

GOODE v GOODE

FAMILY COURT OF AUSTRALIA

BRYANT CJ, FINN and BOLAND JJ

1 November, 15 December 2006 — Sydney and Adelaide

[2006] FamCA 1346

Parents and Children — Parenting orders — Interim proceedings — Appeal from interim parenting orders — Effect of amendments introduced by 2006 amendments to Family Law Act 1975 (Cth) — Whether principles in *Cowling v Cowling* still applicable to interim proceedings — Whether difference between parental responsibility in s 61C(1) of Family Law Act, and an order for shared parental responsibility as set out in s 65DAC of Family Law Act — Whether order for equal shared parental responsibility or for equal time can be sought other than by application of the relevant presumptions in ss 61DA and 65DAA of the Family Law Act — Conduct of interim proceedings — (CTH) Acts Interpretation Act 1900 s 15AB — (CTH) Family Law Act 1975 ss 60B, 60CA, 61C, 61D, 61DA, 64B, 65DAA, 65DAC, 65DAE.

This was an appeal by the appellant father (F) against an interim decision made by Collier J on 10 August 2006. F and the mother (M) had two children, aged 8 years and 2 years at the date of hearing. The proceedings before the trial judge had been commenced by M's application filed 26 May 2006 for final orders in which she sought, inter alia, an order that "[b]oth parties have joint responsibility for the decisions concerning the long term care, welfare and development of the said children". In a response to that application filed by F on 30 May 2006, and in his application for interim orders filed on the same day, F sought "[t]hat each party be jointly responsible for the long term care, welfare and development of the children of the marriage". F was also seeking orders which in effect enabled the parties' children to spend equal time with him. M was instead proposing orders that F spend less than equal time with the children.

The wording used by the parties in their applications was consistent with what was then Div 2 of Pt VII of the Family Law Act 1975 (Cth) (the Act) prior to the amendments introduced on 1 July 2006. However nothing turned on this, and each party conceded that the applications related to parental responsibility, now to be found in the amended Div 2 of Pt VII of the Act and in particular ss 61A, 61B, 61C, 61D, 61DA and 61DB.

The effect of orders of Collier J was that the children would live with the respondent mother (M) and spend time with F. Both children were to spend each alternate weekend with F from the conclusion of school or childcare on Friday to 4.00 pm on Sunday and one child was to also spend time with F on Monday in each week during school terms from after school until 8.30 pm and on Tuesday from after school until 6.00 pm. The orders also provided for the children to spend time with F for one half of each school holiday period.

In coming to his decision, Collier J did not make any order for equal shared parental responsibility but considered the provisions of s 61DA and, pursuant to s 61DA(3) of the Act, determined that on the facts it would not be appropriate to apply the presumption set out in s 61DA(1) that "[w]hen 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 child's parents to have equal shared parental responsibility for the child". The trial judge referred to the decision of *Cowling v Cowling* (1998) 22 Fam LR 776; (1998) FLC 92-801; [1998] FamCA 19 and apparently came to his decision as a result of application of the principles in *Cowling*. Collier J found that there were arrangements between the parties which had been in place since June 2006 which had worked for the benefit of the children, and that

there was nothing in the evidence to suggest that those arrangements were not serving the needs of the children. The trial judge did not consider specifically the matters in s 60CC of the Act as to how a court determines what is in a child's best interests, having regard to the primary considerations in s 60CC(2) and the additional considerations in s 60CC(3), 60CC(4) and 60CC(4A). F appealed, principally on the grounds that the trial judge had misapplied the amended provisions of Pt VII of the Act, and had also misapplied the principles in *Cowling's case*.

Held, allowing F's appeal and ordering that the matter be remitted for a hearing on interim issues as a matter of urgency:

(i) There is a difference between parental responsibility which exists as a result of s 61C and an order for shared parental responsibility, which has the effect set out in s 65DAC. In the former, the parties may still be together or may be separated. There will be no court order in effect and the parties will exercise the responsibility either independently or jointly. Once the court has made an order allocating parental responsibility between two or more people, including an order for equal shared parental responsibility, the major decisions for the long-term care and welfare of children must be made jointly, unless the court otherwise provides: at [39].

(ii) When making a parenting order in relation to a child, the court **must** apply the presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility. The presumption however does not apply where there are reasonable grounds to believe there has been abuse of the child or family violence (s 61DA(2)) or, when making an interim order, the court does not consider application of the presumption appropriate (s 61DA(3)). The presumption may be rebutted if the court is satisfied that it would conflict with the child's best interests (s 61DA(4)): at [43].

(iii) Even if the presumption of equal shared parental responsibility is not applied and neither party seeks an order for equal time (or by implication substantial and significant time), the court is nonetheless required to consider, in determining what is in the best interests of the child, the arrangements that will promote the child's best interests. Subject to according procedural fairness to the parties, this could include a proposal that neither party had advanced, if it was in the court's view ultimately in the child's best interests for such an order to be made: at [47].

U v U (2002) 211 CLR 238; 191 ALR 289; 29 Fam LR 74; (2002) FLC 93-112; [2002] HCA 36; *Bolitho v Cohen* (2005) 33 Fam LR 471; (2005) FLC 93-224; [2005] FamCA 458, followed.

(iv) The amendments to Pt VII have the following effect:

(1) Unless the court makes an order changing the statutory conferral of joint parental responsibility, s 61C(1) provides that until a child turns 18, each of the child's parents has parental responsibility for the child. "Parental responsibility" means all the duties, powers, and authority which by law parents have in relation to children and parental responsibility is not displaced except by order of the court or the provisions of a parenting plan made between the parties.

(2) The making of a parenting order triggers the application of a presumption that it is in the best interests of the child for each of the child's parents to have equal shared parental responsibility. That presumption must be applied unless there are reasonable grounds to believe that a parent or a person who lives with a parent has engaged in abuse of the child or family violence (s 61DA(1) and (2)).

(3) If it is appropriate to apply the presumption, it is to be applied in relation to both final and interim orders unless, in the case of the making of an interim order, the court considers it would not be appropriate in the circumstances to apply it (s 61DA(1) and (3)).

(4) The presumption may be rebutted where the court is satisfied that the application of a presumption of equal shared parental responsibility would conflict with the best interests of the child (s 61DA(4)).

(5) When the presumption is applied, the first thing the court must do is to consider making an order if it is consistent with the best interests of the child and

reasonably practicable for the child to spend equal time with each of the parents. If equal time is not in the interests of the child or reasonably practicable the court must go on to consider making an order if it is consistent with the best interests of the child and reasonably practicable for the child to spend substantial and significant time with each of the parents (s 65DAA(1) and (2)).

- (6) Where neither concept of equal time nor substantial and significant time delivers an outcome that promotes the child's best interests, then the issue is at large and to be determined in accordance with the child's best interests.
- (7) The child's best interests are ascertained by a consideration of the objects and principles in s 60B and the primary and additional considerations in s 60CC.
- (8) When the presumption of equal shared parental responsibility is not applied, the court is at large to consider what arrangements will best promote the child's best interests, including, if the court considers it appropriate, an order that the child spend equal or substantial and significant time with each of the parents. These considerations would particularly be so if one or other of the parties was seeking an order for equal or substantial and significant time but, as the best interests of the child are the paramount consideration, the court may consider making such orders whenever it would be in the best interests of the child to do so after affording procedural fairness to the parties.
- (9) The child's best interests remain the overriding consideration: at [65].
- (v) The reasoning in *Cowling* in making interim decisions, particularly as to the relevance to the best interests of the child of stability when the child is considered to be living in well-settled circumstances, must now be reconsidered in light of the changes to the Act: at [71].

Cowling v Cowling (1998) 22 Fam LR 776; (1998) FLC 92-801; [1998] FamCA 19, considered.

(vi) It can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable. This means where there is a status quo or well settled environment, instead of simply preserving it, unless there are protective or other significant best interests concerns for the child, the court must follow the structure of the Act and consider accepting, where applicable, equal or significant involvement by both parents in the care arrangements for the child: at [72]

(vii) In this case the trial judge, once he had determined that the presumption under s 61DA(1) did not apply, did not address the matters in s 60CC(2) or (3). As noted, maintenance of the status quo, as sanctioned by *Cowling*, is insufficient to meet the requirements under s 60CC, and the trial judge erred in not giving consideration to those matters: at [110].

Ms Christie instructed by *Watts McCray* for the appellant.

Mr Brown instructed by *Browns the Family Lawyers* for the respondent.

Bryant CJ, Finn and Boland JJ.

Introduction

[1] This is an appeal by the appellant father against an interim decision made by Collier J on 10 August 2006. The judgment was given *ex tempore* on the same day as the interim application was argued. The appellant father was seeking orders which in effect enabled the parties' children, T — 8 years of age and J who was 2 years of age at the date of hearing, to spend equal time with him. The respondent mother sought orders that the appellant father spend time with the children each alternate weekend and, in respect of T, for two additional days

during the week and half the school holidays. The regime proposed in respect of J was slightly different and involved lesser periods of time. The parties had separated in late May 2006, about 2½ months before the hearing.

