

THE FAMILY LAW REFORM ACT 1995 (CTH): A NEW APPROACH TO THE PARENT/CHILD RELATIONSHIP

INTRODUCTION

THE *Family Law Reform Act 1995* (Cth) which came fully into operation on 11 June 1996 implements the most wide-reaching changes to private law regulation of the parent/child relationship to have occurred in Australia for many years. The new Act makes significant amendments to Part VII of the *Family Law Act 1975* (Cth). The Australian amendments draw substantially on the provisions of the English *Children Act 1989*.¹ Yet there are significant differences between the two Acts. These reveal certain contrasts in the philosophical approach to legal regulation of the parent/child relationship in the two countries. Moreover the differences of detail have significant practical implications for the use and operation of the new range of orders which are created. Australia has chosen to adopt the broad underpinnings of the English legislation, but with adaptations suited to local social conditions. The differences between the two legislative approaches may prove to be as significant as their similarities.

THE POLICY FOUNDATIONS OF THE 1995 ACT

The policies underpinning the new Australian provisions are clearly articulated in s60B which states:

- (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying this object are that, except when it is or would be contrary to a child's best interests:
 - (a) children have the right to know and be cared for by both their parents regardless of whether their parents are married, separated, have never married or have never lived together; and

* M A, BCL (Oxon); Professor of Law, University of Bristol, England.
1 Family Law Council's Letter of Advice to the A-G on the Operation of the (UK) *Children Act 1989* (AGPS 1994).

- b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future of their children.

These principles apparently derive from the UN *Convention on the Rights of the Child*.² There is no equivalent express declaration of policy in the *Children Act 1989* (UK).

Three main themes emerge from s60B. The first is the conceptual shift away from parental rights to parental responsibilities: children are not objects but subjects, with their own rights of which the correlatives are parental obligations. This re-casting of the parent/child relationship represents the continuation of a trend apparent in case-law such as *Gillick v West Norfolk and Wisbech AHA*³ and fuelled by the UN Convention itself. It draws upon the *Children Act 1989* (UK).

The second theme evident in s60B is the model of joint parenting - parents' responsibilities 'should be shared and are unaffected by the breakdown (or non-existence) of the two adults' relationship *inter se*, and it is assumed to be in the child's interests to have contact with both parents. This policy of joint parenting is clearly reflected in the detailed provisions of the Act dealing both with parental responsibility and with parenting orders: see *infra*. The concept can be criticised as an unrealistic ideal - and by some feminists is seen as a triumph of the political pressure brought to bear by father's groups.⁴ Significantly, the model of joint parenting is cast far more widely in the Australian legislation than in its English equivalent. In Australia both parents have joint parental responsibility by operation of law irrespective of marital status,⁵ whereas the English *Children Act 1989* discriminates between the married and the unmarried father; the latter does not enjoy parental responsibility by operation of law but must take positive steps to acquire it by court order or by agreement, or alternatively by obtaining a residence order.⁶ The practical implications of this difference will be discussed later in this paper.

The third theme to emerge from the policy statement in s60B is the encouragement of parental agreements as the preferred mode of resolving issues of child upbringing. This policy is also expressed in s63(B), which provides that:

2 See in particular Arts 7 & 18.

3 [1986] AC 112.

4 Graycar "Equal Rights versus Father's Rights: The Child Custody Debate in Australia" in Smart and Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (Routledge, London 1989).

5 *Family Law Act 1975* (Cth) s61C(1).

6 *Children Act 1989* (UK) ss2, 4 & 12(1).

The parents of a child are encouraged:

(a) to agree about matters concerning the child rather than seeking an order from a court.

Underpinning this is an ideology of family autonomy - the family is, generally speaking, best able to determine and promote children's interests and, correspondingly, judicial scrutiny of parental arrangements should be exercised only sparingly. This is a policy⁷ fundamental to the *Children Act* 1989 in England, now heavily borrowed by the new Australian legislation. The policy is even more pronounced in England. Thus under the *Children Act* 1989 (UK) in the private law context the "welfare checklist's" application is mandatory in contested proceedings;⁸ it is optional when a consent order is made, but these are rare given the "no-order principle" - namely, that the court is expressly discouraged from making an order "unless it considers that doing so would be better for the child than making no order at all".⁹ This principle is fundamental to the English Act's policy of parental autonomy and judicial restraint; it amounts in essence to an assumption that parental agreement *per se* is always in a child's best interests. The new Australian legislation contains no equivalent of the "no-order principle"; the court is simply (as in the repealed provisions) encouraged to make an order likely to prevent future litigation.¹⁰ Hence consent orders should be more common in Australia than in England. The new Australian provisions permit "parenting plans" to be registered in court, and no equivalent exists under the *Children Act* 1989 in England. Yet the degree of judicial scrutiny of parental arrangements in Australia should not be exaggerated; the influence of the English policy is evident. Thus the application of the "best interests checklist" in s68F is mandatory in Australia (as in England) only in contested proceedings; it is merely optional when the court makes an order by consent¹¹ or registers a parenting plan.¹² In the case of the latter, parents themselves are encouraged to regard the child's best interests as the paramount consideration when drawing up a plan.¹³ Thus the new Australian legislation reflects the policy expressed by the English Law Commission in 1988 that a court should not be obliged to impose its concept of welfare on parents who can agree about a child's future.¹⁴ It seems paradoxical that a shift towards recognition of children's rights has been accompanied by a strong assertion of parental autonomy.

