

FAMILY LAW CHILDREN Final Undefended hearing With whom a child spends time Where interim orders provided for the child to have supervised time with the father Where the mother has not participated in these proceedings since the making of the interim orders nor has she responded to attempts to contact her Where the mother has not complied with orders and has not provided the child for time with the father Where the trial was heard on an undefended basis Where final parenting orders are made on an undefended basis Family Law Act 1975 (Cth) APPLICANT: Mr Buckley RESPONDENT: Ms Buckley INDEPENDENT CHILDRENS LAWYER: Mr Grainger, Solicitor FILENUMBER: BRC 3227 of 2011 DATE DELIVERED: 15 October 2014 PLACE DELIVERED: Brisbane PLACE HEARD: Brisbane JUDGMENT OF: Kent J HEARING DATE: 15 October 2014 REPRESENTATION SOLICITOR FOR THE APPLICANT: Ms Wickham, Solicitor, JMW Legal COUNSEL FOR THE RESPONDENT: No appearance SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Mr Grainger, Solicitor, Legal Aid Queensland ORDERS IT IS ORDERED THAT: The child, B born ... July 2005, live with the Mother. The Father, the Mother and the paternal grandparents Mr J Buckley and Ms M Buckley, shall have shared parental responsibility for the major long term issues in respect of the child. The Father spend time with the child each alternate Sunday for a period of five (5) hours commencing at 10.30 am with changeover to occur at the commencement of time the Father spends with the child at the C Town Contact Centre, and at the cessation of the Father spending time with the child at the Suburb P Contact Centre with such time to be in the presence of the paternal grandparents and/or paternal family. The Father and Mother will attend any intake interview and complete all necessary paperwork as required by each Contact Centre. 5. The cost of changeover at each Contact Centre be paid by the Father. The Father, in the presence of the paternal grandparents and/or paternal family be at liberty to be involved with the child's schooling (including her schooling via Brisbane Distance Education) and with her extracurricular activities with these Orders to act as the authority for the child's education providers, extracurricular activity providers and treating doctors to the effect that each party be able to contact same and be advised of the child's treatment and/or progress and obtain reports, school photographs, newsletters and the like after the payment of any necessary fee. Pursuant to s

68B(1) of the Family Law Act 1975 (Cth) for the personal protection of the Father and his parents, an injunction hereby issue such that the Mother, her servants and/or agents be restrained from having any contact with the Father and/or his parents by any means including in person, by telephone, in writing or by electronic communication at all times. Pursuant to s 68B(1) of the Family Law Act 1975 (Cth) for the personal protection of the Father and his parents, an injunction hereby issue such that the Mother, her servants and/or agents be restrained from entering or remaining in any place of residence or employment of the Father and/or his parents. All copies of statutory declarations signed by the Father dated 27 November 2010 and 13 December 2010 held in the possession of the Mother, her servants and/or agents and her legal representatives (current and former), be returned to the Father's solicitor for destruction within seven (7) days of service of this Order. All outstanding Applications be dismissed and removed from the pending cases list. 11. The Independent Children's Lawyer be discharged. Pursuant to s 62B and s 65DA(2) of the Family Law Act 1975 (Cth), 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 to adjust to and comply with an order, are set out in the document entitled Parenting orders obligations, consequences and who can help, a copy of which is annexed to these Orders. IT IS NOTED that publication of this judgment by this Court under the pseudonym Buckley & Buckley (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 BRISBANE FILE NUMBER: BRC 3227 of 2011 Mr Buckley Applicant And Ms Buckley Respondent EX TEMPORE REASONS FOR JUDGMENT These proceedings under Part VII of the Family Law Act 1975 (Cth) (the Act) concern the child B (the child), born in July 2005, who is now nine years of age. On 14 April 2011, the applicant, Mr Buckley, whom I will refer to as the father, commenced proceedings by way of his Initiating Application filed in the then Federal Magistrates Court which Application was later amended on 16 November 2012. The respondent, Ms Buckley, whom I shall refer to as the mother, filed a Response to the Initiating Application on 21 July 2011, and her Response was subsequently amended and re-filed on 12 November 2012. Throughout the proceedings, the interests of the child have been independently represented by an

