FAMILY COURT OF AUSTRALIA (FULL COURT)

Aldridge v Keaton

[2009] FamCAFC 229

Bryant CJ, Boland and Crisford JJ

16 June, 22 December 2009

Family Law and Child Welfare — Children — Parenting orders — Application for — By person concerned with the care, welfare and development of a child — Determination of — Where two-step approach required — Where threshold test satisfied — Whether second step required Court to consider whether any parenting order should be made at all — Best interests of child is paramount consideration — Whether Family Law Act prescribes a hierarchy of applicants for parenting orders — Family Law Act 1975 (Cth), s 65C.

Family Law and Child Welfare — Children — Parenting orders — Best interests of child — Determination of — Matters required to be considered by Court under s 60CC of the Family Law Act — Where application for parenting orders by person concerned with the care, welfare and development of a child — Whether Court erred in considering matters which relate only to parents — Family Law Act 1975 (Cth), s 60CC.

The appellant was the biological mother of a child conceived by artificial insemination. The respondent and the appellant had an intimate same-sex relationship for a period of time and commenced living together shortly before the child's birth. The relationship between the parties subsequently broke down and the respondent sought parenting orders for equal shared parental responsibility of the child and for the child to spend time with the respondent. The magistrate at first instance declined to make an order for shared parental responsibility but found that the respondent was a person who was concerned with the child's care, welfare and development for the purposes of s 65C(c) of the *Family Law Act 1975* (Cth) (the Act) and granted orders that the child spend time with the respondent. Section 65C provided that:

> A parenting order in relation to a child may be applied for by:
> (a) either or both of the child's parents; or
> (b) the child; or
> (ba) a grandparent of the child; or
> (c) any other person concerned with the care, welfare or development of the child.

The appellant appealed against the decision of the magistrate. It was common ground on the appeal that an application for parenting orders by a person other than a parent or grandparent of a child under s 65C(c) of the Act required a

two-step approach, and that the respondent had satisfied the threshold test of whether or not she was a person concerned with the care, welfare or development of the child. However, the parties disagreed as to whether or not the magistrate had erred in applying the second step under s 65C(c). The appellant contended that, once the primary judge had determined the threshold question, in circumstances where there was to be no shared parental responsibility he should have specifically considered whether or not any parenting order should be made at all, rather than (it was contended) considering how much time the respondent should spend with the child. The appellant also argued that the ordering of s 65C implied a hierarchy of importance and that an application by a parent or grandparent was deserving of greater weight than an application by a non-relative. The respondent submitted that, once the threshold for the purposes of s 65C(c) was crossed, the only test in respect of any applicant was whether or not a parenting order would be in the best interests of the child.

Also at issue on appeal was whether the magistrate had erred in applying s 60CC(2) and (3) of the Act, which stipulated matters that the Court was required to consider in determining what was in the best interests of a child for the purposes of a parenting order. The appellant contended that, as the magistrate had not made an order for shared parental responsibility, the matters in s 60CC(2) and (3) of the Act that referred specifically to parents were not relevant and the magistrate had therefore erred in considering those matters when determining whether to grant the respondent a parenting order.

Held (dismissing the appeal): (1) Once the threshold question under s 65C(c) of the Act as to whether or not an applicant is a "person concerned with the care, welfare or development of a child" is answered in the affirmative, the only question is what order should be made in the best interests of the child. [28], [79], [83]

(2) Section 65C of the Act does not prescribe a hierarchy of applicants. [75], [83]

(3) Section 60CC(3)(m) of the Act, which provides that the Court must consider "any other fact or circumstance that the Court thinks relevant" when determining what is in the best interests of a child, gives the Court a broad opportunity to consider many diverse matters relevant to the welfare of a child, including matters which would normally be considered in respect of a parent. [111]

Appeal against decision of Pascoe CFM [2009] FMCAfam92, dismissed.

Cases Cited

A, In Marriage of (1998) 146 FLR 188.

A and J, In Marriage of (1995) 127 FLR 79.

AMS v AIF (1999) 199 CLR 160.

Evelyn (No 2), Re (1998) 23 Fam LR 73.

Gronow v Gronow (1979) 144 CLR 513.

H v J (2006) 204 FLR 79.

Hodak v Newman (1993) 115 FLR 1.

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705.

Mulvany v Lane (2009) 41 Fam LR 418.

Potts v Bims [2007] FamCA 394.

