Effects of 2010 Post MRR & GR Legislative Amendments, by Jacqueline Campbell, Forte Family Lawyers, released April/2011

The Family Law Act Amendment (Validation of Certain Parenting Orders and Other Measures) Bill 2010 received Royal Asset on 16 December 2010. It commenced operation the following day.

The Act retrospectively validated any orders which may have been invalid because of the High Court's decision in MRR v GR (2010) FLC 93-424. It also amended the Family Law Act 1975 to allow, but not require, a family law court to consider each of the statutory criteria in s 65DAA(1) and (2) when considering an application that it make a parenting order by consent where parents have, or are to have, equal shared parental responsibility for the children.

The 2010 Act was introduced as a result of an article by Richard Chisholm and Patrick Parkinson, 'Reasonable practicability as a requirement: The High Court's decision in MRR v GR' (2010) 24 AJFL 55. The writers were concerned that the failure of a court to make a specific finding, that a child spending equal time or substantial and significant time with the parents is reasonably practicable, meant that the court had no power to make the order even if the court considered the arrangement to be in the child's best interests having regard to the s 60CC factors.

This failure was particularly problematic for orders made by consent where either limited affidavit material had been filed or an Application for Consent Orders had been filed (in the format which existed before it was changed after the 2010 Act commenced). In many cases, even if consent orders are made in open court, no reasons are delivered so there was nothing to demonstrate that the s 65DAA factors had been addressed as required by MRR v GR. As the Family Court is a superior court of record, its orders are valid and enforceable until set aside (Matthews v ASIC [2000] FCA 288). The Family Court has a discretion as to whether or not to set them aside. The situation is less clear for orders made in the Federal Magistrates Court. Chisholm and Parkinson considered that these orders may be nullities (Horne and Horne (1997) FLC 92-734).

MRR v GR

In MRR v GR the wife appealed to the High Court against a decision of the Full Court of the Family Court to uphold a decision of a Federal Magistrate that the parties have equal shared parental responsibility for the child and that she spend equal time with each of them. As the father would not move from Mt Isa it was only possible for the child to spend equal time with each parent if both parents lived in Mt Isa.

Section s 65DAA(1) states:

If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:

a. Consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
b. Consider whether the child spending equal time with each of the parents is reasonably practicable; and
c. If it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

If an equal time order is not made under s 65DAA(1), the court is required (under s 65DAA(2)) to consider making an order for substantial and significant time. The factors to consider are similar to those under s 65DAA(1).

The High Court held (at paras 13, 19):

Section 65DAA(1) is expressed in imperative terms. It obliges the court to consider both the question whether it is in the best interests of the child to spend equal time with each of the parents (par (a)) and the question whether it is reasonably practicable that the child spend equal time with each of them (par (b)). It is only where both questions are answered in the affirmative that consideration may be given, under par (c), to the making of an order. The words with which par (c) commences ('if it is') refer back to the two preceding questions and make plain that the making of an order can only be considered if the findings mentioned are made. A determination as a question of fact that it is reasonably practicable that equal time be spent with each parent is a statutory condition which must be fulfilled before the court has power to make a parenting order of that kind. It is a matter upon which power is conditioned much as it is where a jurisdictional fact must be proved to exist. If such a finding cannot be made, subss (2)(a) and (b) require that the prospect of the child spending substantial and significant time with each parent then be considered. That subsection follows the same structure as subs (1) and requires the same questions concerning the child's best interests and reasonable practicability to be answered in the context of the child spending substantial and significant time with each parent...

The evidence before his Honour did not permit an affirmative answer to the question in s 65DAA(1)(b). It follows that there was no power to make the orders for equal time parenting.

In summary, the High Court found that the Federal Magistrate had not (and most courts were making the same error) prior to making an order for a child to spend equal time or substantial and significant time with each of the parents, first made a specific finding that the child spending equal time with both parents was reasonably practicable having regard to the factors listed in s 65DAA(5).

The factors in s 65DAA(5) are:

a. how far apart the parents live from each other; and
b. the parents' current and future capacity to implement an arrangements for the child spending equal time, or substantial and significant time, with each of the parents; and
c. the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangements of that kind; and
d. the impact that an arrangement of that kind would have on the child; and
e. such other matters as the court considers relevant.

The s 65DAA(5) factors are separate from the requirement for the Court to assess what is in the best interests of a child under s 60CA (or s 65DAA(1)(a)). Chisholm and Parkinson argue that the factors overlap and that the High Court may have interpreted s 65DAA(1) incorrectly to establish an extra hurdle. Regardless of whether the High Court is correct, MRR v GR, of course, binds all lower courts.

The main reasons for the High Court's conclusion that an order for equal time was not reasonably practicable were the following matters:

- the unsatisfactory features of the mother's living circumstances in Mount Isa (a caravan park) and likely future circumstances there (rentals, if available at all, were only affordable in 'rough' areas);
- the limited facilities were not ideal for a child;
- better employment opportunities for the mother in Sydney;
- the mother's depression at being forced to live in Mount Isa

These matters, as Chisholm and Parkinson pointed out, were also relevant to determining what was in the child's best interests.

Effect of 2010 Act

The 2010 Act retrospectively validated affected orders if they were invalid. Section 3(1) of the 2010 Act provides "that the rights and liabilities of all persons are... declared to be, and always to have been, the same as if each affected order were an order in relation to which the court or Registrar

making the order had considered the required matters for the order." The term "persons" is not defined but presumably covers at least the parties to the order.

