Parental responsibility and time: Perspectives and practices of lawyers and other service providers

This chapter examines how the legislative provisions about parental responsibility and time operate, from the perspective of family lawyers and other service providers. A key focus is the impact the legislative and policy framework has on the ability of professionals to work with parents to produce child-focused arrangements in discussions and negotiations outside of the court context. The discussion in this chapter relates to the achievement of policy objective 3—encouraging greater involvement by both parents in children’s lives after separation and also protecting children from violence and abuse (2007 Evaluation Framework, Appendix B)—and the assessment of the “big picture indicators” relevant to whether the reforms have:

- assisted parents to focus on the interests of their children;
- meant that parenting arrangements have evolved in the direction of more child-focused and sustainable agreements; and
- resulted in any unintended consequences.

As described in Chapter 1, the SPR Act 2006 changed the legislative provisions that guide determinations about these issues. It introduced a presumption in favour of equal shared parental responsibility (s61DA), with a linked obligation on courts to consider making orders for children to spend equal (s65DAA(1)) or substantial and significant (s65DAA(2)) time with each parent where the presumption is applied. However, the overarching principle in the legislation remained the best interests of children (s60CA) and a range of factual issues (s60CC) is relevant to this determination. The making of orders for children to spend equal or substantial and significant time with each parent are further subject to a consideration of what arrangements are reasonably practicable (s65DAA(5)), taking into account a range of factors, including the distance between the two homes and the parents’ capacity to communicate and cooperate.

This chapter addresses the following issues:

- What understanding do parents bring to their dealings with service providers, lawyers and courts about what the law says about parenting arrangements?
- Is the presumption, and the circumstances in which it may not be applied or may be rebutted, well understood by parents and system professionals?
- How well understood by parents and system professionals is the difference between equal shared parental responsibility and equal shared time?
- Do legislative and policy frameworks assist professionals to encourage parents to make child-focused arrangements?
- How have the advice-giving practices of lawyers changed since the reforms?
- Is there evidence of any unintended consequences arising from the changes to legislation governing parenting arrangements?

The discussion in this chapter provides a basis for understanding the impact the changes have had on negotiations and discussions about parenting arrangements, mainly outside of the court sector, among parents who seek service assistance and/or legal advice. Patterns in parenting arrangements are described in Chapters 6, 7 and 8. The interpretation of the legislation in case law is discussed in Chapter 15. The data in this chapter are largely drawn from the following:

- Family Lawyers Survey (FLS) 2006 and 2008;
- Online Survey of Family Relationship Services Program (FRSP) Staff 2008 and 2009;
- Qualitative Study of Legal System Professionals (QSLSP) 2008;
Chapter 9

- Qualitative Study of FRSP Staff 2007–08, 2009; and
- FCoA, FMC and FCoWA court files, post–1 July 2006.

The analysis in this chapter suggests strong support for the philosophy of shared parental responsibility among system professionals. However, there is a lack of understanding among some parents and system professionals about the operation of the presumption of shared parental responsibility. The empirical evidence indicates that a significant proportion of parents, and even some professionals, think the legislation requires equal or shared parenting arrangements. The distinction between parental responsibility and time is not clearly understood by many parents on first consulting a legal or family relationship service professional, and “shared parenting” is understood to mean shared time. It is apparent that the different contexts in which lawyers and service system professionals work influence their views as to how the policy and the legislative frameworks operate. Service system professionals operate in the context of a policy framework, while legal system professionals operate in the context of a legislative framework. Legal system professionals in particular have indicated that the legislative framework does not provide assistance in encouraging parents to focus on making child-focused, developmentally appropriate arrangements. Many lawyers believe the changes have favoured fathers over mothers and parents over children. Some service sector professionals and many lawyers believe that issues related to child support and financial settlements influence the positions parents adopt in parenting negotiations. There is some evidence that post-separation property division ratios may have changed, with fathers on average receiving an increased share of property settlements. Mothers are perceived by lawyers to be on the “back foot” in negotiations.

It should be noted at the outset that the views of the professionals reported in this section are shaped by their contact with their respective client bases. As explained in Chapter 4, although many parents have contacted or used a lawyer, only a minority say that this was the main pathway used to sort out their parenting arrangements. A larger proportion, but still a minority, said that family relationship services were the main family law pathway used. The extent to which the issues raised by these professionals may be pertinent to a broader cross-section of parents is uncertain.

9.1 Philosophical support for shared parental responsibility

The level of support among service sector professionals and family lawyers for a key philosophical aspect of the reforms—promoting shared parental responsibility after separation—was tested through the FLS 2006 and 2008 and the Online Survey of FRSP Staff 2009. A general question about this aim was asked, in part to gauge the extent to which response patterns in relation to other issues may reflect philosophical rather than practical concerns.

In relation to shared parental responsibility, participants were asked to indicate the extent of their agreement with the proposition that “spelling out a general expectation of shared parental responsibility after separation is a positive development.”1 Not surprisingly, a majority of service sector professionals and family lawyers agreed with the proposition, although stronger support was more evident among the former group than the latter.

Among lawyers, 80% of respondents to the FLS 2006 either strongly or mostly agreed with the proposition. This level of agreement was slightly lower post-reform, with 76% of respondents to the FLS 2008 either strongly or mostly agreeing. A minority (22%) of 2008 participants disagreed, with only 6% strongly disagreeing.

Among service sector professionals, a large majority agreed that “spelling out a general expectation of shared parental responsibility after separation is a positive development” (Figure 9.1). The proportions agreeing or strongly agreeing with the proposition were:

- 93% of Family Relationship Centre (FRC) staff;
- 92% of family dispute resolution (FDR) staff;
- 95% of Family Relationship Advice Line (FRAL) staff;
- 88% of early intervention services (EIS) staff; and
- 90% of other post-separation services (PSS) staff.

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1 As explained in Chapter 1, such an expectation was not new, but the presumption as a legislative vehicle for it was.
Despite the very high degree of agreement that the legislation spelling out a general expectation of shared parental responsibility after separation was a positive development, a range of concerns were evident among system professionals, especially lawyers, about the impact of the presumption and the linked provisions about care-time arrangements. These are examined in Section 9.3.

![Figure 9.1 Agreement with the statement: “Spelling out a general expectation of shared parental responsibility after separation is a positive development”, lawyers and service providers](image)

Note: Percentages may not total exactly 100.0% due to rounding.
Source: FLS 2006 and 2008, Online Survey of FRSP Staff 2009

### 9.2 Understanding the distinction between parental responsibility and time

The legislative framework is based upon a distinction between equal shared parental responsibility—which is the subject of the presumption—and arrangements for children to spend time with each parent. While parental responsibility has a presumptive basis, care-time arrangements do not. However, courts are obliged to consider making orders for equal or substantial and significant care-time arrangements where orders for shared parental responsibility are made as a result of the application of the presumption (s65DAA), although they may also make them where it is not applied or rebutted (Goode and Goode (2006) FLC 93–286).

A common theme in the qualitative interviews with family lawyers and service system professionals was that some parents, on first seeking assistance from system professionals, failed to understand the distinction between the concepts of equal shared parental responsibility and time. This was also substantiated quantitatively (Figure 9.2), with a majority of systems professionals who participated in the FLS 2008 and the Online Survey of FRSP Staff 2009 disagreeing with the statement that it was "easy for clients to understand the difference" between shared parental responsibility and time. This was more marked among lawyers than service sector professionals. Over 80% of the family lawyers participating in the survey disagreed with this statement.

