noted in the document that 'the inclusion of the factors was recommended by the Family Law Council which considered 2004 research by the Australian Institute of Family Studies entitled, Research Report No 9: Parent-Child Contact and Post Separation Parenting Arrangements'.³¹

*T v N*³² is a decision of (then) Federal Magistrate Ryan. Her Honour listed the matters to be taken into account when considering an application for shared residence (as it then was), included (in addition to matters of parental capacity and co-operation) the prior history of caring for the child; whether the parties agree or disagree on matters relevant to the child's day to day life, such as methods of discipline, attitudes to homework, health and dental care, diet and sleeping pattern; and whether the parents share similar ambitions for the child.³³

The Australian Institute of Family Studies (AIFS) report³⁴ concluded that 'Shared care appears to be adopted by a relatively small group of mainly well-educated, dual career, ex-couples with primary school aged children'.³⁵ The report found that parents typically adopted a working businesslike relationship.³⁶

This report also considered that the 12 parents in the focus groups had 'adopted a shared care arrangement from the time of separation; had maintained this arrangement for a considerable length of time; and most had established this arrangement without any involvement with the legal system'.³⁷

A *Conclusions about the Intent from the Policy Documents*

It seems that the advice from the Family Law Council was not published. This raises a difficult question. It could be that the *T v N* factors were intended to be included within the categories listed in s 65DAA. On the other hand, did the absence of the factors such as shared parental ambitions mean that these matters are specifically excluded? In addition, was the purpose of reference to the AIFS report intended to suggest the type of family arrangements that might lend themselves to equal time orders?

I suggest, absent any consideration of the subsequent decisions, it is open to conclude from these documents that *T v N* was expressly adopted as forming the basis for s

²⁹ Ibid 12-13.

³⁰ Explanatory Memorandum Family Law Amendment (Shared Parental Responsibility Bill) 2005 (Cth) 36.

³¹ Ibid 189.

³² *T v N* (2001) 31 Fam LR 281.

³³ Ibid [93].

³⁴ Australian Institute of Family Studies, *Research Report No 9: Parent-Child Contact and Post Separation Parenting Arrangements* (May 2004) <<http://www.aifs.gov.au/institute/pubs/resreport9/main.html>>.

³⁵ Ibid 126.

³⁶ Ibid.

³⁷ Ibid.

65DAA(5). This may be a controversial view. It relies on the wording of the explanatory memorandum and the words ‘*the* factors’, as opposed to ‘some of these factors’. If the Family Law Council’s advice was available this would help determine the issue one way or another. The reference to the AIFS report suggests that the intent was to demonstrate shared parenting would be successful if the parents had a workable parental relationship.

Moreover, I suggest that the intent was that *both* the reasonable practicability and the child’s best interests were to be considered, and any order was ultimately to be in the child’s best interests.

Curiously, the High Court in *MRR* neither referred to these documents nor the decisions made by the Full Court of the Family Court since 2006. In fact, there are no references to family law decisions at all in *MRR*. This was despite *T v N* being directly referred to in the submissions to the High Court.³⁸

The specific construction of the amendment components of part VII *FLA* had previously been the subject of a number of decisions of the Full Court. It is appropriate at this point to review these earlier decisions and to draw conclusions about the Full Court’s approach.

B *The Full Court’s Approach before MRR*

The leading decision of the Full Court was that of *Goode*.³⁹ In this case, the Court found that the presumption of equal shared parental responsibility is ‘the starting point for a consideration of the practicability of the child spending equal time with each of the parents’.⁴⁰

Then, upon the finding that the presumption applied:

The first thing the court must do is to consider making an order if it is consistent with the best interests of the child and reasonably practicable for the child to spend equal time with each of the parents. If equal time is not in the interests of the child or reasonably practicable the court must go on to consider making an order if it is consistent with the best interests of the child and reasonably practicable for the child to spend substantial and significant time with each of the parents (s 65DAA(1) and (2)).⁴¹

And further, irrespective of the application of the presumption:

The court is at large to consider what arrangements will best promote the child’s best interests, including, if the court considers it appropriate, an order that the child spend equal or substantial and significant time with each of the parents. These considerations would particularly be so if one or other of the parties was seeking an order for equal or substantial and significant time but, as the best interests of the child are the paramount consideration, the court may consider making such orders whenever it would be in the best interests of the child to do so after affording procedural fairness to the parties.⁴²

³⁸ *MRR v GR* [2009] HCATrans 316 (3 December 2009)

³⁹ *Goode v Goode* [2006] FLC 93-286 (‘*Goode*’).

