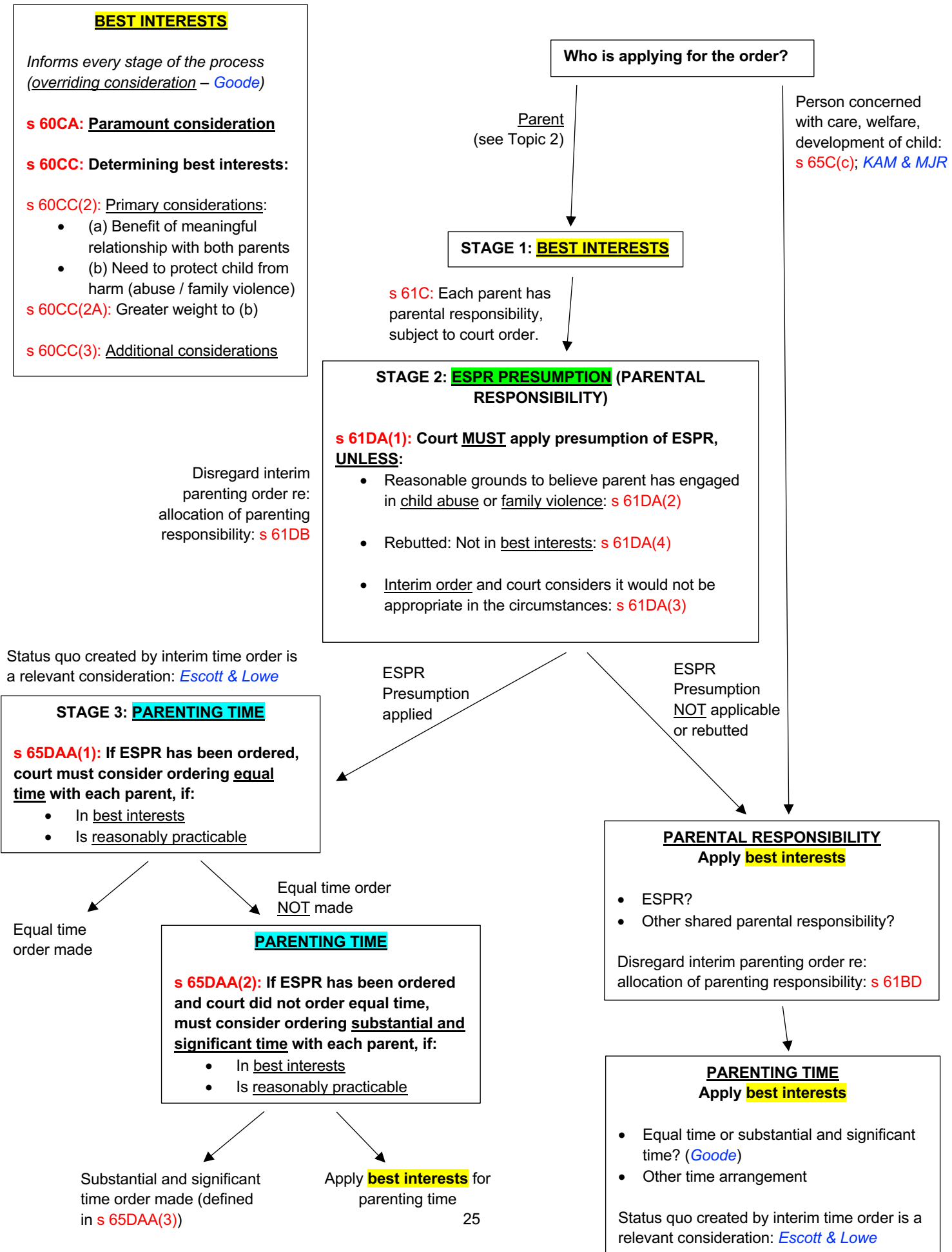


LEGISLATIVE PATHWAY FOR MAKING PARENTING ORDERS



Parenting Time

s 65DAA(1): If a parenting order provides for ESPR, the court must consider making an order to provide for the child to spend equal time with each parent, as long as:

- (a) It would be in the best interests of the child, and
- (b) It would be reasonably practicable.

What does 'reasonably practicable' mean?

