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Welcome to 400 George

- Five star “green star” design
 - 20% reduction in carbon emissions
 - 50% more fresh air than a typical office building
 - Increased natural light
 - Comprehensive environmental and waste management plans
- Close proximity to public transport and a range of amenities within the North Quarter Precinct
- Access to GoMA and South Bank via the new Kurilpa Bridge



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Some elements of our fit-out

- Recycled materials used to make:
 - Carpet tiles
 - Vinyl floor surfaces
 - Treads on internal staircase
- Flooring in team spaces and café area is made from linseed oil and wood flour
- AAAA water efficient fittings
- Energy efficient lighting
- Low VOC (non-toxic) paints

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Cooper Grace Ward and Bain Gasteen

- From 1 December, a merged firm of 200+ people
- Enhanced range of services and support for our clients
- New opportunities for Bain Gasteen and CGW team members



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Our Family Law Team

- Advising on all aspects of:
 - Divorce and separation
 - Property settlement
 - Child maintenance, trusts and child support
 - Review of child support agency assessments
 - Child residence and parental contact disputes
 - De facto disputes
 - Pre-marital agreements
 - Cohabitation agreements



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Three recent family law decisions about children –
what did the judges decide and why?

Kay Feeney, Nichola Di Muzio and Megan Webb

Three family law case studies

- 1. A case involving unsubstantiated allegations of abuse – **Megan Webb**
- 2. A case involving conflict throughout the extended family and serious allegations of substance abuse and child neglect – **Nichola Di Muzio**
- 3. A controversial interstate relocation case (which you may have seen in the press earlier this year) – **Kay Feeney**

Family Law Act – ss.61DA and 60CC

- **S.61DA** - The Court must apply the (rebuttable) presumption of shared parental responsibility
- **S.60CC** In assessing the child's 'best interests' the court is required to take into account a range of factors. **Primary factors:**
 1. the benefit to the child of having a meaningful relationship with both parents; and
 2. the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Section 60CC – additional considerations

- any views expressed by the child and any factors (such as the child's maturity or level of understanding)
- the nature of the relationship of the child with each parent, and other people including grandparents
- willingness and ability of each of the child's parents to facilitate and encourage child's relationship with other parent (good parent rule)

Section 60CC – additional considerations

- likely effect of changes in the child's circumstances, including separation from either parent, or any other child or other person
- practical difficulty and expense of a child spending time with and communicating with a parent

Section 60CC – additional considerations

- capacity of each of the child's parents and any other person to provide for the child's needs (including emotional and intellectual)
- if the child is an Aboriginal or Torres Strait Islander child, the child's right to enjoy his or her culture (including the right to enjoy that culture with other people who share it) and the likely impact any proposed order will have on that right

Section 60CC – additional considerations

- child's maturity, sex, lifestyle and background (including lifestyle, culture and traditions) and of either of the child's parents
- any family violence involving the child or a member of the child's family, and any family violence order that applies to the child or a member of the child's family, if the order is a final order or it was contested (disputed)

Section 60CC – additional considerations

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- the extent to which each parent has fulfilled his or her parental responsibilities
- Any other fact or circumstance that the Court thinks is relevant.

Assumptions family lawyers make

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- The Court will *usually* Order:
 - Shared parental responsibility
 - If practicable, time with both parents
- These assumptions, taken from **s.61DA** and **s.60CC** underpin the advice we give in the vast majority of children's cases
- What happened in *Krach & Krach*?

Krach and Krach [2009]

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- Decision of Bennett J, Family Court of Australia at Melbourne
- Judgment handed down June 2009
- Case involves the parenting arrangements for 2 children:
 - "L" born in August 2000 (8 at trial)
 - "S" born November 2001 (7 at trial)

BACKGROUND...