⁴⁰ *Ibid* [44].

⁴¹ *Ibid* [65].

⁴² *Ibid*.

The key elements from *Goode* are that a court is required to consider if an equal time arrangement is reasonably practicable and in the child's best interests and a court is at liberty to make such orders as may be in the child's best interests.

The Full Court was asked to consider the specific elements of s 65DAA in *Taylor v Barker*.⁴³ The Court was plain in the methodology to be applied, saying:

In our view, the common sense construction of s 65DAA(1)(c), and also of s 65DAA(2)(d), must be that it is only necessary for a court to *consider* [my emphasis] whether it would be 'reasonably practicable' for the child to spend 'equal time' with each parent, or 'substantial and significant time' as the case may be, if the court has already concluded that it would be in the child's best interests to spend 'equal time' with each parent, or 'substantial and significant time' (as the case may be).⁴⁴

A part of this approach was affirmed in *Sealey v Archer*,⁴⁵ the court saying 'if there is to be equal shared parental responsibility for the child, consideration must be given to the child spending equal time (or if not, substantial and significant time) with each parent'.⁴⁶

In *Dicosta*⁴⁷ the Federal Magistrate at first instance made findings in relation to the best interests of the child, and then looked to whether an equal time arrangement was in the children's best interests. The Full Court found this approach was a proper exercise of discretion, in particular commenting that the Federal Magistrate 'was dealing with the relatively complex structure and language of the amended legislation, of which, it must be said, he can be seen overall to have a firm grasp'⁴⁸ and dismissed the appeal.

The Full Court in *Creaghe*⁴⁹ considered an appeal in which one of the grounds was that the Federal Magistrate 'erred in law by failing to properly apply s 65DAA in the court's determination under s 60CC'.⁵⁰ The Court cited with approval the approach from the Federal Magistrate when he said:

[h]aving regard to how s 65DAA is framed, if I consider that, having regard to the evidence, equal time is in her best interests, then that is the order I would probably make. If, however, I decide that having regard to the evidence equal time is not in her best interests, then an order for substantial and significant time would be made.⁵¹

In *Craven*,⁵² Warnick J, on appeal from a decision of a Federal Magistrate, did not interfere with a similar approach.

The court has clearly rejected submissions that an equal time order should be made unless there are disqualifying factors. In *Korban*⁵³ the court directly dealt with this matter, saying:

⁴³ *Taylor v Barker* (2007) 37 Fam LR 461.

⁴⁴ *Ibid* [74].

⁴⁵ *Sealey v Archer* [2008] FamCAFC 142 (16 September 2008).

⁴⁶ *Ibid* [63].

⁴⁷ *Dicosta v Dicosta* [2008] FamCAFC 161 (29 October 2008).

⁴⁸ *Ibid* [56].

⁴⁹ *Creagh v Davies* [2008] FamCAFC 12 (6 February 2008) ('*Creagh*').

⁵⁰ *Ibid* [5].

⁵¹ *Ibid* [22].

⁵² *Craven v Crawford-Craven* [2008] FamCAFC 93 (4 July 2008) ('*Craven*').

Counsel for the mother submitted that, correctly interpreted, sub-paragraph 82(g) of Goode involves a court only making an order for equal time if there are no disqualifying factors. We reject this interpretation. We consider the interpretation puts a ‘gloss’ on the plain wording of s 65DAA(1) and on the guideline. When there is an order for equal shared parental responsibility, or a court proposes to make such an order (as was agreed in this case) the legislation obliges a court to *consider* whether the child spending equal time with each of the parents would be in the best interests of the child; and whether the child spending equal time with each of the parents is reasonably practicable; and if it is, *consider* making such an order.⁵⁴ [court’s emphasis].

