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Issues under the Umbrella of Parental Responsibility

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Issues under the Umbrella of Parental Responsibility



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1. Introduction

Many clients end up in the Family Courts¹ without any clear understanding of what the law says about parental responsibility, finding themselves in a parenting issues trial or in a contravention hearing for breach of parenting orders being criticised for acting unilaterally on issues parents are supposed to decide jointly under the Family Law Act 1975 (Cth) (“FLA”) or the Family Court Act 1997 (WA) (“FCA”).

It is important for us as lawyers to stop and remind ourselves what the Acts say about parental responsibility and to explain that to clients without assuming that they understand their responsibilities.

In this paper, I will firstly look at the legislative framework of parental responsibility - joint, equal shared and sole, day-to-day and major long-term issues – and how that has been applied and interpreted by the Courts.

Then I propose to look at some of the issues which have arisen in the Courts about “the big 5” aspects of parental responsibility – decisions about the major long term issues of education; religion and culture; health; the child’s name; and changes to living arrangements which affect time with the other parent.

Finally, I make suggestions about the form of orders to seek to enhance client understanding and minimise future disputes.

¹ I use the term the Family Courts to describe the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court.

2. Legislative framework

2.1. Meaning of Parental Responsibility

The term “parental responsibility” is defined in s61B FLA (s68 FCA) as follows -

“In this Part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.”

The Full Court discussed the meaning of s61B in *B v B: Family Law Reform Act 1995* (1997) FLC ¶92-755 at paragraph 9.24 and following:

“This definition provides little guidance, relying as it does on the common law and relevant statutes to give it content. It would appear to at least cover guardianship and custody under the previous Part VII and may be wider. The Attorney-General submitted that it was probably wider than that and covered “all of the underlying and continuing common law and statutory law that affects the relationship of parents and their children”. 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. Section 61D(2) provides that a parenting order does not take away or diminish any aspect of parental responsibility except to the extent expressly provided for in the order or necessary to give effect to the order.”

In *Goode & Goode* (2006) FLC 93-286, the Full Court confirmed the statement above before moving on to other issues.

2.2. Section 61C: Where there are no parenting orders and no court orders

Section 61C (FLC s69) states simply that -

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

This seems a fairly straightforward statement that parental responsibility vests in each parent separately or together (like “joint and several” liability under a contract). This means either parent (or both) could enrol a child in a new school, arrange a baptism or a major medical procedure or change a child’s name (subject to any requirements of a Registrar of Births, Deaths and Marriages.)

The notes (or s69(2)&(3) FCA) explain that this deals with the situation where the child is not the subject of court orders or a parenting plan.

Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

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

Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.

S61C(2) & (3) go on to ensure that the reader understands that “joint and several” responsibility will continue after separation of the child’s parents and after either marrying and applies only if there were no earlier orders under any Act (for example child protection legislation).

(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 B v B: Family Law Reform Act 1995 at para 9.29, the Full Court adopted a position that whilst s61C meant that decisions could be made by either or both of the parents pursuant to the legislation, consultation should occur on major issues. Their Honours said -

“In the absence of a specific issues order, we think it unlikely that the Parliament intended that separated parents could only exercise all or any of their powers or discharge all or any of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day to day matters, and the impracticability of such a requirement when they are living separately only has to be stated to be appreciated.

As a matter of practical necessity either the resident parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children.

On the other hand, consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like. We believe that this accords with the intention of the legislation.”

Thus, in situations where there are no court orders or parenting plans (or either is silent on the issue of parental responsibility), parents could be criticised for acting unilaterally on major issues as against the intention of the legislation but no specific section of the Act would be breached if they did so.

2.3. What Parenting Orders may be made about Parental Responsibility?

Section 64B (s84 FCA) defines a parenting order and provides guidance about what orders can be made about parental responsibility.

S64B(2)(c) the allocation of parental responsibility for a child;

S64B(2)(d) if 2 or more persons are to share parental responsibility for a child--the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;

S64B(2)(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

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

2.4. Decisions about Major Long-Term issues (“the big 5”)

There is a tendency to think about the 3 issues of education, religion and health when dealing with issues in parental responsibility but there are actually 5. The oft forgotten 2 can also be very important – the change to a child’s name and changes to a child’s living arrangements.