Background

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- Mother's case:
 - Father sexually abused both girls in 2005 and 2006
 - Father exposed the children to inappropriate behaviour (including he and new wife in shower)
 - Children are smacked and subject to conflict and denigration of mother at father's home
 - Children are at risk of further abuse

Background

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- Orders sought by mother:
 - No orders for children to spend time with the father on an ongoing basis
 - If time ordered, it should be 'minimal', at a contact centre, and directed to being phased out entirely
 - Mother also sought directions about what to do if the children didn't want to see their father

Background

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- Father's case:
 - Denies allegations of impropriety
 - Mother is attempting to destroy relationship between him and the children
 - The children will not be able to have a meaningful relationship (*primary consideration* s.60CC) with him unless they live primarily with him

Background

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- Orders sought by father:
 - Children live with him and new wife
 - Seeks one month moratorium – girls not to see mother
 - Then contact under supervision at a contact centre for 6 months
 - Then weekend day with mother for 3 months
 - Then alternate w/e and half school holidays

ICL's submissions

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- No positive finding of sexual abuse
- If children stay with mother, the relationship with the father will not develop
- Mother has a delusional belief of sexual abuse
- If the children stay with the mother they will be further damaged psychologically and damage will escalate

Allegations of abuse

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- **Mum's position:** Sexual abuse occurred
- **Dad's position:** Mum doesn't really believe abuse occurred – trying to destroy r'ship
- **ICL's position:** Mum genuinely but mistakenly believes abuse occurred
- **COURT'S POSITION:** Only concerned about impact and prospective impact on the children of the parents' positions

Mrs P's evidence

(or what not to do when you're a Psychologist)

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- Mrs P: Psychologist called by the mother
- Saw children 20+ times
- 'gained children's trust' and 'supported and encouraged by mum' managed to get the children to make disclosures
- Children disclosed by nodding 'yes' or 'no'
- Later verbal disclosure exactly mirrored mum's descriptions of events

The Court found

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"I am satisfied that the mother's beliefs about the sexual abuse are without foundation, but that the fact that she holds them and has pursued them with such vigour represents the greatest danger to the welfare of S & L."

Final Orders in *Krach & Krach*

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- Father: sole parental responsibility including education and health
- Children live with the father
- Supervised time with the mother at a contact centre for 1 month
- Unsupervised – 1 day per week for 3 months
- Alternate weekends unsupervised

Masters and Anor & Hereford and Ors

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- A 2007 Family Court case involving three children whose mother had been killed in a motor vehicle accident.
- The Court heard allegations of substance abuse and mental health issues, and the remarkable cross-examinations reflected the family's history of explosive arguments.
- Multiple parties and 112 page judgment.

A Complicated Family Tree and History of Care for three young children

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- The children: J a girl aged 8 at time of judgment; D a boy aged 7 at time of judgment; and R a girl aged almost 4 at time of judgment.
- The mother and J's and D's father had first formed a relationship in 1998 in the Port Stephens area of NSW.
- The three children had been living in Qld with the mother and the grandmother since August 2003, until May 2005 when the mother decided to move to western NSW to pursue a relationship with a man who lived near to where her father (one of the Applicants) was residing.
- J and D had enjoyed weekly telephone contact and limited visits from their father (2-3 times per year).

A Complicated Family Tree and History of Care for three young children (cont'd)

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- After the end of her relationship with R's father, the mother had not advised him about the existence of the baby. When he discovered that he had a daughter, he was unsuccessful in trying to contact the mother to arrange to spend time with R.
- In May 2005, at the mother's request, the Applicants collected the 3 children from Qld and drove them to their home in western NSW. There was no space in the car for the mother. She arranged to travel down a month later but was killed in June 2005 when she was on her way to the maternal grandfather's home.
- The Applicants held on to the 3 children after the mother's death.

Initial Action After the Mother's Death

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- Mr Heresford visited the children and asked Mr Masters & Ms March to allow him to take the three children or, at least, his daughter and son, J & D.
- The grandfather and his partner refused. They commenced proceedings in the Federal Magistrates Court in Newcastle naming only Mr Heresford as a respondent and obtained an urgent ex parte interim order which provided that the three children live with them.

Outcome of initial court action

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- Concerned for the children's welfare, Mr Heresford consulted a solicitor and contacted DOCs at Port Stephens.
- After Mr Heresford was served with the Applicants' court documents, interim orders were made for the three children to live with him.
- When the children were handed over to Mr Heresford, they had a variety of sores, cuts, thrush and R had bad nappy rash.

What happened next...

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- Notwithstanding the interim orders, Mr Heresford agreed to R to staying with the mother's sister who resides in the same area. The sister has three children of her own and, at the time, the maternal grandmother was staying with her.
- Mr Kaleb was finally notified of the mother's death in August 2005.
- The ICL arranged for the preparation of a Family Report – interviews were conducted before either R's father was notified of the mother's death and became a party, or before the maternal grandmother intervened. Neither party was notified of the interviews for the first family report.