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2 In the FLS 2008, the statement with which respondents indicated the extent of their agreement was: “It is easy for clients to understand the difference between equal shared parental responsibility and equal time”. In the Online Survey of FRSP Staff 2009, the statement with which staff were asked to indicate the extent of their agreement was: “It is easy for clients to understand the difference between shared parental responsibility and time”.

statement (with 48% strongly disagreeing); that is, these lawyers considered that it was *not* easy for clients to distinguish between the concepts of parental responsibility and time.

A majority of participants in the Online Survey of FRSP Staff 2009 also disagreed that it was easy for client to understand the difference between shared parental responsibility and time. “Other PSS” service professionals (who included those providing Parenting Orders Programs [POP] and Children’s Contact Services [CCS]) were more likely to disagree with this proposition (69%) than FDR (66%), FRC (61%) or EIS service professionals (59%). FRAL respondents were the only group of service system professionals to be more likely to agree than to disagree that it was easy for clients to understand the differences between shared parental responsibility and time (61% agreeing or strongly agreeing and 37% disagreeing or strongly disagreeing). This may reflect the brevity of the interactions that most callers have with FRAL, which may not allow these issues to be explored in any depth. In the Qualitative Study of FRSP Staff 2007–08 and 2009, FRAL information officers also frequently stated that they felt it was possible to explain this distinction quite effectively during calls and felt they “made a difference” in helping parents to understand these concepts. The interviews suggested that parenting advisors from FRAL were less likely to share this view than FRAL information officers.

A further point relevant to the operation of the presumption relates to the extent to which parents and system professionals understand the circumstances in which it is not applicable. Evidence from the QSLSP 2008 suggests that many family law system professionals believe there is also poor understanding of this issue among a proportion of both parents and system professionals.3

As discussed in Chapter 1, the legislation specifies three sets of circumstances under which the presumption is not applicable or may rebutted:

- It is not applicable in circumstances where there are reasonable grounds to believe that a parent, or someone who lives with a parent, has engaged in abuse of the child subject to proceedings or another child in the family of either party (s61DA(2)(a)), or engaged in family violence (s61DA(2)(b)).

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3 As this is a relatively technical legal point, it was not examined in the Service Provision Project.
In interim proceedings, the court has the discretion not to apply the presumption where it considers it is not appropriate to apply it (s61DA(3)) (see Chapter 15 for a discussion of case law on the presumption).

The presumption may be rebutted in circumstances where evidence is adduced to satisfy the court that its application would not be in a child’s best interests (s61DA(4)).

The FLS 2008 asked family lawyers to indicate the extent of their agreement with the statement that the exceptions to the application of the equal shared parental responsibility presumption were well understood by parents, FDR practitioners, lawyers, registrars and judges (Figure 9.3). As with the distinction between parental responsibility and time, parents’ level of understanding of the exceptions to the presumption was given a particularly low rating. Only 5% of family lawyers agreed that the exceptions were well understood by parents (before they saw a lawyer). It is noteworthy that over half (54%) of all family lawyers who participated in the survey strongly disagreed with this statement.

Turning to the family lawyers’ views about other family law system professionals’ understanding of the exceptions to shared parental responsibility, 48% agreed that the exceptions were well understood by FDR practitioners, although a further 15% were unable to answer this question in relation to this group. Family lawyers identified lawyers, registrars and judicial officers as having a much greater level of understanding of the exceptions, with over 85% either agreeing or strongly agreeing with this statement for each of these three professional groups.

Together with the case law examined in Chapter 15 and qualitative insights from the QSLSP 2008, these data indicate that a fair amount of confusion has arisen from the presumption. A key issue is that, while the legislation indicates a range of circumstances under which the presumption is not applicable or may be rebutted, the approach of the courts has traditionally been and still remains that parental responsibility is only removed from a parent in very serious circumstances, usually involving very serious issues relating to family violence, child abuse, mental health and/or substance misuse.

Participants in the QSLSP 2008 suggested that, rather than seeking to establish that the presumption should be not applied or rebutted, some litigants and lawyers were focusing their argument on “time spent” arrangements. Such strategies appeared at times to be adopted notwithstanding a history of family violence and a relationship history that may suggest incapacity to cooperate.
A federal magistrate noted that they regularly encountered cases where legal representatives and their clients had accepted that the presumption should apply, even though the facts of the cases indicated that it shouldn’t, often because of a history of violence and conflict. This participant said that “people are frightened into thinking that if they don’t do this, that somehow the court will take a particular view about their client”.

Analysis of responses of legal practitioners and judicial officers suggests that the strategy of accepting the application of the shared parental responsibility presumption and focusing the contest on time is a reasonably common strategy. Commenting on where the emphasis in litigation now lies, an independent children’s lawyer (ICL) observed that: “It’s a real focus on hours and minutes, not on the matters that actually relate to parental responsibility”.

A judicial officer maintained that this could lead to an inconsistency in argument:

It’s surprising that people will accept joint parental responsibility and then raise allegations about family violence in the context of time arguments … And so it seems to me there quite often can be this slight tension between wanting to appear to be able to communicate and get on, and make decisions about the long-term position, but then when it comes down to the time, they become a little more pedantic or fussy and will raise issues that sometimes can impact on a decision about shared parental responsibility. (Judicial officer)

Some judicial officers noted that such strategies indicated a lack of understanding of the consequences of the application of presumption:

They don’t really think about that it means consultation and communication. It just seems to be like a nice ideal. And they don’t really understand. And also I think that there’s this perception that if you’re looking for that joint aspect of a rather nebulous concept, that you’re looking reasonable. (Judicial officer)

Some judicial officers noted that, for the reasons referred to in the preceding quote, they found themselves making orders for joint parental responsibility despite doubts about their workability. One noted that:

You’re then saying to people, “You have a legal obligation to reach agreement on major long-term issues”. Is that really going to do children any good if the parents are in conflict and one of them starts to exploit that, saying “Well, you can’t decide that these children … you have to get me to agree and I’m not going to agree”. (Judicial officer)

Yet another federal magistrate observed that, in theory, the factual and evidential basis for not applying the presumption was not high (i.e., reasonable grounds need to be established). However, current practice in making orders for shared parental responsibility, even in cases where there has been a history of violence, reflected the traditional position where “we would have given joint responsibility and we still do”. It was only in severe cases of violence, according to this participant, where the presumption was not applied and care-time arrangements were restricted.

### 9.3 Parental expectations about shared time

#### 9.3.1 Quantitative data on system professionals’ views of parental expectations about shared time

Reflecting the reported focus on care-time arrangements over the presumption of shared parental responsibility among some parents and lawyers, a key area of concern among system professionals in both the legal and family relationship sectors is the pairing of the concept of shared parental responsibility with the concept of equal time.

Participants in the FLS 2008 and Online Survey of FRSP Staff 2009 were asked to indicate what proportion of their clients expected roughly equal time. This question was asked in relation to both fathers and mothers. Responses could range on a scale from 0 to 100%.

Responses from both legal and family relationship system professionals revealed that many parents, particularly fathers, were perceived to have had an expectation of equal care-time arrangements prior to either consulting with a lawyer or attending a family relationship service. Family law system professionals and family relationship service professionals both indicated...
that more than half of their father clients began with an expectation that they were entitled to “equal” parenting time. This estimate was slightly greater among lawyers and FDR and FRAL professionals than FRC, EIS and other PSS professionals.

On average, family lawyers indicated that 65% of their male clients and 32% of their female clients expected equal time (Figure 9.4). Lawyers who had indicated that family violence was an issue in half or more of their matters were more likely to indicate that fathers were more likely to expect equal time.