R v C (unreported, Family Court (FC), No SA 45 of 1992, 25 June 1993).

Rice v Miller (1993) 115 FLR 22.

Stevens and Lee, Re (1990) 102 FLR 108.

Appeal

Ms Cleary, for the appellant.

Mr Lethbridge SC with *Ms Rees*, for the respondent.

Cur adv vult

22 December 2009

The Court

Introduction

1 The fundamental issue raised in this appeal is when it is, or is not, appropriate for a person with no biological connection to a child to have a parenting order made in his or her favour under Pt VII of the *Family Law Act 1975* (Cth) (the Act) in respect of that child.

2 This is an appeal by Ms Aldridge (the mother) against parenting orders made by Chief Federal Magistrate Pascoe on 9 February 2009 in proceedings between Ms Keaton (the applicant) and the mother. The child the subject of the proceedings is B (the child). For a period of time the applicant and the mother had an intimate same-sex relationship. They lived together for approximately eleven months. Their cohabitation commenced shortly prior to the child's birth in 2006.

3 The child, who was born in February 2006, was aged almost three years at the date of the hearing. She is the biological child of the mother and was conceived by artificial insemination with sperm from an unknown donor. The applicant's case before Pascoe CFM was that she and the mother were in a de facto relationship at the date of the child's conception, and hence the child was deemed to be a child of the mother and the applicant, as defined in s 60H of the Act. In other words, that she, the applicant, should be regarded as a parent of the child.

4 At trial the applicant sought orders that she be declared a parent of the child and that she be included on the child's New South Wales birth certificate. Additionally, she sought orders for equal shared parental responsibility for the child, and that the child spend time with her.

5 The learned Chief Federal Magistrate determined that the mother and applicant were not living in a de facto relationship at the date of the child's conception, and declined to make the declaration sought, or the order for inclusion of the applicant's name on the child's birth certificate, nor did he find it appropriate to make an order for equal shared parental responsibility.

6 The Chief Federal Magistrate made a number of parenting orders, including orders that the mother have sole parental responsibility for the child and that the child live with her. He also made orders that the child spend time with the applicant, commencing with short periods each week, and gradually increasing over a period of approximately eight months to each third weekend of the month from 10.00 am Saturday to 4.00 pm on Sunday. Orders were also made for special occasion time with the child, including on her birthday and Boxing Day, as well as for telephone communication with her. The parties are required to inform each other of details of any change of address and telephone numbers and the mother is required to notify the applicant of any serious medical condition suffered by the child. What may be described as "standard" or "usual" orders in a parenting case involving conflict between parties and their extended families were made restraining discussion of parenting issues in the child's

hearing, and also restraining the parties and their immediate families from making derogatory remarks about the other party in the child's presence.

7 The mother's appeal is an appeal against Orders 3 to 9 inclusive of Pascoe CFM's orders. In summary, the mother appeals all of the orders made other than the orders granting her sole parental responsibility for the child, and that the child live with her. Before us, as we will shortly explain in more detail, the mother's counsel argued that the Chief Federal Magistrate was in error in making parenting orders in the mother's favour when she did not seek such orders, nor she submitted, were the orders necessary because the mother was the child's only parent.

8 The mother relied on an amended notice of appeal which contained seven grounds with various subgrounds. Before us the mother's counsel conceded there was overlap between a number of the grounds agitated. In her helpful oral and written submissions the mother's counsel identified the principal challenges to the Chief Federal Magistrate's decision as follows:

- error of law by the Chief Federal Magistrate in not applying a two step approach to determining issues before him (a "threshold" step to determine whether the applicant was a person involved with the care, welfare or development of the child, and a "second" step to determine whether a parenting order should be made at all);
- error of law by considering whether:
  - the child's relationship with the applicant would be of benefit to her; and
  - in considering and applying those parts of s 60CC(2) and (3) of the Act which pertain only to parents;
- errors associated with the expert evidence, including factual error as to the expert's qualifications, placing inappropriate weight on the expert's evidence (on the basis the expert accepted the parties had lived in a de facto relationship and were co-parents) and his conclusions on the child's "attachment" to the applicant; and
- failure to take into account the effect of the orders on the mother, and that the "time" orders effectively precluded the mother from moving, restricted her ability to have holidays at Christmas, or to have extended holidays with the child.

9 After the making of the orders by the Chief Federal Magistrate the mother applied for a stay of the orders. The stay was refused, and the mother filed an appeal against that refusal. We heard the stay appeal at the same time as the substantive appeal, and delivered our reasons dismissing the stay appeal on 19 June 2009.