7 This has been criticised by some as the "delegalisation of the family". See Dewar, "The *Family Law Reform Act* 1975 (Cth) and the *Children Act* 1989 (UK) Compared - Twins or Distant Cousins?" (1996) 10 *Australian Journal of Law & the Family* 18.

8 *Children Act* 1989 (UK) ss1(1) and (4).

9 Section 1(5).

10 *Family Law Act* 1975 (Cth) s68F(2)(k).

11 Section 68F(3).

12 Section 63E(3).

13 Section 63B(b).

14 Law Commission Report No 172 *Review of Child Law, Guardianship and Custody Law* (1988) para 3.19.

KEY FEATURES OF THE NEW PROVISIONS

The *Family Law Reform Act* 1995 (Cth) creates a number of new legal concepts - "parental responsibility", "residence" and "contact" - which replace traditional notions of "guardianship", "custody" and "access" in earlier legislation. The general aim (derived directly from the English model) is to move away from quasi-proprietorial notions of the parent/child relationship, particularly after family breakdown, and to remove the concept of litigation over children as involving a "win or lose" outcome.¹⁵ The change is intended to bring about a fundamental re-thinking of the relationships between parents themselves and between parents and their children - it is not intended to be a mere cosmetic change of terminology.¹⁶ The new concepts employed in the Act will require practitioners to rethink the structure of post-separation parenting. The new concepts as defined in the legislation, and their relationship to the now outdated notions of "guardianship", "custody", and "access" are not without certain ambiguities. Their meaning and operation will inevitably fall to be clarified by judicial interpretation in the years to come. The significant differences of detail between the Australian and English legislative schemes must necessarily introduce a note of caution into the use of precedents under the *Children Act* 1989 (UK) as guides to the interpretation of the amendments to Part VII of the *Family Law Act* 1975 (Cth).

Parental Responsibility

As has been observed, a significant policy aspect of the new legislation in Australia (and in England) is a shift away from the concept of parental rights and towards that of parental responsibilities and obligations. The key concept of parental responsibility is defined in s61B:

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

This provision is very similar to its English equivalent - s3(1) of the *Children Act* 1989 - except for the significant omission from the Australian Act of the term "rights"; the Australian definition must clearly be preferable in this respect.

What does "parental responsibility" mean, and how does it differ from the former concept of "guardianship"? The definitions adopted in both Australia and England are open to

15 Para 3.10.

16 The *Children Act* 1989 (UK) was described by Lord Mackay as "the most comprehensive and far-reaching reform which has come before Parliament in living memory": *Hansard* HL Vol 502, col 488.

criticism in that they are essentially "non-definitions":¹⁷ the statutory definition merely refers to the general law (i.e. common law and other statutes) to reveal the content of parental responsibility. Both the English and the Australian legislation takes the view that it is impracticable and undesirable to list the incidents of parental responsibility. However, guidance may be had from the recent *Children (Scotland) Act 1995* which takes a different approach and spells out the content of the concept:

- s1(1) [A] parent has in relation to his child the responsibility -
- (a) to safeguard and promote the child's health, development and welfare;
 - (b) to provide, in a manner appropriate to the stage of development of the child -
 - (i) direction;
 - (ii) guidance,
- to the child;
- (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
 - (d) to act as the child's legal representative,

but only in so far as compliance with this section is practicable and in the interests of the child.

- s2 [A] parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right -
- a) to have the child living with him or otherwise to regulate the child's residence;
 - (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
 - (c) if the child is not living with him, to maintain personal relations and contact with the child on a regular basis; and

17 Lord Meston in the debate on the *Children Act 1989* (UK), *Hansard* HL, Vol 502, col 1172.

(d) to act as the child's legal representative.

A leading English text¹⁸ identified the following components of parental responsibility:

- a) Providing a home for the child.
- b) Having contact with the child.
- c) Determining and providing for the child's education.
- d) Determining the child's religion.
- e) Disciplining the child.
- f) Consenting to the child's medical treatment.
- g) Consenting to the child's marriage.
- h) Agreeing to the child's adoption.
- i) Vetoing the issue of a child's passport.
- j) Taking the child outside the [country] and consenting to the child's emigration.
- k) Administering the child's property.
- l) Protecting and maintaining the child.
- m) Agreeing to change the child's surname.
- n) Representing the child in legal proceedings.
- o) Burying or cremating a deceased child.
- p) Appointing a guardian for the child.

