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Family Law Case Update #22: Interim Appeals

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Whitby & Zeller (No 2) [2014] FamCAFC 239

Facts

- Appeal from interim decision of Judge Monahan.
- The mother alleged extensive allegations of neglect and abuse against the mother and children.
- Father moved to Australia from China in 2001, parties met 2007 in China father returned to China Jan 2008.
- Parties were married in 2009.
- Following an AVO incident on 22.10.09, the Police removed the father from home. A further incident occurred that same day resulting in charge against the father of common assault and breach interim AVO.
- A two year AVO was granted to the mother in November 2009.
- The father had not seen the child for four years and child was 6 years old at the time of the hearing.
- Father concedes there was an incident of violence.
- Mother advised Centrelink she was separated (to get money from Centrelink put into her own account). In early 2010, when father learned about this, he became angry and the mother then fled with child in March 2010.
- When the maternal grandmother came to Australia to visit, the parties tried to cohabit again.
- Final separation then occurred 10.10.2010. Three days later the mother and maternal grandmother went to China and there had been no contact since then until time of decision.
- Mother's position can be thus summarised in the judgment.

[para 2]: *"she says she has built a happy life for the child which should not be disrupted by him learning the "truth" about who his father is and how poorly his father treated him. She does concede though that "some day" the child will need to know about his father; she says that can only occur when the child is older and more mature."*

Father filed an application in April 2011.



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July 2011, the Court makes orders on an interim basis in the mother's absence as she was in China to restrain the child and the mother departing Australia. The matter was then adjourned for a final hearing.

The husband filed for divorce in approximately April 2011. The mother returns from China to deal with the divorce.

25 August 2011 FCCA transfers to Family court and subsequent to this, the mother returned to China.

The Family Court then dismissed the proceedings and effectively the child's and mother's whereabouts were unknown.

In November 2013, the mother returned to Australia accompanied by the child, her new husband and their baby daughter.

The father recommences his proceedings in the FCCA 25 November 2013.

On the return hearing of the interim orders sought by the father, the trial judge made orders for a Child Dispute Conference and adjourned the matter for an interim hearing. He made an order in chambers for an ICL.

When the matter came back for interim hearing in September 2014, he ordered that the father spend time with the child one day each week at a contact centre and he ordered therapeutic counselling.

The mother then appeals against the interim supervised time and the appointment of the ICL.

Appeal grounds by the mother - mother self-represented, summarised by Full Court as follows:

- Denial of procedural fairness
- Failure to give reasons why child be re- introduced to father
- Failure to consider potential long harm effects to child on re-introduction.

Reasons and Decision

Procedural fairness

- The mother was in fact given time to file her material. She was ordered to do so by May and did not do so until August 2014.
- The matter was not heard until September 2014 so there was procedural fairness.
- His Honour allowed her time for submissions and helped clarify matters where mother did not comprehend - as evidenced in transcript.



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Why Commence Supervised time?

- His Honour would have been aware that one decision he needed to make was whether to re-introduce the child at all.
- His Honour considered an issue is the "*possibility that the child believes that his step-father, rather than the father, is his biological father.*" [58]
- Citing the Child Dispute Memo - family consultant's concerns identified a risk would be mother unable to support child, see father and this may cause further distress, emphasised that would need support of the mother - need for therapy and professional support.
- Full Court concluded there was a basis supported by evidence for his Honour to start time.

51. Long term harm

- Full Court satisfied that the trial judge made orders that would protect the child from the harm that the mother alleged may occur.

Costs

- No order for costs in favour of father.

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