If a court failed to assess, and then perhaps reject an equal time arrangement, an error is established. In *McCall v Clark*,⁵⁵ the Full Court said:

We are unable to locate in the Federal Magistrate’s ultimate conclusions a consideration by him, and a specific rejection, of equal time to be spent by the child with both parents and/or substantial and significant time for the child with both parents as not being in the child’s best interests and thus the Federal Magistrate has failed to give proper consideration to the matters in s 65DAA.⁵⁶

C *Conclusions about the Approach of the Full Court pre MRR*

It is consistent throughout the decisions of the Full Court that any order is ultimately to be made in a child’s best interests.

There did not seem to be any variation to the approach that once the presumption of equal shared parental responsibility arises, consideration needs to be given to whether or not an equal time arrangement, or substantial and significant time arrangement, is in a child’s best interests. A failure by a court to consider the matters contained in s 65DAA would have seemingly amount to an error.

Taylor v Barker suggested a court need only *consider* whether an arrangement is reasonably practicable⁵⁷. *Korban* appeared to approve of this approach⁵⁸. *Goode* was decided earlier, and said only that the proposed arrangement needs to be in the child’s best interests and reasonably practicable.⁵⁹

The conclusion that was open from these decisions is that provided a court expressly considers s 65DAA it is a proper exercise of discretion. Analysis of the High Court’s decision suggests otherwise.

D *The Appeal in Rosa and the Matters before the High Court*

Mr and Mrs Rosa moved to Mt Isa from Sydney for the purposes of the father’s employment. On separation of the parents, the mother sought to return to Sydney with the child.

⁵³ *Korban v Korban* [2009] FamCAFC 143 (13 August 2009) (‘*Korban*’).

⁵⁴ *Ibid* [83], [84].

⁵⁵ *McCall v Clark* [2009] FamCAFC 92 (29 May 2009).

⁵⁶ *Ibid* [89].

⁵⁷ *Taylor v Barker* (2007) 37 Fam LR 461, [74].

⁵⁸ *Korban*, [84].

⁵⁹ *Goode v Goode* [2006] FLC 93-286, [65].

A Federal Magistrate at hearing made orders that the child spend equal time with each of the parents if the mother remained in Mt Isa. In the event that the mother returned to Sydney, the child was to live with the father.

On appeal, the Full Court considered that although the Federal Magistrate had not specifically referred to the requirements of s 65DAA in his reasons, he had considered the relevant matters in other parts of the judgment. The Full Court dismissed the appeal.⁶⁰

There are two key passages about the mother's circumstances. The first comes from the primary judgment of the Federal Magistrate (as recorded by the Full Court) and the second from the High Court's summary.

The Full Court noted that the Federal Magistrate:

referred briefly to the other primary consideration, being the need to protect the child from physical or psychological harm (s 60CC (2) (b)), stating that the only issue of relevance in this case may be 'the mother's anguish and depression in being in [North West Queensland]'.⁶¹

In relation to this concern his Honour observed:

103. But I am also mindful of the recommendations and indications of the report writer that such issues can, to a significant degree if not in their entirety, be dealt with by the mother and perhaps also the father addressing issues in relation to counselling both with respect to their relationship as well as, of course, particularly with regard to their own individual needs.⁶²

In the High Court's reasons the mother's circumstances were summarised as:

The mother had limited opportunities for employment in Mount Isa. When the parties lived in Sydney she had worked part-time. She had full-time opportunities available to her with her previous employer in Sydney which provided her with flexibility of hours. In Mount Isa the mother supported herself from social services payments and income from casual employment. The disparity between her income and that of the father had not been addressed by the time of the hearing. She said there was no employment in Mount Isa for someone of her experience and there were limited opportunities for flexible hours.

