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Family Law Case Update #19: Cases with Protection Issues

Caroline Counsel

Counsel Family Lawyers

Tindall & Saldo [2015] FamCAFC 1

Bryant CJ, Finn & Strickland - Full Court in Sydney

Facts

- Appeal from decision of Justice Austin, orders made on 3 April 2012 and 5 December 2013.
- 3 April 2012 - judge found mother contravened without reasonable excuse orders of 10 May 2010 and 10 December 2010
- 5 December 2013 - judge ordered mother enter good behaviour bond re contraventions
- Commenced relationship September 1998 and separated November 2008.
- One child relationship, aged 8 (born 2006)
- Father had perpetrated serious physical violence against the mother and the child. Father was charged with these offences, including occasioning actual bodily harm on the mother and assault of the child, aggravated sexual assault on mother.
- Father had retained the child against mother's consent and she sought a recover order in December 2008, which was made with orders that the child live her and no time with the father.
- 21 January 2009 an interim hearing date was set at which parties ended up reaching terms that the child live with the mother and spend regular time with the father under supervision of the parental grandmother.
- Later that year mother alleged sexual abuse against child and sought only supervised time.
- An ICL was appointed and DGACS intervened (later withdrawing).
- 10 May 2010 interim orders providing that the father spend supervised time only.
- Father during that time pleaded guilty to offences against the mother, he had back surgery and was sentenced on 19 July 2011 for a period of imprisonment of five years.
- 2 September 2010 mother filed application seeking a positive order that there be no time.
- On 10.12.2010 this order was dismissed and orders made for time at a contact centre.



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- 6 September 2012 - Justice Cleary made final orders for child to commune with father in writing three times a year (no physical contact).

Reasoning of Trial Judge as to reasonable excuse

- Trial Judge found mother had a genuine belief that contravention of orders for supervision was necessary to protect the health or safety of the child or herself. However, found belief re safety not held on "reasonable grounds"
- Trial Judge found safeguards built into orders meant mother's fears not held on a reasonable basis.
- Mother alleged contra necessary to protect the child against death, injury or abduction
- Sentencing
- Mother argued "no utility" in imposition of sanction. His Honour observed that in considering sanctions he was entitled to have regard to the final parenting orders made 6.09.2012.

Appeal grounds

Whether the Mother had demonstrated a Reasonable grounds for mother's beliefs

- TJ had relied on fact that despite fears mother had agreed for contact to occur on a number of occasions during the litigation.
- Full Court Found TJ did err in considering there had been no change to the family dynamic by reasons of the commencement of the criminal trial, a process which involved lengthily cross-examination of the mother over two days following which the father plead guilty to many of the allegations.
- The order at that time provided for contact with PGM only - Full Court found fears were reasonably held.
- The mother had never agreed for PGM to supervise, the order had been for DFACS to arrange supervision, but they withdrew.

Historical matters mother's conduct

"We have dealt with Ground 1 above, but the common theme of the other grounds is that his Honour erred in finding that how the mother conducted the litigation in 2009 militated against her claim that her fears for the safety of herself and the child were reasonably held. With due respect to his Honour, we do not consider those historical matters to be necessarily relevant, and the more critical issue is the effect of the commencement of the criminal trial, the cross-examination of the mother, and the father's change of pleas in August 2010. Nevertheless, it is still incumbent on us to deal with the complaints raised in these grounds." [89]



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Procedural fairness

- This ground made was out - as the Trial Judge had included the notations of the Registrar which did not appear on the sealed Court Orders and so the mother never had an opportunity to respond to these matters.

Whether mother was under duress to enter into orders of 21 Jan 2009:

92. *"His Honour emphasised that the mother attended court with her father and considered that that would have prevented her solicitor engaging in overbearing behaviour. Pausing there, this was a finding that was not open to his Honour on the evidence. For example, there was no evidence that the mother's father was present at any discussions which took place between the mother and her solicitor, or indeed whether he was at the court for the entirety of the hearing. Again, the mother's evidence that she entered into the orders under duress was not challenged before his Honour; there was no cross-examination about this and it was not suggested to the mother that the presence of her father prevented her from being overborne.*

93. *In making his finding though his Honour also relied on the mother's own evidence and the correspondence that passed between her and her solicitor. As far as the mother's evidence was concerned, in our view, and contrary to his Honour's view, she was consistent in saying in her affidavit evidence that she signed the consent orders under duress from her solicitor, and she explained what was said and why she felt she had no choice. We can find nothing in that evidence that demonstrates the inherent improbability of the mother's claim of being coerced and therefore there was no basis to reject her unchallenged evidence to that effect. With the correspondence, true it is that in terminating her instructions the mother did not say that it was because of coercion or duress by the solicitor, but we do not consider that to be fatal to the mother's argument. "*

The Appeal was approved and the application contra dismissed, save as to contra of paragraph 2.2, providing for the parties to contact the children's contact service.

Difference of opinion re duress by Bryant CJ (as to duress)

- Separate judgment of Bryant CJ - disagreed with majority who found that mother had entered into orders under duress.
- The mother had alleged that she had only signed orders for supervised time under pressure from her solicitor to do so. Bryant CJ rejected this as the mother had been provided with written advice by her solicitor prior to the Court date and also had her father present for moral support.



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Judgment

5. *"It is a serious allegation to say, as the mother did, that she was bullied and/or coerced into signing the orders. There are many reasons why parties compromise litigation: desire to conclude proceedings without resort to a hearing; desire to bring matters to an end so they can move on with their lives; cost; and advice about the risks of an adverse result are but a few. All bring pressures if the compromised outcome is not the desired outcome. But the mother did not rely on any of these. She asserted she was "bullied into signing the consent orders" by her own solicitor and as the trial judge noted "it was submitted she consented to the consent orders under duress from her own solicitor" (at [52]).*

6. *In my view his Honour was not in error in finding that he did not have to accept the mother's unchallenged evidence if it was inherently improbable."*

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CONTACT US

COUNSEL FAMILY LAWYERS

(03) 9320 3900

ccteam@ccfamlaw.com.au