



All Available Options Need to Be Considered before Ruling a Parent has No Contact with Their Children: Full Court

All proposals for contact should have been considered before ruling out contact

The case of *Blinko v Blinko* [2015] FamCAFC 146 (23 July 2015) was an appeal based on parenting orders made by the Family Court. The father was self-represented and the matter took over 3 years and 8 sitting days to be decided.

The relative law affecting the appeal discussed here is:

- 1) *Family Law Act 1975* (Cth) Section 60CA - Child's best interests paramount consideration in making a parenting order.
- 2) *Family Law Act 1975* (Cth) Section 60CC - How a court determines what is in a child's best interests.

Introduction

The father appealed to the Full Court of the Family Court from orders of the Family Court made on 30 May 2015 by Judge Coates. The father raised 41 grounds of appeal of which 5 were held valid. The ground of appeal looked at here was that the Trial Judge made an error of law by not considering all of the proposals put forward by the father of how he could have contact with the child.

The Trial Judge made orders that the parties' child live with the mother and have no contact under any circumstances with the father. This included the father not being able to send cards or gifts. The reason for this was based on the mother's fear of the father's propensity towards violence. The mother claimed that the father having contact with the child would cause her so much mental distress it would affect her ability to care for the child which would put the child at an unacceptable risk.

The father appealed stating the Trial Judge made an error of law in assessing what was in the best interests of the child under section 60CC of the *Family Law Act 1975* (the "Act"). The father claimed the Trial Judge could have allowed the father to have contact with the child while addressing the mother's fears.

The Appellate Court found that it was open to the Trial Judge to make the orders made, however there was an error of law as the Trial Judge did not consider and provide an explanation of all of the proposals put forward by the father.



Background

In 2002 the father was living in New Zealand and met the mother over the Internet. The mother was working for Queensland Police. Between 2003 and 2004 the father moved to Australia and started living with the mother. The father also started working for Queensland Police. The parties married in 2005. The father left Queensland Police in 2007. They had a child together in 2008. The parties separated in January 2009 after an incident in which the mother alleged the father attempted to attack her with a 30 centimetre kitchen knife.

After the separation the parties reached agreement that the father would spend time with the child but this only occurred on two occasions. After this the father did not see the child. In January 2010 the mother moved to South East Queensland while the father remained in the Wide Bay Burnett district.

Trial Proceedings

On 8 September 2010 the father commenced proceedings in the Family Court of Australia seeking orders that he have contact with his child. An Independent Children's Lawyer was appointed in October 2010 under section 68L of the Act to represent the child's best interests. In addition to this, a Family Consultant (psychologist or counsellor appointed by a court) was appointed to assist the Court in understanding the complex nature and claims of the parties.

The trial was listed for hearing in March 2012. Before this date the father asked the Court to adjourn the trial and make interim orders for the father to have contact with the child under the supervision of the Family Consultant. The father put this forward under section 65L of the Act which allows a court to order a Family Consultant to supervise parenting orders given by the Court. The father suggested this would help the Court to see how the father and child interacted. The Trial Judge delayed this decision as the father was brought up on stalking charges by a third party not involved in the proceedings. However, the stalking charges were subsequently withdrawn after which the Trial Judge dismissed the father's application for interim orders.

The father was self-represented and there were issues with the father's affidavit with much of the content inadmissible. In a long running matter, the case was heard intermittently over 8 days from March 2012 until 31 May 2013.

During the 11 December 2012 hearing the father made a second application in a case to adjourn the proceedings and by interim order allow the father to be introduced to the child under the supervision of the Family Consultant. The Trial Judge dismissed the interim orders as he wanted to hear all of the evidence prior to making orders.

The hearings concluded on 31 May 2013 after which the Court required written submissions. These were filed by the parties by 18 August 2013. Judgement was made in May 2014. The Trial Judge ordered that the father have no contact of any type with the child. The reasons for the judgement was:

1. The father has anger issues.
2. The father's anger has caused the mother to fear the father.
3. Those fears are rational based on an event involving a knife attack.



