To PRINCIPALS/HEADS

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Ref THE FAMILY LAW ACT: ITS IMPLICATIONS FOR SCHOOLS

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INFORMATION/ACTION

Significant changes to Family Law were effected by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (the "Shared Parenting Act"). These are the most significant reforms to the Family Law system in 30 years. It is hoped that this document will help you become more familiar with the changes and will suggest how schools might best respond to the many difficult situations that could arise.

THE CHIEF FEATURES OF THE SHARED PARENTING ACT

• The Shared Parenting Act emphasises that the best interests of the child are the paramount consideration.

• The Shared Parenting Act makes the rights of a child to know both parents and to be protected from harm the primary factors in determining the best interests of the child.

Key Changes

• Introduces a new presumption of equal shared responsibility. This means that both parents have an equal role in making decisions about major long term issues such as where a child goes to school or major health issues.

• Requires the court to consider whether a child spending equal time with both parents is reasonably practical and in the best interests of the child. If it is not appropriate, the court must consider substantial and significant time.

• Requires parents to attend family dispute resolution and make a genuine attempt to resolve their dispute before taking a parenting matter to court (this requirement does not apply where there is family violence or abuse).

• Strengthens the existing enforcement regime by giving the courts a wider range of powers, to deal with people who breach parenting orders.

• Provides for a less adversarial approach in all child-related matters.

• Amends the existing definition of family violence to make clear a fear or apprehension of violence must be 'reasonable'.

• Better recognise the interests of a child spending time with grandparents and other relatives.
Terminology

- "Living with" replaces the concept of residence (formerly custody).
- "Spending time with" partially replaces the concept of contact (formerly access).
- "Have communication with" partially replaces the concept of contact.
- "Major long term issues" are matters upon which parents who have "shared parental responsibility" must consult each other. This means issues about the care, welfare and development of the child of a long term nature. They are specifically defined as including education, religion, health, the child's name and changes to the child's living arrangements that make it significantly more difficult for the child to spend time with the parent.
- "Parenting Plan" is a written agreement, made between the parents of a child, which sets out parenting arrangements. It is signed and dated by the parties.
- "Parenting Order" is an order or a set or orders made by the court about parenting arrangements for a child.
- "Parental Responsibility" is all the duties, powers, responsibilities and authority which parents have in relation to a child.
- "Shared Parental Responsibility" can only be created by court order and requires decisions above "long term issues" to be made jointly.
- "Family Violence Order" means an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence.
- "Interim Order" is a binding court order that is to remain in force until a final order is made.
- "Location Order" is an order made by the court requiring a person, the Secretary of a Department or an appropriate authority of a Commonwealth instrumentality to provide the Family Court Registry Manager with information about the child’s location.
- "Recovery Order" is an order made by the court requiring the return of a child to the person named in the order.

COMMON QUESTIONS

What should the school do if a parent with whom the child is not living seeks information (reports) about the child’s progress?

- Unless there is a court order to the contrary, each parent has equal rights.
- If the parents have separated, reports should be forwarded to the parent with whom the child is living. The school may also, if it wishes, send copies to the other parent, or if the parent requests copies, the request normally should be complied with. The school may be under an increased obligation to send the reports to the other parent if that parent has signed the enrolment contract. It is appropriate to ensure that any copy sent to the non-residence parent does not include address details.
- If a court order gives sole control of educational matters to Parent A or denies Parent B shared parental responsibility, Parent B is not entitled to any information from the school about the child’s education.
- What has been said about reports applies equally to photographs, any other documentation and access to teachers.
- If someone other than a parent (e.g. grandparent) seek access to school documents, normally it is appropriate to refuse this request, unless permission has been obtained from the parent who the child lives with or unless the person is clearly responsible for the student by being the enrolling person or legal guardian.
• If a non-residence parent or some other person seeks to use the school as a means of delivering a letter or present or birthday card to the child, normally this should be refused, unless permission has been obtained from the parent who the child lives with or the person responsible for the student.

**What should the school do if the parent, with whom the child is not living, wants to attend some school activity where the child is present?**

• Unless a specific court order to the contrary has been made, both parents may attend such activities.
• If there is a court order that prohibits one parent from spending time with or communicating with the child, or an order preventing a parent from attending a school where the child is, it is normally appropriate that the school seek to ensure that that parent does not attend or participate in any activity where the child will be present.

**What should the school do if a parent sets out deliberately to breach a court order by attending at the school or a recognised school function?**

• In the first instance, it is normally appropriate for the school to request that they leave.
• If the child is present at the school or at the function, contact with the parent normally should be avoided but attention should be paid to the actions of the parent and the child.
• On no account should any member of staff try to physically bar or eject a parent, as this may amount to assault.
• As soon as is possible, it would be appropriate for the school to alert the parent with whom the child lives of the breach of the court order by the other parent. They may then decide to file contravention proceedings.