Background

10 In our stay appeal judgment we set out brief relevant background material from the Chief Federal Magistrate's reasons published in the parenting proceedings. For this appeal it is appropriate to record the relevant background in more depth. The Chief Federal Magistrate's recitation of the relevant facts is concise and not subject to any challenge. In [9]-[21] of his reasons he recorded:

> The applicant is 61 years of age and is an [occupation omitted]. She has two adult children from two previous relationships. Her son, [Mr S], is in a relationship with [Ms C] and they have two children together, ages 7 and 2, and

also residing with them is [Mr S's] daughter from a previous relationship, aged 17.

The applicant also has a daughter, [Ms K]. [Ms K] is in a relationship with [Mr H] and together they have two children, a daughter named [Y] aged 4 and a son aged 2.

The applicant resides in what she describes as a "warehouse apartment complex" located in [an inner western suburb] and which contains five apartments. [Ms K], her partner and children reside in a section contained in the applicant's apartment. [Mr S], his partner, and children also live at the same warehouse complex but in a separate unit.

The [mother] is 43 years old and is currently a full-time mother, although she trained as an [occupation omitted] and pursued that occupation until 2005. [B] is the only child of the [mother]. The [mother] resides in an apartment in [an eastern suburb]. Her parents [Ms A] and [Mr A] live in [another eastern suburb]. The [mother] has one brother, [Mr J] who is married with twin four and half year old girls.

The parties met in 1998 and agree they commenced an intimate sexual relationship in September 2001 but the date of their separation is in dispute.

The child [B] was born as a result of artificial conception procedures undertaken by the [mother] in 2005.

From August 2004 the applicant and [the mother] commenced attending the fertility clinic at [a Sydney hospital] where they had initial interviews with [Dr S] and counselling with [Ms L]. The [mother] underwent artificial insemination procedures in March and April 2005.

The applicant was involved in many aspects of the program, including signing consent forms for the [mother] to undergo artificial insemination.

In May 2005 the [mother] became pregnant as a result of the April procedure and subsequently gave birth to the child [in February 2006]. The applicant was there for the birth of the child and stayed at the hospital for three nights with the [mother].

The parties moved in together in January 2006 in preparation for and following the child's birth. After on-going argument and disagreement concerning parenting, these arrangements ended on 21 November 2006 when the [mother] attended Tresillian training for the child, a parenting style the applicant opposed. The [mother] did not return to the applicant's home and went to live with the child at her parent's [sic] house in [an eastern suburb] before returning to her own home in [another eastern suburb].

Following the [mother] leaving the applicant's home, the time the child spent with the applicant was limited. The applicant saw the child for one third of the school holidays before the parties agreed that the applicant spend time with the child from Tuesday afternoon until Wednesday evening and from Friday evening until Saturday evening.

On 2 September 2007 the [mother] told the applicant that she could only spend time with the child in the [mother's] presence and there was to be no overnight time. The applicant thereafter saw the child on Wednesday and Sunday mornings.

On 13 January 2008, the [mother] reduced the time the applicant spent with the child to once a month. The last occasion the applicant spent time with the child until the operation of interim orders came into effect was on 16 February 2008

11 We also record, at this point, that in May 2008 the applicant commenced proceedings in the Federal Magistrates Court and following an interim hearing in August 2008, Coakes FM made interim orders for the child to spend time with the applicant initially for three hours each Saturday with provision for a gradual increase in time.

12 The mother filed an appeal against Coakes FM's orders and sought a stay of his orders pending the hearing and determination of the appeal.

13 On 15 August 2008 Coakes FM partially stayed his earlier orders pending determination of the mother's appeal, but ordered the child spend three hours each Saturday with the applicant. Although the appeal against Coakes FM's orders was subsequently withdrawn, by consent, his orders remained in place until the hearing before the Chief Federal Magistrate.

The grounds of appeal

14 As the mother's counsel refined her argument before us to the challenges we identified earlier in these reasons, it is unnecessary that we set out the grounds of appeal in full. We propose to deal with the challenges to Pascoe CFM's orders in the broad groups previously identified. It is appropriate, however, that we observe at this point that the applicant did not seek to file a cross-appeal to challenge the Chief Federal Magistrate's conclusion that the parties were not in a de facto relationship at the date of the child's conception, nor did she seek to disturb the order that the mother have sole parental responsibility and that the child live with her. We will later discuss the impact of these two orders, and the relevance of these orders to the challenges raised against Orders 3 to 9 inclusive.

