

FAMILY LAW CHILDREN Final Orders Consent Orders where proposed consent orders are silent as to parental responsibility whether presumption of equal shared parental responsibility must apply best interests of the children where Court declines to make orders in terms of the proposed Minutes of Order Family Law Act 1975 (Cth) ss 61C, 61D, 61DA, 64B B & B; Family Law Reform 1995 (1997) FLC 92-755 Goode & Goode (2006) FLC 93-286 Marvel & Marvel [2010] FamCAFC 101; (2010) 43 Fam LR 348 Newlands & Newlands [2007] FamCA 168; (2007) 37 Fam LR 103 Pavli & Beffa [2013] FamCA 144 APPLICANT: Mr Padnall RESPONDENT: Ms Padnall INDEPENDENT CHILDRENS LAWYER: Legal Services Commission FILE NUMBER: ADC 1244 of 2012 DATE DELIVERED: 21 October 2014 PLACE DELIVERED: Adelaide PLACE HEARD: Adelaide JUDGMENT OF: Berman J HEARING DATE: 17 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Jordan SOLICITOR FOR THE APPLICANT: Barnes Brinsley Shaw Lawyers COUNSEL FOR THE RESPONDENT: Mr McGinn SOLICITOR FOR THE RESPONDENT: David Burrell and Co COUNSEL FOR THE INDEPENDENT CHILDRENS LAWYER: Ms Lindsay SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Mr Winter, Legal Services Commission ORDERS (1) The oral application for consent orders made on 17 October 2014 be dismissed. IT IS NOTED that publication of this judgment by this Court under the pseudonym Padnall & Padnall (No. 2) has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT ADELAIDE FILE NUMBER: ADC 1244 of 2012 Mr Padnall Applicant And Ms Padnall Respondent REASONS FOR JUDGMENT INTRODUCTION By Amended Initiating Application filed 25 July 2014, Mr Padnall (the father) seeks parenting orders in relation to A born in 2001, B born in 2004 and C born in 2010 (the children). They currently reside with the mother. Ms Padnall (the mother) seeks orders as set out in her Response to the Initiating Application filed 11 May 2012. The proceedings involve parenting issues and property settlement and division. The proceedings are listed for trial as a primary hearing commencing 1 December 2014. Pursuant to orders made 12 September 2014, paragraph 1 of the father's Application in a Case filed 7 February 2014 seeking leave to adduce separate adversarial evidence was listed for hearing on 17 October 2014. On that date the parties and the Independent Children's Lawyer (ICL) were represented by

counsel. I was advised that agreement had been reached in relation to the outstanding parenting issues and a Minute of Order was tendered and on the joint application of the parties and the ICL, I was asked to make orders by consent in terms of the Minute of Order as provided. I was not prepared to do so at the time, preferring to give the matter some further thought and deliver reasons for judgment.

ORDERS SOUGHT In the Amended Initiating Application the father sought an order that there be equal shared parental responsibility in respect of the children, that they live with the mother but that they spend time with him noting that the orders sought brought to account a significant difference in terms of the ongoing relationship that he would have with C as distinct from A and B. For her part, the mother sought that she have the sole parental responsibility for the children for their long term care, welfare and development, but also their day to day care, welfare and development. The orders sought by the mother in respect of the time that the children should spend with their father was significantly different to the orders that he sought.

PROPOSED ORDERS

The proposed Consent Order is divided effectively into two parts namely, the orders sought as to parental responsibility and then the living arrangements together with specific issue orders. I was advised that the parties had negotiated at length and taking into account that they were each represented by experienced solicitors and counsel, I have no difficulty in determining that the proposed orders in respect of the living arrangements and the specific issues for the children are in their best interests. The focus of concern relates to the manner in which the parties have sought to deal with parental responsibility. Paragraph 1 of the proposed orders provides as follows:- (1) Save as specifically otherwise provided herein, each parent shall be responsible for making decisions concerning the day to day care of the children [A] born.../2001 ([A]), [B] born on the .../2004 ([B]); and [C] born on the .../2010 ([C]) (hereinafter collectively referred to as the children) when the children are living with them. The parties have specified the manner in which they will exercise their parental responsibility in respect of the day to day care of the children. The orders are silent as to parental responsibility in respect of major or long term issues. It must be highlighted that whilst the benefit to the children of the parties resolving their differences cannot be understated, it is also self-evident that this is a matter marred by a high level of conflict in respect of the

parenting arrangements for the children. In considering any order that determines the ongoing arrangements for the children, I am obliged to consider the objects and principles underlying Part VII of the Family Law Act 1975 (Cth) (the Act) as set out in s 60B. The objects of Part VII is to ensure that in respect of any order made, the best interests of the children are met. A determination of what constitutes the best interests of the children is to be considered by reference to the provisions of s 60CC. I considered it was appropriate therefore to enquire of the parties whether the lack of any reference to how the parties would manage the major and long term issues was deliberate or an omission. All counsel agreed that it was deliberate and it was the expectation and understanding of the parties that each party would have parental responsibility subject to s 61C and that this responsibility would be exercised independently or jointly. Counsel for the mother put to me that the authority for such a proposition could be found in the decision of the Full Court in *Goode & Goode* (2006) FLC93-286.