What happened next... (cont'd)

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- In September 2005, R's father was ordered by the Federal Magistrates Court to file and serve a Response and affidavits.
- In October/November 2005, Mr Kaleb and his partner Ms N came to the Port Stephens area and met R for the first time.
- In October 2005, the grandmother became a party to the proceedings.
- The grandmother and R moved to reside with the maternal grandfather's cousin (close to J & D) and then moved to a caravan park north of Newcastle.
- J's & D's father amended his application to seek orders that J & D live with him but that R live with the maternal grandmother.

The Parties Fronting the Court

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- Applicant: Mr Masters- the maternal grandfather of all three children and his partner Ms March
- First Respondent: Mr Heresford – father of J & D
- Second Respondent: Mr Kaleb – R's father
- Third Respondent: Ms Konrad – maternal grandmother of J, D, & R
- The Independent Children's Lawyer – Mr P

Background details

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- The mother's relationship with Mr Heresford was marked by regular use of cannabis by both parties
- There was serious conflict and violence directed by the mother towards Mr Heresford
- The mother suffered from post-natal depression after the birth of J
- The mother formed a number of new relationships after her separation from Mr Heresford
- The mother had relied upon her mother's assistance throughout the children's lives and the maternal grandmother had provided stability for the children

The Grandmother – Ms Konrad

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- **Ms Konrad** had a history of mental illness. She had suffered from depression, panic attacks, and germ obsession. She had been diagnosed with depression and Borderline Personality Disorder and had suffered auditory hallucinations in 1997 and had taken an overdose.
- She had hospital admissions as recently as 2005/2006.
- She down-played her illness.
- Her hospital records showed a history of intravenous drug use and a charge of possession of stolen goods.
- She and Mr Kaleb disliked each other (and the case notes Mr Kaleb's cross-examination of her as involving a "display of mutual hostility and distrust").
- She and the mother had been greatly distressed by her mother's death.
- She acknowledged that she had been sexually abused as a child.

R's Father – Mr Kaleb

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- **Mr Kaleb** had a criminal record and was on charges of resisting arrest and of carrying an offensive weapon
- He was in a "volatile" and violent relationship with Ms N.
- Ms N had a serious criminal record, including assault, weapons, and dishonesty charges.
- A child of this new relationship had been taken into care by DOCs for about 7 weeks.
- Represented himself in the proceedings and was anxious in court and lost control in the court room on two occasions.
- His parents had been heroin users.

The Children - J

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- Moody and violent if not on ADHD medication
- Protective of younger brother and sister
- Little affection between her and her father
- Wanted to continue to live with her father
- Had difficulty making friends at school
- Good relationship with grandmother

The Children - D

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- Problem behaviour at school
- No understanding of “sharing” or “waiting and taking turns or right”
- Likely to repeat kindergarten
- Difficulty maintaining concentration
- Poor fine motor skills
- Low average range of intellectual functioning

The Children - R

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- Language was age appropriate
- Clingy with grandmother
- Had own room but still slept in grandmother’s room (on a separate mattress)
- Enjoyed spending time with siblings
- Good behaviour
- Good physical health

The Decision

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- J & D to live with Mr Heresford
- R to live with Ms Konrad
- R to spend increasing time with Mr Kaleb
- All children to spend time with each other and maternal grandfather and his partner
- Parties ordered to attend parenting courses
- Limits on the grandmother’s movement

Rosa and Rosa [2009]

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- An appeal case about relocation where the Court denied an application by a mother to move herself and the child from North Queensland to Sydney, even though the child had only lived in North Queensland for around 12 months, and the rest of her life in Sydney.
- Subject to a further appeal - outside the Family Law Courts to the High Court.

Rosa and Rosa cont.

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- The facts of the case are important.
- Parties have a five year old daughter.
- They move from Sydney to Mt Isa in ‘early’ 2007 to allow the husband to commence a two year employment contract.
- Early is not defined but by August they have separated.

Rosa and Rosa

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- At some point after that the mother goes back to Sydney with the child.
- By the time the case comes on for trial, the parties are both in Mt Isa and the child is living week about with each parent.
- As a starting point this is fairly critical because the father was positioned to be able to show his practical capacity for the role.

