HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, KIEFEL AND BELL JJ

MRR APPELLANT

AND

GR RESPONDENT

MRR v GR [2010] HCA 4
Date of Order: 3 December 2009
Date of Publication of Reasons: 3 March 2010
B44/2009

ORDER

1. *The appeal from the whole of the judgment and orders of the Full Court of the Family Court of Australia given and made on 15 May 2009 be allowed.*

2. *The orders of the Full Court of the Family Court of Australia made on 15 May 2009 be set aside and in their place order that:*

   (a) *the appeal by the mother against the orders of the Federal Magistrates Court of Australia made on 1 April 2008 be allowed;*

   (b) *the orders of the Federal Magistrates Court of Australia made on 1 April 2008 be set aside;*

   (c) *the matter be remitted to the Federal Magistrates Court of Australia for rehearing de novo.*

On appeal from the Family Court of Australia

Representation

B W Walker SC with L A R Goodchild for the appellant (instructed by Neisha Shepherd Solicitor)

G K W Page SC with T D Betts for the respondent (instructed by Rod Madsen)

CATCHWORDS

MRR v GR

Family law – Children – Parenting orders – Section 60CA of the *Family Law Act* 1975 (Cth) makes "best interests of the child" paramount consideration when making parenting order – Section 61DA(1) provides presumption that equal shared parental responsibility in best interests of child – Section 65DAA requires court to consider whether child spending equal, or "substantial and significant", time with each parent is "reasonably practicable" – Where order required that child spend equal time with each parent – Where order made on basis that parents would live in Mt Isa – Where living in Mt Isa contrary to wishes of mother – Whether spending equal time with each parent reasonably practicable – Significance of circumstances of mother – Relationship between best interests of the child and reasonably practicable – Whether order valid.

Words and phrases – "equal time parenting", "reasonably practicable".

Family Law Act 1975 (Cth), Pt VII, ss 61DA, 65D, 65DAA.

1 FRENCH CJ, GUMMOW, HAYNE, KIEFEL AND BELL JJ. On 1 April 2008 the Federal Magistrates Court (Coker FM) made parenting orders under s 65D(1) of the *Family Law Act* 1975 (Cth) ("the Act") with respect to the child of the marriage between the appellant and the respondent. The orders provided that the parties have equal shared responsibility for the child and that she spend equal time with each of them[1]. The orders were made on the basis that (contrary to the mother's expressed wish) both parents would live in Mount Isa. The mother's appeal from that decision, which was heard on 5 August 2008, was dismissed by a Full Court of the Family Court of Australia (Finn, May and Benjamin JJ)[2]. Regrettably, for reasons not explored on the hearing of this appeal, that decision was not published until 15 May 2009.

2 Following a grant of special leave on 2 October 2009, the appeal was heard by this Court on 3 December 2009 and orders pronounced, with reasons to be provided at a later date. It was ordered that the mother's appeal be allowed. In place of the orders made by the Full Court of the Family Court, it was ordered that the appeal from the Federal Magistrates Court be allowed and the orders of that Court be set aside. The matter was remitted for rehearing de novo.

3 The parties lived in Sydney, in what became the matrimonial home, from 1993 until January 2007, when they moved to Mount Isa in order that the father could gain work experience as a graduate mechanical engineer with a mining company. The position was initially for a term of two years. By the time of the hearing in the Federal Magistrates Court the indications were that his contract would be extended. The child of the marriage was born in August 2002.

4 The parties separated in August 2007 shortly after they had travelled to Sydney to attend an awards ceremony connected with the father's graduation. The father returned to Mount Isa and advised the mother that it would be necessary for her to find alternative accommodation there. The mother returned only to collect her belongings and remained living with the child at her father's residence in Sydney. The mother and child returned to Mount Isa on 17 October 2007 following the making of interim orders, on the application of the father, which provided for the return of the child.

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1 [2008] FMCAfam 427.

2 [2009] FamCAFC 81.

5 At the time of the hearing before Coker FM the mother and father were living in Mount Isa, with the child living with each parent on a week about basis. The mother's initial proposal with respect to parenting orders involved her living in Sydney with the child. The father would not consider living in Sydney. His Honour noted that the father "was very determined … to continue his employment in Mount Isa to the extent of indicating even that if the child were to be living with the mother in Sydney, that he would not consider alternative opportunities for work in the same field that he was working in"[3]. The mother amended her proposal to add two further alternatives – that she remain in Mount Isa or the parties both live in Sydney.