**How should the school act if it appears that a parent is breaching a restraining order?**

• The school should advise the parent with whom the child lives that the other parent has apparently breached the restraining order.
• Normally it would be appropriate for the school to contact the police. In many cases the school will have a copy of the restraining order which can be provided to police.

**Can a parent demand that a child’s surname be changed on school records?**

• Legally, parents usually have joint responsibility for major long term issues including a child’s name.
• Normally there is no requirement for a child to be enrolled under their registered name.
• When a child is enrolled at a school, it is not required that the school investigate the authenticity of the child’s name. There is no legal obligation on the school to do this, nor is the school liable if it unfolds at a later date that the child was enrolled under a name which is not his or her registered name. However, some schools require proof of a child’s name on enrolment to reduce the potential for problems later.
• If the child is already enrolled, records can be changed to another name. Usually, this can occur if:
  a. both parents give their written consent;
  b. a court orders it and a copy of the court order is provided to the school;
  c. a parent requests it and the other parent is dead;
  d. the parent requesting the change is the parent (or one of the parents) who enrolled the student and this parent provides a certified copy of the child’s registration and the registered name is different from the name under which the child was enrolled,
then the name can be changed to comply with the registration. If the other parent is also a signatory to the enrolment, they should be contacted before any change is made;

e. in some cases, on the request of one parent, particularly if the other parent has no contact with the child. This can become problematic for the school if the other parent finds out about the name change. Before agreeing to any change, the school may advise the parent requesting the change of name that advice should be sought from the Family Court as the other parent may have rights regarding the child's name.

• If a legitimate change has been effected and later the other parent expresses concern that the name has been changed, the school could explain that any further change will be made only if there is a court order or an agreement signed by both parents, having regard to the interests of the child.

• Consideration should be given as to whether ‘formal’ school documents should remain in the child’s legal name.

How should the school respond to a request for information about the whereabouts of a child who is, or was, enrolled at the school?

• If the enquiry is by telephone, no information whatsoever should be given.

• If an enquiry is made in person or in writing, the first thing to do is to establish the identity of the person making the request and the reason for their request.

• Address details should only be given to:
  a. the police, if they are conducting criminal investigations or seeking to execute a warrant or recovery order;
  b. Families SA, if the address seems essential to their investigations concerning the child’s welfare;
  c. the court in response to a location order or subpoena issued by the Family Court or Federal Magistrates Court.
  d. Any other person, providing permission has been obtained from the parent with whom the child lives.

• It is appropriate to refuse to give information to anyone else (including, for example, the parent who does not have responsibility for the child, or a solicitor or private investigator).

What should the school do if the school or a staff member is requested to provide a written statement or affidavit concerning the child’s academic progress, behaviour, and appearance at school?

• The request may come from the Independent Childrens Lawyer, who is appointed by the court to independently represent a child in Family Court proceedings.

• If so, it should be remembered that the best interests of the child are always the court’s first concern and therefore a high level of cooperation is desirable. However, comments should be restricted to those that can be made from the staff member’s direct and personal observation of the child. It is advisable to avoid commenting on matters outside of the expertise of the staff member. A staff member is not obliged to answer any question or provide a statement on any matter when they feel uncomfortable or out of their area of expertise. They should not feel concerned about refusing such a request.

• The request may come from a parent or a solicitor acting for a parent. If so, it is a matter in which the principal should make a judgement. Schools can be concerned about the school becoming involved in family disputes and whether providing a statement could lead to the perception that the school is not impartial. The school and its staff members cannot be forced to provide a written statement; and, although the staff member may well be told that the provision of such a statement will obviate any need for the staff member to appear in court, no-one can guarantee that this will be so.
• If requested by a parent, it is appropriate to provide the normal factual information that is provided to parents (e.g. school reports and attendance records). However, where the other parent is also an enrolling parent, it is advisable that the school state to the requesting parent that it will also provide a copy of these documents to the other parent and inform the other parent that a request has been made for these documents and as a joint enrolling parent, a copy is also being provided to him or her.

What to do if the school or a school employee is served with a subpoena?

• There are three types of subpoena:
  - a subpoena for production
  - a subpoena to give evidence
  - a subpoena for production and to give evidence.

• When served with a subpoena, the school must comply with it unless it was not served correctly under the Family Court Rules or was not provided with proper conduct money to attend court. Penalties do apply for non-compliance with a subpoena.

• If the subpoena requires a staff member to give evidence, the staff member must attend court on the date specified on the subpoena. If the subpoena requires the staff member to give evidence and produce documents, the staff member must attend court on the date specified on the subpoena and to produce the documents as set out in the schedule to the subpoena.