15 It aids understanding if we explain the background to the orders the applicant sought in her amended application. The hearing before the Chief Federal Magistrate took place very shortly after the introduction to the Act of amendments, including amendments to s 60H. The amendments were introduced into the Act at the same time as the financial provisions relating to de facto partners. Section 60H defines, amongst other matters, that a child is a child of a woman and that person's de facto partner. The section does not refer to "a parent" or "co-parent" but defines the woman's spouse or partner as an "other intended parent". It provides as follows:

> (1) If:
>
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the *other intended parent*); and
>
> (b) either:
>
> (i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
>
> (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;
>
> then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:
>
> (c) the child is the child of the woman and of the other intended parent; and
>
> (d) if a person other than the woman and the other intended parent provided genetic material — the child is not the child of that person.
>
> …

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

(6) In this section:

this Act includes:

(a) the standard Rules of Court; and

(b) the related Federal Magistrates Rules.

16 Although not directly raised in this appeal, the question of whether an "other intended parent" is a "parent" for the purposes of Pt VII is not without some doubt. This fact is of significance when considering s 60B(1) and (2) and s 60CC(2) and (3). We would, consistent with principles of statutory interpretation, give a purposive construction to the section, and regard both the birth mother and other intended parent as parents of the child. But we note other provisions of the Act appear inconsistent with this interpretation.

17 The Act, in s 4, defines "parent" as "when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child".

18 Section 60H uses the expression "person" and "other intended parent" not "parent". It appears from the Revised Supplementary Explanatory Memorandum that the drafters intended such a person should be treated in the same manner as a parent, to meet the concerns expressed in representations recorded in the Senate Standing Committee on Legal and Constitutional Affairs' report on the *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (the Senate report) but the definition of "parent" in the Act was not amended at the same time amendments were made to s 60H.

19 We also note the applicant sought a declaration she was a parent under s 69VA of the Act. This section appears in Subdiv E which division contains the provisions for ordering parentage testing procedures (DNA testing to establish biological parentage). As originally inserted into the Act it was not intended as a provision to enable declarations of parentage to be made in respect of parties in a same-sex relationship.

20 The applicant also sought an order that she be registered on the child's birth certificate as a parent. That registration, if carried into effect, would have created a *presumption* (see s 69R) that the applicant was "a parent" of the child, which presumption, if not rebutted, would appear to put beyond doubt that the provisions of Pt VII, including s 61DA(1) — the presumption of equal shared parental responsibility — and those sections of s 60CC which specifically refer to a parent would have application.

21 Section 69R which, in its present form, was introduced into the Act in 1996, preceded New South Wales legislation which now permits the recording on a child's birth certificate the name of both the child's biological mother and a same-sex co-parent: see the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW); s 14 of the *Status of the Children Act 1996* (NSW) and the *Births, Deaths and Marriages Registration Act 1995* (NSW).

22 We think from reading the Senate report, it was intended that following amendments to s 60H that children, the subject of proceedings under the Act, regardless of the circumstances of their conception or birth, should have the same rights, protections and privileges under the Act to receive proper parenting from either a biological parent, or that biological parent's partner (including a same-sex co-parent), as biological children born to men and women who have been legally married, living in a de facto relationship or who have never lived

together. We are not sure the legislation has had that effect. However, while some issues in this appeal do focus on the term "person" and "parent" it is unnecessary we say anything further about ss 4, 60H, 69VA in the context of this appeal, other than to note further legislative amendment may be necessary to clarify the non-biological person's status as a parent.

The error of approach challenge

23 It was not in dispute that in the proceedings before Pascoe CFM it was unnecessary for him to determine as a "threshold" or initial step, whether or not the applicant was entitled to rely on s 65C(c) to apply for a parenting order as her status to do so was conceded. However it is useful to understanding the issues under discussion to set out s 65C.

24 Section 65C of the Act was amended by the *Family Law Reform Act 1995* (Cth) and the *Family Law Amendment Act 2000* (Cth). That section now provides:

> A parenting order in relation to a child may be applied for by:
>
> (a) either or both of the child's parents; or
>
> (b) the child; or
>
> (ba) a grandparent of the child; or
>
> (c) any other person concerned with the care, welfare or development of the child.

