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Access And Overnight Stays In Parenting Arrangements:
Reforms Under The Spotlight

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Parental relationships are largely forged while children are young, but when families break down, age can often be used as a weapon in limiting access. With this dilemma in mind and changing societal attitudes, the courts are rethinking parenting arrangements for young children. This paper examines the developments in this area, including:

- The significance of overnight time for young children.
- The relevant considerations that come into play when determining what care arrangements will be in a young child's best interests.
- Spotlight on the draft Family Law Amendment Bill 2023
- An analysis of recent reported decisions involving young children.
- A discussion on how often these arrangements ought to be reviewed, and how to balance this against the harm of ongoing litigation.

Significance of overnight time on young and very young children.

The brain development that happens in the very early years of life, as compared to any other period in life, is astronomical. Critical to the young child's cognitive and emotional development is the formation of secure attachments to their caregiver/s. The implementation of developmentally inappropriate parenting arrangements for this age group can leave the child particularly susceptible to long term negative outcomes. There is therefore a particular onus on "getting it right" when considering parenting arrangements for children in the 0-4 age group.

But what is so special about overnight time in particular? The issue of overnight time specifically, tends to invoke strong reactions. Having regard to the fact that the child support formula bases its assessments on the number of overnights the child spends in each parent's care, allegations are commonly made that parties, in seeking overnight time or attempting to prevent the other from having overnight time with a child, are financially motivated. It is also common, and understandable, for the non-resident parent to want to play a part in the child's night-time routine and to view this as essential in building the relationship between the child and that parent.

As to what the research says, the message is mixed. We have one group of expert opinion telling us that there is a special vulnerability about night-time. That the state of the organism is to be more anxious at night, and

this is hard-wired in our cortisol rhythms.[1] They also say that night-time is often an uncomfortable period for children, they are tired, their normal defences are diminished, and their ability to cope with stress is reduced. It is therefore generally preferable for younger children to sleep in the same place, and that sleeping away from the primary home environment and away from the primary carer can be a frightening experience to an infant and a young child. Indeed, the insistence of overnight contact with a non-resident parent may be counterintuitive and undermine the young child developing a strong relationship with that parent into the future.[2]

Young children also develop the concept of "object permanence" around 8 months of age, where they realise that things and people can exist even when they are out of sight. This coincides with the manifestation of separation anxiety, which peaks around 14-18 months of age and settling down by 2-3 years of age. Bedtime can represent a time of perceived separation for a child in this age group, with the potential to trigger anxieties if not managed delicately and with sensitivity.

However, there is also a body of research which says, in effect, that context is king, and that the issue needs to be approached with both discernment and caution rather than a blanket prohibition on overnight stays away from a young child's primary carer. Factors such as the degree of warmth and responsiveness of parents, the level of communication and cooperation between the parents, as well as the degree of continuity and consistency of the care arrangements, will be key in determining the success or otherwise of the overnight regime.[3] The optimal set of circumstances in which overnight time ought to commence include:

- Both parents have a secure and warm relationship with the child before separation;
- The primary carer is supportive of the child's relationship with the other parent, including expressive positive feelings and reassurance on handover and reunion;
- Routine is consistent and predictable and the child not away from the other parent more than a few days at a time;
- There is no conflict in front of the child or conveyed to the child;
- Both parents communicate and monitor the child's tolerance for the separations.

Legislative pathway when making parenting orders

The Court is to make such parenting Orders as it considers proper and in doing so is to regard the best interests of the children as the paramount consideration. What arrangements are determined to be in the children's best interests are ascertained by a consideration of the objects and principles in section 60B and the primary and additional considerations in section 60CC of the Act.

The objects are to ensure that the best interests of children are met by:-

[1] George, C, Solomon, J & McIntosh, J, (2011), "Divorce in the Nursery: On Infants and Overnight Care", *Family Court Review,* 49(3)

[2] Papaleo, V, Developmental Considerations in Contact, Residence & Relocation Disputes, *Television Education Network,* September 2005

[3] Cashmore, J & Parkinson, P, (2011) "Parenting Arrangements for Young Children: Messages from research", *Australian Journal of Family Law,* 25(3), 236-257

- ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
- protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
- ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The principles underlying these objects (except when it would be contrary to a child's best interests) are that:

- children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- 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); and
- parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
- parents should agree about the future parenting of their children; and
- children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

The primary considerations as set out in s 60CC(2) are:

a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

In balancing these considerations, the Court is to give greater weight to the need to protect the children from harm or being subjected to, or exposed to, abuse, neglect or family violence.