- **s 65DAA(5):** In determining reasonable practicality, the court must have regard to:
 - (a) How far apart the parents live from each other
 - (b) The parents' current and future capacity to implement the time arrangement
 - (c) The parents' current and future capacity to communicate with each other and resolve difficulties that may arise in implementing the arrangement
 - (d) The impact the arrangement would have on the child
 - (e) Such other matters as the court considers relevant.
- **Importance of this requirement emphasised in *MRR v GR*:**
 - s 65DAA(1) is expressed in imperative terms – must be in BOTH the child's best interests AND reasonably practicable in order to have power to make the order.
 - Reasonable practicability is concerned with the reality of the situation – not whether it is *desirable* that there be equal time, but a practical assessment of whether it would be feasible.
- **Requires judge to make a prediction as to whether, at the date on which the order takes effect, it will be practicable or feasible: *Wainder*** (e.g. when child starts school).

s 65DAA(2): If a parenting order provides for ESPR but the court does not order equal time, it must consider making an order for the child to spend substantial and significant time with each parent, as long as:

- It would be in the best interests of the child, and
- It would be reasonably practicable.

What constitutes 'substantial and significant time'?

- **s 65DAA(3):** A child will be taken to spend substantial and significant time with a parent only if:
 - (a) The time the child spends with the parent includes both:
 - (i) Days that fall on weekends and holidays, and
 - (ii) Days that do not fall on weekends and holidays.
 - (b) The time the child spends with the parent allows the parent to be involved in:
 - (i) The child's daily routine
 - (ii) Occasions and events that are of particular significance to the child.
 - (c) The time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.
- **Order must meet the definition in both form and substance: *Eddington***
 - Must look at the practical effect of the orders in reality.
 - What constitutes SS varies between cases, turning on the particular facts and circumstances (e.g. father's 56-day rotating work roster).

Remember that no-contact orders are extremely rare. So if arguing for it, the facts would have to be very clear.

Substantial and significant time

<i>Eddington & Eddington (No 2) (2007) Fam CA 1299</i>	
Facts	<ul style="list-style-type: none"> • The children were 11 and 13; the father had a 56-day rotating work roster. • The father appealed the trial decision on the basis that while the orders <i>technically complied</i> with s 65DAA(3), due to extended periods of no contact, including gaps of up to 2 weeks, they could not be said to provide the children with 'substantial and significant' time with their father.
Held	Appeal court substituted the trial orders with its own, to meet the requirements of substantial and significant time in s 65DAA(4).

Reasoning	<p><i>*Where substantial or significant time is appropriate, the court is required to formulate an order that complies with the definition in both form and substance.</i></p> <ul style="list-style-type: none"> • What constitutes substantial and significant time will <u>vary from case to case</u>, with each case turning on its own <u>particular facts and circumstances</u>. • The order may <u>literally comply</u> with s 65DAA(3), but must also look at the <u>practical effect</u> of the orders in reality. <p>Application: Here the trial judge's orders literally complied with s 65DAA(3) but in substance did not constitute substantial and significant time in the circumstances of the case.</p> <ul style="list-style-type: none"> • Due to the father's 56-day rotating work roster, there were lengthy periods in which the children did not spend time with the father, or spent only a few hours with him, notwithstanding his availability. • <i>This would <u>impact adversely upon the significance of the time which the children would spend with the father</u> – there is a <u>nexus between the substance and the significance of the time</u>.</i> <p>Rae: Demonstrates how the appeal court was following the SST instruction in the legislation precisely; in a context where the arrangements were dictated by the father's work roster. Think about whether the best interests of the children were seriously considered.</p>
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Reasonably Practicable

