

FAMILY LAW CHILDREN With whom a child lives Relocation Family Law Act 1975 (Cth)

APPLICANT: Ms Peakridge RESPONDENT: Mr Martin INDEPENDENT CHILDRENS LAWYER: Harris Lieberman FILENUMBER: AYC 77 of 2007 DATE DELIVERED: 28 November 2007 PLACE DELIVERED: Albury PLACE HEARD: Albury JUDGMENT OF: Justice Cronin HEARING DATE: 19, 27 November 2007 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr O'Shannessy SOLICITOR FOR THE APPLICANT: Nevin Lenne & Gross COUNSEL FOR THE RESPONDENT: In person SOLICITOR FOR THE RESPONDENT: COUNSEL FOR THE INDEPENDENT CHILDRENS LAWYER: Ms Boyle SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Harris Lieberman ORDERS That the Independent Childrens Lawyer have leave to file an affidavit by Sunita Rama sworn 27 November 2007. That the applicant and the respondent have equal shared parental responsibility for the child of their relationship J born ... May 1999. That the children, J born ... May 1999 and M born ... May 1996 live with the mother. That the mother be permitted to relocate the children from North East Victoria to Canberra forthwith. That the mother advise the father seven (7) days prior to any proposed visit by her to north eastern Victoria and by agreement, deliver the children to and collect them from, the father for the children to spend time with him for as long as practicable. That the father and the mother make arrangements for the children to spend time with the father and for the purposes of such time, the father collect the children from the mother's home at the beginning of any agreed time and the mother collect the children from the father's home at the conclusion of any agreed time. That the father communicate with the children by telephone or email at any reasonable time. That the mother keep the father advised of the following: (a) any medical emergency or serious ill health of either of the children and the name of any treating doctor; (b) her address and telephone contact number and email address; (c) any social event at the children's school; and (d) school reports. That the mother advise the father in writing 28 days prior to any proposed move by her from the City of Canberra. That the mother be restrained by injunction from doing any of the following: (a) allowing the children or either of them to come into contact with Mr JD; (b) allowing the children or either of them to come into contact with CD; (c) allowing the children or either of them to come into contact with SD; and (d) allowing the children or either of them to come

into contact with RD. That all applications be otherwise dismissed and all proceedings be removed from the list of cases awaiting a hearing. IT IS CERTIFIED: That pursuant to Order 19.50 of the Family Law Rules 2004 it was reasonable to engage counsel to attend. That pursuant to s.65DA(2) and s.62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders. That a copy of these orders and the reasons for judgment be served by the Independent Children's Lawyer upon the father by ordinary pre-paid post. That the Independent Children's Lawyer be forthwith discharged from the proceedings. That any exhibit in the proceedings be returned to the person providing that exhibit. IT IS NOTED that publication of this judgment under the pseudonym Peakridge & Martin is approved pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth) FAMILY COURT OF AUSTRALIA AT ALBURY FILE NUMBER: AYC77 of 2007 MS PEAKRIDGE Applicant MR MARTIN Respondent And INDEPENDENT CHILDRENS LAWYER REASONS FOR JUDGMENT These are proceedings between the parties for parenting orders. The case was listed before me in the Albury Circuit in August but not determined. It was then adjourned to this circuit. At the last circuit, the father was represented. He ceased to be represented by a lawyer at the end of October. The father participated in the call over of the case and I fixed the hearing for Tuesday 27 November 2007. At the beginning of the day, the father attended and I indicated to him that I would deal with his case as soon as I practically could but with a circuit rolling list, he would have to wait a while. By lunch time, I was advised that there were discussions going on between the father and the Independent Children's Lawyer. By 2.15pm, I was advised that the father had left the Court and there was a probability that he would not return. I asked that the Independent Children's Lawyer contact him to urge him to participate but if it was his wish not to do so, I would determine the matter in his absence. Ms Rama who is the Independent Children's Lawyer filed an affidavit at the end of the day setting out her discussions with the father and of leaving messages for him. It transpires that the father telephoned Ms Rama at about 4.30pm and I had her give evidence about that conversation. The affidavit and the