Section 60CC(3) sets out the additional considerations for the Court in determining what is in the children's best interests.

Section 65DAA and overnight time

Section 65DAA of the *Family Law Act 1975* (Cth) requires the Court to consider in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent.

Although not prescribing an equal care arrangement or even a requirement for overnight time in of itself, this section has been criticised as creating an unnecessary additional step, distracting the Court from an individualised focus on the individual best interests of the child in question. There is also the potential for it to

be misunderstood by separating parents trying to come to their own arrangements, leading them to adopt parenting arrangements that are not otherwise developmentally appropriate for their young children. Indeed, Federal Magistrate Sexton (as she then was) has explicitly noted that she has seen on many occasions this misunderstanding in the community about what the legislation really says, manifesting in some primary care givers doing deals proposed and consent orders being produced, for fear of getting a worse result for their child in a Court, even when that caregiver believes or knows that that child is unlikely to be able to emotionally manage what they have agreed to.[4]

For a specific example of this playing out in practice, the decision of *Tanberg & Remmy* [2020] FCCA 3175 is illuminative. Here, the parties had agreed on a shared care arrangement for a 2-year-old. The mother subsequently applied to vary the orders, on the basis that the arrangement was not working and resulting in adverse outcomes for the child. Judge Neville declined to vary the Orders on an interim basis, even though he acknowledged that shared care arrangements for children that young are generally contraindicated, having regard to:

1. The fact that the original orders were made by consent between the parties.
2. No specific and firm recommendation was advanced by the family report writer to change the current arrangements.
3. The "he-said, she-said" nature of the evidence of the parties.

Noting these concerns, the ALRC in their report "Family Law for the Future — An Inquiry into the Family Law System" recommended the removal of this section in its entirety. This section was also touched on by the Joint Select Committee on Australia's Family Law System. They noted the recommendation of the ALRC Inquiry, but were divided as to whether they also recommended its repeal.[5]

The Response of the then Government in March 2021 to the recommendation from the ALRC was a resolute "Not Agreed". Their position was *"The government remains committed to ensuring that courts appropriately consider children spending equal time, or substantial and significant time, with each parent in determining disputes about children's arrangements."*[6] The Response then goes on to recognise that there are reasons "*including for safety, or relating to practicalities*" as to why it will not always be in the best interests of a child that equal time or substantial and significant time be spent with each parent. The failure of the Response to mention of the child's attachments or developmental needs as a reason why equal time might not be appropriate, was conspicuous in its absence.

However with a change of government, brings the *Family Law Amendment Bill 2023*.

Spotlight on the *Family Law Amendment Bill 2023*

In January 2023 the Federal Government published an Exposure Draft of the *Family Law Amendment Bill 2023.*

This Bill proposes significant changes to Part VII of the *Family Law Act*. The changes are summarised as follows:

[4] Federal Magistrate Sexton, Parenting arrangements for the 0 – 4 year age group, Legal Aid NSW Family Law Conference, September 2011, p 14

[5] Paragraph 4.39, Second interim report of the Joint Select Committee on Australia's Family Law System, March 2021

[6] Page 15, Government Response to ALRC Report 135: *Family Law for the Future – An Inquiry into the Family Law System,* March 2021

- Section 60B, which sets out the objects of the Part, receives a significant slim-down. At present it lists four objects of the part, along with five principles underlying them. The new proposed section 60B simply lists two objects of the Part, to:

    1. Ensure the best interests of the children are met; and
    2. To give effect to the Convention on the Rights of the Child.

- Significant changes to section 60CC are proposed. At present, section 60CC somewhat cumbersome, with primary and additional considerations, and considerable overlap between the various considerations. The revised section removes the primary and secondary considerations, and instead just list the following general considerations:

    1. what arrangements would best promote the safety (including safety from family violence, abuse, neglect, or other harm) of:

        - (i) the child; and
        - (ii) each person who has parental responsibility for the child (the carer);

    2. any views expressed by the child;

    3. the developmental, psychological and emotional needs of the child;

    4. the capacity of each proposed carer to provide for the child's developmental, psychological and emotional needs, having regard to the carer's ability and willingness to seek support to assist them with caring;

    5. the benefit to the child of being able to maintain a relationship with both of the child's parents, and other people who are significant to the child, where it is safe to do so;

    6. anything else that is relevant to the particular circumstances of the child.