Thus parental responsibility encompasses responsibilities both for a child's *long-term* welfare and *day-to-day* care. In the new Australian provisions this is made clear by the language of ss64B(6), 65G(1)(a)(ii) and 65P.

It is important to appreciate that the content of parental responsibility will vary with the age of the child. Its content diminishes gradually as the child's capacities and maturity

18 Bromley and Lowe, *Bromley's Family Law* (Butterworths, London, 8th ed 1992) p301.

grows, as explained by the majority of the House of Lords in *Gillick v West Norfolk and Wisbech AHA*,¹⁹ a proposition accepted by a majority of the High Court of Australia in *Secretary, Dept of Health and Community Services v JWB and SMB (Re Marion)*.²⁰

Who has parental responsibility? The *Family Law Reform Act 1995* (Cth) s61C states simply that:

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

and moreover that:

- (2) Subs (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or remarrying.

Thus the Australian Act confers the model of joint parenting responsibility irrespective of the marital status of the parents, on the unmarried as well as the formerly married family. The establishment of parenthood is itself sufficient to attract the obligation. By contrast, under the *Children Act 1989* in England, whilst the mother has parental responsibility by operation of law, only the father of a child born within marriage shares it.²¹ His unmarried counterpart must acquire it directly²² by application to court for a parental responsibility order²³ or by making a formal agreement with the mother. Alternatively, an unmarried father in whose favour a residence order is made automatically acquires parental responsibility.²⁴ The English model appears unacceptably discriminatory to Australian eyes more accustomed to taking equality arguments for granted; it will be recalled that joint guardianship has been enjoyed by unmarried as well as married fathers since amendments to the *Family Law Act 1975* (Cth) in 1987. The Australian provision has the great merit of emphasising equality of responsibility between separated parents irrespective of the formal status of their relationship. Nevertheless, where parents have never lived together or no longer do so, some practical problems may arise in the exercise of joint parental responsibility which will inevitably have to be resolved by court order.

A key concept of the *Family Law Reform Act 1995* (Cth) is that parental responsibility is not lost by the breakdown of the relationship between the parents. However, it is equally important to realise that the *exercise* of parental responsibility by a parent can be made

19 As above, fn 3.

20 *Re Marion* (1992) 175 CLR 218.

21 *Children Act 1989* (UK) s2.

22 Section 4.

23 Case-law shows an increased judicial willingness to make such orders in favour of fathers who show commitment: see *Re S (Parental Responsibility)* [1995] Family Law 596.

24 *Children Act 1989* (UK) s12(1).

subject to "any order of the court": see s61C(3). The usual order will be a "parenting order" made under Division 5. In essence, a court order may regulate the exercise of particular aspects of parental responsibility. Section 61D elaborates this point, in providing that:

- (1) A parenting order confers responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.
- (2) A parenting order in relation to a child does not take away or diminish any aspect of parental responsibility of any person for the child except to the extent (if any):
 - (a) expressly provided for in the order; or
 - (b) necessary to give effect to the order.

Hence the exercise of parental responsibility - more particularly, specific aspects thereof - by a parent may be modified by the terms of a "parenting order" obtained either by the other parent or by a third party. The practical implications of this legislative scheme in concrete situations relating to a child's upbringing is not without difficulty, and will be discussed *infra* in the context of the range of new "parenting orders" which can be made under the new legislation.

A related area of difficulty is the exercise of parental responsibility by parents who have separated or who have never lived together. Parental responsibility is *joint*, but is it also *several*? Section 61C states simply that *each* of the parents has parental responsibility notwithstanding any changes to their relationship. The section does not state in express terms whether that responsibility can be exercised by one parent *severally* as well as by both *jointly*. In contrast, the English *Children Act 1989* is perfectly clear:

s2(7) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility.

The same position is adopted in the *Children (Scotland) Act 1995* s2(2). Of course, the unilateral exercise by one parent of the power to make decisions about a child's upbringing can be prevented under the English *Children Act 1989* by the other parent obtaining a court order: for instance, a "specific issue" or "prohibited steps" order under s8. How is the Australian provision to be interpreted? Its silence is unfortunate on a matter of such crucial practical importance. How, for instance, are decisions about a child's education or medical treatment to be taken? Jointly, or severally by parents who do not live together? Both interpretations of the relevant Australian provisions are possible. On the one hand s60B speaks of *shared* responsibilities, whereas on the other s61C states that *each* parent

has parental responsibility - the latter terminology suggesting that one can make decisions independently of the other.²⁵ In any event disputes will have to be reduced by one parent obtaining a specific issue order.