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Service sector professionals also reported that, on average, 49–57% of male clients and 29–36% of female clients expected 50–50 care-time arrangements. This was not as marked as in reports from family lawyers.

These distinctions may reflect the differing nature of clients consulting lawyers compared to those attending family relationship services. It may be that clients who wish to pursue 50–50 care-time arrangements are more likely to seek advice from lawyers compared to attending a family relationship service (or they may already have attended a service and not been successful in their attempt at negotiating an agreement with shared care-time arrangements).

Data collected from the FCoA, FMC and FCoWA court files post–1 July 2006 also indicate that more fathers than mothers proposed equal care-time arrangements when going to court. These data are based on the orders sought by applicants and respondents, although this analysis is presented by gender rather than by applicant/respondent status. Applicant mothers proposed equal shared time (48–52% of hours) for 10% of children in our sample. The corresponding proportion of applicant fathers proposing an equal shared care-time arrangement was almost three times higher, at 27% of children.

Source: FLS 2008, Online Survey of FRSP Staff 2009

Figure 9.4 Perceptions of the proportion of mothers and fathers who expect equal time, lawyers and service providers

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4 Appendix B provides a detailed discussion of the sampling and analysis of court files.

5 There were 316 children who were subject to proceedings with a proposal for care-time arrangements from an applicant mother with final arrangements where contact hours were specified.

6 There were 394 children who were subject to proceedings with a proposal for time arrangements from an applicant father with final arrangements where contact hours were specified.
9.3.2 Qualitative insights into parents’ expectations about shared time

The Legislation and Courts Project (LCP) and Service Provision Project (SPP) each explored qualitatively how the nexus between the presumption of shared parental responsibility and expectations about time affected legal and service system professionals’ work with clients. Issues explored in both studies included the ease with which parents understood the presumption, the impact of the presumption on parents’ expectations of equal care-time arrangements, the appropriateness of these arrangements, and how professionals within these sectors managed expectations that they believed not to be in the best interests of children.

Misconceptions about the distinction between shared parental responsibility and equal time

Participants in the QSLSP 2008 (involving interviews and focus groups with family law system professionals) regularly attributed the shift in expectations to the “publicity that surrounded the reforms”. They suggested that misunderstanding of the reforms was widespread in the community and that even some lawyers thought the reforms meant “50–50” time. This perception is supported by the Qualitative Study of FRSP Staff 2007–08 and 2009, who also experienced misconceptions of the purpose of the reforms. FRAL participants in the 2007 focus groups, in particular, often reported receiving calls from lawyers, service providers and parents with queries about the meanings of the changes in terms of time.7

Highlighting the implications of such misunderstandings, a federal magistrate observed that they had noticed some affidavits—in explaining why particular arrangements had previously been made—citing erroneous legal advice on a mythical 50–50 rule: “They will say: ‘My lawyer told me the law has changed and you get equal time now and the judge wouldn’t allow something that wasn’t equal time’.”

Family relationship service professionals—particularly in the FRCs, POP and FDR services—also frequently reported that clients came to their services with an expectation of equal time, which they attributed to their lawyer’s advice. Some respondents questioned whether the lawyers had actually meant this or whether the client had incorrectly taken this impression away from discussions with their lawyer:

   The guys come in with a point of view that’s being embossed by their lawyers. And even though you might talk about shared time, shared parental responsibility not being the same thing, that’s all well and good but they believe they’re going to get the equal time and week-about or whatever it is they want. So … they’re not particularly influenced by that concept of the difference. They’re not going to go there because they’ve already made up their minds that the courts are going to let them have it the way they want it.
   (FRC practitioner, 2009)

However, as discussed below, many practitioners believed that while this view may be a starting point for many fathers, their attendance at the service was an opportunity to work with them to explore the most appropriate parenting arrangements for the children involved.

Managing parents’ expectations

In dealing with parents in the context of increased expectations, both legal and family relationship services practitioners consistently spoke of needing to “reality check” the position taken by clients. Regular reference was made to working with clients (and particularly fathers) who were seeking 50–50 time, to encourage them to consider the practical implications of their proposals:

   I think, being called the Shared Parental Responsibilities Act [sic], I think most—I’m going to make a sweeping generalisation here—most dads only read the first two words, and that’s all that matters to them. They’re not reading the rest about that it’s actually in

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7 These FRAL respondents emphasised that they were not giving legal advice with respect to a particular case. They were giving information regarding the aspirations of the legislation, with all of its caveats.
reference to responsibility. They’re seeing it as the child spends a week about in each home, regardless of their age or their developmental needs. So if the Act were addressing that, it would certainly, rather than just throwing a blanket over all kids from birth to 16 or 18 years, it would need to have an incremental view of what’s appropriate at different times. (FRC practitioner, 2009)

There was a sense among some practitioners that it wasn’t that the care-time arrangements themselves were inappropriate for the children, but that fathers (who had perhaps not taken on a primary carer role in the past) needed assistance with some of the basics in terms of their children’s needs:

So I had to work with dad about even putting out a toy box or, you know, we actually got dad to purchase a bookcase that the child could sit his little figurines up. So he actually felt like when he went to dad’s home it was now his home. So those practical things dad hadn’t thought of. He had got his shared care and he was happy with that, but hadn’t really thought about how to make it a home for his son during that one week. (FDR practitioner, POP, 2009)

Conversely, a small number of service professionals also hinted that in their practice, there was a sense that mothers were resistant to giving more time to the father, and that they also needed to be worked with to shift their view. This was a minority view, however, and was most commonly expressed by FRAL information officers, who were clearly affected by the many calls they reported receiving from fathers who were unable to spend time with their children.

Similarly, a minority of QSLSP 2008 participants described using the legislation to persuade mothers “to adjust their positions [in order to accept more time] to placate the other party and facilitate an outcome” (Barrister, 2008).

The expectations for equal time held by some clients were said to be impossible to shift, placing both legal and family relationship services practitioners in an ethical dilemma when, in the practitioner’s view, this was not in the best interest of the child:

There’s a very strong sense of, “I want to have shared time or equal time”. And it’s challenging for us because we don’t have the authority of the court to suggest to somebody, “No, that wouldn’t be reasonable in the eyes of the child”. So how do you, as a practitioner, decide what would be reasonable and what wouldn’t be reasonable? We’ve had practice examples where [for example], would it be reasonable to leave an eight-year-old at home for half an hour after school, without a parental carer? Who are we to decide what the community standard is on that, and what isn’t? So I think these are the real practice dilemmas that we have. And within a framework where people are saying, “Well, I want to do shared care arrangements for very young children”, many of us would have reservations about orders that the court has made, because we don’t feel that they’re child-focused for those little ones. (FRC practitioner, 2009)

Similarly, a judge noted that, despite having a fairly robust view of what solicitors should do, they believed that shifting expectations would be an “almost impossible task”:

But with the amount of publicity and the public perception, I think if you try to talk somebody out of doing it, they would have very firmly a view that you were not on their side at all. (Judge, 2008)

A family consultant noted that shifting parents’ views when they “propose or agree to arrangements that family consultants believe would be damaging to children” was a key aspect of the role in the current environment: “It can be difficult, but in my view, it’s the role and obligation of the family consultant to stand firm and advocate for the child in these circumstances”.

