

## ***Salah & Salah* [2016] FLC 93-713; [2016] FamCAFC 100 (17 June 2016) – Full Court of the Family Court of Australia**

‘Ignoring allegations of family violence’ – ‘Interim parenting orders’ – ‘Treatment of issues of family violence’

Appeal type: Appeal against interim parenting orders.

Facts: At the contested interim hearing, the mother made allegations of significant family violence perpetrated by the father in the presence of the children. In light of this and one of the children’s epilepsy and developmental delay, she sought an order directing the father’s care of the children to be supervised by another adult. The father disputed the allegations of family violence. In making interim parenting orders, the trial judge said (see [23]-[27]):

*‘The evidence lead [sic] as to alleged family violence made by each parent is not capable of sustaining a finding at this interim stage of proceedings. In circumstances of conjecture given no other evidence. The presumption for equal shared [parental] responsibility is still applicable.*

[...]

*Findings with respect to whether either party perpetrated family violence cannot be made at this interim stage given the conflicted evidence. The civil standard of proof is met by neither.*

*As such and for the same reasons the need for the father’s time with the children to be either in the “presence of” or “supervised by” another adult is not made out’.*

Issue/s:

1. The trial judge made several errors of principle in considering the issues of family violence namely, His Honour erred in his consideration of the family violence issues, failed to have regard to s 61DA(3) of the Act and failed to follow the legislative pathway in his determination of the interim issues.
2. The trial judge failed to take into account relevant facts.
3. The trial judge failed to give adequate reasons for his determination.

Reasoning/Decision: The appeal was allowed. The Court noted at [36] that, ‘[i]t is very common in interim parenting proceedings to see factual disputes which cannot be determined without the evidence being tested in the context of a trial’. They continued at [39]-[40]:

*‘In SS v AH [2010] FamCAFC 13, the majority of the Full Court (Boland and Thackray JJ) said:*

*...Apart from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims and the likely impact on children in the event that a controversial assertion is acted upon or rejected. It is not always feasible when dealing with the immediate welfare of children simply to ignore an assertion because its accuracy has been put in issue.*

*The trial judge here faced just that challenge. His Honour, when confronted with significant allegations of violence was required to do more than merely note the contention (or “conjecture”) and not to “simply ignore an assertion because its accuracy has been put in issue” (see SS v AH)’.*

The Court held that while the trial judge was correct in stating that, at that point, he could not make findings on the disputed allegations, he erred by ignoring the allegations of family violence and finding that the presumption of equal shared responsibility applied. His Honour further erred in his treatment of the allegations of family violence by suggesting with that comment ‘given no other evidence’ that the mother’s allegations required corroboration or objective support and erred in incorrectly referring to the civil standard of proof (see [41]-[45]). Grounds two and three were also successful for similar reasons (see [60],[65]).