5 [2] The effect of his Honour's orders was that the children would live with the respondent mother and spend time with the appellant father. Both children were to spend each alternate weekend with the appellant father from the conclusion of school or childcare on Friday to 4 pm on Sunday and T was to also spend time with the appellant father on Monday in each week during school terms from after school until 8.30 pm and on Tuesday from after school until 6 pm. These times
10 were for the purpose of attending scouts and piano lessons. The orders also provided for the children to spend time with the appellant father for one half of each school holiday period.

[3] In coming to his decision, his Honour did not make any order for equal shared parental responsibility but he considered the provisions of s 61DA of the
15 Family Law Act 1975 (Cth) (the Act) and, pursuant to s 61DA(3), determined that on the facts of this case it would not be appropriate to apply the presumption set out in s 61DA(1) that "[w]hen 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 child's parents to have equal shared parental responsibility for the child".

20 [4] His Honour referred to the decision of *Cowling v Cowling* (1998) 22 Fam LR 776; (1998) FLC 92-801; [1998] FamCA 19 and appears to have come to his decision as a result of application of the principles in *Cowling*. In [10] of his reasons for judgment, his Honour found that there were
25 arrangements between the parties that had been in place since June which had worked for the benefit of the children and that there was nothing in the evidence that he could find which suggested that the arrangements were not serving the needs of the children to have both parents involved in their lives. His Honour did not consider specifically the matters in s 60CC of the Act as to how a court determines what is in a child's best interests, having regard to the primary
30 considerations in s 60CC(2) and the additional considerations in s 60CC(3), 60CC(4) and 60CC(4A).

The applicable law

35 [5] The Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (the amending Act) came into effect on 1 July 2006 and was the law that governed his Honour's decision. The amending Act builds upon the framework of the legislation as it was prior to 1 July 2006. Part VII of the Act applies to children. There are 16 divisions to Pt VII. The significant sections for present purposes follow.

40 [6] Orders concerning parental responsibility, who the child is to live with and spend time with, and the communication a child is to have with another person or other persons are all parenting orders. Section 64B(2) provides that:

- (2) A parenting order may deal with one or more of the following:
- 45 (a) the person or persons with whom a child is to live;
- (b) the time a child is to spend with another person or other persons;
- (c) the allocation of parental responsibility for a child;
- (d) if 2 or more persons are to share parental responsibility for a child — the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
- 50 (e) the communication a child is to have with another person or other persons;
- (f) maintenance of a child;

- (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
 - (i) a child to whom the order relates; or
 - (ii) the parties to the proceedings in which the order is made;
- (h) the process to be used for resolving disputes about the terms or operation of the order;
- (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

Section 64B(3) provides:

Without limiting paragraph (2)(c), the order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child.

[7] The objects and principles from which the provisions of Pt VII are to be applied are set out in s 60B, which provides:

- (1) The objects of this Part are to ensure that the best interests of children are met by:
 - (a) 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
 - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
 - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
 - (a) 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
 - (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); and
 - (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
 - (d) parents should agree about the future parenting of their children; and
 - (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).
- (3) For the purposes of subpara (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
 - (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.

[8] Section 60CA deals with the best interests of the child and provides that:

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.

This provision of the legislation was formerly s 65E and the wording of the section has not changed.

[9] In determining what is in a child's best interests, s 60CC provides that, other than in considering whether to make an order by consent, the court must consider the following matters in determining what is in the child's best interests:

Primary considerations

(2) The primary considerations 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.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

(3) Additional considerations are:

- (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
- (b) the nature of the relationship of the child with:
 - (i) each of the child's parents; and
 - (ii) other persons (including any grandparent or other relative of the child);
- (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
- (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
- (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (f) the capacity of:
 - (i) each of the child's parents; and
 - (ii) any other person (including any grandparent or other relative of the child);
- to provide for the needs of the child, including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (j) any family violence involving the child or a member of the child's family;
- (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or
 - (ii) the making of the order was contested by a person;
- (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (m) any other fact or circumstance that the court thinks is relevant.

Section 60CC(4) provides:

Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

- (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child; and
 - (ii) to spend time with the child; and
 - (iii) to communicate with the child; and
- (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child; and
 - (ii) spending time with the child; and
 - (iii) communicating with the child; and
- (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

Section 60CC(4A) provides:

If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

[10] Thus, in deciding to make a particular parenting order, including an order for parental responsibility, the individual child's best interests remain the paramount consideration (as they did prior to the amending Act — see *B v B: Family Law Reform Act 1995* (1997) 21 Fam LR 676; (1997) FLC 92-755 at [9.51]) and the framework in which best interests are to be determined are the factors in s 60CC(1), (2), (3), (4) and (4A). The objects and principles contained in s 60B provide the context in which the factors in s 60CC are to be examined, weighed and applied in the individual case.

The framework for determining parenting orders

[11] Section 61DA (which is a new section) provides:

61DA Presumption of equal shared parental responsibility when making parenting orders

(1) 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 child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

(2) 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.

(3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

[12] Section 61DB provides that:

61DB *Application of presumption of equal shared parental responsibility after interim parenting order made*

If there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order.

[13] The relevance of the presumption of shared parental responsibility, where it applies, is that it triggers the application of s 65DAA, which provides:

65DAA *Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances*

Equal time

(1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:

- (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
- (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
- (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

Substantial and significant time

(2) If:

- (a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and
- (b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and

the court must:

- (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
- (d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
- (e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

(3) For the purposes of subsection (2), a child will be taken to spend *substantial and significant time* with a parent only if:

- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
- (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child's daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
- (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

(5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:

- (a) how far apart the parents live from each other; and
- (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- (d) the impact that an arrangement of that kind would have on the child; and
- (e) such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

- (a) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (paragraph 60CC(3)(c));
- (b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity — the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

Background facts and decision at the interim hearing

[14] The parties were married in July 1996 and although there was a separation in December 1999 they finally separated in late May 2006. While there was some dispute as to the circumstances of the separation, the facts allowed the judge at first instance to find that the appellant father chose to leave the matrimonial home and bring the marriage to an end. Thereafter there was some dispute as to what happened in relation to the care of the children. Collier J recorded that the respondent mother asserted that after a period of time the parties reached an agreement and the appellant father commenced spending time with the children on each alternate weekend. The appellant father's case was that the respondent mother removed the children from him and made it very difficult for him to have contact (as it was then termed), other than contact that the respondent mother said he could have. The judge inferred from a letter written by the appellant father to the respondent mother that when he left the matrimonial home and the marriage, he was not concerned about the adequacy of the care the respondent mother was providing for the children.

[15] Other than to note the dates of birth and the ages of the children, which we have recorded, that was the extent of the factual matters dealt with in the judgment. This is not to imply any criticism of his Honour. This was an interim application argued on reasonably narrow grounds.

[16] The proceedings had been commenced by application of the respondent mother, filed 26 May 2006, seeking final orders in which she sought, inter alia, an order that "[b]oth parties have joint responsibility for the decisions concerning the long term care, welfare and development of the said children". In a response to that application filed by the appellant father on 30 May 2006, he also sought "[t]hat each party be jointly responsible for the long term care, welfare and development of the children of the marriage ...".

[17] The application for interim orders was filed by the appellant father on 30 May 2006. In para 1 he sought “[t]hat each party be jointly responsible for the long-term care, welfare and development of the children of the marriage ...”.

5 [18] The respondent mother responded to that application in a document filed on 7 August 2006. Paragraph 3 of Pt B of the response to an application in a case required her to state the paragraph numbers of the orders sought in the application in a case with which she agreed. The respondent mother set out paras 1 and 2. Germane to these proceedings is the fact that para 1 is the order
10 sought by the appellant father that each party be jointly responsible for the long-term care, welfare and development of the children of the marriage.

[19] As will be apparent when we turn to discuss the legislation, the wording used by the parties is different to that now contained in the Act. This is because the parties filed their documents prior to 1 July 2006 using language which was consistent with Div 2 of Pt VII of the Act prior to 1 July 2006. Nothing turns on
15 the distinction in the wording of the application sought and each party conceded that it related to parental responsibility, which is now to be found in the amended Div 2 of Pt VII of the Act and in particular ss 61A, 61B, 61C, 61D, 61DA and 61DB.

20 [20] The appellant father sought a shared care arrangement according to a proposal that we set out later in this judgment.

[21] The respondent mother had different proposals which we also set out later in the judgment but essentially provided for the children to live with her, have weekend contact with the appellant father and holiday contact, with different
25 proposals for each of the children.

[22] His Honour noted that the history of the matter was to be found in the affidavit of the appellant father sworn on 7 August 2006, in the affidavit of the paternal grandmother also sworn on that date and in the respondent mother’s affidavit sworn on 4 August 2006.