oral evidence indicate that the father intended not to participate nor would he be going to Canberra to presumably see the children. The same message was reiterated in the late telephone call. The father has therefore had plenty of opportunity to participate but has chosen not to do so. That does not mean that I can ignore his evidence but it does affect the weight that I give it. I am satisfied that it is appropriate to proceed in the absence of the father. The issue which really precipitated the proceedings is the application of the mother to relocate the children to reside in Canberra.

**THE CHILDREN** The children are M born in May 1996 and therefore 11 years of age and J born in May 1999 and therefore eight years of age. Throughout the proceedings and in these reasons for judgment, the children are referred to as J and M. M is not the father's biological child but has treated him as such since he was 18 months old. M has no relationship with his biological father. The father said that M treated him as his father. By way of background, the mother is 47 and the father 45. The parties lived together from April 1999 until February 2004. The mother is a therapist and the father a builder. Throughout the relationship, the evidence seems to establish that the mother was the predominant parent. The relationship between the parties was not a happy one. There are allegations of abuse and violence exacerbated by alcohol abuse. The best the father could do in response to these assertions was say that he did not admit them. Save for the issue of the presumption, the establishment of these matters becomes irrelevant now that the father has chosen not to participate. After separation, there was occasional time spent between father and children. The father suggested that he and the mother were able to work out by agreement how the time between he and the children would be spent. That seems consistent with the mother's acceptance that from Canberra, she will work out some suitable arrangements with the father if he shows interest.

**THE INITIAL PROPOSAL OF THE MOTHER** The mother proposed by application that she be permitted to relocate the children to Canberra and that thereafter, the children spend half of the ACT school holidays with the father along with a weekend in the middle of term. The mother made suggestions for other times such as Christmas Day and the father's birthday.

**THE PROCEEDINGS** The father did not participate in the hearings on 21 March 2007 and 16 April 2007. At the latter hearing, the Registrar ordered the appointment of the Independent Children's Lawyer.

The father did not attend the mediation appointment in March. Orders were made for a family report to be prepared and the father participated in that. I shall deal with that report in a moment. By 2 August 2008, the father, who attended a hearing but had not filed any material was ordered by the Registrar to do so. The file record shows that the relocation issue was very much a matter of contention. On 16 August 2007, the father filed his affidavit of evidence. More importantly, he filed his formal response document seeking that both children live with him. For reasons best known to him and probably out of an abundance of caution, the father sought an injunction against the mother relocating the children away from north east Victoria. Before me on 29 August 2007 at which time as I have said, the father was represented, all parties consented to orders providing for interim parenting orders which inter alia gave them time with the father each alternate weekend and each Wednesday overnight into the Thursday morning. I made distinct injunctions against the mother bringing the children into contact with Mr JD, CD, SD and RD. There was also an injunction relating to the maternal grandfather. I was told that the orders were not carried out for long because the father had to work away from north east Victoria and for the last few weeks, the children have not seen him.

**THE FATHERS PROPOSAL** The father set out his position in his affidavit filed 16 August 2007. That document was a response to the mother's affidavit. He said that he and his partner of 18 months Ms F, had bought a house and the boys got along well with her. He set out all of the things they did together. He expressed concern that if the children went to Canberra, his relationship with them would be compromised. Surprisingly, there was little positive evidence about how he proposed to care for the children. His last paragraph really set the scene though when he said that he would seek that the children live with him if the mother continued her relationship with Mr JD.