Service providers tended to agree that taking a child-focused approach was imperative in working with parents around their expectations of time. Many saw the child-focused aspect of their work as a powerful tool and were confident in their ability to increase the majority of parents’ understanding of their children’s needs:

[In] our pre-family dispute resolution session, we … put a lot of preparation work in there, we work with the parents … we get to that emotional level for them, where they are really focusing on their children … It’s one-on-one, and it really brings about us looking at what’s happening for their child at an emotional level, what is happening with
mum and dad and what’s that creating for the child, [with] a future focus. So we actually say what would you like to see for your child in the future, and that gives us an actual future focus when we go into the joint session. I think that’s been a major change, with how we do our process … We do that [with the parents] separately, one-on-one, and it can take an hour, an hour and a half, one-to-one that we work with the parents. (FRC manager 2009)

However, in agreement with many of the family law system professionals, most service providers did note that some parents’ views about time could not be changed:

I often get a lot of twisting of reading the Act. So, “It’s my child’s rights to spend 50–50 with me”. Which is always an interesting one. Yeah, so the parents, what the parents want, gets twisted into children’s rights, which is not what the Act is actually saying. (FRC practitioner 2009)

A range of issues was identified as stemming from the misunderstanding of the law, including increased disillusionment with the system by fathers. A further concern expressed by lawyers was the impact the misunderstanding may be having on parents who either made their own arrangements or came to negotiated arrangements with the assistance of the FDR sector, without legal advice as to what the law really says and means. Family lawyers expressed concerns that arrangements were being made that were developmentally inappropriate or in the context of a history family violence, and such arrangements proved to be unworkable in practical terms.

Many participants believed that expectations concerning rights, fairness and 50–50 types of outcomes meant that the distance between a child-focused outcome and the initial expectations of at least one parent was greater than before the reforms, in both the negotiation and court context. One ICL practitioner noted that: “Now we have to think about it, and we have to have very good reasons when we are talking to parties and sometimes to magistrates about why we think that a shared care arrangement, in [these] particular circumstances, isn’t appropriate”.

A majority of judicial officers in the sample agreed that they were faced with more unrealistic claims under the reform package. One federal magistrate noted that: “I think there are [a] fair few that have almost like an ambit claim because they know the legislation is there so they just whack it in. I don’t know whether it’s the litigants themselves or their lawyers”.

A judge supported their assessment that children were largely worse off under the reform package by saying: “They really are being divided up more like property than like children”.

Chapter 11 will examine the impacts of shared care-time arrangements on child wellbeing, including where there has been a history of family violence, for young children, or where the inter-parental relationship is highly conflictual.

9.4 Working with parents to produce child-focused outcomes

As mentioned earlier, service system professionals operate in the context of a policy framework, while legal system professionals operate in the context of a legislative framework. Each of these frameworks is ultimately concerned with assisting parents to reach arrangements that are, in the terms of the legislation, in the best interests of their children (SPR Act 2006, s60CA). Thus, the views of both service sector and family law system professionals were obtained on the extent to which the policy and legal frameworks support child-focused agreements (policy objective 4). Service sector professionals were also asked about the extent to which they believed their clients could focus on the needs of their children, while legal sector professionals were asked a range of relevant questions pertaining to the legal framework.

9.4.1 Policy and legal framework support for developing child-focused agreements

Reaching developmentally appropriate agreements

Both the FLS 2008 and the Online Survey of FRSP Staff 2009 asked respondents to indicate the extent to which they thought their respective operational frameworks supported child-focused agreements. The proposition presented to family lawyers was: “The current framework makes it easy to assist parents reach arrangements that are developmentally appropriate for their
children” and it occurred in a sequence dealing with the legislative provisions. The Online Survey of FRSP Staff 2009 statement was the same, except that it included the word “policy” before the word “framework”. Interestingly, there were marked differences in the pattern of responses, with lawyers indicating a much stronger level of disagreement than service sector professionals.

Figure 9.5 shows that a substantial majority (74%) of FLS 2008 participants disagreed that the current framework makes it easy for parents to reach developmentally appropriate arrangements, with 32% strongly disagreeing. Only 20% of participants indicated agreement with the proposition, of which only 3% strongly agreed.

In contrast with these patterns, among service sector professionals, an affirmative response to the proposition was made by 61–67% of FRC, FDR and FRAL participants (with 1–5% of these participants strongly agreeing). A negative response was given by an aggregate of 34% of participants, with 14% strongly disagreeing. It should also be noted that 19–21% of FRAL and EIS participants expressed uncertainty about this issue.

The difference in response patterns between legal and family relationship professionals in these surveys may be explained, at least partly, by responses from many of the family relationship services professionals who participated in the Qualitative Study of FRSP Staff, indicating a belief that they were able to work with parents to find the best arrangements for children. Many of these participants gave examples of being able to used child-focused techniques to assist parents in making arrangements.

The ability to come back and make changes to arrangements once they have been made was also seen as a positive aspect of the family relationship services model. This included scheduled check-ups and “trying out” different arrangements before they were finalised:

We did one where mum and dad were using the contact service and mum had attended “Mums and Dads” and they came in to talk about a shared care arrangement with me. We sort of worked out that it was actually in the child’s best interest and the child wanted it and both mum and dad wanted it too.

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Note: Percentages may not total exactly 100.0% due to rounding.

Source: FLS 2008, Online Survey of FRSP Staff 2009

Figure 9.5 Agreement with the statement: “The current (policy) framework makes it easy to assist parents reach arrangements that are developmentally appropriate for their children”, lawyers and service providers
So we actually put an agreement in place and that started happening. But then what actually happened is it was having a really huge effect on dad’s work and as a result the child was having to go into child care and that on the week that he was with dad and everything like that. So we actually then had to come back and review it and actually this may not be the best arrangement despite the fact that it started out as the best interests of the child. Financially it hasn’t worked out for dad and now it is no longer in the best interests of the child. (POP manager, 2009)

The benefit to children of the legislative reforms

Respondents to the FLS 2008 were asked to indicate their level of agreement with the proposition that: “The legislative reforms towards shared parental responsibility have benefited children in most cases” (Figure 9.6). Just over half of the lawyers participating in the 2008 survey (57%) disagreed with this proposition, with 19% strongly disagreeing, and around 30% of participants agreed with this statement. A similar pattern of responses to this question emerged in the 2006 survey, although a slightly lower proportion of respondents strongly disagreed that the reforms towards shared parental responsibility had benefited children (19% in 2008; 12% in 2006).

![Figure 9.6 Agreement with the statement: “The legislative reforms towards shared parental responsibility have benefited children in most cases”, family lawyers, pre– and post–1 July 2006](image)

Note: Percentages may not total exactly 100.0% due to rounding.
Source: FLS 2006 and 2008

A common view among the legal system professionals involved in the FLS 2008 and the QSLSP 2008 was that negotiation and litigation had become more focused on parents’ “rights” rather than children’s best interests and needs. It was suggested that this resulted from the introduction of the presumption and the linked obligation on the court to consider making orders for equal or substantial and significant time where the presumption is applied. Judges regularly observed that they were being confronted with arguments about parents’ rights in their courtroom and having to undertake a process of “re-education” of litigants to refocus attention on the interests of children, and solicitors described a parallel process in relation to clients.

A judge said: “I think a lot of clients, or a lot of parties and inexperienced lawyers in this field, have confused equal shared parental responsibility with equal time. There is no presumption about equal time. But some people seem to think there is. They seem to think that because the objects are all written out in very pleasing language that therefore you ignore the fact that there’s an overriding factor which is the best interest of the child. And there’s a refocus on what someone’s perceived rights are”.

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Figure 9.6 Agreement with the statement: “The legislative reforms towards shared parental responsibility have benefited children in most cases”, family lawyers, pre– and post–1 July 2006
Similarly, a barrister believed that rhetoric of rights and fairness (in relation to parents) seemed to have gained momentum in family law proceedings: “There was a time when if you said to a judge this outcome will be fair to both parents, a judge would have thrown you out of court”. Expectations that they would “get a fair deal”, according to a legal aid solicitor, meant that more work had to go into explaining what the best interests of the child meant to litigants, who then potentially felt “ripped off” when their expectations weren’t met.