30 [23] Having briefly discussed the facts as we have described them, his Honour turned to a discussion of the law. He noted that both parties had addressed him on various sections of the new amendments and in particular on the basis of the decision in *Cowling* dealing with interim applications. His Honour noted that submissions had been made about the effect of s 61DA, which requires that when
35 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 child’s parents to have equal shared parental responsibility. His Honour noted that s 61DA(2) provides that the presumption does not apply if there are reasonable grounds to believe that either of the parents has engaged in abuse of the child or family
40 violence. He then noted that s 61DA(3) provides that in interim proceedings the presumption applies unless the court considers it would not be appropriate in the circumstances for the presumption to be applied when making the order.

[24] His Honour noted that there were no guidelines to be found in that subsection as to what is to be taken into account by a court in considering
45 whether it would not be appropriate in the circumstances for the presumption to be applied. He observed that as he understood the structure of the amended Act, and in particular the presumption of shared parental responsibility, it is in effect “the key, or the threshold, that must be passed if the court is to consider making
50 an order for shared time between the parents of the child”. His Honour noted that as *Cowling* and other cases concerning interim applications have made clear, it is not possible in the circumstances of such a case as this to say that he was able

to accept the assertions of either party. He noted that the allegations that each made against the other were untested. He noted that, in so far as domestic violence was concerned, there were allegations but he was not able to rely upon them to constitute a rebuttal of the presumption of equal shared parental responsibility because he could not be satisfied on reasonable grounds that such a situation had occurred. His Honour then turned to s 61DA(3), which provides as follows:

When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

[25] His Honour noted that there was a dispute about whether there had been any action or activity on behalf of the appellant father that would constitute family violence, which if ultimately found on reasonable grounds to be family violence within the definition in the Act, would rebut the presumption of equal shared parental responsibility. Being unable to make such a finding, his Honour determined that in the circumstances of the case he should rely on s 61DA(3) and find that it was not appropriate to apply the presumption in making the order. Thus, his Honour did not consider the matters in s 65DAA that would otherwise follow from application of the presumption of equal shared parental responsibility.

[26] His Honour then turned to look at the arrangements that were in place. He observed that they had been in place since June but that he was unable to determine whether, as the respondent mother said, the arrangements had been put in place by agreement or, as the appellant father alleged, he had had no choice and was compelled to acquiesce with them. He found, in the limited circumstances before him, that the arrangements had been in place since June and that nothing he had seen had indicated that they were other than serving the needs of the children to have both parents involved in their lives. He observed that the material before him indicated that the arrangement had worked for the benefit of the children and that he was satisfied that the respondent mother, who had been the person principally concerned for the children when they were sick, had hours of work that were significantly less than the appellant father's. His Honour noted that as the matter would come on for hearing "moderately quickly" and that there needed to be some structure in the meantime whereby the children would spend time with each of their parents, he was of the view that the present arrangement of each alternate weekend with some mid-week time with the oldest child was appropriate.

The grounds of appeal in this case

[27] By his amended notice of appeal the appellant father identified six grounds of appeal as follows:

- (1) That his Honour erred in finding that s 65DAA did not apply in the circumstances of the case, including where the wife had, herself, sought that both parties be ordered to have joint long term parental responsibility.
- (2) That his Honour erred in failing to apply *Cowling v Cowling* (1998) 22 Fam LR 776; FLC 92-801; [1998] FamCA 19 appropriately.
- (3) That his Honour erred in failing to apply Pt VII of the Act as it now exists.
- (4) That his Honour erred in that he made errors of fact.

(5) That his Honour erred in failing to address the issue of the Injunctive Order sought in relation to religious upbringing.

(6) That his Honour erred in that he made errors of Law which include inter alia a failure to give adequate reasons.

5 [28] In her oral submissions, counsel for the appellant father identified nine discrete questions that fell to be answered in a consideration of the amendments to the Act and the grounds of appeal. The respondent mother's representative
10 replied in oral submissions on the same basis and therefore it is convenient for us to deal with these questions as a means of considering the amending legislation.

1. Is there a difference between parental responsibility and equal shared parental responsibility?

15 [29] Parental responsibility is defined in s 61B and its effect is explained in ss 61C and 61D. Section 61B provides that parental responsibility for a child means all the duties, powers and responsibilities and authority which by law, parents have in relation to children.

20 [30] Section 61C provides that each parent has parental responsibility for a child who is not 18 years, despite any changes in the nature of the relationship of the child's parents and in particular it is not affected, for example, by the parties becoming separated or by either or both of them marrying or remarrying. The section provides that it has effect, by operation of law, subject to any order of a court.

25 [31] Section 61D provides that a parenting order confers parental responsibility for a child on a person, but only to the extent to which the court confers on the person duties, powers, responsibilities or authority in relation to the child. Section 61D(2) provides that a parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the
30 child except to the extent (if any) expressly provided for in the order or necessary to give effect to the order.

[32] Sections 61B, 61C (except for the provision of three notes) and 61D have not been amended by the amending Act.

35 [33] In *B v B: Family Law Reform Act 1995*, the Full Court comprising Nicholson CJ, Fogarty and Lindenmayer JJ considered at [9.23] and following what the definition of parental responsibility pursuant to s 61B meant. They said at [9.24] and following:

40 [9.24] This definition provides little guidance, relying as it does on the common law and relevant statutes to give it content. It would appear to at least cover guardianship and custody under the previous Pt VII and may be wider. The Attorney-General submitted that it was probably wider than that and covered "all of the underlying and continuing common law and statutory law that affects the relationship of parents and their children".

45 [9.25] It omits any reference to rights. Whilst this omission is understandable, given the philosophy of the amendments, it is doubtful whether that achieves any practical effect other than to make it clear that there are no possessory rights to children, insofar as this could be said to have been the case prior to the amendments.

50 [9.26] Read in conjunction with s 60B(2)(c) the emphasis is on the continuance of responsibility independently of the status of the parental relationship. Section 61D(2) provides that a parenting order does not take away or diminish any aspect of parental responsibility except to the extent expressly provided for in the order or necessary to give effect to the order.

[9.27] An important issue is whether parents may exercise this responsibility independently or whether they must do so jointly.

[34] At [9.29] and following their Honours said:

[9.29] In the absence of a specific issues order, we think it unlikely that the parliament intended that separated parents could only exercise all or any of their powers or discharge all or any of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day-to-day matters, and the impracticability of such a requirement when they are living separately only has to be stated to be appreciated.

[9.30] As a matter of practical necessity either the resident parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children. On the other hand, consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like. We believe that this accords with the intention of the legislation.

[35] While we consider this is still a correct description of the concomitance of parental responsibility where no order has been made by a court, we do not think in light of the amending legislation it has application once an order for equal shared parental responsibility is made by the court. This is made clear by the provisions of ss 61C, 61D and 61DA.

[36] While it may be self-evident from the provisions of s 61C, note 1 makes it clear that the legal position prevails only to the extent it is not displaced by a parenting order made by the court. Note 1 states:

This section states that the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

[37] Thus, where no contrary order has been made, parents may exercise this responsibility independently or jointly. This would be so whether the parties were married, living together, never lived together or separated as long as there was no contrary order in force.

[38] Section 65DAC sets out the effect of a parenting order that provides for shared parental responsibility. The section requires decisions about major long-term issues about children to be made jointly by those persons who are to share parental responsibility and that they are required:

- (3) ...
 - (a) to consult the other person in relation to the decisions to be made about that issue; and
 - (b) to make a genuine effort to come to a joint decision about that issue.

Section 65DAE provides that if a child is spending time with a person under a parenting order, then that person is not required to consult with a parent or other person who shares parental responsibility about decisions that are not major long-term issues, unless the court has made a contrary order.

[39] We therefore consider it clear that there is a difference between parental responsibility which exists as a result of s 61C and an order for shared parental responsibility, which has the effect set out in s 65DAC. In the former, the parties may still be together or may be separated. There will be no court order in effect and the parties will exercise the responsibility either independently or jointly. Once the court has made an order allocating parental responsibility between two

or more people, including an order for equal shared parental responsibility, the major decisions for the long-term care and welfare of children must be made jointly, unless the court otherwise provides.

5 **2. Does the presumption that equal shared parental responsibility is in the best interests of the child carry with it any presumption about time?**

10 [40] Neither counsel submitted to us that there was any presumption about time arising from the application of s 61DA, namely the application of the presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility. So much is clear from the note to s 61DA(1) itself, which provides:

15 The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

[41] We do not consider, nor was it submitted to us by either counsel, that there was any doubt about the meaning of the note or the section.

20 **3. Can one make an order for equal shared parental responsibility or equal time, other than by application of the presumption?**

[42] We have already set out the provisions of ss 61DA and 61DB (see [11] and [12]). Those are the provisions concerning the presumption of equal shared parental responsibility and the requirement that the court at a final hearing disregard any allocation of parental responsibility in a parenting order made at an interim hearing.

25 [43] Thus, in summary, when making a parenting order in relation to a child, the court *must* apply the presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility. The presumption however does not apply where there are reasonable grounds to believe there has been abuse of the child or family violence (s 61DA(2)) or, when making an interim order, the court does not consider application of the presumption appropriate (s 61DA(3)). The presumption may be rebutted if the court is satisfied that it would conflict with the child's best interests (s 61DA(4)).

