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## Parental Responsibility

### “Using it and Losing it”

*Things you need to know*

Author: **Michele J. Brooks**  
Barrister

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Deakin University, Waterfront campus Geelong, Victoria.

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# Parental Responsibility

## “Using it and Losing it” - *Things you need to know*

Michele J. Brooks, Barrister, Victorian Bar  
Geelong Law Association CPD day  
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### A. Introduction

As Parental Responsibility is only defined in general terms in the Family Law Act 1975, one must look to the surrounding provisions in the Act and the case law to gain clearer meaning and context. Despite the generality of the definition, the statutory provisions relation to and surrounding the concept of parental responsibility are quite technical. Many lawyers perhaps do not fully appreciate the level of attention to detail that is required to draft a parental responsibility order in a meaningful and enforceable way. In turn, many lawyers may fail to correctly explain to their clients the significance of such an order being made; or the legislative obligations triggered by the making of such an order; or the different ways in which parental responsibility (and its sub-types) can be allocated to suit the circumstances. For example:

- the difference between:
  - the general common law parental responsibility that all parents have from the birth of a child; and
  - the statutory form of Parental Responsibility allocated under the Family Law Act 1975 by way of Court order;
- the option not to make orders allocating Parental Responsibility after separation;
- the implications of failing to make orders allocating Parental Responsibility under the Act after separation;
- the other statutory obligations and processes that are automatically triggered when a parenting order for Parental Responsibility is made under the Act;
- the options available for re-allocating certain aspects of Parental Responsibility; for example carving it up so that one parent might have authority to make decisions about certain Major Long Term issues affecting a child's welfare, while all other major issues are still to be decided jointly;
- the difference between “Equal Shared Parental Responsibility” and simply “Shared Parental Responsibility”; and
- the necessity to ensure that a Parental Responsibility order is appropriately worded in accordance with the provisions of the Family Law Act 1975, so that the orders do not become problematic to interpret, or to enforce.

## B. Scope

In this paper<sup>1</sup> I will:

- I. **Provide an overview of the Legislative provisions relating to Parental Responsibility under the Family Law Act 1975<sup>2</sup> and explain:**
  1. the meaning of parental responsibility, including the difference between common law and court ordered (statutory) parental responsibility;
  2. the way in which a parenting order can deal with and affect the allocation and exercise of parental responsibility;
  3. the legal obligations arising from having a Parental Responsibility order made in your favour;
  4. the difference between Major Long Term issues and Day to Day care issues; and
  5. the presumption of equal shared parental responsibility and what flows from the making of such an order.
  
- II. **Provide an overview of relevant Case Law to demonstrate how and when:**
  1. a party might be given sole Parental Responsibility and if so how to “use it” AND whether this means the other party “loses” all of their Parental Responsibility rights OR whether that second party’s rights are just curtailed;
  2. a party might be given authority to make decisions about specific aspects of Parental Responsibility (such as Major Long Term Issues that are in dispute between the parties); and
  3. the Court’s approach in some common scenarios where Major Long Term issues or other aspects of Parental Responsibility are in dispute;
  
- III. **Provide examples of wording for the various types of orders for Parental Responsibility; and**
  
- IV. **Answer some Frequently Asked Questions (FAQ’s);**
  
- V. **Share some tips on how Parental Responsibility orders should be drafted.**

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<sup>1</sup> In the course of researching and writing this paper, I was assisted by a paper entitled “Issues under the Umbrella of Parental Responsibility” authored by Emma Swart of the Victorian Bar. This paper was presented by Emma at the 2013 family law conference in Bali, Indonesia (“Emma Swart’s paper”). It is excellent and I commend it to you.

<sup>2</sup> All references to “the legislation” or “the Act” in this paper refer to the “Family Law Act 1975” unless otherwise stated.

## C. Overview of the legislation

### 1. Section 61B – Meaning of Parental Responsibility

The definition of Parental Responsibility can be found in Division 2 – Parental Responsibility, Part VII (Children) of the Family Law Act 1975:

“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.”

As can be seen, Parental Responsibility is only defined very broadly in the Act. It is a concept which covers a bundle of common law and statutory concepts relating to the law affecting relationships between parents and children. The concept of Parental Responsibility subsumes the old concepts of “guardianship” and “custody”. As the Full Court said in the case of *B v B: Family Law Reform Act 1995*<sup>3</sup>

“This definition provides little guidance, relying as it does on the common law and relevant statutes to give it content... 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...Read in conjunction with s 60B(2)(c) the emphasis is on the continuance of responsibility independently of the status of the parental relationship.”

### 2. Section 61C - Default position where there are no Parenting Orders<sup>4</sup> in force

Section 61C of the Act provides that each parent has Parental Responsibility, subject to any court orders to the contrary:

- (1) Each of the parents of a child who is not 18 has parental responsibility for the child.
- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example by the parents becoming separated or by either or both of them marrying or re-marrying.
- (3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

In other words, Parental Responsibility vests in each parent of a child, from the time of the child's birth, right up until the child attains the age of 18 years of age.

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<sup>3</sup> **B and B:** Family Law Reform Act 1995 (1997), FLC ¶92-755, at paragraphs 9.24 to 9.26 inclusive.

<sup>4</sup> As the notes to section 61C of the Act remind us, parties can also make a Parenting Plan under s.63C which deals with the allocation of Parental Responsibility. However as consent orders are by far the most popular method lawyers use for formalising parenting agreements outside of court (and obviously also in Court) this paper will focus on the impact of Court orders (as opposed to Parenting Plans) upon the allocation of Parental Responsibility.

This form of Parental Responsibility exists pursuant to common law and is simply being restated, or codified by s. 61C of the Act. For ease of reference, I will call it “common law Parental Responsibility”.

### 3. **“Common law” Parental Responsibility**

It is important to note however, that pursuant to s.61C(3) of the Act, common law Parental Responsibility is still “subject to” court orders made under statutes other than the Family Law Act 1975 (past or present) which might have had the effect of varying the common law position. For example in State child protection matters, a Guardianship to Secretary Order under section 289 of the *Children, Youth and Families Act 2005* will take precedence over a parent’s common law Parental Responsibility.

Common law Parental Responsibility is not affected by the marital status or otherwise of the parents; it subsists whether they are married, de facto, separated, or remarried etc. The only way Common law Parental Responsibility can be varied is by Court order.<sup>5</sup>

The difficulty for separated parents however is that common law Parental Responsibility is very fluid: it can be exercised solely or jointly by either parent, which in practice means that one parent can make decisions for a child without consulting the other. As Emma Swart explains in her paper<sup>6</sup> common law Parental Responsibility is “joint and several” like liability under a contract. This has the practical consequence of enabling a parent to make any unilateral decision on behalf of a child that he or she wishes, without contravening any provisions under the Family Law Act 1975. Unlike parental responsibility under a parenting order (which is examined below) there is no obligation to consult with the other parent about major long term issues before making a decision. A parent may be criticised later for not doing so, and although it might be contrary to the spirit of the Act and may offend common law rules, technically such a party will not be in contravention of any statutory provisions for failing to consult the other parent.

Where the relationship of two parents has broken down and their communication is poor, this leaves children vulnerable to a situation where there is unilateral decision making by one party. If that party is self-serving, has poor judgement or is motivated by some agenda other than the welfare of the child, such unilateral power can produce results that may not always be in the best interests of the child - and in some cases may be irreversible.

The biggest problem for some parents is when the other parent makes unilateral (and often controversial) decisions about Major Long Term issues affecting a child’s welfare without consulting them. Using their common law legal power and authority, a parent on their own folly may legally do any number of things on behalf of a child without seeking, or necessarily requiring, the consent of the other parent. All they would need to do is overcome the administrative hurdles sometimes involved in convincing a third party to facilitate same. The third party may not know that the parents are separated.