Such views are in contrast to much of the qualitative data from FRC and FDR practitioners about the capacity of the reforms—and the expanded service delivery system in particular—to benefit children. As noted above, many family relationship professionals saw the child-focused aspect of the reforms as an opportunity to assist parents and children post-separation. However, all seemed to agree that there were improvements to be made in the ways in which the different aspects of the system worked together. One FDR practitioner summed it up as:

“The other good thing is that children have got more of a voice in their parent’s separation in the whole thing. Even if they don’t have a voice, they’re being advocated for by the FRCs, that we understand what they’re going through and now they’ve got all these other services that are supporting them. I think that’s great. The whole family law system is better for children I think.” (FDR practitioner, 2009)

Parents’ capacity to focus on children’s needs

A further issue relevant to the question of child focus is the capacity of parents to focus on their children’s needs. This issue was explored quantitatively in the Online Survey of FRSP Staff 2009, which asked participants to respond to questions concerning the ability of their parent client base to focus on their children’s needs. On average, service providers across the service types indicated half or slightly more than half of mothers (50–58%) and 40–53% of fathers attending their service with post-separation issues were able to focus substantially on their children’s needs (Figure 9.7). Apart from FRAL participants, participants within most service types were more likely to report that mothers were able to focus on their children’s needs more than fathers.

![Figure 9.7 Estimates of the proportion of parents who were able to focus substantially on their children’s needs, service providers, 2009](image)

9.4.2 Lawyers’ advice-giving practices

Family lawyers have a professional obligation to advise clients what their legal position is under the law, and the primary focus of the law is, of course, intended to be the best interests of the child. The extent to which advice-giving practices changed under the post-2006 framework can
be gauged by comparing FLS 2006 response patterns with FLS 2008 response patterns to questions regarding the frequency with which participants gave particular kinds of advice.

The qualitative data from the QSLSP 2008 and the quantitative FLS data indicate that advice that could be perceived to support a so-called “80–20 rule” is no longer given as frequently post-reform as it was pre-reform. Overall, it is suggested that there is now more creativity in the advice being provided about parenting arrangements, with parents being encouraged to consider a variety of ways in which fathers can be part of their children’s day-to-day routine.

The FLS 2006 and 2008 questions that were designed to uncover differences in advice-giving around perceived norms in the pre- and post-reform environments canvassed the extent to which three possible sets of advice regarding care-time arrangements were deployed in practice. These were:

- Mothers who have had major child care responsibilities prior to separation will normally obtain residence of their children.
- The normal outcome is that a father will see his children on alternate weekends and half the school holidays.
- Substantial sharing of parenting responsibilities after separation requires high levels of capacity to cooperate.

Past care-giving patterns

In 2008, a substantially lower proportion of participants indicated that they frequently explained to clients that mothers who have had major child care responsibilities would normally obtain residence of their children, compared to the baseline data collected in 2006.9 Post-reform, 44% of participants stated that they almost always or often advised clients in this way, compared to almost twice this proportion (82%) in 2006. Conversely, the proportion responding that they “sometimes” or “rarely/never” gave this advice increased from 17% in 2006 to 55% in 2008.10

“Normal” contact patterns

Similar differences were also evident in advice-giving practices concerning quasi-legal norms in arrangements for children to spend time with “non-resident” fathers. In relation to a question asking respondents how often they had advised clients that “The normal outcome is that a father will see his children on alternate weekends and half the school holidays”, only 9% of lawyers participating in the FLS 2008 reported giving such advice “almost always” or “often”, compared with 36% of lawyers in 2006. In 2006, only 26% of lawyers who participated in the survey “rarely or never” gave such advice, compared with a much higher proportion of family lawyers (64%) in 2008. In 2006, 37% of family lawyers reported “sometimes” giving such advice, with 26% family lawyers in 2008 reporting “sometimes” giving such advice. Further evidence of a change in this area comes from responses to the question: “Because of the reforms, I have changed the advice I give to clients about fathers seeing children”. In 2006, 64% of the sample said they would be likely to change their advice about this, compared with 90% saying in 2008 that they had changed their advice about this.

Shared care and the ability to cooperate

In contrast to the large differences in advice-giving concerning arrangements for spending time, responses to the third question in this set—concerning cooperation and shared care—suggest a more static set of practices. Unlike the two previous questions, this question relates less to

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8 This was a perception, widely held in the community, that the outcome of family court matters was, usually, the mother gaining sole residence (80% of time) and the father having contact with their children on alternate weekends and half the school holidays (20% of time) (House of Representatives Standing Committee on Family and Community Affairs, 2003, ¶2.13).

9 Data from the FLS 2006 (pre-reform) and FLS 2008 (post-reform).

10 Data from Wave 1 of the Longitudinal Study of Separated Families (LSSF W1) 2008 reveal that where fathers had a high degree of involvement in the child’s day-to-day activities pre-separation, there was more likely to be shared decision-making about the child post-separation (Chapter 8). Similarly, families in which the father had a high degree of involvement in the child’s day-to-day activities pre-separation were more likely to have shared time post-separation (Chapter 7).
the legal framework and more to received wisdom (possibly based on case law\textsuperscript{11} and social science evidence\textsuperscript{12}) about the conditions that should exist in order for shared care to be beneficial to children. In both the pre- and post-reform surveys of lawyers, participants were asked how often they explained to clients that substantial sharing of parenting responsibilities after separation requires high levels of capacity to cooperate. In 2008, almost 62% responded that they explained this statement to clients “almost always”, with a further 26% “often” explaining this. In 2006, 66% of respondents stated that they “almost always” explained this statement to their clients.

Comparison of responses in the “sometimes” and “almost never” categories suggests that, post-reform, marginally less emphasis is placed on the ability to cooperate. In 2006, 4% of participants said they “sometimes” gave such advice, compared with 8% in 2008. Similarly, in the “rarely/never” categories, 1% selected this option in 2006, compared with 3% in 2008.

### Shared care and high conflict

Despite less change in the set of responses in relation to advice-giving practice and the capacity to co-operate described in the preceding paragraph, most participants in the FLS 2008 indicated that the changes had resulted in more shared care-time arrangements being made in high-conflict situations. Asked to indicate their level of agreement with the proposition that: “The legislative reforms have resulted in more children in shared care arrangements where there is high conflict”, most respondents (79%) agreed, with 40% strongly agreeing. In contrast, only 16% disagreed, with 4% strongly disagreeing.

This is consistent with views expressed by many participants in the QSLSP 2008 that shared care-time arrangements were being made by agreement, negotiation and litigation in circumstances where the parents had a conflictual relationship.

### 9.5 Who did the legal changes favour?

#### 9.5.1 Fathers or mothers; parents or children?

A further issue relevant to the impact of the legal changes, particularly in relation to the dynamics that affect negotiations, are professionals’ perceptions of whether the reforms have favoured fathers, mothers or children. Quantitative data on this issue was gathered in the FLS 2006 and 2008, with qualitative insights provided by the QLSLP 2008. Overall, these data indicate that the majority of professionals perceive that the reforms have favoured fathers.