30 [44] The importance of s 61DA is that if the court applies the presumption of equal shared parental responsibility when making parenting orders, then that presumption is the starting point for a consideration of the practicality of the child spending equal time with each of the parents and, if it is consistent with the best interests of the child and not impracticable, the court must consider making an order that the child spend equal time with each of the parents. If the court does not make such an order, it must consider whether making an order that the child spend substantial and significant time with each of the parents would be in the best interests of the child and not reasonably impracticable and, if so, must consider making such an order (see s 65DAA). Section 65DAA(3) explains the meaning of "substantial and significant time".

40 [45] Section 65DAA(5) provides some guidance to determining whether it would be reasonably practicable for a child to spend equal time or substantial and significant time with both parents and includes, but is not limited to, proximity, capacity to implement the arrangements under consideration, current and future capacity to communicate and resolve difficulties, the impact such an arrangement would have on the child and other relevant matters. It is clear that if the

presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility is applied, then the path described in s 65DAA needs to be followed, starting with whether an order for a child spending equal time with both parents would be appropriate.

[46] However, this is not the only way in which the court could consider equal time. Even if the presumption is rebutted or is not to apply in the interests of the child, if one or both of the parties is seeking such an order, the court would normally consider, in the making of an order, what each party was seeking when considering the child's best interests in accordance with the objects in s 60B and the primary and additional considerations in s 60CC.

[47] Similarly, even if the presumption of equal shared parental responsibility is not applied and neither party seeks an order for equal time (or by implication substantial and significant time), the court is nonetheless required to consider, in determining what is in the best interests of the child, the arrangements that will promote the child's best interests. Subject to according procedural fairness to the parties, this could include a proposal that neither party had advanced, if it was in the court's view ultimately in the child's best interests for such an order to be made (*U v U* (2002) 211 CLR 238; 191 ALR 289; 29 Fam LR 74; (2002) FLC 93-112; [2002] HCA 36; and *Bolitho v Cohen* (2005) 33 Fam LR 471; (2005) FLC 93-224; [2005] FamCA 458).

[48] Therefore while the application of the presumption of equal shared parental responsibility may be the trigger for the operation of s 65DAA, it is not the only basis upon which the court may make an order for equal or substantial and significant time to be spent by the parents with the child. However, in our view where the presumption of equal shared parental responsibility is to apply, the starting point is a consideration of whether it would be in the child's best interests to spend equal time with both parents and the practicability of such an arrangement. When neither an outcome providing for equal time nor substantial and significant time promotes the child's best interests, the court determines the parenting applications in the best interests of the child having regard to the matters found in the objects (s 60B) and s 60CC.

4. What is the significance of the specific references to parental responsibility and interim proceedings in the act?

[49] This question raises the issue of whether and to what extent the presumption in s 61DA applies in interim proceedings. The respondent mother submitted that the question of equal shared parental responsibility was not in issue in the interim proceedings before the judge at first instance. The basis for this submission was that the appellant father did not seek *equal shared parental responsibility* in the interim proceedings but rather, as we have pointed out, sought an order that each party be jointly responsible for the long-term care, welfare and development of the children.

[50] Although the respondent mother responded to the application by a document filed on 7 August 2006 and agreed with the orders sought by the appellant father, it was then contended by counsel for the respondent mother that her agreement was to an order for joint parental responsibility, not for equal shared parental responsibility as the Act now provides.

[51] We see little purpose in this debate which is essentially about terminology. As we have already indicated, it is not necessary to seek an order for equal shared parental responsibility to trigger the presumption in s 61DA. All that is required

is that the court be making a parenting order. Thus, it does not matter whether the issue of equal shared parental responsibility was put in issue by the parties, or either of them, as the court is required to apply s 61DA in any case in which a parenting order is to be made.

- 5 [52] Further, the respondent mother did not submit to us or the judge at first instance that his Honour *could* not (as a matter of law) apply the presumption under s 61DA for equal shared parental responsibility in interim proceedings, but rather that he *should* not. At p 102 of the appeal book, p 5 of the transcript, line 10, the following submission to his Honour was made by the respondent
- 10 mother's solicitor:

But if I can just, before I go into that, address some of the submissions that my friend made in relation to the presumption of equal share [sic] parental responsibility and consequence [sic] upon that, the obligation of the Court to consider whether it's appropriate for the parents to have equal time with the children, which seems to be largely the planks upon which [the appellant father's] application is based.

15

First of all, your Honour, clearly under section 65D — I withdraw that. I'm just getting used to these new section numbers, your Honour — number 61D(a) [sic].

The presumption of equal shared parental responsibility does not apply if there are reasonable grounds to believe that a parent of a child or a person who lives with the parent of a child has engaged in family violence.

20

I refer to section 61D(a)(2) [sic]. Now whilst it is clearly true that the presumption of equal shared parental responsibility applies as much to an interim hearing as it does to a final hearing, the Act is quite explicit about that.

How this exception to that presumption applies at an interim — in an interim hearing is a little more difficult to discern, because if one takes the analogy, for example, of an apprehended violence order in the State system, a Court can only issue such an order if the fear that a person has about violence to themselves is reasonable. And usually the grounds for that reasonableness, or that assessment of reasonableness, are based upon the Court's assessment as to the truth of past — of allegations of violence that have occurred in the past.

25

- 30 [53] The respondent mother's solicitor went on to discuss the allegations made by the respondent mother in her affidavit and submitted that there were reasonable grounds to believe that the appellant father had engaged in family violence and then said:

... can it be said at this interim hearing that there are reasonable grounds to believe that a parent of a child has engaged in family violence? In my respectful submission, there are reasonable grounds, because the wife has made that allegation. It is not inherently unbelievable ... Therefore, in my respectful submission, there are reasonable grounds to believe that the husband has engaged in family violence.

35

Now, if your Honour is of that view, then that displaces the presumption of equal shared parental responsibility. That presumption can't apply.

40

- [54] It is clear from this passage that it was neither his Honour's consideration of the application of the presumption of equal shared parental responsibility pursuant to s 61DA, nor his consideration of it in interim proceedings, to which the respondent mother's submissions were directed. The respondent mother's
- 45 submissions were directed to the contention that his Honour should find that the presumption did not apply because there were reasonable grounds to believe that the appellant father had engaged in family violence.

- [55] We think that the Act on its face makes this clear. First, there is no distinction drawn in s 61DA between interim and final proceedings. Second, s 61DA(3) specifically refers to interim proceedings in saying:
- 50

When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

Third, s 61DB, which says:

If there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order.

assumes the making of interim orders for equal shared parental responsibility or some other allocation of parental responsibility.

[56] In our view the Act makes it clear that when a parenting order is sought, whether it be an interim or final order, the starting point is the application of a presumption that it is in the best interests of the child that the child's parents have equal shared parental responsibility as expressed in s 61DA, subject to the qualifications in subs (2), (3) and (4).

5. What does “consider” mean?

[57] This question arises from what follows from an application of the presumption of equal shared parental responsibility in s 61DA. When any parenting order is made for equal shared parental responsibility then the court must apply s 65DAA. This requires the court to *consider* the child spending equal time or substantial and significant time with each parent in certain circumstances. The question therefore arises, what does “consider” mean.

[58] In *Aboriginal & Torres Strait Island Affairs, Minister for & Norvill v Chapman; sub nom Tickner v Chapman (The Hindmarsh Island Bridge case)* (1995) 57 FCR 451; 133 ALR 226 the Full Court of the Federal Court extensively examined the meaning of the word “consider”.

[59] The appeal was part of litigation over the Hindmarsh Island Bridge development. The appellants challenged pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth), both at first instance and on appeal, the decision of the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs to make declarations concerning the development site. The appellants asserted the minister had failed to consider a report prepared to determine whether or not the declaration should be made.

[60] Relevantly, Black CJ held (at CLR 462; ALR 238):

The meaning of “consider” used as a transitive verb referring to the consideration of some thing is given in the *Oxford English Dictionary*, 2nd ed, as “to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of”. Consideration of a document such as a representation or a submission (there is little, if any, difference between the two for these purposes) involves an active intellectual process directed at that representation or submission.

[61] Burchett J held (at CLR 476–7; ALR 251–2):

What is it to “consider” material such as a report or representations? In my opinion, the minister is required to apply his own mind to the issues raised by these documents. To do that, he must obtain an understanding of the facts and circumstances set out in them, and of the contentions they urge based on those facts and circumstances. Although he cannot delegate his function and duty under s 10, he can be assisted in ascertaining the facts and contentions contained in the material. But he must ascertain them. He cannot simply rely on an assessment of their worth made by others: cf *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551 at 568–99;

[1967] NZLR 1057. It is *his* task to evaluate them, a task he can only perform after he knows what they actually are. In a case involving a board which had a duty to “consider” a report, Laskin J, speaking for the Supreme Court of Canada, said: “Certainly, the board must have the report before it” (*Walters v Essex County Board of Education* (1973) 38 DLR (3d) 693 at 697). When Gibbs CJ in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30–31; 66 ALR 299 conceded that the minister, in the circumstances of that case, was not obliged “to read for himself all the relevant papers”, and that it “would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department”, he also made it plain that the summary must “bring to his attention” all material facts “which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial”. That was in the context of legislation expressly empowering the minister, as Mason J pointed out at CLR 46, to delegate his powers and to refer matters to another authority.

