

Full Court of Family Court upholds decision preventing parent having contact with a child where parent has a good relationship with the child. Why?

The Full Court of the Family Court of Australia recently heard and dismissed an appeal by a father against orders made by a Federal Magistrate that despite having a “*good and loving relationship*” the child should have no contact with him.

The orders were based on findings that even though the child enjoyed good relationships with both parents separately, the parties were not able to co-parent the child without exposing her to significant, continual emotional abuse.

The Magistrate held that the mother would “*not facilitate or support any relationship between the child and the father*” and would “*actively destroy*” any such relationship. Coupled with the father’s “*destructive parenting practices*” this created a situation whereby the potential benefit of maintaining the relationship was outweighed by harm that would be caused by being regularly exposed to emotional abuse by both parents.

The history between the parties was lengthy and combative.

The parties were married in 2002 and had one daughter born in 2004.

They moved to Australia from Taiwan in 2005.

In February 2007 the father refused to allow the mother and child entry to the matrimonial home. When orders were first made in March 2007 for the child to spend time with the father both parties seemed to comply.

Later that year, the child indicated she had been sexually abused by the mother’s new partner. These allegations were ultimately found to be entirely the product of the father’s coaching. The mother then effectively cut off contact with the father and actively discouraged the child from spending time with the father.

The father had filed numerous contravention applications against the mother and, although successful on some, there was no penalty to the mother apart from costs orders.

The Full Court rejected the father’s assertion that there was a failure to consider alternatives which would allow the child to have periodic contact with the father. The Court repeatedly stressed that the termination of the relationship with the father was “*a last resort*” and that less extreme and usually reasonable alternative options would be futile in the circumstances of this case.

One important factor was the lack of alternative living arrangements for the child. There was no challenge to a finding that the father was not capable of being the child’s resident parent. The Full Court commented that the Magistrate had to reach a decision “*knowing that a change in residence was not open*” citing the Magistrate’s comments at paragraph 228:

“That removes an important option for the court...in a number of cases where the court has concluded that one parent alienates or attempts to destroy the relationship between the child and the other parent a change of residency has been ordered.”

The Full Court also endorsed the Federal Magistrate’s observations that the primary considerations in *Family Law Act* s 60CC(2) of “*the benefit to the child of having a meaningful relationship with both the child’s parents*” and “*the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence*” were “*two pillars....that pull in opposite directions*”.

The Full Court went further than simply holding that the Magistrate acted within discretion, noting at paragraph 75:

“Faced with his findings that the continuation of a meaningful relationship with the father would result in ongoing emotional abuse of the child; that alternative forms of order would not work; and that it was not in the child’s best interests to live with the father....not only was that decision open to him, on the basis of his findings it was arguably the only available decision”.

The Full Court also discussed the weight to be given to recommendations made by a Family Consultant. The Court cited and approved at paragraph 118 comments taken from *Hall and Hall* (1979) FLC 90:

“The counsellor’s assessment of the parties may often be based upon facts which the counsellor has accepted but which turn out to be wrong; or favourable or unfavourable views formed by the counsellor from interviewing the parties without the opportunity to test in depth the credit of persons.”

Accordingly, the Court was not obliged to accept the recommendations of the Family Consultant. Furthermore, the Full Court held that it is the court that has “*the benefit of all the evidence*” in the matter and hence is a better position to make assessments.

Both the Full Court and the Federal Magistrate emphasised the fact that the paramount consideration is the best interests of the child. Each matter is to be considered “*under the rubric of [the child’s] best interests*”.

The Court pointed out that proceedings are definitely not ‘a contest’ between the parents and usually involve a choice between alternatives “*both of which are less than optimal*”.

In concluding, the Full Court echoed the Magistrate’s comments that the decision “*should not be interpreted as condoning the mother’s conduct*” or “*surrendering to her unreasonable refusal to permit a relationship between the child and her father.*”

Nick Rodda