MRR v GR [2010] HCA 4	
Facts	<ul style="list-style-type: none"> • The 5 y.o. child was living with each parent in Mt Isa on a week-about basis. • The mother wanted to move with the child to Sydney. The father worked as a miner in Mt Isa and refused to move. • At trial, ESPR and equal time was ordered as it was considered to be in the best interests of a 5 y.o. child. The judge ordered that the child live in a week-about arrangement that required the mother to live in Mt Isa.
Held	<p>Trial judge erred when applying s 65DAA, by not considering whether the order for equal time would be in the child's best interests AND reasonably practicable.</p>
Reasoning	<p>Section 65DAA(1) is expressed in <u>imperative terms</u>. It obliges the court to consider both whether the order would be in the child's best interests, AND whether it is reasonably practicable.</p> <ul style="list-style-type: none"> • It is only when <u>BOTH</u> questions are answered in the affirmative that there is power to make the order. • Section 65DAA(1)(b) is concerned with the <u>reality of the situation</u> of the parents and the child, not whether it is desirable that there be equal time spent by the child with each parent. It requires a <u>practical assessment</u> of whether equal time is <u>feasible</u>. <p>Application: Not reasonably practicable to order equal parenting time.</p> <ul style="list-style-type: none"> • Since returning to Mt Isa, the mother had been required to live in a <u>caravan park</u> with the child on alternate weeks (facilities are limited; environment is not ideal for a child). • The <u>availability of alternative accommodation</u> was unlikely – rentals are scarce in Mt Isa and waiting lists are long. She could not afford good quality accommodation in any event and the cheaper properties were in "rough" areas. • The mother had <u>limited opportunities for employment</u> in Mt Isa. In Sydney, she had full-time opportunities available with her previous employer, with flexibility of hours. <ul style="list-style-type: none"> ○ In Mt Isa she had to support herself from social services payments and casual employment. There was no employment in Mt Isa for someone of her experience and there were limited opportunities for flexible hours. ○ There was a disparity between her income and that of the father. • Evidence from the family consultant was that the mother was <u>depressed</u> about being in Mt Isa, as her living conditions were not good and she was <u>isolated from her family</u>.

Pathways to court ³⁷

In 2017-18:

- 56% of all applications for final orders in parenting matters were lodged with a certificate issued under s 60I(8) – i.e. attempted FDR, or it was found to be inappropriate.
- 43% were lodged pursuant to the exceptions to the requirements to attempt FDR in s 60I(9).
- 58% of the 10,066 applications for parenting only settled without a judicial determination.

ALRC suggests that these figures indicate there is still a greater capacity for matters to be determined outside of court – and there is a public interest in fewer cases going to court.

Bargaining in the shadow of the folk law ³⁸

Empirical study of people who had called the Family Relationships Advice Line for information about family law and the family law system, and engaged in negotiation of post-separation parenting arrangements. Their experience reflected:

- Quest for legal information involved engagement with a plurality of ambiguous and often conflicting sources.
- Reliance on friends, family, online sources and popular media.
- Parties either did not obtain legal advice or did not rely heavily on it in identifying and evaluation their options.
- ****It is hard for people to get clear, accurate information.***

Family Dispute Resolution

Use of FDR: Trends over time ³⁹

Since 2006, agreement-making has continued to strengthen, receiving a boost from the 2012 amendments, not just for parents affected by family violence and safety concerns.

- More agreements in FDR: parents reporting an agreement in FDR increased from 36% (2012) to 41% (2014)
- After the family violence reforms, the percentage increased – perhaps the greater weight to be placed on protection from harm supported more agreements being made in FDR.
- Greater satisfaction with FDR and agreement based pathways among parents (compared to lawyers and courts).

FDR and family violence

- Evidence shows that family violence concerns are common among families who use FDR.⁴⁰
- Why might FDR be considered inappropriate for victims of family violence?
 - Safety concerns – if the mediation is not done properly, it can expose parties to greater threats of violence.
 - Power imbalance – psychological power plays.
 - Mediation requires honesty, a desire to settle the dispute, and some capacity for compromise – perpetrators of violence are not generally capable of this.
 - The burden mediation may place on the victim of violence.
- What advantages might it offer to victims of family violence?
 - Inexpensive
 - Faster than court
 - Can be flexible and tailored to needs.

ALRC Family Law for the Future: Recommendations ⁴¹

- Strengthen FDR and especially lawyer-assisted FDR (LADR) for parenting, property and financial matters.
- LADR particularly suitable for those affected by family violence because of involvement of lawyers and support workers, who may help to ameliorate any power imbalance.
- Need greater available of LADR, so that people who would use LADR if they were more available are not instead channelled into court.

³⁷ ALRC: FLF Chapter 8

³⁸ Crowe et al

³⁹ Reference: Kaspiew, R., Carson, R., Dunstan, J., De Maio J., Moore, S., Moloney, L., Smart, D., Qu, L., Coulson, M., & Tayton, S. (2015). *Experiences of Separated Parents Study*. Melbourne: Australian Institute of Family Studies.

⁴⁰ AIFS Experiences of Separated Parents Study

⁴¹ ALRC: FLF Chapter 8