[62] Kiefel J held (at CLR 495–6; ALR 270):

To “consider” is a word having a definite meaning in the judicial context. The intellectual process preceding the decision of which s 10(1)(c) speaks is not different. It requires that the minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them. From that point the minister might sift them, attributing whatever weight or persuasive quality is thought appropriate. However, the minister is required to know what they say. A mere summary of them cannot suffice for this purpose, for the minister would not then be considering the representations, but someone else’s view of them, and the legislation has required him to form his own view upon them.

[63] In *Tickner*, the Full Court affirmed the decision of O’Loughlin J at first instance (*Chapman & Barton v Tickner, Minister for Aboriginal & Torres Strait Islander Affairs* (1995) 55 FCR 316; 133 ALR 74) that the minister had failed to properly consider the report. O’Loughlin J’s comments at first instance are of relevance (at FCR 369; ALR 123):

The verb “consider” is a common word used daily in language and in documents; yet no counsel was able to refer to any judicial determination of its meaning. The *Macquarie Dictionary* and the *Shorter Oxford English Dictionary* ascribe to it a variety of shades of meaning giving, respectively, as their first definitions “to contemplate mentally; meditate or reflect on” and “to view attentively, to survey, examine, inspect”. American and Canadian dictionaries give similar general descriptions: “advert to, analyse, appraise, assess, etc” (*Legal Thesaurus*, 2nd ed, William C Burton) and “to examine, inspect; to turn one’s mind to” (*The Dictionary of Canadian Law*: Duke Low & Niese).

[64] While these observations of the Federal Court are of some assistance, we do not think that the meaning of “consider”, when applied to consideration of administrative law as in the cases referred to, is entirely apposite to the meaning of the word in s 65DAA. This is so because the juxtaposition of s 65DAA(1)(a), 65DAA(1)(b) and 65DAA(1)(c) suggests a consideration tending to a result, or the need to consider positively the making of an order, if the conditions in s 65DAA(1)(a), being the best interests of the child, and s 65DAA(1)(b), reasonable practicability, are met. The same considerations apply to s 65DAA(2).

Summary

[65] In summary, the amendments to Pt VII have the following effect:

1. Unless the Court makes an order changing the statutory conferral of joint parental responsibility, s 61C(1) provides that until a child turns 18, each of

the child's parents has parental responsibility for the child. "Parental responsibility" means all the duties, powers, and authority which by law parents have in relation to children and parental responsibility is not displaced except by order of the Court or the provisions of a parenting plan made between the parties.

2. The making of a parenting order triggers the application of a presumption that it is in the best interests of the child for each of the child's parents to have equal shared parental responsibility. That presumption must be applied unless there are reasonable grounds to believe that a parent or a person who lives with a parent has engaged in abuse of the child or family violence (s 61DA(1) and 61DA(2)).
3. If it is appropriate to apply the presumption, it is to be applied in relation to both final and interim orders unless, in the case of the making of an interim order, the Court considers it would not be appropriate in the circumstances to apply it (s 61DA(1) and 61DA(3)).
4. The presumption may be rebutted where the Court is satisfied that the application of a presumption of equal shared parental responsibility would conflict with the best interests of the child (s 61DA(4)).
5. When the presumption is applied, the first thing the Court must do is to consider making an order if it is consistent with the best interests of the child and reasonably practicable for the child to spend equal time with each of the parents. If equal time is not in the interests of the child or reasonably practicable the Court must go on to consider making an order if it is consistent with the best interests of the child and reasonably practicable for the child to spend substantial and significant time with each of the parents (s 65DAA(1) and (2)).
6. The Act provides guidance as to the meaning of "substantial and significant time" (s 65DAA(3) and (4)) and as to the meaning of "reasonable practicability" (s 65DAA(5)).
7. The concept of "substantial and significant" time is defined in s 65DAA to mean:
 - (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends and holidays; and
 - (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child's daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
 - (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.
8. Where neither concept of equal time nor substantial and significant time delivers an outcome that promotes the child's best interests, then the issue is at large and to be determined in accordance with the child's best interests.
9. The child's best interests are ascertained by a consideration of the objects and principles in s 60B and the primary and additional considerations in s 60CC.
10. When the presumption of equal shared parental responsibility is not applied, the Court is at large to consider what arrangements will best promote the child's best interests, including, if the Court considers it appropriate, an order that the child spend equal or substantial and significant time with each of the parents. These considerations would particularly be so if one or other of the parties was seeking an order for equal or substantial and significant time but, as the best interests of the child are the paramount consideration, the Court may consider making such orders whenever it would be in the best interests of the child to do so after affording procedural fairness to the parties.

11. The child's best interests remain the overriding consideration.

6. To what extent does *Cowling* continue to apply [in interim parenting proceedings]?

5 [66] In broader terms, the question that arises is the extent of the impact of the amending Act to the determination of interim applications. Prior to the amendments, it was left to case law to formulate the methodology to be adopted in interim applications. The decision in *Cowling* was handed down after the 1995 amendments to the Act and followed the earlier decisions *Cilento*, *In the Marriage of* (1980) 6 Fam LR 35; (1980) FLC 90-847, *Griffiths*, *In the Marriage of* (1981) 10 7 Fam LR 322; (1981) FLC 91-064 and *Rainer*, *In the Marriage of* (1982) 8 Fam LR 210; (1982) FLC 91-239. The rationale for providing assistance to trial judges in dealing with interim applications is set out by the Full Court in *Cowling* at [18] in the following passage:

15 [18] The Family Law Act does not draw any distinction between the principles to be applied in determining residence in interim and final proceedings. The essential difference between them is one of procedure. Interlocutory proceedings do not determine the long-term rights and obligations of the parties and their children. The issue for determination at an interim hearing involves a consideration of what orders should be made to properly regulate the position of the children pending the final determination of the matter. Such proceedings are an abridged process where the scope of the inquiry is necessarily significantly curtailed. As a consequence, the court needs to exercise considerable caution against being drawn into matters properly dealt with in the trial process. Ordinarily, at interim hearings, the court should not be drawn into issues of fact or matters relating to the merits of the substantive cases of each of the parties. Accordingly, in determining what orders should be made, the court traditionally looks to the less contentious matters, such as the agreed facts, the care arrangements prior to separation, the current circumstances of the parties and their children and the parties' respective proposals for the future. In some cases, it may also be necessary to consider child protection issues.

20 [67] The Full Court then set out relevant criteria for the determination of interim proceedings for residence and contact (at [20]–[25]):

25 [20] First, having regard to the provisions of s 65E, in determining what interim parenting order should be made, the court must regard the best interests of the child as the paramount consideration.

30 [21] Second, given the mode by which interlocutory proceedings are conducted, those interests will normally best be met by ensuring stability in the life of the child pending a full hearing of all relevant issues. Accordingly, as a general rule, any interlocutory order made should promote that stability.

35 [22] Third, where the evidence clearly establishes that, at the date of hearing, the child is living in an environment in which he or she is well settled, the child's stability will usually be promoted by the making of an order which provides for the continuation of that arrangement until the hearing for final orders, unless there are strong or overriding indications relevant to the child's welfare to the contrary. Such indications would include but are not limited to convincing proof that the child's welfare would be really endangered by his/her remaining in that environment.

40 [23] Fourth, the court is entitled to place such weight upon the importance of retaining the child's current living arrangements as it sees fit in all the circumstances. In determining what weight to place upon that factor, it is appropriate for the court to take account of the circumstances giving rise to the current status quo. In particular, the court may examine the following issues:

- 45
- whether the current circumstances have arisen by virtue of some agreement between the parties or as a result of acquiescence.
- 50

- whether the current arrangements have been unilaterally imposed by one party upon the other.
- the duration of the current arrangements and whether there has been any undue delay in instituting proceedings or in the proceedings being listed for hearing.

[24] Fifth, where the evidence does not establish that at the date of hearing the child is living in an environment in which he or she is well settled, some limited evaluation of the relevant matters referred to in s 68F(2) needs to be undertaken to ensure that the result embodied in the order promotes the child's best interests. In undertaking that evaluation regard must be had to the interim nature of the proceedings and the procedure referred to in *C and C* (1995) 20 Fam LR 24; (1996) FLC 92-651.

[25] Finally in determining whether, at the date of hearing, a child is living in a settled environment, consideration should be given, inter alia, to the following:

- the wishes, age and level of maturity of the child;
- the current and proposed arrangements for the day to day care of the child;
- the period during which the child has lived in the environment;
- whether the child has any siblings and where they reside;
- the nature of the relationship between the child, each parent, any other significant adult and his or her siblings;
- the educational needs of the child.