How does "parental responsibility" differ from "guardianship" under the repealed provisions of Part VII of the *Family Law Act 1975* (Cth)? "Guardianship" was defined as responsibility for the *long-term welfare of the child*.²⁶ However, the new provisions make it clear that "parental responsibility" encompasses responsibilities both for *long-term* care, welfare and development of the child and for *day-to-day* care, welfare and development: see ss64B(6), 65G(1)(a)(ii) and 65P. Hence English authorities under the *Children Act 1989* suggesting that parental responsibility when conferred by court order on an unmarried father does not entitle him to participate in day-to-day management of the child's life²⁷ are not appropriately applied to the interpretation of the new Australian legislation. The two Acts contain significant differences as well as similarities, and the specific context in which a case is decided will determine its value - or otherwise - as a precedent. A crucial difference between the two Acts is that in England an unmarried father does not automatically enjoy parental responsibility but (in the absence of agreement) must acquire it by court order. The nature of the parental responsibility conferred by such an order in England will differ from that conferred on the unmarried father in Australia by operation of law. The former is similar to the *aspects* of parental responsibility conferred on a third party by a specific issue order in Australia. It is crucial to remember, however, that the exercise of parental responsibility can always be modified by court order. Joint parental responsibility is an ideal which will only work when parents who do not live together agree on issues of a child's upbringing.

Parenting Plans

The "Parenting Plan" is a concept unique to the Australian legislation. It is an essential component of the overall policy of the legislation to encourage settlement rather than litigation between parents over children matters.²⁸ A parenting plan is an agreement in writing dealing with residence, contact, maintenance or any other aspect of parental responsibility.²⁹ Like a court order, the terms of a parenting plan may modify the exercise of joint parental responsibility by parents. Once registered in a court, the plan's provisions operate as court orders; its terms may be varied - or not enforced - if the best interests of the child so demand.³⁰

25 This latter interpretation has been adopted by the learned commentator in "The Family Law Reform Bills" (1995) 9 *Australian Journal of Family Law* 183 at 184.

26 Formerly under *Family Law Act 1975* (Cth) s63E(1).

27 *Re S (Parental Responsibility)* [1995] 2 FLR 648.

28 *Family Law Act 1975* (Cth) as amended, ss60B(2)(d) and 63B(a).

29 Section 63C.

30 Sections 63F, 63H.

How often will parenting plans be used, in practice, and what degree of judicial scrutiny of a child's interests is involved in the initial registration process? It is probably of some symbolic significance that the provisions dealing with parenting plans are placed in the amended legislation *before* those dealing with court orders - again, to emphasise the primacy of the aim of resolution without recourse to litigation. The new parenting plans closely resemble "child agreements" under the repealed legislation.³¹ A novelty, however, is that parents are now expressly encouraged to regard the best interests of the child as the paramount consideration when reaching agreement about matters concerning children.³² To what extent can this be enforced, or is it simply empty rhetoric? Can a court refuse to register a parenting plan which in its view does not promote a child's best interests? To answer this one must consider s63E which specifies the registration process:

- (1) Subject to this section, a parenting plan may be registered in a court having jurisdiction under this Part.
- (2) To apply for registration of a parenting plan:
 - (a) an application for registration of the plan must be lodged in accordance with the Rules of Court; and
 - (b) the application must be accompanied by a copy of the plan, the information required by the Rules of Court, and:
 - (i) a statement, in relation to each party, that is to the effect that the party has been provided with independent legal advice as to the meaning and effect of the plan and that is signed by the practitioner who provided that advice; or
 - (ii) a statement to the effect that the plan was developed after consultation with a family and child counsellor (as defined in section 4) and that is signed by the counsellor.
- (3) The court may register the plan if it considers it appropriate to do so having regard to the best interests of the child to which the plan relates. In determining whether it is appropriate to register the plan, the court:
 - (a) must have regard to the information accompanying the application for registration: and

31 *Family Law Act 1975 (Cth)* ss66ZC - 66ZE prior to amendment.

32 *Family Law Act 1975 (Cth)* as amended, s63B(b).

- (b) may, but is not required to, have regard to all or any of the matters set out in subsection 68F(2).
- (4) The Rules of Court:
- (a) must prescribe what information is to accompany an application for registration of a parenting plan; and
 - (b) may prescribe other matters relating to the procedures for registration.

This section was inserted by way of late amendment to the original Bill. It certainly envisages some degree of judicial scrutiny in that the court is to have regard to the best interests of the child when deciding whether to register the plan (s65E(3)). It must take that decision in the light of the information supplied by the parents. However, the application of the full "best interests checklist" in s68F(2) is optional, not mandatory. Much will turn on the amount of supporting information which is required to accompany an application for registration of a parenting plan. This remains to be determined by the Rules.³³ The Honourable Justice Richard Chisholm has suggested that if the Rules require too much supporting material, parenting plans may not be used by parents as it will be easier to obtain a consent order.³⁴ It is worth observing that the operation of the "no order" principle in the English *Children Act* 1989³⁵ where parents have reached agreement appears to have reduced the number of consent orders made in that jurisdiction.