Section 4 (s7A FCA)

“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.

2.5. Decisions about day to day issues

There is no need for orders to provide that each parent has responsibility for decisions about day to day issues as this is clearly dealt with in the legislation.

Section 65DAE (s89AD FCA)

No need 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.

There have been cases with orders about food and clothing where they were actually issues about health concerns such as significant allergies or religion or culture which necessitated particular clothing or a vegetarian diet.

The Full Court commented on this issue in *Chappell & Chappell* [2008] FamCAFC 143

“59. Once again, it will be observed from s 65DAE that in dealing with matters of parental responsibility the legislation is now constructed around the concept of “major long-term issues”. If an issue is a “major long-term” issue then parents must consult and ideally reach agreement. If the issue is not a “major long-term” issue, then consultation is unnecessary and parents may act unilaterally.

60. How in practice does a parent (or ultimately a Court) determine whether or not an issue of parental responsibility is a “major long-term” issue? It will be noted that the s 4 definition is somewhat circular and does little to elucidate, in particular, what is meant by “long-term”. Some clue to the likely dilemmas of categorisation is provided by the note to s 65DAE which indicates that decisions about such things as what a child eats or wears are “usually not major long-term issues” (see s 15AD of the Acts Interpretation Act 1901 and the discussion of the use of notes in Pearce, D C and Geddes, R, *Statutory Interpretation in Australia*, 6th ed, LexisNexis, Australia, 2006, at p 163). Clearly in the note it is contemplated that, for some children, decisions about matters such as what they wear and/or what they eat can be both “major” and “long-term”. Hence, the legislation contemplates a degree of elasticity in determining where the line falls between those decisions that are “major long-term” and those that are not. Such elasticity, in our view, affords proper recognition to the almost endless variety of family circumstances.”

2.6. The presumption of Equal Shared Parental Responsibility

Pursuant to s61DA (s70A FCA), when making a parenting order, the issue of parental responsibility must be dealt with any time a court makes a parenting order but this doesn't mean that the court must make an order for equal shared parental responsibility. The court has the option of making an order for sole parental responsibility or making no order at all in which case the “default” position under s61C will continue to apply.

The starting point is that the court must apply a presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility. The Note draws our attention to the fact that the presumption is not a presumption for equal time.

“S61DA(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).

The presumption may be rebutted in circumstances of child abuse or family violence, at an interim stage and where not in the child's best interests.

S61DA(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.

Goode & Goode was a case where orders were being made at an interim stage early in the operation of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. Justice Collier decided that it was not appropriate to apply the presumption, as there were allegations of violence raised by the mother but no tested evidence as yet to satisfy the requirement of reasonable grounds to believe that the father had engaged in family violence. That decision was not overturned by the Full Court (although His Honour's decision to rely on status quo as a basis for his interim decision was overturned in the appeal).

2.7. The difference between s61C and Equal Shared Parental Responsibility

The distinction between the “default” provision under s61C and Equal Shared Parental Responsibility was raised in the Full Court in *Goode & Goode*.

“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 s 65DAC. In the former, the parties may still be together or may be separated. There will be no court order in effect and the parties will exercise 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.”

2.8. Obligations on parties with Equal Shared Parental Responsibility

If the decision is about a major long-term issue, the parties to an Equal Shared Parental Responsibility order, have an obligation to make the decision jointly (between however many people share the responsibility) which means they must consult the other(s) about the decision that is to be made and make a genuine effort to come to a joint decision.

If the parties are unable to do this, an application may be made to the court to adjudicate the dispute (after attempting dispute resolution if required before issuing proceedings).

Section 65DAC (s89AC FCA) provides -

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.

Subsection 4 is significant as third parties are able to take a party at face value and act on a decision communicated by only one of the parties, for example, a doctor may treat a seriously ill child. In practice however, hospitals require consent from both parents for significant matters, the passport office requires both parents to sign (and has a procedure for exceptions) and schools are reluctant to accept an enrolment from one parent, particularly if there are orders in place.

2.9. “Mix and Match” orders

The legislative framework leaves it open to have orders which have Equal Shared responsibility on some major long-term issues, sole responsibility on others and be deliberately silent on other issues so that the s61C “joint and several” responsibility remains untouched by the orders. It is also open to the court to make orders on particular aspects of the way in which responsibility is to be exercised or giving one party power to do a specified thing, for example, to choose a school and enrol a child. It is important to be very clear in the wording and to use the defined terms in the legislation whenever possible.