[68] In our view some of the comments of the Full Court in [18] are still apposite. For example, the procedure for making interim parenting orders will continue to be an abridged process where the scope of the enquiry is "significantly curtailed". Where the court cannot make findings of fact it should not be drawn into issues of fact or matters relating to the merits of the substantive case where findings are not possible. The court also looks to the less contentious matters, such as the agreed facts and issues not in dispute and would have regard to the care arrangements prior to separation, the current circumstances of the parties and their children, and the parties' respective proposals for the future.

[69] It remains the case that the court must regard the best interests of the child as paramount in deciding what interim parenting order to make. However, there are passages in *Cowling* that do not sit comfortably with the Act as amended. It is the following passage in particular which calls into question the applicability of *Cowling* to the Act as presently drafted:

[22] Third, where the evidence clearly establishes that, at the date of hearing, the child is living in an environment in which he or she is well settled, the child's stability will usually be promoted by the making of an order which provides for the continuation of that arrangement until the hearing for final orders, unless there are strong or overriding indications relevant to the child's welfare to the contrary. Such indications would include but are not limited to convincing proof that the child's welfare would be really endangered by his/her remaining in that environment.

[70] There are many elements in the Act as amended that would militate against the continued application of the principles in *Cowling*, and in particular the passage cited above. While the ultimate goal in the legislation is to provide for an outcome in the best interests of the child, if the presumption in s 61DA applies, then the court is obliged by s 65DAA to consider the outcomes previously discussed. First, whether the child spending equal time would be in the best interests of the child and whether that is reasonably practicable. Second, if an order to that effect is not made, there is an obligation to consider whether an order that the child spend substantial and significant time would be in the best interests

of the child and whether that is reasonably practicable. Section 61DA must be applied in any case, including interim proceedings, where a court is considering making a parenting order.

5 [71] The reasoning in *Cowling*, particularly in [22] of the reasons for decision to the effect that the best interests of the child are met by stability when the child is considered to be living in well-settled circumstances, must now be reconsidered in light of the changes to the Act, particularly changes to the objects (s 60B), the inclusion of the presumption of equal shared parental responsibility (s 61DA), and the necessity if the presumption is not rebutted to consider the
10 outcomes of equal time and substantial and significant time.

[72] In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is
15 in their best interests and reasonably practicable. This means where there is a status quo or well settled environment, instead of simply preserving it, unless there are protective or other significant best interests concerns for the child, the court must follow the structure of the Act and consider accepting, where applicable, equal or significant involvement by both parents in the care
20 arrangements for the child.

[73] That is not to say that stability derived from a well-settled arrangement may not ultimately be what the court finds to be in the child's best interests, particularly where there is no ability to test controversial evidence, but that
25 decision would be arrived at after a consideration of the matters contained in s 60CC, particularly s 60CC(3)(d) and 60CC(3)(m) and, if appropriate, s 60CC(4) and 60CC(4A).

[74] We also acknowledge that, because of the circumscribed nature of the proceedings, the reasons given at an interim hearing may be brief. So too, the
30 filing of lengthy affidavits is unlikely to be helpful where the court is unable to make findings about disputed facts.

7. In what circumstances will s 61DA(3) of the act be properly invoked?

[75] Section 61DA(3) says:

35 When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

In this case, his Honour relied upon s 61DA(3) in coming to the conclusion that the presumption should not apply. In [8] his Honour said:

40 To my mind, perhaps the very difficulty of doing those things, that is making a determination as to who was telling the truth in that regard, may well have been what led the draftsmen to insert subsection (3) ... Where there is such dispute in a matter such as this about whether there has been action or activity on the part of the father that would constitute family violence so as to not trigger the presumption is something of
45 real difficulty. In the circumstances of this case, I have come to the conclusion that I should rely on subsection (3) and find that the presumption has no application in this case.

[76] The submissions by the appellant father, to which we will return, were based on the premise that his Honour erred in his discretion in relying upon
50 s 61DA(3) but the appellant father did not otherwise address the circumstances in which the section might properly be invoked. Similarly, the respondent

mother's solicitor submitted that the application by his Honour of s 61DA(3) was an appropriate exercise of his discretion but did not address the circumstances in which the sub-section might otherwise be invoked.

[77] The subsection is an important one in the context of the determination of interim disputes and justifies consideration of the explanatory memorandum (see s 15AB of the Acts Interpretation Act 1901 (Cth) and *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 at 420). The revised explanatory memorandum circulated in the senate on 27 March 2006 states (at para 133):

New subsection 61DA(3) provides that the presumption of equal shared parental responsibility will apply at an interim hearing, unless the court considers that it is inappropriate for the presumption to apply. This implements recommendation 15 of the LACA [House of Representatives Standing Committee on Legal and Constitutional Affairs] Report. This discretion is appropriate given the limited evidence that may be available for interim hearings.

The House of Representatives Standing Committee on Legal and Constitutional Affairs, in their report on the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, considered the application and effect of the presumption of equal shared parental responsibility at interim hearings at paras 2.155–2.161 inclusive. In recommendation 15 at 2.162 the committee said as follows:

The Committee recommends that the presumption of equal shared parental responsibility should generally be applied at an interim hearing although the court should retain discretion not to apply the presumption if it thought it to be inappropriate. The court should continue to have regard to all the circumstances that are in the best interests of the child when making interim and final orders. This should be made explicit in the Exposure Draft.

[78] The combination of the revised explanatory memorandum and the comments of the House of Representatives Standing Committee on Legal and Constitutional Affairs suggests that s 61DA(3) provides a discretion not to be exercised in a broad exclusionary manner, but only in circumstances where limited evidence may make the application of the presumption, or its rebuttal, difficult. In this case for example, we respectfully agree with his Honour's decision that this consideration meant it was inappropriate to apply the presumption.

8. What is the significance of untested evidence (and more specifically of untested evidence which may be capable of affecting the presumption)?

[79] This question has been answered in the course of earlier discussion, especially at [68].

9. If s 61DA(3) is invoked, do the other changes to Pt VII of the act nonetheless require a different approach from that taken by *Cowling*?

[80] We have earlier touched upon this matter. Even absent the application of the presumption and thus the requirement to consider equal or substantial and significant time where it is not contrary to the child's best interests and otherwise practicable, the addition of subs (a) to s 60B(1), which is to ensure that children have the benefit of both parents having a meaningful involvement in their lives to the maximum extent consistent with their best interests, is not necessarily consistent with a preference at an interim stage in favour of maintaining a status

quo. That is not to say that maintenance of a stable arrangement will not be in the best interests of children in a particular case, but it will be one of the factors to be considered pursuant to the additional considerations in s 60CC(3) and to be determined in conjunction with the primary consideration in s 60CC(2)(a) of the benefit to the child of having a meaningful relationship with both of the child's parents.

How should interim proceedings be conducted?

[81] In making interim decisions the court will still often be faced with conflicting facts, little helpful evidence and disputes between the parents as to what constitutes the best interests of the child. However, the legislative pathway must be followed.

[82] In an interim case that would involve the following:

- (a) identifying the competing proposals of the parties;
- (b) identifying the issues in dispute in the interim hearing;
- (c) identifying any agreed or uncontested relevant facts;
- (d) considering the matters in s 60CC that are relevant and, if possible, making findings about them (in interim proceedings there may be little uncontested evidence to enable more than a limited consideration of these matters to take place);
- (e) deciding whether the presumption in s 61DA that equal shared parental responsibility is in the best interests of the child applies or does not apply because there are reasonable grounds to believe there has been abuse of the child or family violence or, in an interim matter, the court does not consider it appropriate to apply the presumption;
- (f) if the presumption does apply, deciding whether it is rebutted because application of it would not be in the child's best interests;
- (g) if the presumption applies and is not rebutted, considering making an order that the child spend equal time with the parents unless it is contrary to the child's best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;
- (h) if equal time is found not to be in the child's best interests, considering making an order that the child spend substantial and significant time as defined in s 65DAA(3) with the parents, unless contrary to the child's best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;
- (i) if neither equal time nor substantial and significant time is considered to be in the best interests of the child, then making such orders in the discretion of the court that are in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC;
- (j) if the presumption is not applied or is rebutted, then making such order as is in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC; and
- (k) even then the court may need to consider equal time or substantial and significant time, especially if one of the parties has sought it or, even if neither has sought it, if the court considers after affording procedural fairness to the parties it to be in the best interests of the child.

This appeal

[83] Having considered the matters raised by counsel for the appellant father and addressed by the respondent mother in relation to the meaning and intent of the relevant parts of the Act as amended, we now turn to the grounds of appeal.

Ground 1: that his Honour erred in finding that s 65DAA did not apply in the circumstances of the case, including where the wife had, herself, sought that both parties be ordered to have joint long-term parental responsibility.