**THE POSITION OF THE INDEPENDENT CHILDRENS LAWYER** The Independent Children's Lawyer supported the mother's position.

**OVERVIEW** It is quite clear from the evidence to which I shall refer that the mother is quite capable of providing adequate physical care for the children. There is no issue of any consequence relating to accommodation and other arrangements that she can offer the children. My dilemma is that I had before and have now, very little information from the father to assist me. In substance, my task is to consider which of the two proposals will most likely promote the welfare of

these two boys. THE MOTHERS EVIDENCE The mother filed an affidavit on 22 October 2007. The mother set out the issues of violence. She went on to say that she had no family in north east Victoria but all of her close family was in Canberra. She deposed to the fact that there were opportunities for her in Canberra that were not available in north east Victoria. She thought that the relationship between the father and the children was good and would withstand the move to Canberra. Her affidavit is comprehensive about the structure of her proposed life in Canberra. As for the father's concern about Mr JD, the mother deposed in her recent affidavit that the relationship had ended although they remained friends. The issue surrounding this man relates more to his children who were involved in some pornographic video viewing. I am not entirely sure what it is that causes the father angst now about Mr JD. THE FAMILY REPORT The family report was prepared by Family Consultant Ms H. In a comprehensive summary, Ms H set out the competing positions as she was given them in May 2007. Ms H said that the father had not displayed strong motivation to spend substantial time with the children, was not highly involved and committed to the responsibilities of parenting. J felt hurt and disappointed. Ms H was complimentary of the mother's approach to the relationship between father and children. The issue of relocation was a matter left to the Court. The report writer raised all of the concerns about risks and also all of the benefits for the children. A suggestion was made that the mother undergo some therapeutic counselling with a specialist sexual assault program relating to her own past on the basis that that may assist her in setting some protective boundaries for the children. I do not have the father's side of all of this and the Independent Children's Lawyer was supporting the mother and the mother has agreed to some three injunctions. THE IMPACT OF THE MOVE TO CANBERRA UPON THE CHILDREN. The mother's evidence is that the children will settle and that they will have support. To some extent, I feel that a move away from the environment of northeast Victoria may be a good thing for these children having regard to the behavioural problems that I was told about in August at the local school concerning the D children. The difficulty is that I have very little evidence from the father and he has chosen first not to avail himself of the time in the last orders I made and secondly, he left the Court for reasons best known to himself and has chosen not to participate. I can only determine the matter on the evidence.

DISCUSSION Relocation cases are parenting cases. Subsequent of 1 July 2006, the legislative pathway has been set out in Part VII of the Family Law Act 1975 (Cth) (the Act). Because I intend to make parenting orders regardless of the fact that these orders are a variation of existing parenting orders, s 61DA requires that I apply a presumption that it is in the children's best interests for their parents to have equal shared parental responsibility. This exercise needs to be undertaken before the determination of any parenting order. Section 61DA provides: (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. Section 61DA(2) provides that the presumption does not apply if there are reasonable grounds to believe that a parent of the child has engaged in abuse of the child or family violence. The definition of family violence is set out in s 4 of the Act. I am satisfied in this case that the presumption is rebutted by virtue of s 61DA(2). The mother has made serious allegations and although not admitted (as distinct from denied) by the father, he has chosen not to challenge the mother in the proceedings. I am entitled to accept the truth of what she said. I do not therefore have to contemplate equal shared parental responsibility. Section 61DA(4) however also says that the presumption may be rebutted if I am satisfied that it would not be in the children's interests for it to be applied. In circumstances where the father puts forward no positive material having applied for the children to live with him and then having opposed a move of the children in circumstances where he has not availed himself of the opportunity to spend quality time with them, it is clear that normally I would not have to consider equal shared parental responsibility. Both the Independent Children's Lawyer and the mother sought orders that notwithstanding all of that, the parties have equal shared parental responsibility. The rebuttal of the presumption does not mean that a court has to make an order that the parties cannot have that shared responsibility. The presumption is a pathway to assist in the determination of time between parents and children. I am satisfied for that pathway to say that it is appropriate and in the best interests of the children to rebut the presumption. I do so also under s 61DA(4).