Chappell & Chappell was an appeal from a case where the Magistrate made an order for Equal Shared Parental Responsibility subject to an order giving “management” of the child’s health and schooling to the mother. In allowing the father’s appeal, the Full Court said –

69. It is clearly imperative that orders relating to parental responsibility should be accompanied by as little ambiguity as practicable. This is especially so given the extent to which third parties such as schools and hospitals rely upon Court orders to satisfy themselves about the authority of parents to make decisions about their children. It could not be expected that third parties would be required to peruse the reasons for decision of a judicial officer in order to assist them to understand forms of words used in Court orders.

And further –

76. We can also envisage circumstances in which the Court, in the proper exercise of discretion, might make very specific orders in relation to issues which could be loosely described as relating to the “management” of particular aspects of a child’s welfare. Thus, for example, in the present matter his Honour might appropriately have made an order that the wife have responsibility for making of appointments with the speech therapist, as this has been a point of contention. However, where the Court proposes (as his Honour did in this case), to give one of the parents a form of responsibility for issues as broad as “health” and “education”, we consider this should ordinarily be done by use of the concepts prescribed by the legislation itself.

Another example of a Mix and Match order comes from a then Federal Magistrate’s decision to allow the mother’s relocation with the children in *Longer & Longer* [2013] FMCfam 257. Terry FM ordered sole parental responsibility to the mother but then restrained her from changing the child’s name, moving any further from the father’s residence and from travelling internationally without consent or a court order. She then ordered the mother to inform the father about schools and allowed the father the ordinary parent access to school information and events and information about medical issues.

The following are extracted from the orders in the judgment -

“(1) Subject to order (2) the mother shall have sole parental responsibility for the children [X] born [in] 2007 and [Y] born [in] 2008.

(2) The mother is not permitted to:

- (i) change the children’s names;
- (ii) relocate the children’s place of residence to a place at a greater distance from the father’s residence than they are living at present;

- (iii) travel internationally with the children without the written consent of the father or an order of the court.”

- (14) The mother shall keep the father informed of the school(s) the children are attending and each party may obtain from the children’s school(s) copies of school reports, newsletters, order forms for school photographs and other information normally provided to parents and may attend events at the children’s school(s) normally attended by parents.

- (15) Each parent shall keep the other advised of the name of any medical practitioner or other health professional who treats the children and the other parent is authorised to request from that treating medical practitioner or health professional any information that person is lawfully able to provide about the children.

3. Sole parental responsibility

One parent may be ordered sole parental responsibility for a child in relation to all major long-term issues or in relation to one or more specified issues.

Often a parent seeking some aspects of sole responsibility will not actually want sole responsibility for all “big 5” issues. It is not uncommon to see applications for sole parental responsibility in high conflict cases and it is often advised to be in the child’s best interest to give responsibility to one parent to minimise future conflict. However even in these cases, it is rare for parents to want the power to change a child’s name. Religion may not be an issue, for example. Where any of the “big 5” are not an issue, and the application for sole parental responsibility is limited to areas where it is actually required for the child’s best interests, a matter is more likely to be resolved before court. I am surprised how often clients themselves do not actually want (or need) some of the orders they are seeking in their applications.

Another example of limited sole responsibility orders is *Muldoon & Carlyle* (2012) 93-513 where the then Federal Magistrate permitted the relocation of the mother and ordered sole responsibility for schooling and health but otherwise equal shared parental responsibility and this was upheld by the Full Court on appeal.

In *Cox & Pedrana* [2013] FamCAFC 48, the mother successfully appealed against an order that the father have sole parental responsibility for a child in circumstances where she

was highly anxious but the evidence disclosed no risk to the child from the father. The appeal succeeded as the Full Court was not satisfied that the Trial Judge had followed the legislative pathway.

4. Some decisions on Major Long-Term issues

The inability of some parents to agree on some major long-term issues keeps the Family Courts very busy.