Parenting Orders

Division 5 of the new Part VII of the *Family Law Act* 1975 (Cth) gives the court power to make "parenting orders". This Division lies at the heart of the new legislation, since the "menu" of new orders available is intended to effect far more than merely cosmetic change of terminology. Three³⁶ new orders require consideration. Whilst the Australian scheme draws heavily on the English *Children Act* 1989, there are significant differences of detail which have important practical implications.

33 Sections 63E(2)(a) and (4).

34 Butterworth's *Australian Family Law Bulletin* No 132, January 1996 [626]. Note that the application of the "best interests checklist" is not mandatory when a consent order is made: s68F(3).

35 Section 1(5).

36 The fourth type of order - a child maintenance order - does not represent any change from the previous law.

Residence Order

A residence order deals with the person or persons with whom a child is to live.³⁷ It may be made in favour of a parent or a third party.³⁸ It is crucial to understand that residence under the new provisions does *not* simply equate with "custody" under the old law. Under the repealed provisions, a "custody" order conferred the right to have daily care and control of the child, and the right and responsibility to make decisions concerning the daily care and control of the child: see the former s63E(2). Nor is a residence order under the new Australian provisions the exact equivalent of its counterpart under the English *Children Act* 1989, despite the identical terminology, since under the English scheme a residence order made in favour of a non-parent or an unmarried father automatically confers parental responsibility.³⁹ Under the *Family Law Act* 1975 (Cth) as amended, a residence order (in whomsoever's favour made) simply regulates where the child is to live and no more. In theory it leaves parental responsibility intact, except that the parent without a residence order loses the opportunity to provide a home for the child.⁴⁰ Strictly speaking, if a residence order is made in favour of one parent, both parents "remain equally authorised to make decisions about name, medical care, diet etc".⁴¹ If more extensive powers especially over day-to-day care are to be conferred on the residence provider alone, then strictly speaking a specific issues order should be sought. But what of practice? In reality it will be easier for the parent without residence to exercise parental responsibility in respect of decisions concerning the long-term welfare of the child than in respect of those concerning the day-to-day management of the child's life.

Hence the continuation of full joint parental responsibility notwithstanding the parents' separation unless modified by court order⁴² may prove to be more of a symbolic ideal than a practical reality. In any event disputes about the exercise of parental responsibility will have to be resolved by recourse to court.

Will orders for *shared* residence between two parents who do not live together become common under the new legislation in Australia, given that residence *per se* means simply what it says? Shared residence orders would seem in accordance with the new general emphasis on shared responsibilities.⁴³ Moreover, it has been suggested that,

if the court wished to order that the child is to live with the husband every alternate weekend and half school holidays and with the wife for the rest

37 *Family Law Act* 1975 (Cth) as amended, ss64B(2)(a), (3) and (7). The general obligations created by a residence order are found in s65M.

38 Section 64C. If made by consent in favour of a non-parent, there is a normal pre-condition that the parties have attended counselling and a report has been prepared: s65G.

39 *Children Act* 1989 (UK) s12.

40 Bainham, *Children: The Modern Law* (Family Law, Bristol 1993) p127.

41 The Hon Justice R Chisholm, as above, fn 34.

42 *Family Law Act* 1975 (Cth) as amended, s61C(3).

43 Section 60B(2)(c).

of the time, it appears that the most appropriate order would be *an order giving each party residence for the relevant periods*, rather than making orders for the wife to have residence and the husband contact on alternate weekends.⁴⁴

What is the English experience of shared residence orders since the *Children Act* 1989 came into operation? Such orders have become somewhat more common in recent years,⁴⁵ although they are by no means the norm. The leading authority on shared residence orders under the English provisions is now *A v A (Minors)(Shared Residence Order)*⁴⁶ where the matter was fully considered by the Court of Appeal. An appeal from a mother against an order for joint residence (whereby the children were to live with the mother and stay with the father on alternate weekends) was dismissed. The commentary on the decision by Gillian Douglas is illuminating:

The decision may now be regarded as the leading case on shared residence orders. It makes clear, as Butler-Sloss LJ put it, that the *Children Act* 1989 specifically contemplates, in s11(4), that a child might have a residence with more than one person. The Act has, accordingly, overruled *Riley v Riley* [1986] 2 FLR 429, and this decision should no longer be relied upon in resisting a shared order. Furthermore, the view expressed by the Court of Appeal in *Re H (A Minor) (Shared Residence)* [1994] 1 FLR 717 that a shared residence order, while permitted under s11(4) of the *Children Act* 1989, should rarely be made and would depend upon exceptional circumstances, would now appear to have overstated the case. This is not to say that shared orders are to become the norm. Both judges made clear their view that such an order is unusual, and only appropriate where it can be demonstrated, in the light of the welfare check-list in s1(3), that there will be a positive benefit to the child.