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<sup>5</sup> Or by Parenting Plan pursuant to s.63C – see note 4.

<sup>6</sup> *Supra* – see note 1

For example, where no Court Order is in force (thus only common law Parental Responsibility applies) a parent could unilaterally do any of the following:<sup>7</sup>

- change the child's name;
- arrange a religious or cultural event for the child (such as a circumcision, baptism or arranged marriage);
- change the child's school enrolment;
- move the child to live in a destination which makes it significantly more difficult for the other parent to spend time with the child;
- authorise a travel document to be issued for the child;
- authorise a major medical procedure for the child; or
- authorise medication or alternative treatments for the child (a particularly controversial step if one parent has not been included in the child's assessment and diagnosis for the condition being medicated, or if that parent disputes the diagnosis).

Of course, sometimes parents acting unilaterally might be frustrated by practical obstacles or safeguards that third parties put in place (particularly statutory or government authorities such as the passports office of the Registry of Births Deaths and marriages requiring both parents to sign for passports or change of name) but one cannot always rely upon third parties to "ask the right questions" or have the right procedures in place to check that a parent acting unilaterally has consulted the other parent.

So in every case where there is not yet a court order specifying how Parental Responsibility is to be allocated and therefore exercised, there is an obligation upon us as family lawyers to alert our clients to the risk another party may act unilaterally in making decisions about major long term issues affecting their child.

#### **4. Section 61D – Parental Responsibility NOT displaced other than by express Order**

Section 61D highlights the fact that the making of a parenting Order is NOT what displaces common law parental responsibility. Common law parental responsibility will continue to be joint and several until such time as the Court makes a specific parenting order about Parental Responsibility.

In other words, a parenting order only confers statutory parental responsibility on a parent or other person if the wording of the order specifically "confers on the person duties, powers, responsibilities or authority in relation to child"<sup>8</sup> So if a person does not already have parental responsibility, making a parenting order in their favour won't give it to them unless the wording of the order specifically provides for it.

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<sup>7</sup> A few of these examples are drawn from the paper referred to in note 1

<sup>8</sup> See section 61D(1) of the Act.

Conversely s. 61D(2) provides that if a parent already has common law parental responsibility, a parenting order of itself, does not detract from that common law responsibility they already have, save as specifically provided for in that order.

In other words, both statutory and common law parental responsibility may be vested in a person simultaneously and operate side by side.

## 5. **Section 64B – Types of Parenting Orders one can make re: Parental Responsibility**

So how can common law parental responsibility be altered? And how can persons with no pre-existing parental responsibility (for example a grandparent) be granted parental responsibility?

The answer is by Court order. Section 64B of the Act provides that a Parenting Order may deal with one or more of the following:

- S.64B(2)
- (c) the allocation of parental responsibility for a child;
  - (d) if 2 or more persons are to share parental responsibility, the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility.  
.....
  - (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

The person referred to in this subsection may be, or the person referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

- S.64B(3)
- .....  
Without limiting paragraph 2(c), the order may deal with the allocation of responsibility for making decisions about major long-terms issues in the relation to the child.

## 6. **Difference between “common law” & “equal shared” parental responsibility**

The Full Court of the Family Court considered this issue in the decision of Goode & Goode<sup>9</sup>. The Full Court said at paragraph 39:

“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 s65DAC. 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.

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<sup>9</sup> (2006) 93-286; [2006] FamCA 1346

The obligation to make joint decisions about Major Long Term issues affecting the care and welfare of children is discussed further below.

## **7. Legal obligations arising from orders for shared parental responsibility**

### **7.1 Section 65DAC - Major Long Term issues - obligation to consult**

Section 65DAC provides that where an order is made sharing parental responsibility between two or more people and the exercise of that responsibility involves making major long-term decisions about the child, each of them is required to consult the other about the decisions and make a genuine effort to come to a joint decision.

It is the sharing of Parental Responsibility which triggers the obligation to consult. I reiterate that even though there is a presumption of equal shared Parental Responsibility (discussed below) the Parental Responsibility does not have NOT have to be equally shared for this obligation to arise.

Section 65DAC reads as follows:

#### **65DAC Effect of parenting order that provides for shared parental responsibility**

- (1) This section applies if, under a parenting order:
  - (a) 2 or more persons are to share parental responsibility for a child; and
  - (b) the exercise of that parental responsibility involves making a decision about a major long-term issue in relation to the child.
- (2) The order is taken to require the decision to be made jointly by those persons.

**Note:** Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).
- (3) The order is taken to require each of those persons:
  - (a) to consult the other person in relation to the decision to be made about that issue; and
  - (b) to make a genuine effort to come to a joint decision about that issue.
- (4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

In the case of *Pavli & Beffa*<sup>10</sup>, Justice Watts set out the three main elements of the obligations triggered by a shared Parental Responsibility order very clearly:

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<sup>10</sup> [2013] FamCA 144, at paragraph 15 and following.

15. As can be seen, s 65DAC FLA provides that any “shared parental responsibility” order about major long term issues creates three statutory requirements:
  - 15.1. Consultation (s 65DAC(3)(a) FLA);
  - 15.2. Genuine effort to come to a joint decision (s 65DAC(3)(b) FLA);
  - 15.3. Decisions to be made jointly (s 65DAC(2) FLA).
16. The solution to any ultimate impasse between parties who share parental responsibility is for the parties to seek an order about a particular major long-term issue from a court.

So in summary:

- it is always important to advise clients that if they cannot comply with these obligation they need to apply to the court, rather than act unilaterally; and
- third parties are not responsible for ‘checking’ that parties have complied with their obligations to consult each other about major long term issues.

## 7.2 section 4 – Definition of Major Long Term issues

So, now let us look at how the Act defines Major Long Term issues - section 4 of the Act:

***“Major Long-Term Issues”***, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

- (a) the child's education (both current and future); and
- (b) the child's religious and cultural upbringing; and
- (c) the child's health; and
- (d) the child's name; and
- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a ***major long-term issue*** in relation to the child. However, the decision will involve a ***major long-term issue*** if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent.

It should be reiterated that the definition of “major long term issues” is NOT limited to those matters listed. But the list in section 4 does cover the five issues most commonly encountered in practice.

### 7.3 section 65DAE - Day to day issues – No obligation to consult

s.65DAE of the Act provides that there is no obligation on parties with parental responsibility conferred by a court order to consult on issues that are not major long-term issues:

- (1) If a child is spending time with a person at a particular time under a parenting order, the order is taken not to require the person to consult a person who:
  - (a) has parental responsibility for the child; or
  - (b) shares parental responsibility for the child with another person;

about decisions that are made in relation to the child during that time on issues that are not major-long term issues.

Note: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long-term issues.

- (2) Subsection (1) applies subject to any provision to the contrary made by a parenting order.

- “Day to Day Issues” are not defined in the Act.
- Major Long Term issues are not defined exhaustively.
- There is plenty of scope for some overlap between the two depending on the situation and indeed the court recognises this elasticity.

The Note in s.65DAE above provides some kind of indication of what a Day to Day issue is by default, in that it says what a child “eats or wears” is “usually not” a major long term issue. However that does not rule out the possibility of a Day to Day issue, such as what a child eats, becoming a Major issue. For example where the child has a restricted diet for reasons of health or religion, this may place the issue of nutrition into the category of Major Long Term issue.

As there is no need to consult on Day to Day issues, there is usually no need to allocate parental responsibility for Day to Day issues in an order – it just falls to the person with physical care.

But if one person is granted sole parental responsibility without specifying that this sole responsibility is limited to Major Long Term issues, the other parent ought to be very careful to ensure that there is an order in their favour giving them responsibility for decisions about Day to Day issues affecting their child whilst the child is in their care - otherwise that party will be hamstrung by the lack of authority to decide what the child eats and wears!