The evidence of the family consultant was that the mother was 'definitely despondent' about being in Mount Isa, as her living conditions were not good and she was isolated from her family. The family consultant said that the mother was depressed and recommended that she attend counseling.⁶³

These paragraphs note both the mother's perspective as it was at the time of hearing, and how the mother's circumstances could potentially be addressed. The question was then whether this situation, particularly from the mother's perspective was 'reasonably practicable' within the meaning of s 65DAA.⁶⁴

⁶⁰ Ibid [32].

⁶¹ *Rosa v Rosa* [2009] FamCAFC 81 (15 May 2009) [37].

⁶² Ibid.

⁶³ *MRR v GR* [2010] HCA 4 (3 March 2010), [17], [18].

⁶⁴ Ibid [8].

E *The High Court's Reasons*

On the hearing of the application it was clear that the High Court was concerned with the concept of reasonable practicability as it applied to the *parents*. During the course of submissions on the special leave application, Hayne J commented:

But a complaint made in this matter is that the Act required consideration of reasonable practicability in circumstances where the parents of the child, putting it as neutrally as I can, appeared likely to be living at a distance, and reasonable practicability then injects questions about, does that mean somebody has to move, or does it mean nobody has to move?,⁶⁵ and further, 'Practicability does encompass such issues [the financial impact on the Mother] and that it is that kind of issue which is presented by the legislation'.⁶⁶

In the reasons, a number of key paragraphs set out the Court's interpretation of s 65DAA, in particular:

Section 65DAA (1) is expressed in *imperative terms* [my emphasis]. It obliges the court to consider both the question whether it is in the best interests of the child to spend equal time with each of the parents (par (a)) and the question whether it is reasonably practicable that the child spend equal time with each of them (par (b)). It is only where both questions are answered in the affirmative that consideration may be given, under par (c), to the making of an 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. It is a matter upon which power is conditioned much as it is where a jurisdictional fact must be proved to exist.⁶⁷

The Court cited the decision of *Minister for Immigration v Eshetu*,⁶⁸ in which the High Court, considering issues unrelated to family law, found:

The 'jurisdictional fact', upon the presence of which jurisdiction is conditioned, need not be a 'fact' in the ordinary meaning of that term. The precondition or criterion may consist of various elements and whilst the phrase 'jurisdictional fact' is an awkward one in such circumstances it will, for convenience, be retained in what follows.⁶⁹

The Court then went on to explain the relevance of the circumstances of the parents, saying:

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.⁷⁰

⁶⁵ *MRR v GR* [2009] HCATrans 248 (3 December 2009).

⁶⁶ *Ibid.*

⁶⁷ *MRR v GR* [2010] HCA 4 (4 March 2010) [13].

⁶⁸ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

⁶⁹ *Ibid* [130].

⁷⁰ *MRR v GR* [2010] HCA 4 (4 March 2010) [15].

The Court concluded that the evidence (that is, in respect of the child living in Mt Isa or Sydney) 'did not permit an affirmative answer to the question in s 65DAA(1)(b). It follows that there was no power to make the orders for equal time parenting'.⁷¹

F *Key Conclusions about the Operation of s 65DAA from MRR*

Based on this review, I suggest that a number of conclusions can be drawn. First, the 'reasonable practicability' test is not a 'best interests' test, but rather a separate test. The High Court's reasons draw a clear distinction.

Second, the *Taylor v Barker; Korban; and Sealey v Archer* approach is no longer good law. While the High Court is not express in rejecting these decisions, it is clear that the 'imperative nature' of the section (as described by the High Court) requires a positive finding about the reasonable practicability of the proposed arrangements. Merely considering those arrangements is not sufficient.

Third, without a finding of reasonable practicability there is no power to make an order. In *Goode*, the Full Court said that an order for equal time (or substantial and significant time) could be made if it was in a child's best interests. The High Court, while again not expressly rejecting *Goode* in this respect, clearly stated that, without a finding of reasonable practicability (a jurisdictional fact) no order can be made.

