FAMILY LAW CHILDREN undefended proceedings Family Law Act 1975 (Cth) AMS & AIF [1999] HCA 26 APPLICANT: Ms Selby RESPONDENT: Mr Dufort FILENUMBER: MLC 3373 of 2014 DATE DELIVERED: 29 August 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Cronin J HEARING DATE: 29 August 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Salamanca SOLICITOR FOR THE APPLICANT: Taussig Cherrie Fildes THE RESPONDENT: No appearance ORDERS Thatthe applicant mother have leave to proceed without further notice to therespondent father. Thatthe mother have sole parental responsibility for the child N (thechild) born ... May 2005. Thatthe child live with the mother. Thatthe child be permitted to travel internationally outside of the Commonwealth ofAustralia and the mother be at liberty to relocatethe childs residenceto Canada or such other place outside of Australia. Forthe purposes of paragraph 2 of these orders, the mother have sole authority todo all acts and things and sign all such documentsin relation to thefollowing: (a) thechilds residence; (b) thechilds passport; (c) thechilds visa for a residence; (d) thechilds enrolment at school; (e) thechilds medical treatment; and (f) thechilds religion. Thata copy of this order be served upon the father by electronic means set out inthe previous court order. Thatthe reasons this day be transcribed and be placed on the court file. Thatthe application filed 29 July 2014 is otherwise dismissed. Thatpursuant to s 65DA(2) and s 62B, the particulars of the obligations these orderscreate and the particulars of the consequences that may follow if a personcontravenesthese orders and details of who can assist parties adjust to andcomply with an order are set out in the Fact Sheet attached heretoand theseparticulars are included in these orders. IT IS NOTEDthat publication of this judgment by this Court under the pseudonym Selby& Dufort 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 MELBOURNE FILE NUMBER:MLC 3373 of 2014 Ms Selby Applicant And Mr Dufort Respondent REASONS FOR JUDGMENT Thisis an application for parenting orders by the mother of N (thechild) who is nine years of age. Theapplication was filed on 16 April 2014 returnable on 28 May 2014. By28 May the childs father had been served with documents. Apart fromanything else, he acknowledged that by email. On thereturn date, he appearedby a solicitor from the firm Schetzer Constantinou

notwithstanding that, notonly had no address for servicebeing filed, but nor had any formal responsebeen filed either. Iam told and the evidence is supported by what the mother has indicated orallytoday, that there had been negotiations between thetwo firms of lawyers aboutthe whole issue before April 2014; culminating in the application being filed. Thefile does not record entirely what happened on that day in May other than thatorders were made that the father was to file therelevant response by 21 July2014. The record shows that he has not done that. There is correspondence,apparently, between thetwo law firms in or around the month of June, in whichSchetzer Constantinou indicated that they were no longer acting for thefather. Onthe return date of 25 July 2014, Registrar Moser noted the absence of the fatheror any representative on his part, and made ordersthat the matter betransferred to me. Further orders were made for, not only the filing of furtherdocumentation, but also for theservice of the Registrars orders. Ihave the benefit of an affidavit of an Yvette Moran which indicates that servicehas taken place in a variety of different waysboth by hard copy and byelectronic version. Indeed, the hard copy seems to have been accepted by thehusband in France becausethere is a receipt from the postal authorityindicating that it had been served equivalent to our Registered Post inAustralia. Asan abundance of caution, the solicitors for the wife have also served SchetzerConstantinou who indicated in their correspondencethat the only address theyhad was the one that had already been known. On7 August, the wifes amended application and affidavit material was servedby email and again, out of an abundance of caution,the solicitors provided acopy of the orders of the court translated into the French language. Accordingly,the father has had the originating application as well as the subsequentamending application and has chosen, for whateverreason, not to be here today. That is consistent with his approach in relation to parenting to which I willturn in a moment. Thefather has had ample opportunity and chosen not toparticipate. On that basis the mother has leave to proceed in his absence andwithout further notification. Thebackground of this particular marriage is relatively simple. The parties weremarried in September 2002 having lived togethersince April 1999, and theyseparated in February 2010. The child was born very early in the marriage andon the separation in February2010, by consensual arrangement, the wife returnedto Australia with the child. The

evidence shows that is was the fathersagreement with the mother that he was to follow, but that did not occur. Sincecoming to Australia, the child has had limited contact, both physically andelectronically with the father. There is evidenceof a number of visits so Iwould describe the contact between father and child as spasmodic. Throughoutthat period of time, the mother has exercised all of the responsibilities ofparenthood as well as been the predominantcarer of the child. The father hasprovided no financial support except for a bizarre sum of $8500 accrued arrearsof child support,which, apparently, was clawed back from him when he foundhimself in the position of being unable to leave the country. The evidenceshows there is no reason why he cannot pay child support. That is a factor ofrelevance when it comes to the question of the bestinterests of the child, andwhat orders should be made. Themother remarried in April 2013 and her husband has now obtained a position inCity B, Canada in his chosen field. Unsurprisingly,the wife wants to move toCity B with her husband. Theaffidavit material that she has filed has set out the basis of the application. She deposes to the fact that in addition to herhusband having work in City B,she has been accepted into a program at a university in City B and is due tocommence her studiesin September. That is also the period of time that most ofthe schools start their new term for children. On that basis there issomeurgency about this application proceeding today. Theprocess of moving from one country to another is obviously one involvingImmigration Departments, and the wifes evidenceis that to obtain a visa,she contacted the Canadian Immigration Department who required her to have someevidence of authority tomove the child to Canada. She obtained the writtendocument, but that did not satisfy the relevant authorities in Canada whorequiredher, through her immigration lawyers, to produce a formal Court orderso that the child could reside with her in City B. That ledto a discussionabout the question of what the wording of sole parental responsibility meansunder the Family Law Act 1975 (Cth) (the Act). As anabundance of caution I shall make orders in terms of paragraph 5 of thewifes application. Thisis an application for the wife to be permitted to travel with the childinternationally. That is a parenting order as describedunder the Act. Whenmaking a parenting order, the over arching principle is set out in s 60CA whichsays that: In deciding whether to make a particular parentingorder in relation to a child, a court must regard the