## 8. Section 61DA - Presumption of equal shared parental responsibility

The Court must apply a presumption that it is in the best interests of a child for parents to have equal shared parental responsibility.

Section 61DA provides as follows:

- (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).

As can be seen below, the presumption may be rebutted on certain grounds. This issue was explored at length in the case of *Goode & Goode*<sup>11</sup>. The rest of s.61DA reads as follows:

- (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.

In summary, the presumption of equal shared parental responsibility can be rebutted on the following grounds:

- Child abuse
- Family violence
- Interim proceedings - if not appropriate in the circumstances
- Evidence that equal shared parental responsibility not in child's best interests

In a speech<sup>12</sup> delivered by the Honourable John Faulks DCJ, entitled "In the Best Interests of the Children" delivered in April 2008, His Honour said:

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<sup>11</sup> Supra – at note 9

<sup>12</sup> "A PERSPECTIVE OF THE 2006 AMENDMENTS TO THE FAMILY LAW ACT Shared Parental Responsibility in Australian Family Law and the Impact on Children" Seminar Adelaide, South Australia 13 – 15 April 2008

“The presumption of equal shared parental responsibility in section 61DA should be considered in the light of the following:

- i) It does not apply if there are reasonable grounds to believe that a parent of a child, or a person who lives with a parent of a child, has engaged in family violence or child abuse.
- ii) It can be rebutted by evidence that it is not in the child’s best interests for the presumption to apply.
- iii) It does not relate to the time that children will spend with a parent.
- iv) It does not mandate how parental responsibility is to be shared. That is, parents are not necessarily required to live in the same area. Parents will not necessarily be required to speak to each other, to be in the presence of each other, or to abandon protection orders or domestic violence orders. It will not force a person to come into physical contact with the other.
- v) Undoubtedly it is hard for parents to make decisions jointly if they are unable to communicate in some form. However, if reasonable communication is not possible, then it is unlikely that the presumption will be applied as it will either be a case involving allegations of violence or it will not be in the best interests of children.”

## D. Overview of the case law

### 1. Hybrid orders – mix of Sole & Shared Parental Responsibility

The relevant provisions of the Family Law Act 1975 allow a lot of flexibility for the Court to tailor parental responsibility orders to fit the situation as might be appropriate, which means there are potentially limitless combinations of orders which the court can make about parental responsibility.

For example the court can make an order which simultaneously:

- Gives both parents equal shared parental responsibility on certain major long term issues; and
- Gives one parent sole parental responsibility on a specified major long term issue; and
- Leaves other aspects of parental responsibility “at large” meaning that the default or common law position will apply in those respects – ie. parties will be at liberty to make decisions jointly or severally (unilaterally) on matters of parental responsibility about which the order is silent.

For example, in the Family Court case **Geeves & Geeves**<sup>13</sup>, the father sought sole parental responsibility of a 9 year old child, plus orders that the child live with him. This was in circumstances where the Mother did not participate in the proceedings and the father had gone to some lengths to bring the proceedings to her attention. The context was that both the child and the father had made allegations that the mother had subjected the child to violence (although because of the Mother's absence, those allegations were untested).

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<sup>13</sup> [2013] FamCA 422

Ultimately, Benjamin J ordered that the father have parental responsibility in respect of certain specified major long term issues, rather than just a blanket order for sole parental responsibility. Further, the order specifically placed a restriction on aspects of sole parental responsibility that the father was not permitted to exercise unilaterally. The wording of the order and the reasoning was as follows:

1. The father have parental responsibility in relation to the long term issues including:-
  - (a) the child's education (both current and future);
  - (b) the child's religious and cultural upbringing; and
  - (c) the child's health;on condition that:-
  - a) the father will endeavour to contact the mother in writing and provide his views about any such issue;
  - b) the father shall endeavour to consult with the mother with regard to any such issue;
  - c) the father and mother will make a genuine effort to come to a joint decision about such issue;
  - d) if no agreement is reached between the parties then, within fourteen (14) days, the father shall make the final decision and advise the mother, in writing, of the decision about such issue; and
  - e) this limitation on time shall not apply if there is a question of emergency in which case the father has the sole responsibility.

This order for sole parental responsibility does **NOT** give the father sole responsibility as to questions of major long term issues about the child's name and/or changes to the child's living arrangements to outside the Commonwealth of Australia, without the consent of both parents or order of a court exercising jurisdiction under the *Family Law Act*.

It is interesting to note the reasoning behind the making of these orders. Benjamin J stated:<sup>14</sup>

Having considered all of the material and the father's evidence that the mother has not engaged with the child since separation, it seems to me appropriate that there be an order that the father have sole parental responsibility. In doing so I am alert to the issues raised by Watts J in *Pavli & Beffa* [2013] FamCA 144 as to the breadth of parental responsibilities and the need to constrain those bearing in mind the ability to relocate with the child, change the child's name and so on. As such, I have placed some constraints on the orders in regards to parental responsibility.

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<sup>14</sup> *Ibid*, at paragraphs 35-36

## 2. Sole Parental Responsibility

### 2.1 *Sole parental responsibility for major long term issues only*

In some cases it is appropriate for the Court to order that one parent have sole responsibility in relation to decisions for all major long term issues, in the best interests of the child.

In the case of **Penski & Kocher**<sup>15</sup> Cronin J ordered that the Mother have sole parental responsibility for all major long term issues pertaining to the parties' 5 year old child, on the basis that:

- Although the evidence of family violence was untested, there were sufficient reasons in terms of the parties' acrimony and lack of ability to cooperate for the court to rebut the presumption of equal shared parental responsibility on the basis that it would be in the best interests of the child to do so; and
- The court was of the view that if one of the parties was given sole parental responsibility for only certain major issues affecting the child and the other party was given sole parental responsibility for certain other major issues, the child would be caught in the crossfire and his welfare would be at risk.

At paragraph 71 of the judgment delivered in the Family Court on 17 April 2013 in Melbourne, Cronin J made the following very compelling observations (*my emphasis added*):

71. Children have the rights that are set out in s 60B to which I have referred above. Those are the responsibilities that parents have for their children. Here, there is little prospect that those responsibilities could be fulfilled together in any joint sense. Similarly, ***even if I gave the parties an opportunity to comment on each other's proposed decisions, conflict would be likely to follow. In circumstances where one parent had the responsibility for one thing and the other for another major long term responsibility, where they were parenting in their own way oblivious to the views of the other, the child must be at risk.*** If major long term health issues includes psychological assistance, a school welfare counsellor might be conflicted if the wife had the health responsibility and the husband the education responsibility. Similarly, if the wife is responsible for the major daily activities of the child, having the husband make long term decisions in relation to education, could be problematic if he chose a school that was difficult for the wife to attend or at which she did not have a reasonable relationship with other parents. Conversely, if she was responsible for the education but the husband health, he could create problems that would ultimately place the wife in a position where if she disagreed with the decision, she would still have to produce the child for whatever medical examination or treatment the husband dictated.
72. As such, ***until such time as the parents can have a modicum of respect for each other and make decisions in a consultative way, the person who has the major responsibility for the daily activities including giving the child a home base, should be the person who has the responsibilities for making those long term decisions.*** In this case, that is clearly the wife.

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<sup>15</sup> [2013] FamCA 255

## 2.2 Sole parental responsibility for ALL issues (major long term and day to day)

### ➤ On grounds of risk to the child and high conflict between parties:

In a recent Family Court case coming out of Newcastle, namely **Dawhurst & Tinto**<sup>16</sup>, each of the parents were seeking equal shared parental responsibility of a 5 year old child however Cleary J found that the presumption was rebutted by reason of:

- risks to the child in the care of the Mother (“best interests of the child”); and
- the high likelihood of conflict arising if the parties endeavoured to discuss major long terms issues about the child, let alone come jointly to a decision.