[84] As we previously described, neither party sought an order for equal shared parental responsibility in applications and responses both interim and final. As we have pointed out, at least in so far as the appellant father was concerned, this was because his documents were filed prior to 1 July 2006.

[85] In our view however nothing turns upon the wording of the applications. That is because there is an obligation on the court under s 61DA when making any parenting order to apply the presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility, unless it is not applicable due to violence or abuse, or the presumption is rebutted because the court finds that it would be contrary to the interests of the child to apply it, or it is inappropriate to apply the presumption in interim proceedings. The fact that the parties have sought such an order may be a relevant consideration but the court's obligation under s 61DA in relation to the presumption arises independently of what has been sought by the parties.

[86] In this case, his Honour did commence with a consideration of the application of the presumption and found that it did not apply by the application of s 61DA(3). In particular his Honour found that as a result of allegations about family violence, which he was unable to make positive findings about as a result of the evidence being untested, it would be inappropriate to apply the presumption. In our view his Honour correctly applied the structure of s 61DA and was not in error in his approach.

[87] The second part of this ground asserts that:

- (1) his Honour erred in reaching the conclusion that the presumption was not to apply because the parenting orders (other than those concerned with parental responsibility) sought by both parties supported the application of the presumption. It is submitted that both the appellant father and respondent mother sought that the appellant father spend extended periods of time with the parties' children; and
- (2) there was a further error in reaching the conclusion that the presumption ought not to apply because the respondent mother's case was that the interim determination was not one in which "risk" was an issue.

[88] It is clear that the parties were not agitating before his Honour anything other than the quantum of time the appellant father should spend with the children. This is apparent from the transcript at appeal book p 98, transcript p 1, line 44:

His Honour: Whether there be contact at all or the quantum of that contact?

Mr Dowd: The quantum of contact, your Honour.

Mr Brown: That's right. It's just a quantum issue and I'm in the same position as my friend ...

His Honour: Is the matter involving any allegations of risk?

Mr Brown: No.

[89] The orders sought by the appellant father proposed a shared care arrangement. He sought that the children live with him:

- (a) each alternate week from after school Friday to commencement of school Wednesday;
- (b) each other week from after school Monday to before school Wednesday;

- (c) Father's Day;
- (d) on the children's birthdays and on the father's birthday; and
- (e) for half the school holidays.

[90] The respondent mother sought an arrangement whereby the children would spend time with the appellant father as follows:

- (a) each alternate weekend from the conclusion of school on Friday to 4 pm Sunday;
- (b) in relation to T, on Monday in each week during school terms from 3 pm until 8.30 pm for the purpose of attending scouts;
- (c) in relation to T, on Tuesday of each week from 3 pm until 6 pm for the purpose of a piano lesson;
- (d) in relation to T, for one half of all school holidays each alternate Christmas holiday period from the 2007 year to include Christmas Day;
- (e) in relation to J, during each school term holiday period for one period of 4 days from 9 am on the first day of such period to 5 pm on the fourth day;
- (f) in relation to J, during each Christmas school holiday period for two periods of 4 days from 9 am on the first day of such period to 5 pm on the fourth day.

The appellant father's evidence

[91] In his affidavit of 7 August 2006 the appellant father deposed to the fact that he would pick up the children from school/pre-school on Friday and care for and supervise them with the assistance of his parents until Wednesday morning the following week, when they would be taken to school/pre-school by him or his parents. On the alternate week he would collect the children from school/pre-school on Monday and return them to school or pre-school or the respondent mother's home on Wednesday morning.

[92] The appellant father asserted that the parties separated in late May 2006 and that since separation he resided with his parents. His parents' home provided for T to have his own bedroom. He deposed to the fact that since separation the children had lived with their mother, apart from the time they had spent with him at his parents' home. His parents' home is close to T's current school and J's childcare centre.

Pre-separation

[93] The appellant father contended that the parties had lived with his parents after coming to Australia in 1997 until January 2000. During that time he worked flexible hours in the family business and T was cared for by the respondent mother and T's paternal grandmother and he shared in T's care after work and on weekends.

[94] He asserted that when the parties moved into rented accommodation in January 2000 he continued to work in the family business and at that time the respondent mother commenced working in the Sydney CBD 3–4 days a week from 9 am to 5 pm as an accountant. The appellant father asserted that his work commenced between 6 and 9 am and finished between 2.30 and 4.30 pm. When the respondent mother started work, T was enrolled in childcare from 8 am until 12 pm on Mondays and Wednesdays and was collected by the appellant father's parents on those days and cared for by them until he returned from work between 3 and 4 pm.

[95] He deposed that on other days when the respondent mother worked and T was not at childcare, the respondent mother would drop T at the appellant father's workplace where T, the appellant father and his parents would have breakfast together and T's paternal grandmother would care for T at her home until 3–4 pm, when the appellant father would return from work. On the days when the respondent mother did not work she supervised T until the appellant father's return from work.

[96] In January 2001, T was enrolled at a Childcare Centre initially on Mondays, Tuesdays and Fridays from 9 am until 1 pm and later until 3 pm.

[97] In 2003, T was enrolled at primary school and was collected by either the appellant father or the appellant father's parents and cared for until after dinner on the days the respondent mother worked. On the one or two days she did not work she collected T from school and took him home.

[98] In January 2004 until April 2005, the respondent mother was on maternity leave and J was born on 20 April 2004. During this time the respondent mother cared for J and cared for T after school. However, the appellant father's parents still collected T from school one to two days a week and the appellant father looked after T and had dinner at his parents' home on those days.

[99] In April 2005, the respondent mother returned to work 3 days a week from 9 am until 1 pm ... as an accountant. J was enrolled at a Childcare Centre on the days the respondent mother worked for approximately 8 hours per day from 9 am until 5 pm. The respondent mother supervised the children on her days off and again the appellant father's parents collected T from school one to two days per week and the appellant father had dinner with them at their home.

[100] T started piano lessons and attended cub scouts. The appellant father had been taking T to these extra-curricula activities on Mondays and Tuesdays and to cricket in summer from 8 am until 12 pm on Saturdays and to soccer during the winter.

Post-separation

[101] For 2 weeks after separation until 9 June 2006 the appellant father deposed that the respondent mother did not allow the children to spend any time with him. From 9 June 2006, both children were spending alternate weekends with him and his parents from Friday to Sunday and on each Monday and Tuesday the appellant father collected T from school and supervised his homework, piano practice and other activities. On Mondays T had dinner with the appellant father and his parents before going to his cub scout meeting and on Tuesdays the appellant father took T to his piano lesson. T had spent the first half of the last school holidays with the appellant father but apart from 2 weekends a month the respondent mother, he alleged, had refused to allow J to spend any further time with him.

The respondent mother's evidence

[102] The respondent mother's evidence was contained in her affidavit sworn 4 August 2006. The respondent mother asserted she worked in the family business from 2000 for up to 2 days a week and was otherwise engaged in caring for T. In 2000 she obtained a part-time job as an accounts assistant for 2 days a week and on those days T attended at a Childcare Centre. She agreed the appellant father's parents picked T up at lunchtime, although she said she had not been in favour of this arrangement.

[103] The respondent mother's work days increased from 2 days to 3 days a week and she continued in employment until the birth of J. She did not work again until August 2005 except for a 2 week stint in July. After that, she obtained a job working 12 hours a week as an accounts assistant. She worked the hours over 3 days during school hours. She said she took T to and from school and that J went to childcare on the days she was working and she took and collected him from childcare. She agreed that the appellant father's parents collected T from school 1 day a week prior to separation.

[104] The respondent mother said that she had the primary role during the marriage in caring for the children. The respondent mother spent some time in her affidavit being critical of the appellant father's parents. As to the current arrangements she deposed to the fact that she lives in the former matrimonial home and is available to care for the children except for the 12 hours that she works. Her work hours are flexible and she said when she was at work T was at school and J was at day-care. It is notable in our view that she did not indicate in her affidavit why a shared arrangement or, if not a shared arrangement, the children spending substantial and significant time with the appellant father, should not occur.

[105] Under the sub-heading "Family Violence" the respondent mother asserted that she was subjected to physical abuse by the appellant father after the first few months of marriage. She asserted that on one occasion when she was pregnant he pushed her onto the floor and on another occasion between 1997 and 1999 the appellant father pushed her and then slapped her with an open hand. She asserted that in about 1999 the appellant father's mother hit her on the back. She further asserted that in January 2006 she and the appellant father had an argument in which she was physically abused and thrown around the bedroom. This incident, she asserted, was sufficiently serious that she could not attend work the next day. She alleged there were numerous other examples of violence during the marriage. The appellant father had not had an opportunity to respond to the respondent mother's allegations. However, the solicitor for the respondent mother conceded that they were denied (at p 102 of the appeal book):

[Mr Brown:] [W]hilst the husband hasn't specifically answered them — I'm prepared to accept for present purposes that he denies them — nevertheless, can it be said at this interim hearing that there are reasonable grounds to believe that a parent of a child has engaged in family violence?