Rosa and Rosa

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- The father was also able to provide evidence of how the child coped with the arrangement. The mother applied:
- 1. to live in Sydney and have the child spend time with the father; or
- 2. to live in Mt Isa and the child live mainly with her and spend time with the father; or
- 3. that both parents move back to Sydney and the father spend time with the child.

Rosa and Rosa

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- The mother faced three hurdles - to pull back from the full week about arrangement on any of her applications - to relocate such a distance from the father when the child was so young – and in addition the father had had the opportunity to demonstrate his parenting skills and obtain evidence of the child coping with shared care.

Rosa and Rosa

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- There had been a family consultant involved. She supported the continuation of the shared care in Mt Isa.
- The trial judge ordered shared care in Mt Isa. The other orders involved the father retaining major care if the mother left.

The Appeal

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- The mother had 21 grounds of appeal.
- The trial judge:
- Liked the father's mother.
- Shared the family consultant's view that the mother's family *didn't recognise the importance of the father in the child's life.*
- Had concerns that the mother's family *could not provide positive reinforcement of the relationship of father and child.*

The Appeal

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- *The mother's applications showed a lack of understanding or assessment in relation to the importance of the relationship between the father and the child.*
- His Honour was *troubled by a number of matters also associated with the mother's recognition and appreciation of the importance of the role of the father in relations to the child.*

The Appeal

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- He felt that the mother was unknowingly continuing to minimise and failing to recognise the importance of the father in the life of this child.
- *The failure to recognise in any way, shape or form, the importance to [the child] of growing up with a close and fostered bond and interaction with the father is telling and is troubling.*

Rosa and Rosa – the law

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- Section 60CA *Family Law Act 1975*
- In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

The law – section 61DA

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- When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility for the child.
- The presumption relates solely to parental responsibility – it is not a presumption about the amount of time with each parent.

Section 61DA continued

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- The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
 - (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
 - (b) family violence.

Section 61DA continued

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- When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances.
- The presumption may be rebutted by evidence that satisfies the court that equal shared parental responsibility would not be in the best interests of the child.

The law – section 65DAA

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- If a parenting order provides for equal shared parental responsibility, the court must:
 - 1) consider whether the child spending equal time with each of the parents would be in the best interests of the child and reasonably practicable;
 - 2) if it is, consider making an order to provide for the child to spend equal time with each of the parents.

Section 65DAA continued

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- If a parenting order provides for equal shared parental responsibility and the court does not make an equal time order, it must:
 - 1) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child and reasonably practicable;
 - 2) if it is, consider making an order to provide for the child to spend substantial and significant time with each of the parents.

Back to the Rosa case

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- At the age of five, the child was not expressing any particular views.
- Section 60CC(3)(c) - the willingness and the ability to facilitate and encourage a close and continuing relationship between the child and the other parent.
- Remember His Honour's concerns about the mother and her family.

Section 60CC(3)(d)

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- The issue of impact on the child of separation from a parent.
- If the mother was in Sydney: *the most serious and detrimental affect [sic] upon the very close and important relationship that exists and which should be fostered and developed between this child and the father.*

Automatic relationship deterioration

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- His Honour in the next paragraph considered that if the child were to live in Sydney there would be *an almost automatic deterioration in the relationship between the father and the child and that that would be to the detriment of the child.*

The outcome of the Appeal

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- The Appeal Court begins its discussion: *His Honour's overwhelming concerns in this case were to preserve the child's relationship with her father and the reservations he had about the mother's capacity to do this.*
- "It is absolutely clear from His Honour's reasons why he considered that an equal time arrangement was in this child's best interests."

The next step

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- The mother sought leave to appeal to the High Court.
- The court was asked to consider reasonable practicality.
- His Honour had not expressly addressed the issue and neither had the Full Court in specific terms.

The High Court

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- Was this an issue of general application?
- The meaning of "reasonably practicable" is not made clear by the legislation.
- Did it include how the mother would live? Could she get employment?
- The mother contended that a consideration of section 65 DAA goes to the nuts and bolts of what is going to happen when you make an equal time order.

The High Court

- The central issues are issues of statutory construction.

What do you think?

- Where did the judges get it right?
- Where did they go wrong?
- Questions?
- Comments?



Thank You

Kay Feeney, Nichola Di Muzio and
Megan Webb