6 Part VII of the Act (ss 60A-70Q) concerns children. It was substantially amended in 2006 by the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth). Section 60B(1) of the Act provides that it is an object of the Part to ensure that the best interests of children are met, inter alia, by "ensuring that [they] have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child". Section 60CA requires that a court must regard the best interests of the child as the paramount consideration when deciding to make a particular parenting order in relation to a child. The considerations necessary to be taken into account in determining what is in a child's best interests are listed in s 60CC.

7 Section 65D(1) provides that the Court[4] may make such a parenting order as it thinks proper, subject to the provisions of ss 61DA and 65DAB. Section 61DA(1) requires the Court to apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child. The presumption may be rebutted by evidence that satisfies the Court that it would not be in the best interests of the child[5]. Section 65DAB requires the Court to have regard to any parenting plans entered into between the parties and is not relevant in this case.

8 Sub-section (1) of s 65DAA is headed "Equal time" and provides:

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3 [2008] FMCAfam 427 at [71].

4 Section 69H(4) confers jurisdiction on the Federal Magistrates Court in relation to matters arising under Pt VII.

5 *Family Law Act* 1975 (Cth), s 61DA(4).

"If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:

(a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and

(b) *consider whether the child spending equal time with each of the parents is reasonably practicable*; and

(c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents." (emphasis added)

Sub-section (2) makes provision for where a parenting order provides that a child's parents are to have equal shared parental responsibility for the child (par (a)) but the Court does not make an order for the child to spend equal time with each of the parents (par (b)). In such a circumstance the Court is obliged to:

"(c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and

(d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and

(e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents."

Sub-section (3) explains what is meant by the phrase "substantial and significant time".

9 Each of sub-ss (1)(b) and (2)(d) of s 65DAA require the Court to consider whether it is reasonably practicable for the child to spend equal time or substantial and significant time with each of the parents. It is clearly intended that the Court determine that question. Sub-section (5) provides in that respect that the Court "must have regard" to certain matters, such as how far apart the parents live from each other and their capacity to implement the arrangement in question, and "such other matters as the court considers relevant", "[i]n determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents".

10 Coker FM said that he applied the presumption of equal shared parental responsibility[6]. His Honour noted that he was obliged, pursuant to s 65DAA, to consider "whether equal time with each parent would be in the child's best interests and is reasonably practicable, and if equal time is not appropriate then whether substantial and significant [time] would be in the best interests and reasonably practicable."[7]

11 Because the father had said he would not move from Mount Isa, the only possibility for equal time parenting would arise if the parties both remained in Mount Isa. In what follows his Honour was clearly of the view that they should do so. His Honour said[8]:

> "If [the] parties remain in Mount Isa as the father suggests, then they are in the same locality. They are proximate to each other and there can be the opportunity for equal time which would be, in my assessment, in the best interests of this child."

His Honour noted that the Family Consultant had recommended a continuation of the existing arrangements[9]. His Honour said that he too did not consider it would be beneficial to the child if the parents lived "thousands of kilometres apart"; it was in the child's interests that there be equal time spent with each parent[10].

12 His Honour concluded that the father's proposals of equal shared parental responsibility with the child living in Mount Isa most appropriately ensured the child's best interests and welfare would be met[11] and on that basis made the orders in question.

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6 [2008] FMCAfam 427 at [95].

7 [2008] FMCAfam 427 at [98].

8 [2008] FMCAfam 427 at [98].

9 [2008] FMCAfam 427 at [99].

10 [2008] FMCAfam 427 at [100].

11 [2008] FMCAfam 427 at [121].

13 Section 65DAA(1) is expressed in imperative terms. It obliges the Court to consider both the question whether it is in the best interests of the child to spend equal time with each of the parents (par (a)) and the question whether it is reasonably practicable that the child spend equal time with each of them (par (b)). It is only where both questions are answered in the affirmative that consideration may be given, under par (c), to the making of an order. The words with which par (c) commences ("if it is") refer back to the two preceding questions and make plain that the making of an order can only be considered if the findings mentioned are made. A determination as a question of fact that it is reasonably practicable that equal time be spent with each parent is a statutory condition which must be fulfilled before the Court has power to make a parenting order of that kind. It is a matter upon which power is conditioned much as it is where a jurisdictional fact must be proved to exist[12]. If such a finding cannot be made, sub-ss (2)(a) and (b) require that the prospect of the child spending substantial and significant time with each parent then be considered. That sub-section follows the same structure as sub-s (1) and requires the same questions concerning the child's best interests and reasonable practicability to be answered in the context of the child spending substantial and significant time with each parent.