Independent Children's Lawyer (the ICL) appointed pursuant to s 68L of the Act. The parenting proceedings proceeded to a final trial before Bell J on 30 May 2013 for several days until 4 June 2013. In the result, Bell J pronounced interim parenting orders and delivered Reasons for Judgment with respect to those orders on 21 June 2013. The central issues for trial were allegations that the child was at an unacceptable risk of harm in the unsupervised care or time of the father. There were also issues surrounding the father's mental capacity and his intellectual disability, which his Honour addressed in some detail in his Reasons for Judgment. It is also clear from those Reasons that issues concerning potential parental alienation of the child by the mother and the maternal grandmother in particular, were dealt with by his Honour. Whilst I will not detail in any substantive way the Reasons delivered by Bell J, those reasons should be read with these Reasons for a full understanding of this matter. In summary, Bell J was not satisfied that the father presented any unacceptable risk of abuse to the child. His Honour's concerns about the father's parenting capacity appeared to be limited to the diminishment of that capacity by reference to the father's intellectual disabilities. It was on that basis that his Honour made interim orders for there to be graduated and increasing time between the father and the child with the assistance to the father of supervision of the paternal grandparents. I emphasise that the orders for supervision by the paternal grandparents were to address any issues concerning the father's capacity to parent by reason of his intellectual disability and were not referable to any potential unacceptable risk of harm, which his Honour rejected as being the case. His Honour also made orders which contemplated the matter returning to Court for final determination after some certain processes set out in those orders were followed. Those processes included the obtaining of an updated family report after some months had elapsed from the time of the orders. It is clear that, in the result, the mother was non-compliant with the processes contemplated by his Honour's orders to facilitate the further determination of the matter. For example, that non-compliance included the mother not on any single occasion delivering the child for changeover to have time with the father as required by those orders. It would seem that, in the result, the father has not seen the child since some time prior to the trial before Bell J in June 2013. Subsequently, a number of orders have been made. On 9 July 2013, the mother filed a Notice

of Appeal against Bell J's orders, and that appeal was heard by the Full Court on 17 September 2013. However, it seems that the parties had entered into a parenting agreement which appears to have rendered the appeal nugatory on the basis that such a parenting agreement would supersede parenting orders. Strickland J delivered ex tempore Reasons on behalf of the Full Court with Murphy and Treen JJ concurring and made orders that the mother's Amended Notice of Appeal be dismissed and that she pay the father's costs of and incidental to the appeal. On 26 July 2013, the father filed an Application for Contravention of the June 2013 parenting orders. That Application came before Bell J on a duty hearing on 26 November 2013. It seems that the 26 November 2013 is the last occasion that the mother, or a representative on her behalf, has attended proceedings or Court events in this Court. On that occasion, Bell J made orders inter alia that the father's Application for Contravention be adjourned for further hearing before his Honour on 19 December 2013. There is also a declaration within those orders stating that the alleged parenting agreement dated 17 August 2013 is not in accordance with s 64D of the Act. As just noted, it seems that, following the hearing on 26 November 2013, the mother has not actively participated in any way in the proceedings in this Court, nor has she responded to attempts to contact her. On 10 December 2013, the mother's then solicitors filed a Notice of Ceasing to Act, at which time the mother became self-representing in the proceedings, but she has not filed any further documents in the proceedings since then. The mother has not, subsequent to the filing of the Notice of Ceasing to Act, attended any Court hearings either in person or by telephone, nor has she caused any representative to appear on her behalf. At the further hearing of the father's Application for Contravention on 19 December 2013, the mother did not appear, and Bell J made orders in her absence that the parents be restrained from removing the child from Australia; that the child's name be placed on the Airport Watch List and that the parents and the paternal grandparents have shared parental responsibility for the child. Further, on 20 December 2013, Bell J adjourned the father's Application for Contravention to 16 January 2014 and made information orders directed to the Department of Human Services, the Department of Immigration and Border Protection and the Australia Federal Police in an effort for the mother to be located. I note that the Court has received monthly correspondence from the aforementioned government departments