Cleary J said at paragraph 95 of the Judgment (*my emphasis added*):

95. These are competing applications for parenting orders by each of the child's parents. Each of them has parental responsibility for the child, subject to orders of the Court. 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 a child's parents to have equal shared parental responsibility for the child. However I consider that the ***presumption is rebutted by the evidence of risk from the mother and her household, and of pathology in the relationship between the parents such that it would not be in the best interests of the child for her parents to have equal shared parental responsibility.***

96. ***Just raising the long term issues for consideration is highly likely to lead to conflicts and in the case of the mother, an emotional reaction of anger. Accordingly, one parent should have sole parental responsibility*** and in this matter, although the father is untested as the sole parent, it should be him, for reasons I will come to shortly.

The orders made in that case were quite straightforward (although I note that the Court perhaps erroneously uses the terminology “long term issues” rather than “major long term issues”, which is a term defined in the Act):

1. The father is to have sole parental responsibility for the child x born xx 2007 (“the child”).
2. The father is to keep the mother advised in writing of decisions he makes in relation to long term issues such as enrolment at school, religious instruction and medical treatment for serious ill health or injury of the child.
3. The child is to live with the father.

The fact that the order grants the father a blanket right of “sole parental responsibility” means that this order “covers the field” and effectively deprives the Mother of any decision making power in relation to the child at all. There is no distinction made between “day to day” and “major long term” issues – the father just has unfettered responsibility for the whole lot. The only proviso is that the father is to keep the Mother advised about decisions he makes in relation to long term issues.

Interestingly, this is not a case where the child did not have a meaningful relationship with both parents, on the contrary – the court recognised that the child did have a meaningful connection with the Mother. But that was not the full picture; the Mother had a very violent ex-partner and some serious issues of her own, making it necessary for the safety of the

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<sup>16</sup> [2013] FamCA 640

child to have supervised time only with the mother pending her compliance with numerous requirements in relation to treatment and therapy.

I suggest that there are many cases (maybe including this one?) where the Court makes or approves orders which erroneously give one parent “sole parental responsibility” thereby giving the other parent “no parental responsibility” – as an unintended consequence. In that regard, see my comments under the heading “*Beware the blanket order for sole parental responsibility*” below.

➤ *on grounds of extreme violence:*

In ***Bayer & Imhoff*** [2010] FamCA 532 (2 July 2010) Austin J granted the mother unfettered sole parental responsibility and made an order that the children were to spend no time with the father. This was in the context that he had been severely violent towards the mother and the children had witnessed his violence and that the father had also been violent towards the children. The father had been convicted and imprisoned. The Mother and the children moved to an undisclosed location but subsequently the father wanted to resume his relationship with the children, which the Mother wholly (and successfully, with the support of the Independent Children's Lawyer) opposed.

Clearly the presumption of equal shared parental responsibility under s. 61DA was readily rebutted both on grounds of extreme violence (abuse of children and family violence) and in the best interests of the children generally.

➤ *By reason of father's mental health issues and violence and him being a vexatious litigant; plus mature child's wish not to see father:*

See the case of ***Caffell & Falcon***<sup>17</sup> in this regard.

### ***2.3 Sole parental responsibility to Mother on certain conditions and in default, sole parental responsibility to revert to Father***

In the recent Family Court case of ***Fleischer & Fleischer***<sup>18</sup>, Austin J ordered that the Mother (who had alienated the children from the father, or at least aligned them against him) was awarded sole parental responsibility on the strict condition that she facilitate the orders for the children to spend time with the father, with whom the court found the children could benefit from having a meaningful relationship. Regrettably they had not been able to maintain such a relationship previously due to the influence of the Mother.

However the Court characterised both parties unfavourably, as having “*an epic capacity for misrepresentation and disobedience of court orders*”. The Mother alleged severe and sustained family violence, which the father completely denied. One expert opined that the

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<sup>17</sup> [2013] FCCA 1652

<sup>18</sup> 2013\_FamCA\_415

children should live with the Mother and have their relationship with the father severed or severely limited and another expert was of the view that the Mother was fabricating the allegations to undermine the relationship with the father and the children should be immediately placed in the father's care. A third viewpoint was that the children only be permitted to live with the Mother on the condition that she facilitate the children spending time with the father.

Of course in this context, the prospect of the parties complying with their obligations under s.65DAC to consult each other, make a genuine effort to come to a decision and indeed make a joint decision is practically unthinkable. The presumption of equal shared parental responsibility was clearly rebutted as not being in the best interests of the children.

This is a sad but interesting “all or nothing” case where the Court effectively gave the Mother sole parental responsibility and ordered that they live with her on the basis of “one last chance” to facilitate a meaningful relationship between the children and their father, failing which she would lose both residence of the children and parental responsibility.

#### **2.4 Sole parental responsibility with obligation to consult, but right of veto**

In the case of **Luu and Xia**<sup>19</sup> heard in the Federal Magistrates’ Court (as it then was) in Sydney in November 2012, Sexton FM (then) delivered a judgment in January 2013 to the effect that the 4 year old child subject of the proceedings live with the Mother and spend regular time with the father, but that:

- the Mother have sole parental responsibility for the child (*interestingly, this was granted unconditionally with no mention of limiting that to major long term issues even though this is what is implied by the day to day care order following*)<sup>20</sup>;
- the parties are each otherwise responsible for the day to day care, welfare and development of the child whilst in their care<sup>21</sup>; and
- the Mother have an obligation to consult the father and consider his views in relation to major long terms issues (if he responded within a defined time frame) but that ultimately she have the unilateral right to make the decisions about major issues affecting the child and otherwise only have the obligation to keep the father informed.

The terms of the orders of the Court were as follows:

1. The Mother have sole parental responsibility for the child [X] born [in] 2008 (“[X]”).
2. Without derogating from the meaning of sole parental responsibility, in considering a decision about a major long-term issue in relation to [X]:

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<sup>19</sup> [2013] FMCAfam 35

<sup>20</sup> See my comments under the heading ‘Beware – Blanket Orders for Sole Parental Responsibility’ below.

<sup>21</sup> Clearly this “each party have day to day care” order tempers and limits the scope of the sole parental responsibility order which, at least on first reading, appears to give the Mother exclusive right to make all day to day and long terms issues - as the sole parental responsibility order is not worded of itself in a way which appears to limit it only to decisions about major long term issues.

- a. The Mother advise the Father by email transmission (to an electronic address nominated by the Father) of her proposal relating to [X] and her reasons for such proposal;
  - b. If the Father wishes to comment on the Mother's proposal, he shall, within fourteen (14) days after the date on the Mother's email transmission, advise the Mother by email transmission (to the address from which the Mother sent her communication) of his views;
  - c. Upon receipt of any comment or proposal by the Father, the Mother shall give consideration to his views; and
  - d. After the Mother has considered the Father's comments, she shall make a decision and electronically advise the Father of the outcome immediately after making that decision, with her reasons for decision.
  - e. The Mother shall provide the Father with all relevant information arising from the decision, including with respect to [X]'s health care, the names and contact telephone numbers of professionals treating her, and with respect to education, the name and contact details of the educational institution.
  - f. For the purpose of Order (3), if the Father does not electronically respond as provided by paragraph (3)(b), the Mother shall be entitled to presume that the Father does not wish to be involved and she may decide the issue without input from the Father.
3. The Mother shall communicate to the Father by email transmission:
- a. Advice as to hospital, medical, dental or health professional appointments for [X];
  - b. Any advice as to medication being administered to [X], and the Father may attend any appointment with any hospital, medical practitioner, dental health practitioner or other health professional relating to [X].
4. Each party be otherwise responsible for [X]'s day to day care, welfare and development when in that party's care.<sup>22</sup>

A similar style of order was made in the case of **Rittman & Rittman**<sup>23</sup> decided by Barry J in the Family Court sitting at Brisbane, whereby the younger of two children, a twelve year old, suffered from tuberous sclerosis - but there was a dispute between the Mother and father about the severity of the child's condition. The Father contended that the mother overstated the child's medical condition (the Court ultimately preferred his evidence) and the Mother asserted that the father understated the child's condition (and the Court found her credibility lacking and it was also seriously concerned about the lengths to which she went to undermine the father including apparently sending letters to expert witnesses purporting to be from him.