PARENTING ORDERS

As to what parenting order I should then make, it is important to look firstly at the objects and principles of Part VII of the Act. The objects and principles from which the provisions of Part 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). Section 60B also makes provision for an Aboriginal child or Torres Strait Islander child being able to enjoy their culture but in this case, that provision does not apply.

**THE BEST INTERESTS PRINCIPLE** Section 60CA is fundamental. It says: 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. In determining what is in a child's best interests, s 60CC provides that 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.

**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. The Court is exhorted to ensure the best interests of the children are met by ensuring that the children have the benefit of their parents having a meaningful involvement in their lives and s 60CA requires the Court to regard the best interests of the children as paramount. In determining what is in the best interests of the children, the Court is obliged to turn to s 60CC. It is a primary consideration for the children to have the benefit of a meaningful relationship with the parents. I cannot force the father to participate in the proceedings any more than I can force him to be a responsible parent. I have presumed that he does not want to have a meaningful relationship with the children and in any event, I am satisfied that should he now wish to do so, the mother would facilitate that. The impact of a relocation means that the father will not be able to exert influence and direct the children's development but to date, I have doubts as to whether he seriously wanted to fulfil that role. As Professor Patrick Parkinson<sup>[1]</sup> said: ...courts cannot by order create meaningful relationships between parents and children; they can only create or maintain the circumstances that make meaningful relationships possible. In my view, the future of any relationship between father and children is now in the hands of the father. SECTION 60CC FACTORS I do not believe that the mother would do anything deliberately to thwart the relationship between the father and the children. That is not to say that the relationship between the parents could not be improved with the obvious benefit for the children. Unfortunately, I do not have the father's side of all of that. I have taken little account of the views of the children in this case because of their age. Their views can carry little weight. I have considered the nature of the relationship of each of the parents with the children and can only say that I am satisfied that the mother has a good relationship and the father has one which whilst the children seem to show excitement, the father shows

ambivalence. Section 60CC requires a consideration of the willingness and ability of each of the parents to facilitate and encourage a close and continuing relationship between the children and the other parent. I accept that the mother has facilitated and will in the future facilitate the relationship between the children and the father if he decides to participate. I have considered the effect on the children of separation from the father but I detect that they have become accustomed to that. I have considered the question of the practical difficulty and expense of the children spending time with the father and note that the mother has set out all of the methods by which an arrangement between father and children could be implemented. The father has again shown little interest. A significant feature of s 60CC(3)(f) relates to the capacity of the parents to provide for the needs of the children including emotional and intellectual needs. I am satisfied that the mother has done the tasks well up until now and I see no reason for that to change in the future. The questions of the maturity, sex, lifestyle and background together with the cultural issues in this case are of no moment. Another significant feature however of s 60CC relates to the attitude of the parents towards the children as well as to their responsibilities of parenthood as they have demonstrated those things. The father's attitude is now clear. In relation to the wife's attitude, I accept that she has shown a responsible attitude to parenthood. She has attended to all of the needs of the children. The issue of family violence and family violence orders in this case is set out above and I shall not repeat the matters. I do not accept the father's protestations under the cover that matters are not admitted. I am also obliged to consider whether it would be preferable to make an order that would be least likely to lead to further proceedings. For the sake of the children being able to settle quickly and organise their lives with particular emphasis on a new school year, it is important to put this matter to an end. I am also obliged under Part VII of the Act to consider what the parents have done subsequent to separation. I do not propose to say more than that I am satisfied that the mother has facilitated the relationship between the father and the children but the father has not been diligent in that area. I propose therefore to make orders which I think are in the best interests of the children. I certify that the preceding Seventy Eight (78) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin Associate Date: 28 November 2007 [1] Decision-making about the best

interests of the child: The impact of the two tiers, (2006) 20AJFL 2 AustLI:Copyright

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