4.1. Relocation cases and parental responsibility

The most notable example are the relocation cases where the stakes are usually so high in terms of the effect on the relationship with the non-relocating parent, that few cases resolve without a trial. I don't propose to deal with them in this paper as they are the topic of another more detailed paper but it is interesting to note that relocation cases fall into one or sometimes two of the s4 definitions of major long-term issues either -

(e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent,

or sometimes -

(a) child's education (both current and future).

The objection to change of school appears to be raised more often in cases where the proposed change to living arrangements don't on their face seem to make it “significantly more difficult” to spend time with a parent.

4.2. Immunisation disputes

There have been a few cases recently where the courts have been asked to make decisions permitting vaccination against diseases. At the same time as the Bill and Melinda Gates foundation is spending billions of dollars to immunise children in poverty, Australia has growing numbers of parents who choose not to vaccinate to avoid the risk that the vaccine may harm the child. *Kingsford & Kingford* [2012] Fam CA 889 was a case where the mother was passionately opposed to vaccinations but diligent in providing the child with a long series of homeopathic immunisation. The father had repartnered with a nurse and they were expecting another child. Prior to the birth, the stepmother took the child for her first shots without even telling the mother afterwards. Bennett J heard from the acknowledged expert on Homeopathic immunisation but preferred the evidence of a Paediatrician from the Royal

Children’s Hospital and ordered that the mother arrange for vaccines through her GP on a schedule provided by the paediatrician.

In *Mains & Redden* [2011] FamCAFC 184, the Full Court allowed the mother’s appeal against an order to vaccinate on the basis of new medical evidence on the risk of injury from the vaccine. After a lengthy hearing with many witnesses, the Federal Magistrate had found that there was an “extremely remote” risk. The case was remitted for rehearing (but resolved prior to the rehearing.)

Contrast the case of *Howell & Howell* [2012] Fam CA as yet unreported decision of Young J where there was evidence that the father’s Tao religious beliefs meant he was reluctant to quickly seek medical assistance for the child and was not likely to vaccinate the child and that was a factor His Honour took into account in the best interests of the child in making an order for sole parental responsibility in favour of the mother on health matters.

4.3. Child’s Name

W and C [2009] FCWA 61 is an interesting little case involving assisted reproduction for same sex parents where it was originally intended by all the parties that the male biological parent and his partner would have an ongoing involvement with the child. Crisford J considered the Application for Equal Shared Parental Responsibility and in particular the decision about the child’s name. Her Honour found that the Applicant was not a parent under the FCA and therefore there was no presumption for Equal Shared Parental Responsibility. Her Honour ultimately decided that it was not in the child’s best interests for there to be an order for equal shared parental responsibility at the interim stage given that the parties had been in significant conflict since before the child was born. She noted that the issue of the name was pressing and that the sole parental responsibility order she would make would give that decision to the mother.

5. Practical suggestions for orders

There is a practice developing of setting out the definition of major long-term issues in the order about parental responsibility. Given the issues that can and have arisen, I recommend it.

This fine example was drafted by Justice Watts in *Pavli & Beffa* [2103] FamCA 144 in a case with 2 litigants in person.

1. Parental responsibility will be allocated between the parents in the following manner:
 - 1.1. The parents shall have shared parental responsibility for D Pavli born ... March 2006 (“the child”) in relation to major long term issues about:
 - 1.1.1. The child’s name;
 - 1.1.2. Changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent.
 - 1.2. The mother shall have parental responsibility for the child in relation to all other major long term issues including:
 - 1.2.1. the child’s education (both current and future);
 - 1.2.2. the child’s religious and cultural upbringing;
 - 1.2.3. the child’s health;

On the conditions that:

- 1.2.4. the mother will contact the father in writing and provide her views about any such issue;
- 1.2.5. The mother shall consult with the father with regard to any such issue;
- 1.2.6. The mother and father will make a genuine effort to come to a joint decision about any such issue; and
- 1.2.7. if no agreement is reached between the parties, then within 14 days the mother shall make the final decision and advise the father in writing of the decision about any such issue.

6. Some “do”s and “don’t”s

DO consider whether an order is required at all or whether s61C “joint and several” would be in the child’s best interest.

DO keep to the wording in the legislation.

DON’T ask for orders greater than you client needs or wants.

DO take the judicial officer through the legislative framework to ensure the decision addresses the presumption before considering the child’s best interests.