Fourth, the *T v N* factors remain good law. The parliamentary intent to include all or some of the factors from *T v N* in my view allows an interpretation, in making a finding of reasonable practicability, the matters contained in that case should be considered.

Fifth, that the parent's perspective is relevant to a finding of reasonable practicability. The High Court's reasons specifically refer to the circumstances of the *parents* including, it seems, their financial circumstances.

G *The Full Court's Approach since MRR*

The Full Court has referred to *MRR* on no less than nine occasions in the six months since the reasons were published.

In *Akston v Boyle*,⁷² O'Ryan J (with whom Warnick and Boland JJ agreed) having cited the paragraphs from *MRR* earlier referred to in this article, said that a court must consider the primary considerations in s 60CC(2) of the Act and the additional considerations in s 60CC(3).⁷³ In doing so, it may be preferable to first deal with the additional considerations before considering the primary considerations.⁷⁴

In addition O'Ryan J considered once the findings about the above matters are made then a court could turn to the presumption of equal shared parental responsibility, and if the presumption applied, then return to the findings already made about the primary and

⁷¹ Ibid [19].

⁷² *Akston v Boyle* [2010] FamCAFC 5 (26 March 2010).

⁷³ Ibid [201].

⁷⁴ Ibid; see also *Mazorski v Albright* (2008) 37 Fam LR 518 (Brown J).

additional considerations to see if the presumption is rebutted.⁷⁵ After that, a court must then turn to s 65DAA.⁷⁶

This dual, or multiple use of factual findings as part of considerations pursuant to s 60CC and again in wording through the other relevant components of part VII was affirmed in the joint judgment of May, O’Ryan & Strickland JJ in *Collu v Rinaldo*.⁷⁷

In *Klein*⁷⁸ the Federal Magistrate considered that an equal and substantial and significant arrangement was desirable but failed to make a practical assessment of whether such arrangements were feasible. Her Honour failed to consider the circumstances of the mother. This failure constituted an error.⁷⁹

H *The Reasoning Pathway*

In my view, the correct methodology for determining applications for equal time (or substantial and significant time), is for a court to:

1. Make findings of fact in relation to all of the considerations (perhaps with the additional considerations first) in s 60CC.
2. Determine whether the presumption of equal shared parental responsibility could apply (as there is no family violence or abuse).
3. Return to the findings made pursuant to s 60CC to determine whether or not it is in the child’s best interests for the presumption of equal shared parental responsibility to apply.
4. If the presumption is not rebutted by the s 60CC findings, then determine whether or not the proposed arrangements (if equal time or substantial and significant time) are reasonably practicable, in doing so considering the matters contained in s 65DAA, including matters mentioned in *T v N*.
5. In determining reasonable practicability, consider and make findings about each parent’s perspective and reality for them of the proposed outcomes.
6. If there is a positive finding that the arrangements are reasonably practicable; consider whether an equal time arrangement (or substantial and significant time arrangement) is in the child’s best interests using the s 60CC findings already made.
7. If there is a finding that the arrangements are not reasonably practicable, then consider making such an order (other than an order for equal time or substantial and significant time) in the child’s best interests, again using the s 60CC findings.

⁷⁵ *Akston v Boyle* [2010] FamCAFC 5 (26 March 2010) [202].

⁷⁶ *Ibid* [203].

⁷⁷ *Collu v Rinaldo* [2010] FamCAFC 53 (25 March 2010).

⁷⁸ *Klein v Klein* [2010] FamCAFC 150 (18 August 2010).

⁷⁹ *Ibid* [227].

I *Criticism of MRR*

Professors Parkinson and Chisholm have jointly addressed the High Court's reasons.⁸⁰ They conclude, with the greatest of respect, that the High Court's reasons are difficult to reconcile with the legislation.⁸¹

The difference between the High Court's reasons and the approach proffered by Professors Parkinson and Chisholm is the mandatory nature of s 65DAA. Parkinson and Chisholm say that the natural meaning of s 65DAA is that upon a finding of reasonable practicability *consideration* [my emphasis] is mandatory of an equal time or substantial and significant time arrangement.