Butler-Sloss LJ considered it unlikely that an order would be made where there are concrete issues still arising between the parties which have yet to be resolved, such as the amount and type of contact to take place, or the child's education. She also agreed with the view, expressed by Purchas LJ in *Re H (A Minor) (Shared Residence)* (above), that a child should not have two competing homes likely to cause him confusion and stress. The cases suggest the following as suitable circumstances for shared orders - where it perpetuates the arrangement the two children have become used

44 Per Chisholm J, as above, fn 34; see also Conway, "Shared Residence Orders" in *Family Law* [1995] 435.

45 For examples, see *M & A (Wardship: Removal From Jurisdiction)* [1993] 2 FLR 715; *G v G (Joint Residence Order)* [1993] *Family Law* 615; *Re H (A Minor) (Shared Residence)* [1994] 1 FLR 717.

46 [1994] 1 FLR 669.

to, and fits in with their own views of what they want (see *G v G (Joint Residence Order)* [1993] Fam Law 615); to stress the equality of the parents' position *vis-à-vis* one another against a background of considerable dispute and acrimony over the care each is giving to the child (see *Re A (A Minor) (Shared Residence Orders)* [1994] Fam Law 431); and where there is no dispute that substantial periods of the child's time will be spent with each parent, and there is no possibility of confusion in the child's mind as to where he will be at any particular time (the present case).⁴⁷

The relative infrequency with which shared residence orders are made in England can be explained by the operation of the "no order" principle: where parents are highly cooperative, no order at all will be made.

However, there is one respect in which the use of shared residence orders in England has no application in Australia. Since under the *Children Act 1989* (UK) a residence order confers parental responsibility on a third party, shared residence orders can be used to confer parental responsibility on a non-parent such as a step-parent or parent's cohabitant.⁴⁸ In Australia a residence order does not confer parental responsibility on a third party, and so a parent's new partner will have to seek a specific issue order under the new s64B in order to obtain aspects of parental responsibility.

Contact Order

Under the new provisions of the *Family Law Act 1975* (Cth) as amended, a parenting order under Division 5 may deal with contact between a child and another person or persons.⁴⁹ If shared residence orders were to become common in Australia, then the scope for contact orders would be reduced; as Justice Chisholm has suggested, contact orders would be confined to matters such as telephone and letter contact ("indirect" contact).⁵⁰ The meaning of a contact order is more fully defined in the *Children Act 1989* (UK) than it is in the new Australian provisions, as an order requiring the person with whom a child lives "to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other".⁵¹ The new Australian provision, whilst more laconic, is still child-focused: it emphasises contact between *the child* and another person, not vice-versa. This is in accordance with the new philosophy of children

47 [1994] *Family Law* 432.

48 *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR 883; cf *Re WB (Residence Orders)* [1995] 2 FLR 1023.

49 *Family Law Act 1975* (Cth) as amended, ss64B(2)(b), (4) and (7). The general obligations created by a contact order are found in s65N.

50 As above, fn 34.

51 *Children Act 1989* (UK) s105.

as the subjects and not the objects of legal regulation, and with the shift away from a view of post-separation litigation as representing a "win or lose" outcome for parents.

Will the new Australian provisions lead to a discernible difference of emphasis in the principles by which disputes about contact are determined? It was already established by case-law under the repealed Australian provisions that it is incorrect to view "access" as a parental right. Moreover, in *In the marriage of Brown and Pedersen*⁵² the Full Court of the Family Court of Australia, whilst holding that all questions of access must be determined by the application of the welfare principle and that there is no onus to be rebutted, nevertheless adopted the observation of the High Court of Australia in *M v M*⁵³ that "the court will give very great weight to the importance of maintaining parental ties ... because it is prima facie in a child's interest to maintain the filial relationship with both parents".⁵⁴ The general statement of principle in the new s60B(2)(b) should if anything strengthen the view of contact with both parents as being prima facie in a child's best interests:

- (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development.

The approach of case-law under the English *Children Act* 1989 (with its very similar policy of the encouragement of co-parenting) is to regard contact as the right of a child and to presume that contact with both parents is in a child's best interests.⁵⁵ This is viewed as being in accordance with Article 9(1) of the United Nations *Convention on the Rights of the Child*. Moreover, recent English decisions show a greater degree of reluctance in a court permitting one parent's hostility to justify denial of contact with the other parent.⁵⁶

What of applications for contact by relatives other than parents? Is there any prima facie assumption that it is in a child's interests to maintain contact with relatives who have played a significant role in their lives? Here the new Australian provisions arguably give a greater advantage to non-parent relatives than their English counterparts. The *Children Act* 1989 (UK) has a complex structure of *locus standi* requirements governing parties' entitlements to apply for section 8 orders. In the relatives category, only parents, guardians

52 (1991) 15 Fam LR 173.

53 (1988) 166 CLR 69.

54 (1991) 15 Fam LR 173 at 184.