The Mother sought residency and shared parental responsibility, but sole parental responsibility regarding medical decisions. The father sought sole parental responsibility and that the child reside with him. The Court found that the best interests of the child would be served if the child lived with the father and that he had sole parental responsibility for all major long term issues, subject to consulting the Mother and keeping her informed.

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<sup>22</sup> Supra – at note 19

<sup>23</sup> [2011] FamCA 186

The orders in favour of the father were bolstered by an injunctive order restraining the Mother from attending upon the child's health professionals without the father's prior consent save in emergency and a further requiring her to effectively produce a copy of the Court's Judgment and a copy of the sealed orders to any medical professional from whom she sought "emergency treatment", in the event she asserted there was an emergency pertaining to the child whilst in her care.

The wording of this rather unique order was as follows:

1. The Father is to have sole parental responsibility in respect of all major long term issues in respect of the child save that the Father shall, prior to making a decision about any such issue:
  - a. use his best endeavours to advise the Mother in writing of the decision to be made;
  - b. seek the Mother's written response in relation thereto;
  - c. consider with respect to the best interests of the child, any such response, prior to making any decision; and
  - d. advise the Mother in writing as soon as reasonably practicable of his ultimate decision.
2. That each party shall advise the other immediately in writing of any emergency involving the child.
3. That each party shall keep the other advised of all medical practitioners, hospital or allied health providers upon whom the child attends.
4. An injunction is granted restraining the Mother from attending upon any medical practitioners, hospitals or allied health providers with the child (except during a genuine medical emergency) without the express written consent of the Father. In the event the Mother says the child requires emergency treatment at the time of treatment the Mother is to provide to the treating doctor or allied health professional a copy of these Orders and a copy of pages 44 to 69 (inclusive) of the reasons for judgment delivered in final form on 25 February 2011.

### 3. **Beware - Blanket Orders for Sole Parental Responsibility**

In the course of examining a number of otherwise unexceptional judgments in cases where a blanket order is made for sole parental responsibility in favour of one parent, one begins to think that this must be in error: surely the Court must really mean 'sole parental responsibility *in respect of major long term issues*'.

If not, the parent without the 'sole responsibility' has no authority at all over the child as a parent... not even to make day to day decisions whilst in their care! If the child is spending time with that parent, this might be creating a situation which puts the child at risk and/or the parent without any parental responsibility would need to keep asking permission from the parent with sole parental responsibility in respect of making even the most mundane day to day parenting decisions.

Such suspicions have been given voice in the form of some eloquent discussion by Murphy J about this very issue in the Family Court case of **Lansa and Clovelly** <sup>24</sup>

First, I think it is of interest to reproduce here His Honour's succinct summary of the legal principles in relation to parental responsibility (at paragraphs 136 – 145 inclusive) as follows:

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<sup>24</sup> [2010] FamCA 80

## PARENTAL RESPONSIBILITY

### *Principles*

The parents of children each have, by the fact of parenthood alone, parental responsibility for each of those children. (s 61C). That means that each parent has, in respect of each child, “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children” (s 61B). That situation is not affected by any change in the nature of the parent’s relationship, for example by them separating or re-marrying (s 61C(2)).

Parental responsibility can, though, be altered by the making of a parenting order by the court but only to the extent that the order confers duties, rights, responsibilities or authority in relation to the particular child or children the subject of the order. However, a parenting order does not *per se* remove or diminish any aspect of parental responsibility; the order must expressly do so or doing so must be necessary to give effect to the order. (s 61D(1) and (2)).

But, when a court is to make a parenting order, it must apply a presumption that it is in the best interests of the subject children for their parents to have “equal shared parental responsibility” for those children. The latter expression is not defined, but reference to s 61B would seem to render a meaning that all of the duties, powers, responsibilities and authority which, by law, parents have in relation to children are to be shared, and shared equally.

The statutory presumption just referred to is rebuttable in circumstances where the court has reasonable grounds to believe that there exists abuse or family violence as defined (s 61DA(2) or where the court considers that it is in the best interests of the children for the presumption to be rebutted. (s 61DA(4)).

No statutory provision other than s 60CC governs how best interests is to be determined in that context. Section 60CC, it has been noted, is headed “how a court determines what is in a child’s best interests”. It is, then, again called into use in this context.

The ambit of the legislative provisions referred to thus far is narrowed by reference to s 65DAE and the Note to s 65DAC. The latter section makes it clear that sharing parental responsibility (whether equally or not) is not a passive activity; it requires those having shared parental responsibility, or aspects of it, to make joint decisions and to consult and attempt to reach agreement in order to do so. However, the section goes on to provide that consultation is not required unless the decision is about a “major long-term issue” – an expression that is defined.

Section 65DAE and its Note underline the last point by providing that there is no necessity to consult a person who has or shares parental responsibility about decisions that are made in relation to the child during the time that the child is spending with that person, that are not decisions about “major long-term issues”. It is to be noted that the section is made subject to any provision to the contrary in a parenting order. (s 65DAE(2)).

“Major long-term issues” is defined in s 4:

**major long-term issues**, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

- the child’s education (both current and future);
- the child’s religious and cultural upbringing; and
- the child’s health
- the child’s name;
- changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent.

To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a **major long-term issue** in relation to the child. However, the decision will involve a **major long-term issue** if, for example, the relationship with the new partner

involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent.

Thus, if the presumption of equal shared parental responsibility is not rebutted, then, absent specific provision in the parenting orders, the consultation and genuine effort to reach a decision required by s 65DAC applies, but (subject to specific provision in the Orders) only in respect of “major long-term issues”.

Equally, the application of the presumption will mean that decisions during time spent between parent and child that are not about “major long-term issues”, can be made by the parent exercising the time without the necessity for the consultation and joint effort otherwise required in respect of “major long-term issues”. (s 65DAE(1) and (2)).

His Honour then goes on to discuss (at paragraphs 147 to 151 inclusive) the dubious practice of lawyers and the Court inadvertently employing the phrase “**sole parental responsibility**” when what one suspects they really mean is “**sole parental responsibility for major long term issues**”:

A further issue arises by reference to the use of the expression “sole parental responsibility” which is in wide use in orders sought by parties and, indeed, in orders made by this court (and which has been in use for many years, including prior to the passing of the Reform Act which introduced into the Act the sections just referred to). The expression is neither now, nor was then, defined or used in the Act. A question arises as to what might be meant by the expression “sole parental responsibility” in the context of the current legislation.

The definition of “parental responsibility” in s 61B refers to “all of” the powers, duties etc of parents. It is strongly arguable, then, that the expression “sole parental responsibility” means, or is intended to mean, that the specified parent has “all of” the powers, duties etc in relation to the specified children. If so, it seems to me equally strongly arguable that the expression means, or is intended to mean, that the other parent has no parental responsibility – that is none of the duties, powers, responsibilities and authority over their child otherwise conferred by law.

If that is the meaning of the expression, then, in my view, a court should take account of a particular additional consideration (see s 60CC(3)(m)): the exercise of discretion in favour of excluding one parent from the decision making and responsibilities for their children in respect of “major long-term issues” in the manner just outlined - particularly where, as here, there are many years until the children turn 18 – is, it seems to me, a very significant interference with the fundamental rights of a person. There is no doubt that those rights must give way in favour of an outcome which is found to be in the best interests of the children. But, the fact that this is the paramount consideration does not, in my view, mean it is the sole consideration nor that the legitimate fundamental rights of a parent are irrelevant. (cf *AIF v AMS* (1999) 199 CLR 160; *U v U* (2002) 211 CLR 238).

