

Family Law Case Update #18: Cases with Protection Issues

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Pollock & Breen-Pollock (No. 3) [2014] FamCA 1026

Judgment of Justice Hannam - Parramatta

Facts

- Two children one aged 7 "C" and another aged 6 "K". Mother alleges sexual abuse by father against the children.
- Parents met online -mother from South America.
- Parties began dating January 2004 and then living together April 2004
- Parties were married in July 2006 and separated on 6 August 2013, at which time mother and children left the family home.
- Police took out an AVO on 11.08.13.
- 13.08.13 one of the children interviewed by JIRT (Joint Investigative and Response Team - NSW Police and DFACS)
- 26.08.13 mother and children started living in a women's refuge.
- In September 2013 mother gave further statements to police of father sexually abusing the children prior to parent's separation.
- 9 September 2013 - father commenced proceedings. In December the family was assessed by a child and adolescent psychiatrist, report released 5.02.2014.
- On 18 February 2014, further orders were made for the children to spend time with their father for 12 hour period each Saturday for six weeks at which point it would be increased to overnight time on weekend.
- When the overnight time was to commence, the children spent one night in April and then no time over the next 11 weeks.
- Mother subsequently ordered to attend therapy with Dr A and only did so twice in June and August 2014, prior to the hearing in September 2014.
- The mother did not want to engage with the psychiatric reports process.
- The mother included orders in her application that the father not be permitted to bathe or shower the children.
- The father and ICL proposed orders where the children would live solely with the father over a short period and transition to have increasing time with their mother

Reasons:

Unacceptable Risk

- Mother alleged inappropriate use of nappy-rash cream on K.
- Mother's position: father had been sexually abusing children over many years and she was concerned re children's behaviour at times.

Detail of the Allegations

- Mother deposes to incident where child says father applies cream better, when asked to demonstrate where "daddy" had put the cream the mother deposed to the child turning onto her side and pointing with her right index finger to her anus.
- Mother then accused father of molesting K. Father then told mother relationship was over.
- Father's evidence that he never put cream inside anus only on exterior skin and last time applied had been a year ago.
- Under cross examination, mother's story varied so that she said K had signalled to the mother after she had asked where the father put the cream and shoved her hands in her vagina and anus.
- Mother reported the incident to GP who made report to DFACS.
- GP's records - when asked to demonstrate on a teddy bear where her father applies cream child penetrated towards the anal area.
- Police records indicate K interviewed on 13.08.2013 stating father put cream on her bum when it was itchy and provided no other contextual info other than this occurred in parent's bed.
- During cross examination the mother saw the video tape of the interview and reported for the first time she was satisfied with how the interview was conducted.
- A further interview was conducted at the mother's request. The incident was not-substantiated by DFACS and Police.
- 5 September 2013 mother alleged a further incident where father touched C's genital area while on a plane in December 2007. Further detail of plane incident - Father changing child's nappy in bathroom, door ajar mother alleged the father was bending down while nappy not yet on, his nose and mouth touching the child's vagina.
- During cross examination, the mother admitted she had not reported plane incident to authorities.
- She reported for the first time in January or February 2012 another occasion in 2013 where the father had his right hand in C's vagina.
- Mother made further allegations that she saw C trying to put a toy inside her vagina on two occasions. She also said at least six times in 2013 observed C trying to put her fingers into K, while having a bath.

- 8 September 2013 mother alleged for the first time that years back she had seen C sitting naked on top of the father's groin and was inappropriately touching the children.
- Mother came in and saw C in May 2012 asked sitting on father's lap with his hands on her thighs near her groin area.
- Father's evidence was he recalled incidents where children sitting on him in underpants, can't recall incident where they were naked - however if such incident occurred would not consider it to be sexual.
- Mother alleged a further incident in 2012 in the bathroom, where the father had his middle finger in C's vagina moving it back and forward.
- January 2013 similar incident.
- Mother cross examination said father had put in C's vagina at least 20 times.
- Further incident alleged in 2013 where mother said she caught the father in room with the girls had his fingers in their vagina.
- Mother also made allegations of the father watching child pornography and walked around the home naked in front of the girls
- There had been two incidents observed by third parties -
- C's child care had seen her rubbing a cucumber over her genital area
- K's child care had seen her on a few occasions lying on top of boys trying to kiss them.

Findings as to sexual abuse

- Judge found that the mother's evidence showed even if the allegations were accepted that she had very limited discussions with the father (i.e. inappropriateness of behaviour towards children) in light of the seriousness of the allegations and preferred the father's evidence.
- Also found mother had failed to report concerns to any person when the events occurred, including failing to disclose to a counsellor at the time - who she had a strong rapport - as show in counselling notes.
- Found despite allegations the mother's evidence was that she had continued to allow the father to care for the children.
- Found the mother's allegations had become more serious as the proceedings progressed.
- Judge not satisfied father has physically or sexually abused children.

Example of mother's contradictory evidence (para 184-187)

- During cross-examination the mother had said she had disputed that JIRT had properly investigated her complaints. Later when shown a copy of the Magellan report in the box, she denied having seen the report until the trial and if she had it would have made a big difference to her views. During cross examination she was then shown an older copy of the report with her notes on it, and mother admitted she had read it earlier, but at that earlier time the report had left no impact.

Best interests and conclusions

The father was observed to have a positive relationship with the children and to understand and appreciate the positive relationship they had with their mother.

The main risk to the children arose from the mother's actions and beliefs

There was expert evidence provided that in the event the children were to live with their father the adverse impact of being removed from their mother would be mitigated if they maintained their peer relationships and school relationships and had the support extended family.

The mother maintained there was a risk to the children despite the evidence and HH decided it would be impracticable to order sole PR in such a situation

Judgment

*"A final observation in relation to the issue of the mother's allegations of sexual abuse is the internally inconsistent position she has taken not only in relation to the Magellan report but to all of her allegations of abuse. The mother claims at some points in her evidence that she was concerned about the **possibility** that the father may have sexually abused the children. However, under cross-examination about exactly what she had seen on each of the occasions of sexual abuse she alleges, she maintained that she had a clear present memory of each of the incidents. In particular, she was emphatic in stating that she remembered seeing the father's fingers in C's vagina. [188]*

In determining whether the allegations of sexual abuse are proved, I am of the view that the mother's failure to voice her concerns to the father at the time of the alleged incidents is inconsistent with her having observed his abuse of the children as alleged. Further, her failure to report the alleged abuse to her psychologist or any treating health professional, child welfare agency or police is inconsistent with her believing that the father represented any risk to the children, as are her actions in allowing the father to continue to care for the children in her absence. The piecemeal way in which the mother reported matters to the police and the increasing complexity and serious nature of the allegations of both the alleged abuse and the sexualised behaviour are inconsistent with the mother reporting what she actually observed." [192]

Orders:

- Orders were made for the father to have sole parental responsibility of the children and for them to live with him.
- Therapeutic intervention transition of children into father's care.
- Father collect children from school on date of making orders.
- Mother to undertake therapeutic intervention to "minimise the children's exposure to her feelings arising as a consequence of these orders".
- Time with mother commence after 10 weeks on alternate weekends Saturday to Sunday also provided she hands a report from her treating Dr to confirm



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she is still undergoing therapeutic intervention.
Following the expiration of a further 12 weeks mother spend alternate weekends and half school holidays - provided provides a further report from treating practitioner.

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