bestinterests of the childas the paramount consideration. Albeit,that the decision of AMS & AIF [1999] HCA 26 preceded the amendmentsto the Act in 2006. Kirby J observed that it was: necessary for acourt, making decisions affecting the child's place of residence, to attempt aresolution of often irreconcilableconsiderations. Theirony here is that the childs father has chosen, for whatever reason, notto travel the extensive distance from Europeto Australia, so travelling toCanada might alleviate that problem. It seems, therefore, that absent somecomment by the fatheras to why he is not here and having some participation inthe proceedings there is really no irreconcilable consideration at all.However, Kirby J went on to say that the statute sets out the welfare principlesrelating to the child, and that they should bethe paramount consideration. But, paramount also means that there must be some other consideration as well. That is, paramountis not the sole or only consideration. The statutoryinstruction, as his Honour said, was to treat the welfare or best interestof achild as the paramount consideration, but that did not oblige a court to ignorethe legitimate interests and desires of a parent. The only time a problemarises is if there is a conflict between parent and child considerations. Thepriority then must be accordedto the rights and welfare of the child. Section60CA requires the court only to make a decision if it is in the best interestsof the child. To determine what is in the best interestsof the child, theCourt must consider both the primary and additional considerations set out in s60CC, even if the evidence is unopposed and the matter is undefended. Inthis particular case, I am satisfied that there is benefit to the child inhaving the meaningful relationship he already has withhis mother, but I haveabsolutely no understanding of what his relationship is like with his father. The absence and silence ofthe father makes it clear that he has very littleinterest in telling me. Thereis no suggestion in this case that there is any need to protect the child fromany physical or psychological harm by being subjectedto or exposed to abuse,neglect or family violence. Ido not have any understanding of what the childs views are but I imaginethat the mothers new husband has, indeed,fulfilled the role that thefather would otherwise be fulfilling. No doubt, the child would be very happyto travel to Canada withhis mother. There is a very clear and unequivocalrelationship between the child and his mother but, again, I have no idea whathis relationship is like with his father. Tothe extent that the legislation

requires the Court to take into account how aparent has failed to take an opportunity to participatein major long-termissues, the evidence shows that the father has failed to participate indecisions, one of the most important ofwhich, is the international travelquestion. As I earlier described his time with the child since the motherreturned back to Australiahas been, at best, spasmodic. I can draw aninference from that that he has very little interest in his own child. Anotherexample where the Court is required to consider the best interests principleslies in s 60CC(3)(ca) which requires the court to consider the extent to whicheach of the childs parents has fulfilled, or failed to fulfil, theirobligations to maintain the child. This is, indeed, the child support issue. Whilst the husband might say that he paid $8500, myunderstanding of theevidence is that he did that begrudgingly and only by way of obtaining his exitfrom Australia. Iam also required to take into account the likely effect of any changes in thechilds circumstances, particularly in relationto separation from eitherof his parents. In this particular case, there does not seem to be any reasonwhy he is troubled aboutbeing absent from his father. As I earlier said, themove to Canada may very well give him an opportunity to be closer to his fatherif his father is interested. Thereare no other questions in relation to practical difficulties and expenses ofspending time with the father, particularly ashe will now be closer to thechild. All of the evidence points to the fact that the mother is fulfilling therole of the carer ofthe child. I cannot say the same for the father providingfor the emotional as well as the intellectual needs of the child. Oneof the significant things in s 60CC which the Court is required to consider isthe attitude to the child and the responsibilities of parenthood demonstrated byeachof the childs parents. I do not need to make any remarks about themothers position, but I can only ponder as to whythe father has adoptedthe position he has not only in relation to these proceedings, but inrelation to the period subsequentto February 2010. Thereare no family violence considerations here of which I am aware. Thefinal matter relates really to the question of whether it would be preferable tomake an order that would least likely lead tofurther proceedings. The fatherhas had his opportunity to have a say. The lawyers for the mother seem to haveexhausted all avenuesto encourage him to participate. On that basis, it seemsto me that it is preferable to make an order that brings this matter toanend. Section61DA requires a court, when making a parenting order, to apply

a presumptionthat it is in a childs best interest for both parentsto have equalshared parental responsibility. In this case, the wife seeks sole parentalresponsibility which, indeed, she has beenfulfilling since February 2010. Section 61DA(4) provides discretionary rebuttal of that presumption if the Courtis satisfied that it is not in the childs best interestsfor thepresumption to be applied. The presumption ought to be rebutted here, havingregard to the position that the father hasadopted, not just in relation to theproceedings, but also in relation to the child. On that basis, I am satisfiedthat it wouldbe in the best interests of the child that the mother have soleparental responsibility and otherwise for the orders to be made interms of theparagraphs of the minute that has been handed to me today. Icertify that the preceding thirty two (32) paragraphs are a true copy of thereasons for judgment of the Honourable Justice Cronindelivered on 29 August2014. Associate: Date: 21 October 2014 AustLII:Copyright Policy|Disclaimers|Privacy Policy|Feedback URL: http://www.austlii.edu.au/au/cases/cth/FamCA/2014/896.html