- Most of the existing s60CC factors do however still make it into the revised version, save for the requirement that the Court consider making orders least likely to lead to further proceedings. This appears to be consistent with a recent judicial trend that recognises that, especially for young children, final orders are not necessarily in a young child's best interest. I discuss this further in the case examples, below.

- There is then a separate sub-section, 60CC(3), which is specific to children who are an Aboriginal or Torres Strait Islander child.

- Section 61DA – Presumption of equal shared parental responsibility when making parenting orders – is removed in its entirety.

- Section 61DB – Application of presumption of equal shared parental responsibility after interim parenting order made – is removed in its entirety.

- The obligations on advisors in Section 63DA changes accordingly.

- Section 65DAA is removed entirely. From a legal perspective this does not change matters significantly, but as with section 61DA, its removal will hopefully assist in combatting the information in in the community surrounding the presumption of equal time.

- The inclusion of a new Section 65DAAA, which would have the effect of codifying the rule from *Rice v Asplund* (1979) FLC 90-725. It provides that when a final order is in force in relation to a child, the Court must not reconsider the final parenting order unless:

    1. There has been a significant change of circumstances since the final parenting order was made; and
    2. It is in the best interests of the child for the final parenting order to be revisited. When determining the best interests of the child for the purpose of this section, there are a list of additional considerations that will apply, on top of the section 60CC factors.

- Streamlining the operation of Division 13A of the Act, relating to the enforcement of parenting orders.

- Section 68LA is amended to require an Independent Children's Lawyer to meet with the child, unless the child is under 5 years of age, or does not want to meet with the Independent Children's Lawyer, or there are other exceptional circumstances that justify not performing this "duty".

- The introduction of the power of the Court to make a "Harmful Proceedings Order". This enables the Court to retrain a person from filing further family law applications without leave of the court in circumstances where it would be harmful to the other party or the children involved. It is similar to and an extension of the Court's current power to dismiss vexatious proceedings, but broader in that the applicant does not necessarily have to have a history of instituting court proceedings that abuse the court process or are without reasonable grounds.

- Section 121 – Restriction on the Publication of Court Proceedings – receives a rework. The proposed changes give some guidance on what sort of communications are prohibited and what are allowed. A private communication with a family member or a friend will not be caught by section 121.

- The Bill also increases inclusivity of Aboriginal and Torres Strait Islander children, by widening the definition of "member of the family" to be more inclusive of Aboriginal and Torres Strait Islander concepts of family and kinship.

Attachment theory

Attachment theory refers to the psychological connectedness and emotional bonds between people. In the context of a parent-child relationship, attachments develop through the child having its basic needs met, in a consistent and predictable manner, leading to the experience of the world as a safe place in which to live.[7] The significance of secure attachments early in life cannot be overstated. Attachments drive brain development and are critical for both the short and long term emotional and psychological functioning of an individual.

In terms of a timeline, from birth until about 5-9 months an infant's attachment to its caregiver first develops. By then, a child's clear-cut attachments have evolved, following which stranger wariness and a degree of separation anxiety will be a feature of a child's attachment behaviours until 3-4 years of age.[8]

The formation of attachments is much more susceptible to a stress event in the first 1 to 2 years of life than the same event occurring in the 3rd to 4th years of life. Children do however still remain sensitive to attachment distress throughout childhood.

It is fair to say, however, that the concept of attachment is frequently misunderstood and, in the family law arena, misapplied in an ill-conceived manner to justify developmentally inappropriate care arrangements. And there is a real danger to this. Improper parenting arrangements can negatively impact on both the continuity and the quality of the child's attachment relationships. For the primary attachment figure, a parenting arrangement that is too disruptive may undermine and damage the quality and security of this attachment. Similarly, for the non-primary parent, forcing overnight contact before it is appropriate may undermine the young child developing a strong relationship with that parent into the future.[9]

When formulating parenting arrangements for young children, attachment theory tells us that the focus ought to be on supporting the growth and consolidation of the primary attachment, as well as allow for familiarity and growing attachment with the second parent.[10] Obviously this needs to be considered in the context of other factors such as the nature of the parenting relationship between the parties, their physical proximity and so on.

What about the situation where a child has strong attachments to both parents? Would that give rise to the earlier commencement of overnight time and/or an equal shared care arrangement? Likely yes to the former, and likely no to the latter. There is a false equivalency in saying that a young child with strong attachments with both parents ought to equate with an equal time regime. Rather, the child in these circumstances would still likely benefit from having a single secure home base from which they would scaffold the relationship with the other parent.