indicating that their records do not hold any material in relation to the mother or the child, nor any information in relation to the specified address where the mother used to reside. I am informed this morning that the mother continues to reside, it seems, at the Suburb Y address stated to be her address historically, but that she has removed the child from formal school attendance and, according to education department records, is now attending to home schooling of the child. On 16 January 2014, Bell J ordered that the father's Application for Contravention be adjourned to the duty list on 24 March 2014, and his Honour also issued injunctions pursuant to s 68B(1) of the Act in favour of the father and the paternal family preventing the mother from contacting the father or the paternal family by any means and precluding her from entering any place of residence or employment of the father or his parents or from contacting the father's employers by any means. On 24 March 2014, these proceedings came before me for a duty hearing. The mother did not appear on that occasion, and the father and the ICL then sought and I granted orders to the effect that enabled them to effect substituted service upon the mother of relevant material and relevant applications made in the then recent past, and also provided for service upon the mother on a substituted basis of the orders I made on 24 March 2014. Those orders provided for the father and the ICL to proceed to have further final parenting orders heard and determined on an undefended basis, given the mother's apparent unwillingness to cooperate further in the proceedings. I also ordered that the proceedings be adjourned for final hearing before Bell J, if possible, on 4 July 2014. In the result, due to Bell J's ill health, that could not occur. Pursuant to the orders of 24 March 2014, the father's solicitors effected service upon the mother by sending a letter to the mother's last known address, and, it seems, also to the maternal grandmother, which set out the date and time for the adjourned final hearing on 4 July 2014 and incorporated copies of my orders and Reasons for Judgment delivered on 24 March 2014 and the final orders that were sought by the father. On 6 June 2014, the father's solicitor filed an affidavit setting out the steps she had taken to effect service upon the mother. At paragraph 5 of that affidavit, Ms Wickman deposes that, as at the date of signing that affidavit, neither of the letters sent to the mother or the maternal grandmother had been returned to sender, nor had she received any response. Due to Bell J's continuing ill health, the father's Application for final parenting orders

and Application for Contravention were re-listed for case management before me on today's date. For the record, the Court sent correspondence to all parties, including the mother, specifying that the matter has been listed for hearing today, and I record that the Court has not received any response from the mother, nor has any correspondence from the Court to her been returned to sender via the postal service. Exhibit 1 in the proceedings is a letter dated 10 April 2014 sent by the father's solicitor to the mother at her last known address setting out the orders that would be sought. The ICL does not oppose the making of any of those orders, albeit that the ICL has no view one way or the other on the order identified in paragraph 8 of that letter, being an order for the destruction of certain statutory declarations, which I will refer to again shortly. The Father's solicitor confirmed that the father does not wish to pursue his Application for Contravention and consents to that Application being dismissed to achieve finality. The rules of procedural fairness and natural justice need to be considered before determining any matter on an undefended basis. Within the rule of procedural fairness lies the indispensable requirement of the Courts system of justice that a party affected by a decision have the opportunity to be heard. As highlighted by Kirby J in *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172, where a person's interest may be adversely affected by a court's decision, that person must be afforded an opportunity to place before the court material and information and submissions before the decision is made. However, as was emphasised by Kirby J, it is the opportunity to be heard which is essential to procedural fairness, not that the court must receive evidence or submissions on behalf of that party before orders are made; that is, the principle does not require the decision-maker to actually hear from the party. As Kirby J observed at paragraph 38 of *Allesch v Maunz*: ...Sometimes, through stubbornness, confusion, misunderstanding, fear or other emotions, a party may not take advantage of the opportunity to be heard, although, such opportunity is provided. Affording the opportunity is all that the law and principle require. As already noted, the mother has filed no material in these proceedings since her legal representative filed a Notice of Ceasing to Act on 10 December 2013. At all material times, the mother has been well aware that the parenting proceedings had to come to a final conclusion. As observed, the mother has not attended any Court events, when it was self-evident that the father, and indeed, the ICL would be seeking final