• If the subpoena requires the school to produce documents, the school can produce the documents to the Registry Manager of the Family Court not less than two days before the date fixed for production of the documents in the subpoena or can appear in court on the date specified on the subpoena with the documents.

• The school may choose to comply with the subpoena by producing a copy of the documents. If the school does this, the copies must be attached to an “Affidavit – producing documents under subpoena”. This form can be obtained from www.familylawcourts.gov.au or the Family Court Registry.

What should the school do if the Police call at the school in order to remove a child?

• First, the school should read and check the details on the warrant or recovery order that the police will bring.

• Where plain clothes police officers attend, they should be asked to produce their identification.

• All police officers (or at least the most senior police officer) should be asked for their names and at which police station they are located. These should be recorded by the school.

• If everything appears to be in order, the school should assist the police in whatever way seems appropriate.

• Though the school will, of course, act with sensitivity so far as the child and the other students are concerned, the school must provide assistance to the police irrespective of any objections that the child may make.

• The school may indicate to police that it is the normal school procedure to contact the parent to inform the parent that the police wish to remove the student from the school premises. If the police request that this not happen they may be asked to explain why and the school should note the answer.

• If the police have removed a student from the school or advised that parents are not to be contacted, the school may limit the information given to parents if they enquire to,
their child has been taken from the school premises by named police officers from a specific police station.

**What are the common questions that need to be asked if there is a family break-up?**

**Q:** How does the school establish such matters as parentage and parental responsibility, where the child will be living, and with whom the child may spend time?

**A:** A birth certificate, parentage testing results or court order will establish parentage. A court order will establish who the child lives with and who the child may spend time with.

**Q:** Do letters from solicitors have any legal standing so far as the matters raised in Q1 are concerned?

**A:** No.

**Q:** Can an old Family Court Order be relied on?

**A:** Yes, unless the school knows of a later one. If a parent gives the school details of a more recently made court order but does not produce a copy, the school should request a copy of the most recent Court Order. The Court Order should be dated and have the Court seal appearing thereon. The more recent order should be relied upon.

**Q:** Is it only natural parents who are granted parental responsibility, and so on?

**A:** No. Grandparents, and other persons, may be parties to parenting plans, and if necessary, may apply to the court for certain orders concerning child. Court orders can be made granting parental responsibilities to other persons, other than the child’s parents. This is rare. Court orders can be made ordering that a child lives with, spends time with, or communicates with, a grandparent or other person, other than the child’s parents.

Encapsulated in the Objects of Part VII of the Family Law Act concerning children, is:- “S.60B(2)(b) Children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives).”

**Q:** If an order allows a parent to spend time with a child, should that contact be allowed whilst the child is in school?

**A:** This is a matter for the school’s discretion but it is rare that a school agrees.

**Q:** How should the school respond if a parent, who the child does not live with, seeks to work in a voluntary capacity at the school?

**A:** If the voluntary work would be likely to breach any court order, parenting plan, restraint order made, the request should be denied.

However, if the voluntary work will not necessarily breach any contact order, then the non-residence parent’s request can be accommodated.

**Q:** If there is a shared care arrangement in place, which parent signs absentee/permission notes and receives reports/notices from the school?

**A:** The parent who the child lives with during the week, or on the particular school day in question. If a shared care arrangement is in place, this usually means there is a high level of co-operation and communication between parents.
Q: If there are no court orders in place but the school knows that the family has broken up and that the child lives with one parent as the other parent is an alcoholic or given to violence, can the school refuse the latter contact with the child or access to information from a teacher?
A: No, unless the school believes the child would be at risk of harm.

Q: If the alcoholic or violent parent seeks to remove the child from the school, can the school stop this?
A: No, not unless there is a court order or the school believes the child is at risk of harm, and then the school should notify Police and Families SA. The best the school can do is to notify the other parent in the hope that any dispute will be resolved away from the school.

Q: If their alcoholic or violent parent comes to the school to attend some public event – a sporting fixture, say, or a concert – and the other parent is distressed by this, should the school seek to ask the alcoholic or violent parent to leave?
A: No, not if that parent is not causing any trouble.

Q: If a parent, who is seeking parenting orders, wants to discuss the child’s progress and behaviour, must the school enter into such discussion?
A: You should treat this parent the same as you would treat any other parent.

Q: Can the school rely on advice from a parent about what is in a court order?
A: It is important in cases of family breakdown to ascertain from the parents whether there are any court orders and to request that complete copies of the most recent orders are provided to the school. Some schools seek this information on enrolment forms.

If you have any questions about these matters please contact Roger Anderson on 8179 1419.