Discussion

[106] Thus in summary, his Honour was dealing with a matter in which there was little in dispute, in reality, about the ability of either party to adequately care for the children. He could comfortably have found, on uncontested facts, that:

- (a) although not using the words of the Act as amended, both parties invited the court to make an order that parental responsibility be exercised (albeit jointly and severally) by both parents;
- (b) T attends school and J attends childcare on 3 days a week on Monday, Thursday and Friday from 8.30 am to 4.30 pm when the mother works;
- (c) since separation the appellant father has been spending time with the children each alternate weekend from Friday afternoon to Sunday afternoon and with T on Monday afternoon and Tuesday afternoon each week;

- (d) the respondent mother proposed that T spend one half of the school holidays with the appellant father and J spend block periods of four consecutive days with the appellant father, including two of such blocks during school holidays;
- (e) T spent one half of the July school holidays with the appellant father;
- (f) the respondent mother lives in the former matrimonial home and the appellant father lives with his parents in close proximity to the school, day-care and the former matrimonial home;
- (g) the appellant father has the assistance of his parents to care for the children and works in the family business with them;
- (h) the respondent mother conceded there was no issue of risk to the children and the only issue was the amount of time the children should spend with the appellant father.

[107] In considering whether the presumption applied, his Honour identified the allegations of family violence made by the respondent mother. While his Honour did not expand upon the nature of the allegations, we observe that the definition of “family violence” in s 4(1) of the Act is a broad definition and would undoubtedly encompass the conduct complained of by the respondent mother. His Honour recognised this but said at [7] of the reasons for judgment:

[7] ... they are no more than allegations insofar as domestic violence is concerned, family violence is concerned, to use the wording of the section, and therefore I am not able to rely upon them to constitute a rebuttal of the presumption for equal shared parental responsibility. The section talks about being satisfied on reasonable grounds to believe that such a situation occurs.

His Honour then went on to postulate that s 61DA(3) may have been inserted for this very purpose; namely that where there was a dispute about whether or not there had been family violence but where no finding could be made, s 61DA(3) enabled him to determine in interim proceedings that it would not be appropriate to apply the presumption.

[108] We observe that his Honour did not give any consideration or weight to the surrounding circumstances; namely that it was conceded that there was no risk to the children and that both parties were seeking an order which would involve them in joint and several parental responsibility. Although considering those facts we might come to a different conclusion, given the wide discretion vested in the court to make orders in the best interests of the children, we do not consider that his Honour erred in the exercise of his discretion in not applying the presumption. This is especially so when his Honour could still make the orders sought by the appellant father for essentially shared time within his general powers to make orders that are in the best interests of the children.

Ground 2: that his Honour erred in failing to apply *Cowling* appropriately.

[109] As we explained at the commencement of these reasons, his Honour appears to have come to his decision as a result of the application of the principles in *Cowling* and particularly by his reliance on the arrangements that were in place since June, which his Honour found served “the needs of the children to have both parents involved in their lives”. His Honour found in particular that the respondent mother’s hours of work were significantly less than the appellant father’s and that she was the person who had been principally concerned when the children, for example, had been sick.

[110] We agree with the appellant father's submission that his Honour, once he had determined that the presumption under s 61DA(1) did not apply, did not address the matters in s 60CC(2) and in particular "the benefit to the child of having a meaningful relationship with both of the child's parents". Nor did he address the additional considerations in s 60CC(3). He appears to have accepted that the status quo, absent any adverse impact on the children, was appropriate to continue, but without a consideration of the factors involved in coming to a decision on best interests and particularly s 60CC(2)(a) to which we have referred. As we have said at [80], maintenance of the status quo, as sanctioned by *Cowling*, is insufficient to meet the requirements under s 60CC and his Honour, who was of course working without the benefit of appellate guidance, erred in not giving consideration to those matters.

Ground 3: that his Honour erred in failing to apply Pt VII of the Act as it now exists; and

Ground 6: that his Honour erred in that he made errors of law which include inter alia a failure to give adequate reasons.

[111] These two grounds overlap and thus we will consider them together. The appellant father contends that the legislation required his Honour to consider the objects, the paramountcy principle, the question of parental responsibility and the question of the order concerning what time the children should spend with each parent, having regard to the matters set out in s 60CC. We agree that his Honour did not consider these provisions, which we have now concluded was necessary, and that he fell into error in not doing so.

[112] We do not agree with the respondent mother's submission that the court is only required to consider equal or substantial and significant time if the presumption of equal shared parental responsibility applies. Although his Honour decided that the presumption of equal shared parental responsibility did not apply and thus the provisions of s 61DA were not triggered, the appellant father's application sought equal time. Accordingly, his Honour was obliged to deal with and consider whether such an arrangement would be in the best interests of the children, particularly having regard to the objects of the Act and the primary considerations in s 60CC(2).

[113] The uncontested evidence before his Honour was that up until June, the parties and children had been living as one family and that the arrangements in place — essentially weekend and holiday contact — were of recent duration. In our view his Honour fell into error in not considering the orders sought in the appellant father's application in the light of s 60CC. We agree in addition with the submission of counsel for the appellant father that no reasons were given about the children's best interests on an application of s 60CC. However, these errors in our view probably stem from the fact that his Honour seems to have thought that upon the application of the principles of *Cowling*, he did not need to do more than refer to the current arrangements and find that they were working for the benefit of the children.

Ground 4: that his Honour erred in that he made errors of fact.

[114] The appellant father submitted that his Honour made errors of fact that were relevant to the determination of the interim application. They are:

(a) His finding that the father had made no specific proposal in respect of the children on the date of separation

The evidence to which we were directed by the appellant father does not in our view indicate that his Honour was in error in finding that no specific proposal for the care of the children had been made by the appellant father. However more importantly, in our view, nothing turned on his Honour's comment. He simply inferred from that fact that the appellant father, when he left the former matrimonial home, was not concerned with the care of the children in the respondent mother's care. That fact could have been inferred equally from the fact that the appellant father had sought a joint living arrangement in his application.

(b) His finding that the father's work hours were significantly greater than those of the respondent mother

Again we do not agree from the matters referred to by the appellant father that his Honour was in error. In general terms it was clear that the appellant father was working full-time and the respondent mother worked 3 days a week. The fact that the appellant father worked less time during the school holidays when he had the children with him, had been finishing earlier on 3 days a week, and had some flexibility provided by his employment in the family business, does not overcome the fact that he was essentially working full-time while the respondent mother worked limited part-time hours 3 days a week. Certainly the appellant father indicated that because he worked for the family business he was able to change work hours in order to care for the children and could work from home and that since separation he had already made changes to his work routine. These are matters of weight to which his Honour might appropriately have had regard if he had specifically considered the matters in s 60CC(3) but in our view they are not errors of fact.

Ground 5: that his Honour erred in failing to address the injunctive order sought in relation to religious upbringing.

[115] The appellant father contended that his Honour failed to address the appellant father's application and give reasons for the omission of the injunction. We do not find any merit in this ground. While it is true that an injunction was sought in the interim application, no submissions were directed to it before his Honour and, in truncated proceedings, we do not think it could be reasonably left to his Honour to identify the evidence or to even assume that matters in the application were necessarily being pursued on an interim hearing, unless he was specifically directed to this matter by the parties' solicitors.

Conclusion in relation to the appeal

[116] Given the errors that must be found as a result of our consideration of the legislation, the appeal must succeed.

[117] Although we were invited to re-exercise the discretion, a further consideration of how the case was presented, both before Collier J and before us, leads us to conclude that no submissions were directed to the arguments as to what would be best for these children and particularly for J in view of his age. As a result, the matter will be remitted for further hearing.

Costs

[118] In the event the appeal succeeded, both parties sought cost certificates which we propose to grant.

Orders

- (1) That the appeal be allowed.
- (2) That the matter be remitted for a hearing on interim issues as a matter of urgency.
- 5 (3) That the court grants to the respondent mother a costs certificate pursuant to the provisions of s 6 of the Federal Proceedings (Costs) Act 1981 (Cth) being a certificate that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the respondent mother in respect of the costs incurred by the respondent mother in relation to the appeal.
- 10 (4) That the court grants to the appellant father a costs certificate pursuant to the provisions of s 9 of the Federal Proceedings (Costs) Act 1981 being a certificate that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant father in respect of the costs incurred by the appellant father in relation to the appeal.
- 15 (5) That the court grants to the respondent mother a costs certificate pursuant to the provisions of s 8 of the Federal Proceedings (Costs) Act 1981 being a certificate that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the respondent mother in respect of such part as the Attorney-General considers appropriate of any costs incurred by the respondent mother in relation to the new trial.
- 20 (6) That the court grants to the appellant father a costs certificate pursuant to the provisions of s 8 of the Federal Proceedings (Costs) Act 1981 being a certificate that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant father in respect of such part as the Attorney-General considers appropriate of any costs incurred by the appellant father in relation to the new trial.
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ANGELA NANSON
SOLICITOR

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