



HIGH COURT OF AUSTRALIA

Manager, Public Information

3 March 2010

MRR v GR [2010] HCA 4

On 3 December 2009 the High Court allowed the applicant's appeal from a decision of the Full Court of the Family Court dismissing her appeal against orders of a Federal Magistrate. The Full Court should have held that it was not open to the Federal Magistrate, on the evidence before him, to find that it was reasonably practicable for the daughter of MRR and GR to spend equal time or substantial and significant time with each of her parents; and therefore it was not open to the Federal Magistrate to consider making the order described in s 65DAA(1)(c) of the *Family Law Act 1975* (Cth). The High Court today published its reasons for decision.

The parents lived together in Sydney from 1993 until 2007. Their daughter was born in August 2002. In January 2007 the family moved to Mount Isa to allow the husband to gain work experience. The parents separated in August 2007. Following the separation the wife and her daughter lived in Sydney. However, they returned to Mount Isa in October 2007 in accordance with interim orders sought by the father and made by the Federal Magistrates Court. On 1 April 2008 the Federal Magistrates Court made final parenting orders, which provided that the parents have equal shared responsibility for their daughter and that she spend equal time with each of them. The orders were made on the basis that both parents would live in Mount Isa. The Full Court of the Family Court dismissed the wife's appeal and the High Court granted her special leave to appeal from that decision.

The Family Court and the Federal Magistrates Court (the Court) may make parenting orders under s 65D of the Family Law Act. Section 60CA provides that the Court must regard the best interests of the child as the paramount consideration in making parenting orders. Under s 61DA the Court must apply a presumption that it is in a child's best interests for the child's parents to have equal shared parental responsibility, though the presumption may be rebutted. If the Court is considering making an equal shared parental responsibility order then it must, under s 65DAA(1), consider whether it is in the child's best interests, and whether it is reasonably practicable, for the child to spend equal time with each parent. If both of those things are so, the Court may consider making an order for the child to spend equal time with each parent.

When the parents separated, the husband made it very clear that even if his daughter were living in Sydney with her mother he would not consider leaving his employment in Mount Isa to find alternative work in Sydney. He was determined to stay in Mount Isa. When the orders were made the wife was living in a caravan park in Mount Isa, and relying on welfare payments and income from casual employment to support herself. She was also suffering depression arising out of her poor living conditions, lack of employment opportunities and isolation from her family in Sydney.

The High Court noted that the Federal Magistrate had applied the presumption that equal shared parental responsibility was in the child's best interests. However, in considering whether he should therefore make an order under s 65DAA(1) for the child to spend equal time with each of her parents, the Federal Magistrate addressed only the question whether it was in the child's best interests for her to spend equal time with each of her parents. He made no assessment of whether spending equal time with each parent was actually feasible. That is, he failed to make a finding about a statutory condition which was mandatory in determining whether an order for the child to spend equal time with her parents could be made. The High Court held that if the Federal Magistrate had undertaken that assessment, the evidence before him would not have permitted him to find that it was 'reasonably practicable' for the child to spend equal time with each parent. Thus he had no power to make orders for equal time parenting.

The High Court allowed the wife's appeal and ordered that the orders of the Federal Magistrates Court be set aside. The matter was remitted to the Federal Magistrates Court to be reheard.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*