

Family Law Case Update #14: Protection Issues

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Jacobs & Kirby & Anor [2014] FamCA 231

Justice Hannam - Parramatta Registry

Facts

- Department was intervener in case. No appearance by the Applicant father at the hearing.
- Parties had lived in refuges and father had periods of being homeless. They met in a refuge in 2008. Mid-2009 mother began engaging with a youth service. Parties separated in late 2010, while mother was in early stages of her pregnancy with the child since October 2010.
- In 2011 the mother then recommenced a relationship with T and was still in this relationship at the time of the hearing.
- April 2011 child born. Between May and August 2011 father spent no time with the child.
- On 29 June 2011 the father commenced proceedings in the FMC. Father alleged that the mother had a history of mental illness and self-harm and that the mother was not compliant with medication.
- Mother attended with child at N Centre to assist mothering skills.
- On 9 August 2011 - Department invited to intervene which they did and on 25.08.2011 a safety plan was required by Department on the basis that there were risks to the child by virtue of the child coming into contact with the extended maternal family.
- Department had concerns about violence in the maternal family home, allegations of the maternal grandfather being violent and sexually assaulting children and his girlfriend.
- Mother agreed to have no contact with her extended family.
- Agreed mother and father have no contact as there was a history of family violence between them.
- There were orders for the father to spend some supervised time with the child and also some unsupervised time between October 2011 and June 2012.
- The case continued the mother had another child with T and the father entered into a new relationship.

- A report was prepared on 15 July 2013 and in November 2013 the mother showed DOCS workers a video of the father abusing marijuana.
- Father agreed to submit to urinalysis testing, but did not attend any of the appointments scheduled by the Department.
- On 18.12.2013 the father cancelled eight visits with child, on that basis orders for unsupervised time were to be rescheduled.
- Mother and ICL supported orders no contact with father.

Reasoning and decision

- Due to father's disengagement from proceedings, evidence of his suspected drug abuse and failure to undergo drug testing, court doubted the child would benefit from a meaningful relationship with father.
- Harm - went into mother's previous concerns - i.e. had previously shown borderline personality disorder traits. The mother had stabilised by the time of the report.
- Expert evidence was that the mother was following safety plan of Department and seeking intensive support.
- Father posed a number of risks - the greatest risk opined by the single expert was that of destabilising the wellbeing and capacity of the mother, as the child grows and if he is exposed to the father's belittling of the mother's parenting this would "create distress and loyalty conflict for the child" (para 60)
- Court also satisfied evidence psychological harm through neglect as father had unstable accommodation, violent tendencies towards the mother and substance abuse issues.
- The Court considered whether it had power to make an order for supervision sought by the Department for a further 12 months, which would have the Department to continue to conduct home visits, ensure the child's attendance at medical appointments and ensure attendance at parenting courses and comply with any further directions.
- These orders were opposed by the ICL.
- The Court found it would be contradictory to order sole parental responsibility to the mother to have so much oversight by the Department and so did not order the supervision.

Judgment

- *"The doctor appears to have seen a benefit to the child in continuing a relationship with her father, particularly in the long term. The Department relies upon this evidence in opposing an order that the child spend no time with the father. The mother did not call the doctor for cross-examination and therefore his evidence stands unchallenged. The Department submits that the*

Court should place considerable weight upon the doctor's report and urges the Court to make no order in respect of the father's time in preference to a positive order for no time as proposed by the mother and supported by the Independent Children's Lawyer.

- *Since the doctor's report was prepared however, some circumstances have changed. It appears that at the time the doctor made his recommendations, the father was the most motivated he has been in the proceedings". [124 - 125]*
- *"The father participated in the proceedings, albeit behaving in an agitated manner at times because of the limitations and restrictions on his time with the child, up until early September 2013. Despite being made aware on the last Court date he attended that the matter had been set down for a four-day hearing and a readiness check, he failed to appear at both subsequent events.*
- *The mother is concerned that due to the father's history of irregular and unpredictable contact with the child, the child will be left disappointed and confused if orders are put in place for the father to spend time with her but he fails to attend in the future." [127] - [128]*
- *"Seeking a supervision order in this case is inconsistent with the order for sole parental responsibility to the mother, to which the Department has consented and which I have found is in the best interest of the child. As the Independent Children's Lawyer submits, s 61D(2) of the Act provides that a parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent, if any, expressly provided for in the order or necessary to give effect to the order. The Independent Children's Lawyer submits that there could be tension between the supervision order proposed by the Department and the order for sole parental responsibility." [144]*

Orders

- No specific time was ordered between the child and father, only a condition on any time the father had that not be in presence of Ms H, paternal grandmother.
- Otherwise ordered sole parental responsibility and a live with order to the mother, with the mother restrained from bringing child into contact with various former associates of hers.



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