55 *Re H (Minors) (Access)* [1992] 1 FLR 148; *Re R (A Minor) (Contact)* [1993] 2 FLR 762; *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1; *Re H (Contact: Principles)* [1994] 2 FLR 969; *Re M (Contact: Welfare Test)* [1995] 1 FLR 274; *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124. But see Willbourne & Geddes, "Presumption of Contact - What Presumption?" [1995] *Family Law* 87.

56 *Re J (A Minor: Contact)* [1994] 1 FLR 729; *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124; Jolly, "Implacable hostility, contact, and the limits of law" [1995] *Child & Family Law Quarterly* 228.

and step-parents have the right to apply for residence or contact orders without leave.⁵⁷ Other persons must obtain leave:⁵⁸ this includes grandparents. The object of the complex leave provisions under the English legislation is to act as a filter to protect children and families from "the stress and harm of unwarranted interference and the harassment of actual or threatened proceedings".⁵⁹ In practice grandparents experience no difficulty in obtaining leave, but once they do there is no presumption under English law in favour of contact between a child and them.⁶⁰ Grandparents (and possibly other relatives too) in Australia may well be in a stronger *prima facie* position as regards contact. Firstly the new Australian provisions contain no "filter" in terms of leave requirements. Instead, s69C speaks in positive terms of those who may institute proceedings, and makes specific mention of grandparents. Secondly, s60B(2)(b) refers expressly to the child's right of contact with not only parents but also "other people significant to their care, welfare and development". The stronger position of non-parent relatives under Australian law may well reflect greater recognition of the ties of the extended family in a multicultural society. The English legislation is arguably underpinned by a narrower conception of the family unit, and by stronger notions of parental autonomy.

Specific Issue Order

The third type of new order created by the *Family Law Reform Act 1995* (Cth) is the specific issue order - terminology once again taken directly from the *Children Act 1989* (UK).⁶¹ The essence of such an order is to deal with aspects of parental responsibility *other than* residence, contact or maintenance. It confers, "duties, powers, responsibilities or authority" in relation to a child.⁶² It may deal with aspects of parental responsibility relating either to the long-term care of the child or to day-to-day care.⁶³ A specific issue order may be made in favour of a parent or a third party.

It seems likely that the specific issue order will be used more frequently in Australia than in England under the *Children Act 1989* (UK). Several differences between the legislative schemes justify such a prediction. Firstly, a residence order in favour of a non-parent in Australia does not automatically confer parental responsibility, unlike its English counterpart. So, for example, a step-parent in Australia who wants some status in a child's upbringing will apply for aspects of parental responsibility under a specific issue order, whereas in England he or she would seek a residence order. Moreover, a specific issue order may be sought in Australia by a parent who wishes to "bolster" a residence order

57 *Children Act 1989* (UK) ss10(4), (5).

58 Section 10(1)(a)(ii).

59 Lord Mackay LC, *Hansard* Vol 502, col 1227.

60 *Re A (Sec 8 Order: Grandparents' Application)* [1995] 2 FLR 153; *Re S (Contact: Grandparents)* [1996] 1 FLR 158.

61 *Children Act 1989* (UK) s8(1).

62 *Family Law Act 1975* (Cth) as amended, s64B(7). The general obligations created by a specific issue order are found in s65P.

63 Sections 64B(6) and 65P.

with additional powers over the child's day-to-day care.⁶⁴ Second, in Australia all biological parents already possess parental responsibility by operation of law, irrespective of their marital status; a larger population of parents are thereby empowered to make decisions jointly or severally in Australia than in England, with a correspondingly larger number of disputes likely to require resolution by specific issue orders. Thirdly, the English *Children Act* 1989 contains a fourth type of order absent from the "menu" available in Australia - the "prohibited steps order". This order empowers a court to place a specific embargo on the exercise of parental responsibility.⁶⁵ It can be used, for instance, to prohibit the removal of a child from the jurisdiction, to prevent a change of name, or to prohibit medical treatment (assuming such decisions to be within the ambit of parental responsibility). In Australia such matters will be dealt with under a specific issue order.

The specific issue order in Australia will probably be the primary means of resolving disputes between parents who have separated or who have never lived together, and between parents and third parties, concerning medical treatment and education of children, sport and their removal from the jurisdiction.⁶⁶ It remains to be seen the extent to which it will be invoked to resolve disputes about routine day-to-day matters.

It is important to bear in mind that a specific issue order is confined to determining issues (other than residence, contact or maintenance) which are within the scope of parental responsibility. Hence matters outside the ambit of parental decision-making - such as the sterilisation of a mentally incompetent minor,⁶⁷ - must under the new Australian provisions continue to be referred to the "welfare jurisdiction" of the Family Court under s67ZC(1).