Other Relevant Factors

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[7] Papaleo, V, above n 2

[8] Sexton FM, above n 4

[9] Papaleo, V, above n 2

[10] McIntosh, J, "Guest Editor's Introduction to Special Issue on Attachment Theory, Separation, and Divorce: Forging Coherent Understandings for Family Law" *Family Court Review*, 49(3), 418 -425

The following is a non-exhaustive list of additional matters which may be relevant to the question of when overnight time ought to commence for a young child with their non-primary parent.

- Age and temperament. Even at the narrow spectrum of very young children, there is an enormous difference between a 6 month old infant and a 3 year old toddler. In the absence of any other information, an infant will almost certainly not be able to tolerate overnight time away from their primary carer, whereas it is feasible for a toddler to manage.

  It is also fairly obvious, but worth mentioning that the views of children in this age group aren't readily ascertainable in any meaningful way. They are also less able to communicate and articulate their needs clearly, be it hungry, tired, uncomfortable and so on. Even the most sensitive and attuned non-primary parent may struggle to pick up on their young child's cues simply by virtue of not having the same level of involvement as the primary parent. This renders it all the more important to consider the child's temperament and ability to tolerate the separation when determining the issue.

  Finally, query what level of understanding the child has. Do they understand what "tomorrow" is, are they aware that a person can leave and come back again, and so on.

- Child's physical needs and health/development:

  Sleep and nap schedule

  Query whether the child is sleeping through the night, or is still waking and requiring assistance from their primary caregiver to go back to sleep. If the latter, this is contraindicative of the commencement of overnight time, and it may be appropriate to investigate what factors may be underlying the disrupted sleep. The Australian Association for Infant Mental Health recommends that overnight time not commence until the child is able, at least in part, to self-soothe.[11]

  What will also be relevant is the settling technique adopted by each party, as consistency across both households is to be preferred.

  Breastfeeding

  Pursuant to Article 24 of the UN Convention on the Rights of the Child, breast-feeding is promoted as a health advantage for the child. The right to breast-feed does not lie with the mother but with the child. The WHO also recommends recommend that infants be breast-fed for six months exclusively and for the first two years of life with other complimentary feeding.

  The issue of breastfeeding has come up on a number of occasions, in the decisions of *H & D* [2003] FMCAfam 290, *SDW & JCJ* [2005] FMCAfam 210 and *Marsh & Hornby & Ors* [2009] FMCAfam 951. The issue was also touched on by the Full Court in the decision of *Jackson & Macek* [2015] FamCAFC 114. This was an appeal from a decision which, inter alia, imposed a restraint on the mother from breastfeeding an 11-month-old infant on the grounds of concerns about the hepatitis and HIV risk from the mother getting a tattoo a month prior. The Full Court found that the evidence did not support the trial judge's finding of risk, and that in reaching his decision, the trial judge had not

[11] Guidelines for Infants and overnight care – post separation and divorce, Australian Association for Infant Mental Health, 26 November 2011.

considered the benefits to the child both emotionally and physically of continued breastfeeding and any negative effects from its sudden cessation.

Toilet training

Children generally demonstrate signs of being ready for toilet training around the 24 month mark onward, although this is variable. If the child is on the cusp of toilet training, or is in the middle of it, overnight time should not commence until the process is complete unless there is a high degree of cooperation between the parties and they are able to adopt a unified approach to the training regime.

- Pre-separation arrangements. There is an obvious difference between an overnight stay that represents a continuation of a pre-separation caring regime and staying overnight with a parent but who for practical purposes is a is unfamiliar with the child's routines.

- Nature of the parenting relationship. This is a particularly significant point, as it has consistently been pointed out in the literature on the topic that a cooperative and functional relationship between the parents does wonders for a child's ability to manage the transitions between households.

- Impact on the primary carer. *In Biondi & Koen* [2020] FamCA 201, Bennett J stated in relation to a three-year-old "*I have regard to the impact that introducing overnight time at this juncture might have upon the mother's parenting capacity as she is the primary carer and X's emotional wellbeing is closely linked to the mother's emotional wellbeing*." Her Honour further noted that in upholding children's rights to protection from sexual, psychological or emotional harm, the Court must take into account any anxiety on the part of the primary caregiver concerning the child's exposure to potential harm where such anxiety is likely to impact adversely on that parent's caregiving ability.