The expression “sole parental responsibility” is frequently used without otherwise distinguishing between “major long-term issues” and decisions made during periods of time with the children. Or, it is used in conjunction with expressions used in now-repealed legislation such as, for example, “long-term care, welfare and development”.

An order that simply provides, without more, for one party to have “sole parental responsibility” is, at least arguably, an order making provision contrary to s 65DAE(2) and, arguably, an order expressly providing for the diminution or “taking away” of parental responsibility within the meaning of s 61D(2).

(my underlining - emphasis added)

So if section 65DAE (1) of the Act says that a person who is spending time with a child under a parenting order is not obliged to consult another person who has parental

responsibility for the child about decisions that are not major long term issues, then an order for sole parental responsibility in favour of the other parent (say) would be a parenting order that makes a provision for parenting responsibility contrary to s 65DAE (1) – thus the parent or person spending time with the child would need to consult the parent with sole parental responsibility about day to day issues as well as major long term issues before making any decisions at all (even day to day ones) for the child.

This is an anomaly and surely an unintended consequence – at least in most cases – of a blanket order for sole parental responsibility.

The moral of the story is that unless you really mean to completely exclude one parent from all aspects of decision making in a child's life – which is a pretty radical thing to do – then DO NOT seek or permit the other party to seek orders for sole parental responsibility without specifying the types of decision (day to day or major long term issues) that power covers.

#### 4. Cases about Specific Major Long Term Issues

##### 4.1 Religious lifestyle as a basis for sole parental responsibility

The Family Court case of **Juni & Juni (No 2)**<sup>25</sup> was a case where a 14 year old child (one of many of the relationship) was brought up in a religious community, but the mother had since left the community and commenced a new De Facto relationship. The subject child was the only child who retained a strong link with the Community where the father lived - and she still strongly held the views of that community. The wife maintained that the community was a cult where a man had the right to physically discipline his wife according to Scripture - and she asserted strenuously (and called many witnesses in support) that the child was at risk from regular violence toward women in the community. The father said the community was benign and the mother was the one living in sin.

There were a whole range of allegations by the mother of unacceptable risk arising from the child continuing to remain in this religious community, including violence, poor level of home schooling, physical and emotional abuse, poor nutrition and lack of health care and the fact that the cult practiced polygamy.

The child was interviewed by the judge, Watts J, in the presence of the Family Consultant. This was a somewhat unusual step but done under controlled circumstances, where the session was recorded and transcribed and the Family Consultant gave evidence about the interview immediately afterward, to the parties. The child also expressed the view that the mother was living in sin and that she wished to live with her father and cease the week about time with her mother. The child believed that “if you are not a true strong Christian, you will go to hell”. She said she “did not want her mother to go to hell”. The court summarised evidence from the child's psychologist inter alia:

“The child said she is hoping to be a mother one day, and that if she returned to the community and married a man who beat her, she would be okay with this because she would rather put up with domestic violence and

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<sup>25</sup> [2010] FamCA 1113

have children than to not marry and not have children". She also said that ... when a 16 year old girl became pregnant to a 13 or 14 year old boy, they were both beaten and then forced to marry."

However after hearing extensive evidence and from a long parade of witnesses, the court found in favour of the father and stated at paragraph 143 and onwards:

I am unable to accept the mother's assertion that either the leader or the Community as a whole have a culture which is physically, psychologically and emotionally abusive....

There is no doubt that the Community teaches, and the child has accepted, what might be described as "traditional values" of the role of men and women. The child for most of her developing life was brought up by the mother and father in the Community, having those roles modelled to her. I accept the family consultant's view that it is inappropriate now for the mother to assert that these values, which are strongly held by the child, are in some way detrimental to her welfare.

I am unable to accept the mother's evidence that there are significant issues in relation to nutrition and health amongst Community members. The child appeared to me to be very well nourished and of average weight for her height and age

Whilst some of the accommodation that the Community lives in may be basic, the child's accommodation in North Queensland seems to be adequate and appropriate for her.

Overall, I am unable to find, as the mother asserted, that there are aspects of the Community's behaviour that would lead me to conclude that the Community is a "destructive cult" from which it is necessary to remove the child, in her best interests.

(my underlining - emphasis added)

The court then set out the following at paragraph 232 – 238 under the heading Equal Shared Parental Responsibility

- Each of the parents seeks an order for sole parental responsibility of the child in their respective favour. The *Family Law Act* provides a presumption of equal shared parental responsibility.
- The mother and father now have totally different lifestyles and beliefs.
- After separation the father sent the mother letters describing her as an adulteress and explaining the duties of a wife. In them he said that she would burn in hell. These letters are annexed to the mother's primary affidavit.
- The mother says there is no possibility of shared parenting. She says that the father is not able to make any decision without the leader's permission.
- The parents currently have no communication with one another and it is unlikely that that situation will change any time in the foreseeable future.
- Section 61EA(4) FLA provides that the presumption of equal shared parental responsibility 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. That evidence exists in this case.
- I conclude that I need to provide that one of the child's parents has sole parental responsibility. The child will be primarily living with the father and consequently I find

that it is in the child's best interests for the child's father to have sole parental responsibility.

Finally, the court proceeded to make orders as follows:

1. Subject to these orders, the father will have sole parental responsibility<sup>26</sup> for Child A born ... August 1996 ("the child").
2. Day to day decisions regarding the child are the responsibility of the parent who has care of the child at that time.
3. The father give notice to the mother in writing or by email of any major decision he intends to make about the child's education or medical care at least 21 days prior to making such decisions, and before making the decision, consider any view expressed by the mother in writing or by email received within 21 days of the notice given by the father to the mother.
4. The child will live with the father.
5. The father will communicate with the mother in writing on any occasion when there is any significant development in relation to the child's health, education, religion and any other long term issues, advising her about those developments.

#### **4.2 Relocation – making spending time with a child more difficult**

In the case of Bryce & Bonig [2010] FamCA 999 (10 November 2010) the Family Court had to make a decision about whether or not to let the mother relocate from Australia to the UK with the teenaged children of the relationship, to be with her new partner who lived in UK. It was a case where there was a history of family violence between the parties and it was alleged the children had suffered harm from exposure to that and that the father would not be the parent most likely to facilitate a relationship between the children and the Mother.

The court ultimately ordered that the Mother be permitted to relocate and the father spend time with the children on school holidays with the Mother to contribute much of the cost. It is ironic therefore that the Court made orders that the Mother have sole parental responsibility (without any reservation of the father's rights to make day to day decisions about the children's welfare when spend time with them) inter alia as follows:

- The mother have sole parental responsibility for the children L born on ... January 1998 and W born on ... June 2000.
- The children live with the mother.
- The mother be permitted to relocate with the children to the United Kingdom.
- The children spend time with the father unless otherwise agreed in writing as follows:...."

It is suggested that on the basis of the way these orders are drafted, the father has been awarded NO parental responsibility, and that the Mother has unfettered parental responsibility on all issues - not just major long term issues.

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<sup>26</sup> Once again, here we see the anomaly of a blanket sole parental responsibility order, however in this case it is tempered by order 2, preserving the Mother's rights to make decisions about the child's day to day care issues when with her.

### 4.3 Special Medical procedures

In the case of **Re: Sean and Russell (Special Medical Procedures)**<sup>27</sup> the Family Court considered the question of how the 2006 amendments to the Family Law Act 1975 affected, if at all, the position in relation to the court's jurisdiction to authorise special medical procedures beyond the then scope of parental guardianship and responsibility. This was in the context of a special medical procedure called a "gonadectomy" (removal of testes) needed by two (unrelated) male children with the same genetic birth defect affecting their sex organs, whose treating doctors via the State medical authority brought the application for permission to do the procedure. The procedure would be akin to sterilisation in circumstances where failure to operate would lead to kidney failure and possibly death; noting that the children would probably be infertile anyway.