In other words, if arrangements are not reasonably practicable it is not necessary to consider an equal time or similar order, but such an order could still be made.

The contrast is with the High Court's reasoning which says if the arrangements are not reasonably practicable then a court cannot make an order for equal time or substantial and significant time. Professors Parkinson and Chisholm seem to agree that this is the affect (right or wrong) of the High Court's judgment.⁸²

III THE PARAMOUNTCY OF A CHILD'S BEST INTERESTS AND S 65DAA

Assuming my analysis is correct, there is now a test in s 65DAA that requires a court to make findings, as a jurisdictional pre-requisite, about matters which are not matters 'in the best interests' of a child.

This fundamental tension was considered by the Family Court of Western Australia (well before *MRR*) in the decision of *F and B*.⁸³ Thackray CJ asked the question:

Why would Parliament merely require the court to 'consider' making an order that is both in the best interests of a child and reasonably practicable when the court's fundamental obligation is to make orders that are in the best interests of the child? Why not instead direct the court to make such an order?⁸⁴

The question is a good one. How does s 65DAA sit in its place in part VII? There is clear parliamentary intent for the best interests of the child to remain the 'paramount' consideration. The explanatory memorandum to the 2006 amendments stated:

Section 60CA moves the existing section 65E which provides that the court must regard the best interests of the child as the paramount consideration in deciding whether to make a particular parenting order to section 60CA in new Subdivision BA in Division 1, Part VII (Children). The intention is to increase the visibility and emphasis of this important provision.⁸⁵

⁸⁰ 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.

⁸¹ *Ibid* 268.

⁸² *Ibid* 270.

⁸³ *F and B* [2008] FCWA 132 (7 November 2010).

⁸⁴ *Ibid* [40].

⁸⁵ Explanatory Memorandum Family Law Amendment (Shared Parental Responsibility Bill) 2005 (Cth) 13.

But what is the meaning of ‘paramount’? In his text, Dr Dickey⁸⁶ adopted the view in *Kress*,⁸⁷ equating ‘paramount’ with ‘overriding’, and that taking into account all the relevant considerations, ‘the court’s decision must be based solely upon what will promote the best interests of the child. To this extent, the best interests, or welfare, of the child [is] indeed the only consideration.’⁸⁸

One view is that nothing has changed at all. Young and Monahan⁸⁹ conclude ‘there has been considered law reform in the area of family law and it has not resulted in any significant retreat for the traditional position, though as we have indicated the most recent reforms introduced more guidance on the process for exercising discretion.’⁹⁰

There are some who are critical of the concept altogether. Professor Parkinson⁹¹ has suggested problems ‘as ones of indeterminacy, fairness and cost efficiency’⁹² and that such a principle ‘is almost impossible for it to produce the correct answer.’⁹³

Felberg and Behrens⁹⁴ suggested (again prior to *MRR*) that the construction of s 65DAA requires consideration of both the best interests of the child and reasonable practicability, and say that if ‘both these criteria are satisfied it must then consider whether to make such an order. If a court was required simply to determine what order was in the child’s best interests and make the order (the strong view), then the additional qualifications in that section would be inappropriate.’⁹⁵

Dr Dickey, having reviewed the High Court’s reasons in *MRR*, says these matters are reconcilable, as ‘the interests of the child do not override the interests of the parents; they have to coexist with them. The function of the court is to balance these interests in a way that best promotes the welfare of the child whilst giving appropriate recognition to the claims and interests of the parents’.⁹⁶

While Dr Dickey’s analysis seems sensible, the difficulty in my view is that the High Court’s reasoning operates as a constraint on a child’s best interests, not a mechanism to balance the parents’ perspectives in a way that promotes a child’s best interests.

IV THE IDENTIFIED PROBLEMS AND THE CASE FOR REFORM

There are a number of issues with s 65DAA in its present form. First, the section, on my analysis, potentially imports elements from previous decisions that are not clear on an initial reading of the statute.