An "affected order" is defined in s 2(1) of the Act as an order (including an interim order) in relation to a child:

a. that was made or purportedly made by a court or Registrar under section 65D of the Family Law Act 1975:

    i. on or after the commencement of Schedule 1 to the Family Law Amendment (Shared Parental Responsibility) Act 2006; and
    ii. before the commencement of this item; and

b. that:

    i. provides for the child's parents to have equal shared parental responsibility for the child; or
    ii. was made on the basis that another order provides for the child's parents to have equal shared parental responsibility for the child; and

c. in relation to which the court or Registrar did not consider the required matters for the order.

The "required matters" are defined in s 2(2) as:

a. if the order was made or purportedly made without the consent of all the parties to the proceedings:

    i. in any case—whether the child spending equal time with each of the parents was reasonably practicable; and
    ii. if the order does not provide for the child to spend equal time with each of the parents—whether the child spending substantial and significant time with each of the parents was reasonably practicable; or

b. if the order was made or purportedly made with the consent of all the parties to the proceedings:

    i. in any case—the matters referred to in s 65DAA(1)(a) to (c); and
    ii. if the order does not provide for the child to spend equal time with each of the parents—the matters referred to in s 65DAA(2)(c) to (e).

The 2010 Act also deals with the making of future consent orders. Under s 65DAA (6) when a court is considering whether to make a parenting order with the consent of all the parties to the proceedings and the order provides that a child's parents are to have equal shared parental responsibility for the child, the court may, but is not required to, consider the matters referred to in s 65DAA (1)(a) to (c) or (if applicable) the matters referred to in s 65DAA(2)(c) to (e). Section 65DAA (6) applies to orders made after 17 December 2010 regardless of the date on which proceedings were commenced.

Amendment to Application for Consent Orders

As a result of the 2010 Act, two new questions were inserted into the Application for Consent Orders. The new form must be used after 1 February 2011. The new questions are:

13. Are you seeking a parenting order that provides for the child's parents to have equal shared parental responsibility for the child?

- If the answer to this question is no - Is this a case where all parties accept that the presumption in Section 61DA(1) does not apply? If the answer to this is yes - Give brief details of why the presumption does not apply.
- If the answer to this is no - Briefly explain why it is in the best interests of the child for the court to make the order/s you are seeking rather than order/s which provide for the child's parents to have equal shared parental responsibility for the child.

13A Are you seeking a parenting order that provides for the child's parent to spend time with the child?

- If the answer to this is yes - Having regards to s 65DAA(5), briefly explain why the child spending equal time or substantial and significant time with each of the parents is reasonably practicable.
- If the answer to this is no - Briefly explain why it is not in the child's best interest to spend time with each parent.

Later decisions dealing with interpretation of s 65DAA

As a guide to matters to cover under reasonable practicability, decisions of the Full Court which have considered MRR v GR include:

- *Klein and Klein* [2010] Fam CAFC 150. The Federal Magistrate considered that the children should spend equal or substantial and significant time with each parent, but she failed to make a practical assessment of whether such arrangements were feasible if the mother had to move back to Bendigo from Adelaide. Practical considerations were where she would live and the loss of family support.
- *Coles and Coles* [2010] Fam CAFC 237. The Federal Magistrate failed to adequately examine the practical and economic aspects associated with the mother obtaining a home in Sydney and her practical support if she moved from the Hunter Valley to Sydney. In addition, there was the practical difficulty of a mid week changeover if the mother lived within a 30 km radius of the GPO as this could still be a substantial distance from the father.
- *Collu and Rinaldo* [2010] Fam CAFC 53. One of the reasons the trial Judge's decision was set aside was her failure to consider the practicalities of the mother living in Sydney rather than Dubai. The mother would need to establish herself somewhere in Sydney in sufficient proximity to wherever the father established his housing (the location of which was unclear as the home in which he had been living had been sold) so as to enable an equal shared or substantial and significant time regime to be put into place. The ability of the parties to communicate with each other and resolve difficulties (s 65DAA(5)(c)) and the impact of any arrangement on the child (s 65DAA(5)(d)) in relation to the amount of travel which might be involved for the child were both of relevance.
- *Malcolm and Monroe* [2011] Fam CAFC 16. As no order was made for equal shared parental responsibility between the mother and the first respondent, s 65DAA had no application. There was no mandatory requirement for the Federal Magistrate to consider whether an equal or substantial and significant time arrangement was in the best interests of the child or reasonably practicable. The first respondent had believed he was the father of the child until biological testing confirmed otherwise. The court found him to be a significant person in the child's life. The father did not seek to be heard at the appeal. As the father had equal shared parental responsibility the Federal Magistrate was require to consider the relevant factors in 65DAA. Although the Federal Magistrate did not formally do so, the Full Court was satisfied that he considered the reality of the situation between the parents and the child, it was in the child's best interests that the child spend time with the father by agreement between the parties.

Conclusion

Serious concerns were raised by Chisholm and Parkinson that some parenting orders may be invalid or liable to be set aside. The 2010 Act addresses these concerns. Even if the reasonable practicability step in s 65DAA(1)(b) identified in MRR v GR was not followed before the parenting

order was made in circumstances where the parties have shared parental responsibility, the rights and liabilities of the parties covered by the order are the same as if the court did consider the required matters before making the order.

Since the 2010 Act commenced, it is clear that there is no mandatory requirement that the court consider reasonable practicability when making consent orders, although the court may do so.