The FLS 2006 and 2008 asked participants to indicate who they believed the reforms had favoured, in relation to fathers and mothers,\textsuperscript{13} and parents and children.\textsuperscript{14} Between the survey periods, perceptions that the reforms favoured fathers over mothers and parents over children strengthened. As shown in Figure 9.8, the majority of 2008 FLS respondents (71%) reported that fathers were favoured over mothers, compared with 52% in 2006. As Figure 9.9 shows, this pattern of responses in 2008 was consistent across male and female respondents, with around 70% of male and female lawyers stating that fathers had been favoured over mothers.

In both surveys, between 1% and 2% of respondents believed that the reforms favoured mothers over fathers. It is interesting to note that in the 2008 survey not a single male family lawyer believed that mothers were favoured over fathers. Another 22% of all respondents stated that neither fathers nor mothers were favoured by the reforms in 2008, compared with 34% in 2006.

Similarly, the FLS 2006 and 2008 show a strengthened perception that the reforms have favoured parents rather than children. In 2008, 62% stated that the reforms had generally favoured parents over children, compared with 46% in 2006 (Figure 9.10, on page 221). The response patterns are consistent with a view regularly expressed by participants in the QSLSP 2008 that the

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\textsuperscript{11} For example, Padgen (1991), FLC 92–231 at 78,596.

\textsuperscript{12} See, for example, McIntosh (2003).

\textsuperscript{13} The question was posed as a statement: “The legislative reforms have generally favoured …”, with the following options available for selection: “fathers over mothers”; “mothers over fathers”; “neither”; and “can’t say”.

\textsuperscript{14} The question was posed as a statement: “The legislative reforms have generally favoured …”, with the following options available for selection: “parents over children”; “children over parents”; “neither”; and “can’t say”.
framing of the legislation—in particular, the presumption of equal shared parental responsibility, and a misunderstanding of what it means—have encouraged an increased focus on parents’ rights.

Table E9.1 in Appendix E further illustrates these data and also shows that there was some variation in the pattern of responses by gender of the respondent, with a higher proportion of female lawyers stating that parents had been favoured over children (64% of females compared with 57% of males). Furthermore, male lawyers (21%) were more likely than female lawyers (10%) to report that the reforms favoured neither fathers or mothers.
Further insight into the implications of the shifts perceived by system professionals is provided by qualitative data in the QSLSP 2008, where a consistent concern was expressed about mothers “being on the back foot” after the reforms. Across the sample, professionals regularly expressed the view that the shift in bargaining dynamics, and popular perceptions of what “the law” requires had created fear and apprehension among separated mothers. One senior member of the bar said: “A lot of female clients are really fearful. They come in and say, ‘Well, I understand he is going to get shared care. Is there anything I can do to stop it?’ … I think a lot of the women are desperate to settle because they’re so frightened of what might happen if they go to court”.

Legal system professionals regularly made the point that women felt pressured to agree to outcomes in negotiations that they didn’t feel were in their children’s interests. While this was said to be happening frequently, particular concerns were expressed about the nature of the agreements reached in two different situations. The first concerned cases where there had been a history of family violence. For example, an ICL maintained that situations where there had been family violence and power imbalance frequently resulted in a scenario where “the father has told the mother categorically that the law now says she can have 50–50 and she believes him … So she feels she’s got no choice but to go along with that, otherwise she might be seen as an obstructive mother or something like that”.

The second situation causing concern involved matters where a lack of legal representation at all, or a perceived imbalance in the quality of the legal representation, failed to alleviate the apparent pressure caused by the imbalance in bargaining power, resulting in women agreeing to inappropriate arrangements. “OK if you have an experienced ICL to work against, but if you have an inexperienced one or not one at all, then its not OK … means people are agreeing to arrangements because they think they have to, not because they think it’s in the best interests of the children.” This comment highlights the possibility that the involvement of an ICL may ameliorate the imbalance; however, similar sentiments were regularly expressed in relation to legal representation generally.

Many mothers were reported to be potentially welcoming of greater involvement, but concerned about its practical implications. A number of aspects of potential shared care-time

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Notes: One respondent in the 2006 FLS did not answer this question. Percentages may not total exactly 100.0% due to rounding.
Source: FLS 2006 and 2008

Figure 9.10 Perceptions of whether the legislative reforms have generally favoured parents or children, lawyers, 2006 and 2008

15 This expression was used by a family consultant.
arrangements were seen to raise particular concerns for mothers. These stem from the potential for disjunction between the patterns of care prior to separation and those that may result from negotiations or litigation.

The first relates to concerns reported among mothers who were facing the prospect of equal or substantial care-time arrangements being made in favour of fathers who had not played an active caring role previously. Such concerns focused on the workability of such arrangements, as well as the capacity of such fathers to meet the day-to-day needs of their children. One legal aid solicitor noted: “The most difficult thing for lots of mums to come to terms with [is] he’s now saying he wants the children however many days. He’s never been left alone with them for a night by himself, especially little ones. He hasn’t changed their nappy, he doesn’t know what they eat for morning tea”.

The second relates more specifically to the implications that changes in arrangements have for mothers themselves. A number of family law system professionals spoke of women feeling that their performance as mothers was being devalued by changes in caring arrangements. This was seen to have practical as well as psychological implications. One barrister noted observing a thinking pattern among their clients along the lines of: “I once had the major care of these children, now they are being taken away from me. Am I such a bad mother?”

9.6 Bargaining? Dynamics and issues

An issue connected to the themes examined in the preceding sections relates to a concern about what impact the legal changes have had in relation to the dynamics that affect parents’ bargaining positions in family law matters more widely. It was particularly apparent from data from the FLS 2008 and QSLSP 2008 that a number of issues may be relevant to the positions adopted by the parties in relation to care-time arrangements, including child support liability, access to Family Tax Benefit and post-separation property division. However, while many legal system professionals clearly expressed the view that property and financial considerations and children’s arrangements were connected in negotiations through a potentially complex web of demands and trade-offs, the extent to which this type of dynamic affects separated parents generally is uncertain.

Parents’ reports from the LSSF W1 2008 suggest a link in only a small proportion of cases. Of the 71% of fathers and 73% of mothers in the sample who had reported having sorted out their parenting arrangements, 16% of fathers and 13% of mothers indicated a link between property/financial arrangements and children. It may be that a “bargaining dynamic” may be more strongly evident among the group that had not concluded their arrangements. This is an issue that may be examined further on the basis of LSSF W2 2009 data. Further, socio-demographic characteristics are likely to be relevant in this context and this may be an area where a sample derived from the Child Support Agency (CSA) database has different characteristics from other groups of separated parents; for example, those who arrange child maintenance with no engagement with the CSA. These issues should be borne in mind when considering the data reported in the following sections.

9.6.1 Child support

As outlined in Chapter 1, the Child Support Scheme was reformed in parallel with the changes to the Family Law Act 1975 (Cth). The question therefore arises as to whether there is any connection between parents’ desires to increase the time they spend with their children and their potential child support liability and, conversely, whether there is any connection between a desire to stop a reduction in time in order to maintain child support entitlements. Other financial issues are also relevant here, as government payments such as Family Tax Benefit and Parenting Payments are tied to the amount of time each parent spends with the child or children.

Professionals’ perceptions of the extent to which child support is linked to motivations to seek particular types of parenting arrangements was examined in the FLS 2008 and the Online Survey of FRSP Staff 2009. The data suggest that lawyers see this as strong motivation, in particular for potential CSA payers. Service sector professionals also see it as a motivation for a proportion of their client base, but make almost no distinction between payee motivation and payer motivation. The majority of FLS 2008 respondents perceived that potential payers are motivated to spend more time with their children for financial reasons, with 68% of all respondents agreeing with the statement (29% of them strongly agreeing). In relation to the motivation of potential
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CSA payees, 49% of respondents agreed that payees were opposing their ex-partner having more time with their children for child support reasons, and 45% disagreed (Figure 9.11).