⁸⁶ A Dickey, *Family Law* (Lawbook Co, 5th ed, 2007).

⁸⁷ *Kress v Kress* [1976] FLC 90-126, 75, 599.

⁸⁸ Dickey, above n 86, 301.

⁸⁹ L Young and G Monahan, *Family Law in Australia* (Lexis Nexis Butterworths, 7th ed, 2009).

⁹⁰ *Ibid* 286.

⁹¹ P Parkinson, *Australian Family Law in Context* (Lawbook Co, 4th ed, 2009).

⁹² *Ibid* 633.

⁹³ *Ibid* 634.

⁹⁴ B Fehlberg and J Behrens, *Australian Family Law – The Contemporary Context* (Oxford University Press, 2008).

⁹⁵ *Ibid* 272.

⁹⁶ A Dickey, ‘Reflections of *MRR v GR*’ (2010) 84 *Australian Law Journal* 296, 297.

Second, in applying the section there must be consideration of the parent's individual perspective, which is not easy to identify on the face of the section.

Third, the section requires findings of fact to enliven the court's power to make certain orders (and therefore limits the power of the court to make an order). Fourth, the section is inconsistent with the paramountcy principle.

My suggestion is that s 65DAA needs to be revisited by Parliament. Only legislative amendment will address the four matters addressed. Before turning to potential changes. In doing so, Parliament ought to consider recent studies on children's exposure to parental conflict subsequent to the introduction of the 2006 amendments.

V CHILDREN'S EXPOSURE TO CONFLICT AND SHARED PARENTING

A 2006 study⁹⁷ found that poor outcomes for children resulted (in cases of substantially shared care) if 'Fathers had low level of formal education; there was high, ongoing inter-parental conflict; there was high acrimony (psychological hostility; the child in question was under 10 years old; and children's overnight care was substantially shared.'⁹⁸ The 2009 follow up⁹⁹ found 'Modeling of children's current mental health showed the ongoing and independent damage of having witnessed high levels of conflict between their parents four years previously.'¹⁰⁰

A 2007 review of post-court outcomes¹⁰¹ described poor emotional outcomes for children (particularly children under 10) when: 'The care climate is marked by apprehension about the child's safety; at least one parent reports a poor relationship with the child, an alliance between the parents is absent, considerable levels of inter-parental conflict remain present, and the child is unhappy with the substantial division of their time and life.'¹⁰²

It has been argued that exposure of children to conflict is a component of s 60CC(2)(a) (protection from psychological harm), in particular that a court 'is obliged to consider the nature of the parental conflict (if any), the extent to which the child is exposed to

⁹⁷ J McIntosh and C Long, *Children Beyond Dispute, A Prospective Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution 2006* (October 2006) Australian Government, Attorney-General's Department, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ChildrenBeyondDispute-October2006>.

⁹⁸ Ibid 9.

⁹⁹ J McIntosh and C Long, *Children Beyond Dispute April 2009: a Four Year Follow-Up of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution* (April 2009) Australian Government, Attorney-General's Department, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ChildrenBeyondDispute-April2009>.

¹⁰⁰ Ibid 92.

¹⁰¹ J E McIntosh and C Long, *The Child Responsive Program, Operating within the Less Adversarial Trial: A Follow Up Study of Parent and Child Outcomes: A Report to the Family Court of Australia* (July 2007) <http://www.familycourt.gov.au/wps/wcm/resources/file/ebc70245b4d525f/CRP_Follow_up_Report_2007.pdf>.

¹⁰² Ibid 19.

any such conflict, and the likelihood of causing actual or potential physical or psychological harm to the child as a result of such exposure'.¹⁰³

The evidence is concerning but what, if anything, can a court do about it? The difficulty is that no specific references are made in the legislation to 'conflict', or 'exposure to conflict' or 'mental health'. So can a court take these things into account (as the best interests of the child remain paramount), or, given that these elements are not mentioned, must they be ignored?