4. The mother's fear would cause her to "decompensate" and this would affect the child's quality of relationship with the mother and put the child at an unacceptable risk.

The Kitchen Knife Incident and the Mother's Fear of the Father having Contact

During the course of the trial, the mother alleged that the father had issues with anger and violence. The mother alleged that the father had attacked her with a 30 centimetre kitchen knife and that there was a struggle between the mother and father with the father wielding the knife.

The father alleged that the struggle occurred before the father grabbed the kitchen knife. The father alleged he took the knife out of the house to his shed.

The Trial Judge found the evidence of the mother to be more reliable. The mother stated that if the father was to have contact with the child it would cause her so much fear that it would render her unable to continuing functioning as a parent. There was psychiatric evidence which supported her position.

Excluding the Father from the Child's Life

When a court makes a decision in a parenting matter, section 60CA of the Act requires a court to have the best interests of the child as the paramount consideration. Section 60CC of the Family Law Act 1975 provides the grounds that a court must consider when determining what is in a child's best interests. Section 60CC(2) states:

The primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The Trial Judge had to assess the benefit of the child having a meaningful relationship with the father and on the other hand the child being exposed to the mother's psychological state from her fears for the child. The Trial Judge decided that the mother's psychological state would cause harm to the child and this outweighed the benefit of the child having a meaningful relationship with the father. At paragraph 222 the Trial Judge stated:

I also accept that the fears would prevent the mother from ever facilitating a relationship between the child and the father, because she could not cope psychologically if the court ordered any time under any circumstances for the child to spend time with the father.



The Appellate Court agreed with the Trial Judge's conclusion that if the father has contact with the child it would cause the mother serious distress so that "the mother would 'decompensate' which would detrimentally affect the mother's care of the child." The Appellate Court noted that a court could prevent a parent from having contact with a child if it caused the primary carer so much fear that it would impinge on a child's best interests. These principles can be found in the cases of *Cochrane & Peterson* [2008] FamCA 597 and *M v M* (1988) 166 CLR 69.

The Appellate Court also found that based all of the evidence and facts no conclusion could be made that there was an unacceptable risk that the father would harm the child.

However, the Appellate Court could not support the Trial Judge's decision on the grounds that the he should have considered the alternative ways the father could be introduced to the child. The father put forward that he could have contact with the child by:

1. sending cards, gifts and letters;
2. having supervised contact one or more times a year;
3. having closely supervised contact with counselling support; and
4. having the mother and child attend counselling to prepare the mother for the father having contact.

The Appellate Court found that the Trial Judge made an error of law by not considering each of the father's proposals and weighing the risks and benefits in each case. The Trial Judge then needed to provide an explanation in each case. Only after consideration of these matters would a Judge be able to determine that there was an unacceptable risk to the child.

In addition to this, the Appellate Court also found that the Trial Judge made an error of law by not providing reasonable explanations for dismissing the interim order requests put forward by the father to have contact with the child. The Trial Judge had a duty to evaluate all reasonable proposals and provide an explanation as to whether there was an unacceptable risk or not.



Conclusion

In this case the father's past violent conduct had caused the mother to have fear of the child having contact with the father. This fear would have such a high psychological impact on the mother that it would affect her care of the child and put the child at risk.

The tests applied under the Act to determine the matter were:

- 1) Section 60CA that the best interests of a child are paramount;
- 2) Section 60CC(2) that when determining the best interests of a child the court must consider:
 - a. the benefit of the child having a meaningful relationship with both parents; and
 - b. the need to protect the child from physical or psychological harm.

The Appellate Court found that before a decision preventing a parent from having contact with a child can be made a court is required to consider all of the proposals put before it. In this case the Court was presented with proposals that it did not consider or provide a reasonable explanation on. This is an error of law. The matter was sent back to the Family Court to be reheard.