parenting orders to be made. I am satisfied that the mother has had the opportunity to be heard within the principles of procedural fairness and natural justice I have referred to and has chosen not to participate in the proceedings. I am satisfied it is in the interests of the child, the subject of these proceedings, that there be finality to them. Part VII of the Act provides the statutory framework in which the Court exercises its powers to make parenting orders. Most of the amendments to Part VII which took effect in June 2012 do not apply to these proceedings given that they were commenced prior to the date of those amendments. Section 60(B) of the Act sets out the objects of Part VII including to ensure the best interests of children are met and details how those objectives are achieved, and the principles which underlie those objects. Relevantly to this case, one of the principal objects of Part VII is to ensure 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. Further, to protect children from physical or psychological harm, from being subjected to or exposed to abuse, neglect or family violence. Section 60CA of the Act requires that in deciding whether to make a particular parenting order in relation to a child, the Court must regard the child's best interests as the paramount consideration. Section 60CC of the Act identifies the primary considerations and the additional considerations the Court must consider in determining what is in the child's best interests. That requirement is supplemented by the further requirement for the Court to consider the extent to which each parent has fulfilled or failed to fulfil responsibilities as a parent in the particular respects identified in subsection (4) of s 60CC. Section 65D of the Act provides the source of the Court's power to make a parenting order as defined. That section expressly provides that this power is subject to, inter alia, section 61DA of the Act. Section 61DA(1) requires the Court to 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 presumption does not apply in circumstances of abuse or family violence and 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. The effect of s 65DAA of the Act is that if the Court is making an order providing that a child's parents are to have equal shared parental responsibility, then the Court must

consider whether it is in the best interests of the child and reasonably practicable for the child to spend equal time with each of the parents, and if it is, to consider that order, and if not, the Court must consider an order for substantial and significant time with each of the parents. In this case, the father, by his solicitor, has reached the position that the orders he presses for would see him having only five hours of time each alternate Sunday with that time to be in the presence of the paternal grandparents or paternal family members and with changeovers with respect to that time to occur at a contact centre. There is also an order sought that the father, again, within the presence of his own parents or paternal family members be at liberty to be involved with the child's schooling and extracurricular activities. The father does not pursue by way of final orders the orders for more extended time, including overnight time, as was provided for in the interim orders made by Bell J as referred to. It is clear on the history to which I have referred, and in particular the Reasons for Judgment delivered by Bell J, that in many respects the mother has dismally failed this child with respect to the proper exercise of parental care and responsibility. His Honour Justice Bell determined that there was no unacceptable risk to the child of having time with the father by reason of any alleged sexual abuse and the only limitation upon him, as I have already referred to, was in relation to his intellectual disability. That limitation was met by the involvement of his own parents in spending time with the child. I am satisfied that the orders sought by the father as set out in Exhibit 1 ought to be made in the child's best interests in the circumstances that present. By this, I emphasise that the father seeks the orders sought recognising the reality of the situation that confronts him with respect to the mother's abject failure to comply not only with orders of this Court, but with respect to what would best meet the interests of the child, the subject of these proceedings. It would seem that the father, with the assistance of his parents, has made a practical decision as to the final orders that ought to be made that give him some chance of having some meaningful involvement and participation in the child's life, given the abject failure of the mother, and, I suspect, of her own mother in recognising what is best for this child. With respect to the orders seeking the destruction of statutory declarations, I am satisfied that it would, given the findings made by Bell J with respect to the circumstances in which those statutory declarations were created, namely that they were the

product of some influence over the father given his intellectual disability, that it would not be in the child's best interests for versions or copies of those statutory declarations to be circulated by the mother or her agents to any person. I am therefore satisfied that an order ought to be made pursuant to s 68B(1) by way of mandatory injunction requiring that those copies of statutory declarations be returned as ordered. For these reasons, I make orders in terms of paragraphs 1 to 8 of Exhibit 1. I should note that those orders include an order for equal shared parental responsibility as between the parents and the paternal grandparents. Usually in a case such as this, it would be self-evident that such an order would have little prospect of success, given the lack of relationship between any of the parties concerned as between the father and his parents and the mother on the other hand. However, I make that order in this case in circumstances where it may at least, to some extent, achieve some redress of the mother's capacity to attempt to defeat or preclude the father's relationship with his child and to defeat orders of this Court. For these reasons, I make the orders referred to. I will order that all Applications be removed from the pending cases list and be dismissed. I will formally order that the ICL be discharged. I certify that the preceding thirty-seven (37) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Kent delivered on 15 October 2014. Associate: Date: 15 October 2014 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/876.html>