THE LEGAL POSITION

The Full Court in *Goode & Goode* (supra) considered the difference, if any, between parental responsibility and equal shared parental responsibility. Section 61B defines parental responsibility as follows:- In this part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. The effect is explained in respect of s 61C and s 61D of the Act. Section 61C (1) provides:- Each of the parents of a child who is not eighteen has parental responsibility for the child. There are notes to the section as follows:-

Note 1:- This section states the legal position that prevails in relation to parental responsibility to the extent 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.

Note 2:- This section does not establish a presumption to be applied by the Court when making a parenting order. See subsection 61DA for the presumption that the Court does apply when making a parenting order.

Section 61D provides:- (1) A parenting order confers responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child; (2) 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 child except to the extent (if any):- (a) Expressly provided for in the order; or (b) Necessary to give effect to the order.

The Full Court, referring to parenting responsibility pursuant to s 61C held in *Goode & Goode* at [37] that:- 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 were no contrary orders in force. This would appear to be consistent with the approach adopted by the Full Court prior to the 2006 amendments, see *B & B*; *Family Law Reform Act 1995* (1997) FLC 92-755 paragraph 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. In *Pavli & Beffa* [2013] FamCA 144 Watts J in referring to s 61C noted at [18] that:- When that type of parental responsibility is exercised, it need not be described as shared as decisions about long term issues can be made either jointly or independently. The Full Court in *Goode & Goode* highlighted an important distinction to be drawn between s 61C and an order for shared parental responsibility at [39]:- We therefore consider it clear that there is a difference between parental responsibility which exists as a result of section 61C and an order for shared parental responsibility, which has the effect set out in section 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 their 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 the children must be made jointly, unless the Court otherwise provides. The Full Court in *Newlands & Newlands* [2007] FamCA 168; (2007) 37 Fam LR 103 were again required to consider the distinction to be drawn between parental responsibility and equal share parental responsibility. In that case the trial judge had made an order for joint parental responsibility save and except the mother would have sole parental responsibility in respect of the child's education. There is no reference to joint parental responsibility in the Act and the Full Court were unable to discern whether the trial judge

sought to make orders for equal shared parental responsibility. At [91] the Court considered an alternative approach that could have been adopted by the trial judge namely, for the mother to be given sole responsibility in relation to schooling and: for the orders to be silent as to the remaining aspects of parental responsibility in which case section 61C and section 61D would have effect and the remaining aspects of parental responsibility would be exercised by both parents either jointly or independently. Accordingly, the decisions of *Goode & Goode*, *Newlands & Newlands* and *Pavli & Beffa* all suggest that parental responsibility conferred on a parent by virtue of s 61C of the Act may be exercised jointly or independently providing there is no contrary order in force. However, in *Marvel & Marvel* [2010] FamCAFC 101; (2010) 43 Fam LR 348 the Full Court considered whether the operation of s 61DA in instances where the presumption had not been rebutted, would displace the operation of s 61C and require a Court to consider the presumption of equal shared parental responsibility and therefore the provisions in s 65DAA:- [94] Section 61C, as explained in *Goode*, provides that each of the parents of a child has parental responsibility for a child. That responsibility exists whether the parties are in an intact family, separated, or remarried. The section has effect subject to any order of the Court. That is, one or more aspects of parental responsibility may be changed by a Court order. [95] The logical corollary of the interaction between Section 61C and Section 61DA is once a parenting order of any description is made or to be made, the presumption, if there is no finding of risk of abuse or family violence or not rebutted as not in the child's best interests, applies. That presumption is that the parties then have equal shared parental responsibility not parental responsibility. We pause here to note that authority prior to the amending Act established that parental responsibility could be exercised jointly or severally; see *B & B*; Family Law Reform 1995 (1997) FLC92-755. If the presumption does apply, but is not reflected in an order for equal shared parental responsibility does it displace the operation of Section 61C? Ultimately the Full Court declined to determine the issue as their Honours had not had the benefit of extensive argument on the topic, but noted helpfully at [104]:- It seems to us, as presently advised that the implication of the legislation, having regard to the provisions of Section 61C, 61D, 61DA, 65D(1) and 65DAA is that if the presumption applies, an order for equal shared parental responsibility will generally be made thus

displacing Section 61C and triggering considerations of the provisions of Section 61DAA. I consider that the parties seek orders from the Court that clearly constitute a parenting order as defined in s 64B of the Act:- Section 64B (1) A parenting order is:- (a) An order under this Part (including an order until further order) dealing with a matter mentioned in Subsection (2); or (b) An order under this Part discharging, varying, suspending or reviving an order, or part of an order, described in paragraph (a). There appears to be no controversy that the proposed orders deal extensively with the matters set out in s 64B (2). I consider therefore that in the parties seeking that the Court make a parenting order in relation to the children, s. 61DA requires that I 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. Clearly the parties seek orders by consent following negotiated settlement and the assistance of experienced legal advisors. There are no allegations of family violence or other circumstances which would see that the presumption is rebutted and accordingly, I consider that the presumption must apply and in the absence of express provision to the contrary, the parties have equal shared parental responsibility and therefore requires the parties to confer as to major decisions for the long term care and welfare of the children. Those decisions must be made jointly.

CONCLUSION The expressed understanding of the parties is that if the orders as currently drafted are made, the parental responsibility as it relates to major decisions can be exercised jointly or independently. I do not consider that the orders as currently drafted give effect to that expectation. Accordingly, I decline to make orders in terms of the Minute of Order pending further submissions. I certify that the preceding thirty eight (38) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Berland delivered on 21 October 2014. Associate: Date: 21 October 2014