- Practicality of the proposed arrangements. What is the distance between the respective residences? What travel will be involved for the child? Does the non-primary parent have an appropriate sleep space set up for the child? What are the child's day time activities? A long and tiring day at day-care is not a good precursor for overnight time with the non-primary parent.

- Continuity of household routines. When the care of the child is shared for even one night of contact, similarity of routine across households is essential to ease the transition, and to encourage relative stability. Parents who can communicate about the child and the child's needs, who share and accept the understanding of the infant and the toddler's specific routines, and who can collaborate on such important routines as meal time, sleep schedules and soothing techniques, will contribute much more to a successful negotiation of this phase of a child's life. [12]

- Older siblings. The presence of an older sibling may provide reassurance and continuity for a young child when commencing overnight time. Also note that it may be entirely appropriate for there to be different arrangements for different children within a family. Whilst it may be logistically preferable for children to be on the same schedule, there may be compelling reasons for this not to be appropriate.

[12] Papaleo, V, above n 2

When should arrangements be reviewed

"*The aim of an effective contact and residence plan is for parents to maintain flexibility in revising arrangements, acknowledging the need for a dynamic and accommodating arrangement to meet the changing needs both socially and developmentally of their children, and that there not be adherence to a static contact agreement which is neither sympathetic to nor synchronous with the changing needs of the child across the different stages of their development*."[13]

In an ideal world, parenting arrangements would be dynamic and responsive to the changing developmental needs of the child. This however requires a cooperative co-parenting relationship between the parties.

Absent this, the law and legislative framework and the barriers to entry of the Court (both in time and cost) render it difficult for parenting orders to be revisited in court. Whilst there is an obvious benefit in having finality and avoiding ongoing litigation, this also has undesirable side-effects in matters involving young children, namely:

- There is an element of "crystal ball gazing" when attempting to determine what arrangements will be in a child's best interests years down the track.

- Parents often fight for a bigger share of time now, as it will be harder to get more time later.

To ameliorate this, when preparing consent Orders for young children, it has often been the case that the practitioners have inserted a notation to the effect that the rule in Rice & Asplund would not apply to any later applications. However as articulated by Judge O'Shannessy in *Williamson & Parrish* [2022] FedCFamC2F 68, this will not be binding on the Court. At paragraph 56 he states, "*a notation does not and cannot exclude the court's jurisdiction to deal with the matter nor can it prevent the applicable law applying. For example if the parties were to agree, and whether recited in a notation or not, that in any subsequent litigation concerning the children the best interests of the children would not apply or that Part VII of the Act was not to apply, or that the parties were at liberty to make a new application whether the parties chose or for any trivial reasons, obviously neither the court or the parties could not be bound by such agreement".*

Where a notation to this effect has been included, all it will represent is an element of the fact matrix that must be considered when determining whether or not the threshold from *Rice & Asplund* is met. His Honour was however sympathetic to reasons underlying why parties seek to include this notation. At paragrpah 59 he states:

"It can be difficult, and for some parents impossible, to chart in court orders the entire childhood of their children. It is not uncommon that parents are able to agree upon the children's living arrangements for certain stages of their children's lives but not for their entire childhood. It is not uncommon that a parent, or one of them, or a family report writer, considers it premature to attempt to fix the living arrangements for years later when the child or children will be of school-age and or at secondary school while those children are very young or in kindergarten or have just commenced school or when the parents' separation is recent. In that circumstance it is not uncommon for parents to agree upon the children's living arrangements for the time

[13] Papaleo, V, above n 2

being and for the next few years, or at least into the foreseeable future, and to agree that those arrangements be reviewed down the track and on the basis that if the assistance of the court was required either or both parties could seek that assistance in the event agreement by themselves could not be reached. Without the ability to make a new application parties may see an agreement to "review" as mere words and over empowering the parent that prefers, or can live with, the status quo of the existing order in the review negotiations. In some cases the ability to review arrangements, including with the assistance of the court, is significant to the parties in reaching agreement about their children. In those cases the parents may not ever bring any further application notwithstanding that they have agreed or contemplated that such event may occur."

Noting the comments of His Honour, when preparing Consent Orders, rather than simply asserting that the rule will not apply, instead give consideration to an expanded notation or recital to the effect that the parties agree that the parenting arrangements ought to be revisited in accordance with the children's age, stage of development, etc. Also consider the inclusion of an Order made pursuant to section 13C providing for the appointment of a Parenting Coordinator, who can assist the parties to navigate this when the time comes.