The Interests of the Child

Unlike the English *Children Act* 1989, the *Family Law Reform Act* 1995 (Cth) effects a change in terminology from the child's "welfare" to that of the child's "best interests" as the paramount consideration.⁶⁸ The intention is to bring Australian domestic law into line with the language adopted in the UN *Declaration on the Rights of the Child*.

The general principle that the welfare of the child is the paramount consideration applies when the court is deciding to make a particular parenting order.⁶⁹ However, the "best interests checklist" found in s68F(2) applies mandatorily only to contested proceedings: its consideration is optional when an order is made by consent,⁷⁰ or a parenting plan is

64 As suggested by Chisholm J, as above, fn 34.

65 White, Carr and Lowe, *The Children Act in Practice* (Butterworths, London, 2nd ed 1996) p120.

66 For illustrative English decisions, see *Re R (A Minor) (Blood Transfusion)* [1993] 2 FLR 757; *Re D (A Minor) (Child Removal From Jurisdiction)* [1992] 1 FLR 637.

67 *Re Marion* (1992) 175 CLR 218; *P v P* [1995] FLC 92-615.

68 *Family Law Act* 1975 (Cth) as amended, ss63B, 65D and Division 10.

69 Section 65E.

70 Section 68F(3).

registered.⁷¹ This policy of restricted judicial scrutiny of the *content*⁷² of welfare where parents are in agreement has already been discussed (see pp 84-85 above). It represents a non-interventionist philosophy where parents agree - in other words, an assertion of parents' autonomy. Whilst less pronounced in Australia than in England because of the absence of the "no order principle", it is nevertheless clearly evident in the *Family Law Act* 1975 (Cth) as amended. Note that the child's wishes are part of the "best interests checklist" and *not* part of the *general* paramourcy principle.

The recent amendments to the *Family Law Act* 1975 (Cth) introduce new elements into the "best interests check-list", now to be found in s68F(2). First, there is a greater emphasis on taking proper account of family violence, including that to which a family member other than the child herself is subjected, and irrespective of whether the child witnesses it.⁷³ Moreover the court is now required to consider making an order which does not expose a person to an unacceptable risk of family violence.⁷⁴ Whilst drawing on the approach already evidenced in earlier case-law,⁷⁵ the express reference now in the statute follows recommendations from the Australian Law Reform Commission that the direct and indirect effects of family violence be accorded greater recognition.⁷⁶ This new element has no equivalent in the *Children Act* 1989 (UK). Secondly, there is new express reference to cultural and racial considerations.⁷⁷ Such candour would fall foul in England of accusations of political correctness. Thirdly, practical difficulties and expenses of direct contact are now expressly acknowledged.

CONCLUSION: POLICY, PRACTICE AND PREDICTIONS

This paper has outlined both the similarities and the differences between the English *Children Act* 1989 and the extensive recent amendments to Part VII of the *Family Law Act* 1975 (Cth) effected by the *Family Law Reform Act* 1995 (Cth). It may well be that the practical significance of the differences fall to be elaborated by judicial pronouncements in the years to come; one can but recall the comment of the Full Court of the Family Court of Australia (in context of financial proceedings) in *Soblusky and Soblusky* that:

71 Section 63E(3)(b).

72 Law Commission Report 172 *Review of Child Law, Guardianship and Custody Law* (1988) para 3.19 (1988).

73 *Family Law Act* 1975 (Cth) as amended, ss68F(2)(g) and (i).

74 Section 68K.

75 *In the Marriage of Jaeger* (1994) 18 Fam LR 126; *In the Marriage of JG and BG* (1994) 18 Fam LR 255; *In the Marriage of Patsalou* (1994) 18 Fam LR 426.

76 ALRC Report No 69 Part I *Equality Before the Law: Justice For Women* (1994) Chap 9 and Rec 9.1.

77 *Family Law Act* 1975 (Cth) as amended, s68F(2)(f).

In the past the tendency has been for Australian legislation and courts to follow at a respectful distance behind their English counterparts. In the *Family Law Act* Australia has chosen its own path in this social field.⁷⁸

Only the pattern of future case-law will reveal whether the *Family Law Reform Act 1995* (Cth) will ultimately be regarded as following or departing from the model of the *Children Act 1989*.

Prior to such judicial elucidation, the following points are raised for speculation as the issues on which most debate in theory and in practice will centre:

1. *The exercise of parental responsibility*: what will this mean in practice to the parent with whom the child does not live, especially in respect of decisions concerning the day-to-day management of a child? How frequently will a specific issue order be used to modify decision-making about both long-term and day-to-day management of a child?
2. *Residence*: will shared residence orders become common, with a reduced scope for orders relating to direct contact?
3. *Contact*: will the new legislative provisions lead to even further emphasis on the desirability of a child maintaining contact with both parents? And will this be extended to a (quasi-) presumption in favour of contact with other relatives, notably grandparents?
4. *Parenting Plans*: will these be popular, or will parents who agree prefer to seek consent orders?

78 (1976) FLC 90-124 at 75, 587.