Service sector professionals were asked to estimate the proportion of clients attending their service who:
- are potential CSA payers trying to get more time with their children so that they can pay less child support; and
- are potential CSA payees trying to stop their ex-partner getting more time with their children so as to avoid losing child support.

Estimates of the proportions of clients in each category in response to each of these questions varied little, with large proportions providing a response of “can’t say/don’t know”.

In relation to payers, 60% of FRAL, 59% of FRC and other PSS, and 49% of FDR and EIS participants said that a quarter or fewer of their clients were trying to get more time with their children so that they could pay less child support (Figure 9.12).

Similarly, in relation to payees, the majority of participants (63% FRC, 59% FDR, 56% FRAL, 50% EIS and 52% other PSS) nominated about a quarter or fewer clients who were potential CSA payees trying to stop their partner getting more time with their children so as to avoid losing child support. Again, a substantial minority across the service types provided a response of “can’t say” for this item (Figure 9.13).

These responses are consistent with findings from the Qualitative Study of FRSP Staff 2009, where many noted that while they did have clients for whom child support was the predominant issue behind their preferred care-time arrangements, these parents were in the minority.

9.6.2 Property settlements

Further insight into the relationship between financial issues and parenting arrangements was assessed through the FLS 2008, in which three new questions dealt with the issue of property arrangements. The first question concerned the extent to which property settlements had shifted to favour mothers or fathers, the second asked participants to quantify the extent of the shift and the third concerned advice-seeking patterns in relation to changing concluded property
Chapter 9

These questions were included to gain quantitative insight into the extent of an issue that emerged in the QSLSP 2008 where professionals were suggesting that a change in the average ratio of property settlements in favour of fathers had occurred since the reforms. About half of FLS 2008 respondents (51%) reported that property settlements had on average changed in favour of fathers. A further 27% answered that the changes favoured neither parent, with 22% being unable to say. Only one respondent, or 0.3% of the sample, indicated that

Note: Percentages may not total exactly 100.0% due to rounding.
Source: Online Survey of FRSP Staff 2009

Figure 9.12 Estimates of proportion of potential CSA payers seeking more time with children so they pay less child support, service providers, 2009

Figure 9.13 Estimates of proportion of potential CSA payees trying to stop ex-partner having more time with children to avoid losing child support, service providers, 2009

arrangements. These questions were included to gain quantitative insight into the extent of an issue that emerged in the QSLSP 2008 where professionals were suggesting that a change in the average ratio of property settlements in favour of fathers had occurred since the reforms.

About half of FLS 2008 respondents (51%) reported that property settlements had on average changed in favour of fathers. A further 27% answered that the changes favoured neither parent, with 22% being unable to say. Only one respondent, or 0.3% of the sample, indicated that
property settlements had changed in favour of mothers. As Figure 9.14 shows, this finding was broadly consistent, irrespective of gender of the respondent, in relation to the proportion reporting that one gender was favoured over the other in terms of property settlements. In the FLS 2008, 47% of male respondents stated that property settlements had changed in favour of fathers, compared with 53% of female respondents. It is noted, however, that a much higher proportion of male respondents (40%) relative to female respondents (20%) stated that neither mothers nor fathers were favoured in terms of property settlements.

Respondents to the FLS 2008 were also asked to quantify the average property division allocated to mothers and fathers. Separate questions were asked to assess this allocation both prior to the 2006 reforms and after the introduction of the 2006 reforms.

These quantitative data suggest mothers may, on average, be receiving a reduced share of the property since the introduction of the reforms. In 2008, 60% of the lawyers in the sample indicated they had changed the advice given to clients about property settlement entitlements. When asked to quantify average property settlements pre- and post-reform, on average, respondents answered that prior to the reforms the property division allocated to mothers was 63%. A lower figure of 56% was reported for the question relating to average property divisions after the 2006 reforms.

As shown in Figures 9.15 and 9.16, there was some variation in respondents’ estimates of the average property division allocated to mothers and fathers. Responses relating to the average property allocation to mothers prior to the 2006 reforms ranged from 45% to 80%. Most respondents (88%) estimated that between 56–65% of the property division was allocated to mothers prior to the reforms. After the reforms, the majority of respondents (76%) indicated that the average property division to mothers was between 51–60%. Similarly, there was a range of responses in terms of property allocation to fathers. When asked to estimate the average property division to fathers prior to the reforms, responses varied from 20% to 55% (88% indicating an average of 31–40%), and after the reforms the corresponding responses ranged between 30% and 66% (with 78% estimating an average property division to fathers of 36–50%).

There are two potentially relevant (and to some extent overlapping) issues that may underlie the trends suggested by these data. One is bargaining dynamics and trade-offs made in negotiations that may involve both care-time arrangements and property settlement. The other is the...
extent to which a party’s responsibility for future care of the children may influence property division. Under FLA s79(4)(e) and s75(2), the court, in making orders concerning post-separation property division, has a duty to consider the future needs of each party in the context of a range of factors, including whether either of them is responsible for the care of children (s75(2)(c)). This set of considerations follows on from prior steps, in which the court ascertains the value asset pool of the former couple and evaluates the contributions made by each party. If fathers

![Graph showing property division]

**Figure 9.15** Average property division allocated to mothers and fathers, pre-2006 reforms (2008 data)

Note: Percentages may not total exactly 100.0% due to rounding.
Source: FLS 2008

![Graph showing property division]

**Figure 9.16** Average property division allocated to mothers and fathers, post-2006 reforms (2008 data)

Note: Percentages may not total exactly 100.0% due to rounding.
Source: FLS 2008
were, on average, caring for children for greater amounts of time, then this may result in greater adjustments in property division being made in their favour under FLA s75(2)(c).

The views of many legal system professionals in the QSLSP 2008 indicate that the desire to obtain a greater proportion of the property settlement was a common motivation for seeking shared care-time arrangements on the part of fathers. For example, an ICL argued that property division was often a “hidden agenda” behind a push for shared care-time arrangements and noted that this was “one of the major problems” in practice. “I’ve got quite a few cases where I’ve dug into it a little bit and realise that this really is about the finances. Dads push for shared care to get 50–50 property”.

Legal practitioners and registrars (who are involved in conciliation conferences where there are property disputes) alike spoke of seeing a change in the bargaining dynamics in this area. A senior member of the bar noted that, in her experience, “a lot of women are trading away property in order to try to secure their preferred outcome in relation to arrangements for the children. So some women are saying to me, ‘If I let him have 10% more, does that mean I don’t have to give him shared care?’” Registrars described consistent experiences in negotiating agreements where mothers had agreed to accept less property if the father accepted less time with the children.

An issue that some participants in the QSLSP 2008 expressed concern over was situations in which parents had negotiated care-time and property arrangements on the basis of a particular division of time, but the care-time arrangements then changed (with greater care reverting to one or other of the parents, usually the mother). In the eyes of some legal system professionals, such circumstances may mean that one party would be disadvantaged financially, since the financial settlement would have been predicated on the short-term care-time arrangements, not the longer term situation.

To examine the extent to which this might emerge as an issue, the FLS 2008 asked participants to indicate how often clients asked for advice on changing care-time and property arrangements. As a point of comparison, lawyers were asked about two time periods: pre–1 July 2006 and post–1 July 2006. As shown in Figure 9.17, it was not very common for clients to seek to change finalised property arrangements. A little over 69% of respondents reported their clients “never/rarely” sought to change property arrangements made after 1 July 2006. This was slightly higher than the corresponding proportion relating to property arrangements made before 1 July 2006 (64%). A further 19% of respondents stated that their clients “sometimes” sought advice concerning changes to such arrangements post–1 July 2006, while 24% of respondents reported “sometimes” for changing arrangements made before 1 July 2006.