14 His Honour treated the answer to the firstmentioned question, whether it was in the best interests of the child to have equal time with each parent, as determinative of whether an order should be made. His Honour did not consider, as he was obliged to do, whether it was reasonably practicable in all the circumstances. The Full Court acknowledged that his Honour "did not expressly address the issue of whether an equal time arrangement would be 'reasonably practicable'"[13]. However, the Court observed, his Honour went on to consider, at length, the matters to be considered under s 60CC in determining what arrangements are in the child's best interests[14]. But those matters could be relevant only to the question posed by par (a) of s 65DAA(1), not the question in par (b), which required consideration of other, different matters.

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12 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [130]-[131] per Gummow J; [1999] HCA 21.

13 [2009] FamCAFC 81 at [96].

14 [2009] FamCAFC 81 at [97].

15 Section 65DAA(1) is concerned with the reality of the situation of the parents and the child, not whether it is desirable that there be equal time spent by the child with each parent. The presumption in s 61DA(1) is not determinative of the questions arising under s 65DAA(1). Section 65DAA(1)(b) requires a practical assessment of whether equal time parenting is feasible. Since such parenting would only be possible in this case if both parents remained in Mount Isa, Coker FM was obliged to consider the circumstances of the parties, more particularly those of the mother, in determining whether equal time parenting was reasonably practicable.

16 Had consideration been given to the question only one conclusion could have been reached, one which did not permit the making of the order. From the time that she returned to Mount Isa to the date of the hearing the mother had been required to live in a caravan park, and live there with the child on alternate weeks. Apart from the facilities being limited, it could not be said that such an environment is usually ideal for a child. The availability of alternative accommodation did not seem likely. Rental accommodation is scarce in Mount Isa and the waiting lists for it long. The mother said that she could not afford good quality accommodation in any event and the cheaper rental properties were in "rough" areas.

17 The mother had limited opportunities for employment in Mount Isa. When the parties lived in Sydney she had worked part-time. She had full-time opportunities available to her with her previous employer in Sydney which provided her with flexibility of hours. In Mount Isa the mother supported herself from social services payments and income from casual employment. The disparity between her income and that of the father had not been addressed by the time of the hearing. She said there was no employment in Mount Isa for someone of her experience and there were limited opportunities for flexible hours.

18 The evidence of the Family Consultant was that the mother was "definitely despondent" about being in Mount Isa, as her living conditions were not good and she was isolated from her family. The Family Consultant said that the mother was depressed and recommended that she attend counselling. The finding of Coker FM that "the mother's anguish and depression in being in Mount Isa … can, to a significant degree if not in their entirety, be dealt with by … counselling"[15] is not supported by this evidence.

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15 [2008] FMCAfam 427 at [103].

19 The evidence before his Honour did not permit an affirmative answer to the question in s 65DAA(1)(b). It follows that there was no power to make the orders for equal time parenting. It was necessary for his Honour to proceed to consider whether substantial and significant time spent by the child with each parent was in the child's best interests (given that equal time was not possible) and whether that was reasonably practicable. That would require consideration of the mother being resident in Sydney. But without a finding as to practicability no conclusion could be reached. At the rehearing of this matter afresh, the necessary determinations will be made on the evidence as to the practicability of such orders, given the circumstances pertaining to the parties as they then stand.

20 The orders made by his Honour did include one to the effect that if the mother did not live in Mount Isa, then the child should live with the father and the mother spend time with and communicate with the child at reasonable times to be agreed. No reasons were given concerning the order. It may have been intended as an interim order, to cover the contingency that the mother did not remain in Mount Isa and make provision for what was to occur until further consideration could be given by the Court, having regard to the changed circumstances of the parties. It could not be an order under s 65D, the statutory criteria not having been addressed.

21 It is for these reasons that, when pronouncing orders on 3 December 2009, this Court expressed the opinion that the Full Court of the Family Court should have held that (a) it was not open to the Federal Magistrate to find that it was reasonably practicable, within the meaning of s 65DAA(1)(b) of the *Family Law Act* 1975 (Cth), for the child to spend equal time or substantial and significant time with each of the child's parents, and that (b), accordingly, it was not open to the Federal Magistrate to consider making an order as described in s 65DAA(1)(c).