I do not propose an answer, but only comment that if the legislation is to be prescriptive about the circumstances in which equal time or like orders are to be made then Parliament needs to be clear about whether or not potential exposure to conflict should be taken into account.

VI OTHER PROPOSALS FOR REFORM

Professor Chisholm¹⁰⁴ has called for substantial reform, saying:

It would be helpful, however, to deal separately with parental responsibility and the making of parenting orders dealing with such matters as with whom the child should live, and thus s 65DAA (which creates the link between parental responsibility and matters relating to the times the child should spend with each parent) should be repealed.¹⁰⁵

Professor Chisholm recommends a wholesale re-write of s 60CC, with the major changes being new subsections including any likely advantages to the child if each parent regularly spends time with the child on weekdays as well as weekends and holidays, and is involved in the child's daily routine and occasions and events that are of particular significance to the child; and the likely effect of any changes in the child's circumstances, including any separation from either parent any other child or adult with whom the child has been living.¹⁰⁶

What these suggested amendments do not do is directly address the issue of exposure to conflict or the child's mental health, security of a child's attachments, or the practicability of the arrangements already mentioned in the existing s 65DAA.

My proposed amendments attempt to achieve the following objectives. First, s 65DAA(5) is repealed, but specifically incorporated into s 60CC. This will ensure those matters should be expressed to be subject to a child's best interests. Second, all of the matters in *T v N* should be included in the section.

Third, there should be specific reference to the parent's perspective (given what the High Court said in *MRR*). Fourth, the power of a court to make an order for equal time

¹⁰³ M Wright, 'Comment: Best Interests, Conflict and Harm – A Response to Chisholm and Parkinson' (2008) 22 *Australian Journal of Family Law* 4, 7.

¹⁰⁴ R Chisholm, *Family Courts Violence Review – A report by Professor Richard Chisholm* (27 November 2009) Australian Government, Attorney-General's Department, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Chisholm_report.pdf/\\$file/Chisholm_report.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Chisholm_report.pdf/$file/Chisholm_report.pdf)>.

¹⁰⁵ *Ibid* 135.

¹⁰⁶ *Ibid* 132.

(and substantial and significant time) should be specifically included in the powers of a court in s 64B(2).

Section 60CC(2) could then for example include an additional section:

(c) The practicability of the proposed parenting orders for the child, including but not limited to:

- (i) How far apart the parents live from each other;*
- (ii) 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;*
- (iii) The parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind;*
- (iv) The impact that an arrangement of that kind would have on the child (in particular upon the child's mental health); (v) The exposure, or risk of exposure, of the child to conflict between the parents;*
- (vi) The impact upon the parents of the proposed parenting orders, including the emotional and financial impacts;*
- (vii) The prior history of care arrangements for the child;*
- (viii) The consistency of the parental styles, ambitions, and attitudes of the parents towards parenting;*
- (ix) The effect the proposed parenting order may have on the child's attachments, or ability to develop attachments, to each of the child's parents.*

The whole of s 65DAA could then be repealed. Placing these factors in subsection (2) would make them a 'primary' consideration. I do not propose to enter into the debate about the interaction between the primary and additional considerations contained in section 60CC.¹⁰⁷ I add only that if my proposed changes were simply included in a list (akin to the previous drafting of s 68F(2) *FLA* prior to 2006), this would avoid any need for debate about the weight that ought to be attached to them.

VII CONCLUSIONS

The High Court has, by interpreting s 65DAA in *MRR*, exposed fundamental problems with the construction of the 2006 amendments to the *FLA*. The present legislation lacks transparency, is inconsistent and difficult to understand.

It will take significant political will to make the proposed changes. Disputes about the appropriate care arrangements for children will not go away. The proposed changes will, in my view, make the legislation consistent, transparent, and easier to explain and understand.

¹⁰⁷ See P Parkinson, 'The Values of Parliament and the Best Interests of Children— A Response to Professor Chisholm' (2007) 21 *Australian Journal of Family Law* 213.