The main reason for the application by the medical authorities was that the parents of the children did not have the authority, notwithstanding their common law parental responsibility (as enshrined in s.61C of the Act) to authorise this special procedure, as it **fell outside the normal scope of parental responsibility**.

Murphy J reviewed the current parental responsibility provisions in the Family Law Act 1975 post- **Re Marion (No. 2) (1994)**<sup>28</sup> and stated as follows:

#### ***Legislative Amendment after Marion's Case***

Subsequent to the decision in *Marion's Case*, the Act has been amended significantly by *Family Law Reform Act* (1995) (Cth) and, later, by the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth).

A number of questions arise:

- Do the subsequent legislative amendments and the current Act alter the *requirement* for some medical procedures to be authorised by a court;
- If so, does this court have jurisdiction to grant any such application and does that jurisdiction have any relevant limits; and
- Where is that jurisdiction to be found.

The court then went on to say at paragraphs 58-59: (my underlining - emphasis added)

In my view, "parental responsibility" has the same limits as guardianship discussed in *Marion's Case*. The legislature did not seek to change that position subsequent to the decision in *Marion's Case*.

Accordingly, in my view, the words of the High Court in *Marion's Case* remain the law: "... the decision to sterilise a child [remains] a special case requiring authorisation from a source other than the child's parents" and no provision of the Act gives the Court "the power to enlarge the powers" of those with parental responsibility for children.

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<sup>27</sup> [2010] FamCA 948 (26 October 2010)

<sup>28</sup> FLC ¶92-448

And the Court summarised its findings at paragraph 75 as follows:

In summary, then, in my view the legislation and principle dictate that:

- Parents (or guardians) do not have, as an incident of their parental responsibilities, the power to authorise or give consent on behalf of their non-Gillick competent children to medical procedures or treatment of a type analogous to that in *Marion's Case*<sup>29</sup>;
- For children (or others) who are not “Gillick competent”, it remains the law that court authorisation is required in respect of medical procedures or treatment that can be properly so categorised;
- This court has jurisdiction to hear such an application and the jurisdiction is to be found in s 67ZC;
- The court does not have jurisdiction or power to make *parenting orders* of that type because it cannot make an order in respect of “any aspect of parental responsibility” that has the effect of enlarging parental responsibilities beyond those which parents, by law, have;
- For children, or others who are not “Gillick competent”, medical procedures or treatment not analogous to that in *Marion's Case* – even, it is to be noted, those involving serious and irreversible consequences including sterilisation – can, and in most cases should, be authorised by parents (or guardians) as part of their “parental responsibilities”;
- Nevertheless, this court has jurisdiction (found in Part VII) and power (also found in Part VII) to make “parenting orders” in respect of any such issues, because they deal with “any other aspect of parental responsibility” and do not seek to enlarge powers which those with parental responsibility otherwise have by law;
- The power to make parenting orders of that type includes the power to make orders akin to declarations, including where no inter-parties dispute exists between parents or guardians.

(my underlining - emphasis added)

#### 4.4 General Health Issues

In the case of **Howell & Howell**<sup>30</sup>, Young J made orders as follows:

- THAT the husband and wife have equal shared parental responsibility for the child B born ... August 2003 (“the child”) save that the wife have sole parental responsibility to make all decisions about her health.
- THAT the child live with the wife.
- THAT the child spend time with the husband on each alternate weekend...”

This case involved a dispute around a number of issues including the father's religious beliefs, which included beliefs such that he was unlikely to seek medical care or vaccinate the child. The case was not decided on the basis of the child remaining within or outside the father's religion (both parties having raised the child as a Taoist and strict vegetarian, but the Mother having since left religion) but on the best interests of the child having regard to which of her parents should be the primary caregiver, having regard to their conflicting views about her welfare. However the father's beliefs in relation to health issues were a

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<sup>29</sup> ie. Sterilisation

<sup>30</sup> [2012] FamCA 903

factor taken into account in the court making an order giving the Mother sole parental responsibility on the issue of health.

#### **4.5 Education**

In the case of **Hamill & Hamill**<sup>31</sup> the Court, Faulks DCJ resolved a dispute between the parents about a dispute of “which school” by granting the Mother sole parental responsibility for deciding the school the children would attend, but the parties were otherwise to continue to “share equally” parental responsibility for the children.

#### **4.6 Name change**

In cases of this nature, there is a general theme that a primary carer will not usually be allowed to change the child’s surname where the child is still in regular contact with the other parent from whom the child took his or her name, unless there are other circumstances indicating that it is in the best interests of the child.

In the latter case, the Court will grant sole parental responsibility to one parent, in relation to the name change issue, to enable them to do so. Mere convenience to the resident parent is not a sufficient reason of itself. General factors to be considered in name change cases (eg. from father's name to another name such as step-father or mother’s maiden name) include:<sup>32</sup>

- The short term and long term advantages to the child if their name remains the same;
- The amount of time the father spends with or is likely to spend with the child in future;
- The degree of identification that the child has with their father;
- The degree of identification the child now has with their mother and their step-father;
- The degree of identification which the child will have with any child from the Mother's new relationship or a child that is about to be born to their mother (if the situation involves a half sibling)
- Any likely confusion in the future if their father’s surname is restored; and
- The desire of the father that the original name be retained.

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<sup>31</sup> [2009] FamCA 1324

<sup>32</sup> See *Chapman and Palmer* (1978) FLC 90-510 and *Beach and Stemmler* (1979) FLC 90-692

## **5. Frequently Asked Questions (FAQ'S)**

### **Why would you need an order allocating parental responsibility after separation (as opposed to just have a parenting order that remained silent on the issue)?**

- Because the common law position (as codified in s. 61C) provides for parental responsibility that is joint and several
- Separated parties ought to seek an order for equal shared parental responsibility (at least) if possible as that order triggers the operation of other legislative provisions which require the parties to consult each other (unlike the common law position)

### **What are the legal obligations triggered by an order for shared parental responsibility? S. 65DAC**

- For parties to consult each other
- Make a genuine effort to reach agreement
- To come to a joint agreement

### **Does it have to be EQUAL shared parental responsibility for these obligations to be triggered?**

No – see wording of s.65DAC. Any order for shared parental responsibility (divided up in any way) triggers the obligations to consult and agree.

### **How does one rebut or get around the presumption of equal shared parental responsibility and thus avoid triggering the “equal time” regime?**

- If applicable, one needs to argue that the presumption does not apply by reason of the fact that there are reasonable grounds to believe that a parent of the child (or a person who lives with them) has engaged in:
  - Abuse of the child or other child in the family - s. 61DA (2)(a)
  - Family violence s. 61DA (2)(b)
- If the order is made on an interim basis, argue the matter afresh at trial, because any interim order for allocation of parental responsibility must be disregarded at trial (s.61DB)
- Rebut the presumption by adducing evidence that satisfies the court that it would not be in the best interests of the child for the parents to have equal shared parental responsibility (s. 61DA (4))

### **Can a party avoid the s.65DAA regime (requiring the court to consider equal time, then substantial and significant time etc) triggered by the s. 61DA presumption - by NOT making an order for equal shared parental responsibility?**

- Perhaps technically yes, but this is probably only an academic point because:
  - if parties enter into consent orders for a parenting regime it does not matter whether those orders are silent on equal shared parental responsibility, or whether they allocate equal shared parental responsibility (in terms of triggering s. 65DAA (6)) as the court is not obliged to follow the “equal time” regime when approving consent orders. The spend time with orders will just be whatever the parties have agreed, assuming the court approves them.
  - if parties are in dispute about what the parenting orders should be, the court will always have an obligation to:
    - apply the presumption of equal shared parental responsibility

- (s. 61DA(3) and
- make an order of the Court to that effect (unless a party successfully argues that the presumption should not apply for the reasons set out in s. 61DA (2) or unless it is rebutted by evidence regarding the best interests of the child) (s. 61DA (4))

### **What sorts of decisions are involved when one has parental responsibility?**

- Decisions about Major long term issues affecting a child
- Decisions that are NOT about Major Long Term issues (often referred to as decisions about day to day care of a child – although this term is not defined in the Act)

### **What is a decision about a Major long term issue? (section 4 of the Act)**

Decisions about:

- the child's education (both current and future); and
- the child's religious and cultural upbringing; and
- the child's health; and
- the child's name; and
- changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

### **Is this list exhaustive?**

No – the court has discretion to consider any issue and decide whether it fits the definition on a case by case basis.