Case examples

Darvall & Darvall [2021] FamCA 606

This is a decision of Justice Williams, involving a review of a Senior Registrar's decision. The child in question was 14 weeks old. The parties were in a same sex relationship, and the Applicant was the child's biological mother and the Respondent the child's birth mother. Prior to the child's birth, the biological mother commenced proceedings in the Supreme Court of Victoria seeking that she have primary care of the child upon the child's birth, the child live with her upon discharge from hospital, she be permitted to breastfeed the child on his birth and that the birth mother spend time with the child for two hours each day. Immediately following the child's birth, the birth mother filed urgent proceedings in the Family Court seeking orders that the biological mother be restrained from attending the hospital whilst she and the child were inpatients, the child live with her and that the biological mother spend supervised time with the child three times a week for no more than one and ½ hours on each occasion with such time to occur at her home.

Orders were ultimately made by the Senior Registrar enabling both mothers to be permitted to breastfeed, an ESPR order, and time arrangements including the progression to one overnight a week with the biological mother commencing when the child would be 8 months old.

The birth mother sought a review of this decision. As to the question of when overnight time ought to commence, the evidence from the expert was that this could occur once the child had stabilised. On an interim basis, Her Honour declined to make any orders for overnight time whatsoever, in light of the child's age, and left the question of when overnight time ought to commence to be addressed at a future date.

Wadford & Cafferty (No.3) [2019] FCCA 3687

This matter involved a 3.5 year old who lived with her mother, and had not spent any overnight time with her father at the time of trial. It is a good example of the conundrum facing the court when making final orders for little children.

The parties separated prior to the birth of the child, and the father commenced proceedings in the months following her birth. Various interim orders had been made for the child to commence overnight time with the father, however the mother did not facilitate these, on each occasion on the basis of the child's health and anxiety levels. On the testing on the evidence, the crux of the issue became not whether the child was developmentally ready for overnight time (she was) but rather the mother's ability to support that arrangement.

Noting the difficulties in making final orders for young children, His Honour instead elected to make further interim orders, for the follow reasons:

> *To introduce overnight time for X with her father, two, to test how the father might handle that overnight time and thirdly, to test the mother's commitment to supporting orders for overnight time. I would add however a fourth reason for making an interim order that being, and in my view this is significant, in nine or so months' time, X will be four and a half and had the benefit of overnight time with her father including hopefully more than one overnight at a time.*

Horner & Horner [2017] FamCA 779

This decision of Justice Tree related to a child of 3 years of age at the time of trial, who lived with the Respondent Mother and had only spent very limited time with the Applicant Father.

The evidence of the expert was that overnight time between the father and the child ought to occur when the child reached 4 years of age. This was in the context of the child and father having an emerging strong and positive relationship, albeit embryonic. The recommendations of the family report writer were accepted by His Honour.

Interestingly, although the matter was listed for trial, it was agreed between the parties and court that it was not feasible for the trial to produce final Orders. The Father needed to begin spending unsupervised time with the child and that relationship needed time to develop before any consideration could be given as to what form of long term Orders would be appropriate. Although this lead to a continuation of the litigation, the competing considerations were such that this was a regrettable necessity.

Ruskin & Bonner [2016] FamCA 765

This is an interim decision involving children aged 5 and 1.5. The children lived with their mother. The younger child had not spent overnight time with the father, whereas the older child had been spending one night a fortnight with the father.

A Family Report was prepared, recommending that the older child commence overnight care with the father immediately, with the younger child to increase her day-time contact with the father and overnights to commence when the child turns 2. The importance of a slow and staged extension of the father's time with the younger child was emphasised.

Her Honour Justice Johns ultimately declined to make any orders for overnight time between the father and younger child at this hearing, and instead increased the day-time contact between them pending a further report.

Nardo & Nardo (No.2) [2013] FamCA 356

Here, the child in question was 3.5 years of age, and living with the mother. It was agreed between the parties that overnight time with the father ought to commence, in dispute was when and the frequency of the overnight time. Relevant to the Judge's decision to adopt the slower, more cautious approach advocated for by the mother and the Independent Children's Lawyer, was the following:

- There was a period of time when the father was entirely absent from the child's life, by his own choice.
- The father's parenting capacity was untested.
- There were allegations of family violence made by the mother against the father.

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