Note: Percentages may not total exactly 100.0% due to rounding.
Source: FLS 2008

Figure 9.17 Frequency of clients seeking to change finalised property settlements, pre- and post-reform, lawyers’ reports, 2008
In contrast, advice about changing finalised parenting arrangements for children was sought much more frequently. While 69% of participants chose the “never/rarely” category in relation to property arrangements, only 9% chose this category in relation to parenting arrangements, post-reform (Figure 9.18).

![Figure 9.18 Frequency of clients seeking to change finalised parenting and property arrangements, post-reform, lawyers' reports, 2008]

Note: Percentages may not total exactly 100.0% due to rounding.
Source: FLS 2008

Qualitative insights shed further light on the complexities involved in renegotiating post-separation parenting and/or property arrangements. In relation to property, courts do have the power to set aside orders concerning property if a party can establish that “exceptional circumstances” exist relating to the care, welfare and development of a child, or where an applicant has caring responsibility and can establish grounds of “hardship” (FLA s79A(1)(d)). Few participants in the sample could recall either litigating or being asked to give advice on this provision (or apply it in judicial practice), and some participants were even unaware of its existence. In relation to children, if agreement to vary an existing final order cannot be reached, parties may apply to the court to have a new order made in certain circumstances. The decision in Rice and Asplund (1978) 6 Fam LR 570 requires that the applicant demonstrate a “material change in circumstances” since the making of the original order. Case law and legal commentary suggest the scope and application of this principle are complex and subject to discretionary assessments made on a case-by-case basis (see, for example, Middleton, 2007; Miller and Harrington (2008) FamCAFC 12; SPR and PLS (2008) FamCAFC 16).

In addition to the longer term implications of children’s arrangements changing after a property settlement has been concluded, family law system professionals expressed concern about child support payments being based on court order arrangements that subsequently change.17

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16 The operation of the rule was explicitly preserved in the SPR Act 2006: Sch 1, Part 2, Item 44. Courts also have the power to vary an existing primary order where contravention proceedings are brought (SPR Act s70NBA).

17 This question is dealt with under Child Support (Assessment) Act 1987 (Cth) ss52–54. Where the arrangement in court orders is departed from and both parties agree on this departure (not necessarily in formal terms), the CSA will base the assessment on the actual arrangement. Where the parents disagree about whether arrangements in a court order are being followed, the CSA makes an “interim care decision” for the purpose of assessment that lasts for 6 months. In the 6-month period, the CSA conducts an investigation that considers a range of matters, including why there has been a change, why the court order is not being observed, who instigated the change and why, and how the change is being formalised (i.e., through mediation, seeking a variation in the order, obtaining legal advice). Depending on the outcome of this investigation, the assessment may be varied or it may revert to reflect the original court order.
Qualitative insights from family law system professionals also indicate a complex range of factors influences decisions about whether to seek new orders. Registrars, for example, suggested that litigation was expensive, and client “burn-out” was a barrier to re-engaging with the system. In other instances, a range of complex personal circumstances might influence the strategy adopted. A community legal centre lawyer, for example, explained that the decision to seek new court orders could be a difficult judgment call to make, depending on the impact such a move could have on the client’s life. In situations where the other party might be disinterested, then “that’s great, you refer them off and they’ll get a hearing in the undefended list”. However, “rocking the boat” by seeking a new order could also entail significant risks: “Sometimes it’s better to let sleeping dogs lie, particularly if you’ve got a parent that our client believes is perhaps not a desirable influence in the children’s lives”. In such circumstances, it might be better, the solicitor observed, simply to wear the child support consequences. It was evident from the comments of other lawyers that such a strategy was considered to be appropriate in circumstances where there had been a history of violence, since a new application could re-inflame the situation.

This was not a phenomenon seen as being confined to agreements made in the court or legal sector, but was also applicable to those reached in family dispute resolution. Some practitioners reported some clients were simply deciding to live with the discrepancies between actual and formal arrangements as a result of a reluctance to engage with the system again. Such clients, it was said, expressed “frustration with the entire system, are not willing to go through it again. So they are content to accept the lower amount of money that they’ve got for peace and quiet in their life” (lawyer).

9.7 Summary

In summary, this chapter has examined some broad issues arising from the legislative and service context in which parenting arrangements are litigated and negotiated. While there is strong in-principle support for the philosophy of shared parental responsibility, the data suggest that some practical difficulties arise from the way it is expressed in the legislative framework. The first point is that many parents, particularly fathers, believe that the law means they are “entitled” to 50–50 “shared care” in the sense of responsibility and time spent with children.

Legal sector professionals, in particular, believe that these expectations are difficult to work with and have a number of consequences, including greater disillusionment with the system among fathers who find the law does not provide for 50–50 “custody” and increased difficulties in working with parents to achieve child-focused arrangements. The distinction between parental responsibility and time was also said by a majority of participants in the FLS 2008 and the Online Survey of FRSP Staff 2009 not to be easily understood. There is evidence from the FLS 2008 that the circumstances in which the presumption does not apply or may be rebutted are not widely understood either.

While many service professionals reported that a proportion of parents—particularly fathers—have expectations of 50–50 care when they first attend services, they also suggested that in many of the cases where such arrangements are not appropriate, parents can be worked with to develop more flexible agreements that can meet both their child’s and their own needs. They also noted that some fathers may need additional support in creating a welcoming environment for their child.

Pre- and post-reform data from the FLS indicate that advice-giving patterns about parenting arrangements have changed since the reforms, with advice consistent with an “80–20” rule being given much less frequently post-reform. Although lawyers have not changed the advice they give about the need for parents to be able to cooperate for a shared parenting arrangement to be of benefit to children, lawyers believe more children are in shared care-time arrangements in circumstances of high conflict than before the reforms.

There were significant divergences between the views of lawyers and service system professionals on key aspects of the reforms. These are likely to reflect a number of issues, including the different professional obligations that lawyers and service system professionals have, the different contexts in which they operate and differences in their respective client bases. An indication of this is that a substantial majority of family lawyers said that the legal framework did not facilitate the making of arrangements that were developmentally appropriate for children; however, family relationship professionals were more positive about the policy framework’s ability to facilitate this. This probably reflects the strong belief among many of the qualitative
Many legal sector professionals believed the reforms have favoured fathers over mothers and parents over children, and that the post-reform bargaining dynamics are such that mothers are “on the back foot”. A connection between child support liability/entitlement and positions in relation to care-time arrangements was perceived by professionals in the legal sector to be relevant to a substantial proportion of clients’ circumstances. However, the majority of family relationship service professionals indicated that they thought child support was a motivation for changing care-time arrangements for a quarter or fewer of their clients. These differences between legal and family relationship professionals should be treated with caution, however, as they are based on two very different sets of response categories.

A further issue identified by lawyers as being relevant to the positions some parents adopt in negotiating parenting arrangements relates to post-separation property division. Some lawyers perceived some fathers were motivated to seek equal care-time arrangements to maximise their share of the post-separation property division. Overall, the data suggest there may have been a decrease in the average share of property allocated to mothers in post-separation property settlement after the reforms, with varying estimates of the shift, but most being in the region of a five per cent decrease (i.e. from 70–30 in favour of mother pre-reform to perhaps 65–35 in favour of the mother post-reform).18

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18 This is an area where further research could usefully be conducted.