### **Are there any exceptions?**

- Yes – parental responsibility does not cover certain decisions about health issues such as special medical procedures as these (for various public policy and other reason) fall outside the scope of the definition of parental responsibility, such as a child undergoing:
  - sterilisation
  - major surgery
  - sex reassignment
  - bone marrow donation
- There are also certain decisions that are so irreversible or so grave that parties (whether or not separated) may decide to apply to court for permission or a declaration authorising them to authorise certain medical treatment of a child

### **What sorts of parental responsibility orders can be made by a court?**

Orders for parental responsibility are NOT one size fits all. They can be tailored to suit the needs of the situation if the presumption of equal shared parental responsibility is not appropriate or is rebutted. Examples include:

- equal shared parental responsibility (the presumed starting point)
- shared (but not equally shared) parental responsibility including:
  - specific responsibility allocated to one parent re: certain major long term issues BUT parental responsibility about all other issues is still shared (NB. Which means parties still have an obligation to consult under s.65DAC)
  - Equal shared parental responsibility on major long term issues BUT sole parental responsibility to one party (usually the primary carer) on all other

issues. NB. This might be appropriate where a party does not spend time with the child, eg. overseas, in jail or incapacitated but still seeks to retain a role in making decisions about major issues affecting their child

- sole parental responsibility to one party in relation to major long terms issues and otherwise equally shared
- sole parental responsibility to one party on ALL issues
  - this effectively means there is NO parental responsibility to the other parent at all.
  - This is usually only appropriate where the other party has no involvement at all and does not spend time with the child
- equal shared parental responsibility on certain major long term issues and otherwise silent (so that the common law “joint and several” parental responsibility decision making applies in relation to all other issues)

### **Which sorts of factors are likely to be relevant in a Court restricting or taking away parental responsibility from a parent?**

- Abuse
- Violence
- Not in child’s best interests - usually because of factors which go against parties being able to fulfil their s. 65DAC obligations to consult and come to joint decisions:
  - Conflict
  - Distance / impracticality
  - Absence / not spending time with
  - Medical conditions where decisions need to be made without delay
  - Urgency
  - Radically different views about lifestyle, food, religion, education
  - Parties unable to agree on a school
  - Necessity or desirability of issuing a passport for child /changing a child’s name
  - Immunisation disputes
  - Relocation disputes which make it harder for a party to remain involved
  -

### **When does parental responsibility cease?**

- upon a child attaining the age of 18 - section 61C(1).
- at common law, parental responsibility ends upon a child marrying below the age of 18. Under section 61B “parental responsibility” means “the duties, powers, responsibilities and authority which, *by law*, parents have in relation to a child” (italics supplied). The words “by law” here probably import the common law rule on the effect of marriage by a minor, which is that it ceases on marriage.
- generally upon a child being adopted- unless the parent is a prescribed adopting parent that falls within the exception under s. 61E of the Act.
- as to some particular powers and authority within the scope of parental responsibility, they may cease upon the child acquiring sufficient maturity and understanding to make a decision on particular matters for himself or herself<sup>33</sup>
- When parties themselves terminate parental responsibility through a parenting plan or by a court order.

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<sup>33</sup> *Secretary, Department of Health and Community Services v JWB and SMB (“Marion’s case”)* (1992) FLC ¶92-293 AND *Re: Jamie* (2013) FLC ¶93-547.

- Presumably, the parental responsibility vesting in one parent ceases upon the death of that parent and all residual parental responsibility vests in the other parent unless there is a court order to the contrary.

**What is the suggested wording to use for a basic parental responsibility order where parties seek:**

- **equal shared parental responsibility and**
- **wish to clearly set out their obligations in relation to major long term issues?**

1. *The parties have equal shared parental responsibility for the child xxx*
2. *The parties consult each other and make a genuine effort to come to a joint decision about major long term issues affecting the welfare of the child, including but not limited to decisions about:*
  - a. *the child's education (both current and future); and*
  - b. *the child's religious and cultural upbringing; and*
  - c. *the child's health; and*
  - d. *the child's name; and*
  - e. *changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.*
3. *That in the event that parties cannot come to a joint decision about a major long terms issue including the issued described in order 2 herein, each of the parents will do all things necessary to participate in Family Dispute Resolution at an Organisation recognised under the Family Law Act.<sup>34</sup>*

## **6. How should orders about Parental Responsibility be drafted?**

The final word goes to Watts J, who in the case of ***Pavli & Beffa***<sup>35</sup> set out the following comments in relation the drafting of parental responsibility orders:

1. *“Drafters of orders should note that:*
  - 1.1. *An order for either equal shared parental responsibility or shared parental responsibility carries with it the statutory requirement for consultation, with genuine effort and for the parties to make a joint decision concerning all major long term issues (the information attached to parenting orders pursuant to s 65DA(2) FLA reminds parties of this in relation to equal shared parental responsibility but not shared parental responsibility). Failing the ability to reach a joint decision, the ultimate recourse is to seek an order from a court to break the impasse.*
  - 1.2. *In the event that an order provides that one party is to have the final decision about all or any major long term issues, then any such order*

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<sup>34</sup> Wording of order 3 taken from orders made by Altobelli J in ***Silas & Barry*** [2009] FMCAfam 448

<sup>35</sup> *Supra* – note 10 at paragraph 49

*should give that person “parental responsibility”. If appropriate, that order should have attached to it:*

- 1.2.1. a requirement for consultation with the other party with genuine effort (some orders have provided that parties attend with a mediator to discuss the issue); and*
  - 1.2.2. any machinery orders in relation to notice about proposed decisions and final decisions;*
  - 1.2.3. a provision that one party is to have the final decision about all or any major long term issues.*
- 1.3. In many cases, the fact that the order is not a “shared parental responsibility” order but rather a “parental responsibility” order is emphasised by adding the adjective “sole”. “Sole parental responsibility” is not an expression used in the FLA. “Sole” is an antonym of “shared”. Although the Full Court in Barone [2012] warned against the use of the synonym “joint”, the use of the word “sole” is permissible because it is likely to promote certainty rather than create uncertainty.*
- 1.4. Moving from the inclusive to the exclusive, orders for parental responsibility can be drafted so that:*
- 1.4.1. the parents have equal shared parental responsibility. The effect of an order using those words is that all decisions about all major long term issues need to be made jointly and the requirements of s 65DAA FLA are attracted; or*
  - 1.4.2. one party has parental responsibility for some major long term issues and decisions about those issues need not be made jointly, but in relation to other major long term issues, parental responsibility is shared and decisions regarding those issues need to be made jointly; or*
  - 1.4.3. there is no shared parental responsibility but parental responsibility does not rest exclusively with one person. That is, one party has parental responsibility in relation to some major long term issues, and another party has parental responsibility in relation to other major long term issues and neither party is required to make decisions jointly regarding the major long term issues allocated to them; or*
  - 1.4.4. one person has parental responsibility (sometimes referred to as “sole parental responsibility”) for all major long term issues and is not required to make decisions jointly.”*

**Michele J. Brooks, Barrister,**

**Owen Dixon Chambers**