25 The mother's counsel submitted that notwithstanding the applicant satisfied the threshold test, what the Chief Federal Magistrate should have done in the circumstances where there was to be no aspect of shared parental responsibility assumed by the applicant, was to consider whether a parenting order should be made at all. She further submitted that the ordering of s 65C implied a hierarchy of importance of the named potential applicants. In short, an application by a parent was deserving of greater weight than an application by a grandparent, and lesser weight or importance should be afforded to an application by a non-relative.

26 The mother's counsel, in her oral submissions, drew our attention to the following matters:

- the mother as the undisputed sole parent did not seek, nor did she need, an order for sole parental reasonability or that the child live with her — in summary, that the Chief Federal Magistrate should not have made Orders 1 and 2 of his orders;
- that there was no ongoing relationship between the applicant and the mother, that the mother sought to appropriately "scale down" any contact between herself, the child and the applicant, and the applicant's "relationship" with the child was only as a result of the interim orders;
- there was no biological or extended family connection between the child and the applicant which required fostering so that the child would maintain links with her broader family, or to enable her, in due course, to know her family identity;
- the applicant had no financial responsibility for the child as does a parent under the child support legislation, and all of the financial burden fell to the mother;

- it was illogical to require the mother to provide information about serious medical matters when, by reason of lack of parental responsibility, the applicant could never be involved in decisions relating to the child's health;
- the orders did not increase periods to be spent with the child over time in an age appropriate manner as would normally occur in a dispute between parents;
- the inflexible time to be spent with the child interfered inappropriately with the mother's life, and the time with the applicant was likely to be of limited benefit to the child — it affected the mother's ability to relocate, or to enjoy extended holidays with the child;
- the child had the benefit of wider family support from the mother's family and the applicant did not offer the child anything that the extended family could not; and
- there would be no logical explanation to give the child as she matured as why she was required to spend time with the applicant.

27 In her written submissions, the mother's counsel submitted that:

> If the child's best interest are not promoted by the making of an Order for the allocation of parental responsibility to [the applicant] should any Order be made for time to be spent beween [sic] [the applicant] and the child and for specific issues? (page 10)

and later she submitted:

> How would such Orders be in the best interests of the child?
>
> Some insight into judicial reasoning is provided in the Reasons for Judgment in the Application for a Stay.
>
> His Honour appeared to consider that [the applicant] had a stronger case for an Order for time than a grandparent or biological relative because there had been a relationship between the parties. With respect, the legislation does not support this approach.

28 Senior counsel for the applicant agreed in circumstances such as the instant case, where a person is not a parent or grandparent of a child, there is a threshold question to be determined as to whether or not an applicant is a "person concerned with the care, welfare or development of a child". However, he submitted once that threshold is crossed, the only test in respect of any applicant is whether or not a parenting order will be in the best interests of a child. For reasons we will now explain, we agree with that submission.

The Chief Federal Magistrate's treatment of the application before him

29 The Chief Federal Magistrate commenced his reasons by referring to the competing applications before him, relevant background and the documents read in the proceedings.

30 At [26] he identified the issues he was required to determine as follows:

> The issues for me are:
>
> a) Whether the applicant is a parent of the child for the purposes of the *Family Law Act 1975* (Cth), including consideration of:
>
> i) Whether the parties were in a de facto relationship for the purposes of s 60H(1) of the Act; and
>
> ii) Whether the parties gave the relevant consent for the purposes of s 60H(1) of the Act;

b) If the applicant is a parent of the child whether I should make orders effectively amending the child's birth certificate to include the applicant;

c) The allocation of parental responsibility; and

d) How much time the applicant should have with the child and if the applicant is to have time with the child whether that time is to be supervised.

31 Thereafter, the Chief Federal Magistrate dealt extensively with evidence about the nature of the parties' relationship and ultimately concluded, at [117], that the mother and the applicant had not been living in a de facto relationship at the time of the child's conception.

32 Under the heading "Parenting orders", at [122] of his reasons, the Chief Federal Magistrate indicated he proposed to deal with a number of factual issues before addressing relevant legal principles. Although at this point in his reasons he recorded disputed factual issues, the Chief Federal Magistrate did not make findings about such issues. Those issues were important issues which were later considered by him under s 60CC(2) and (3) of the Act. We record now a summary of the topics identified:

- safety concerns of the mother, including:
  - concerns about asserted aggressive behaviour of the applicant, including the throwing of a plate by her in the child's presence;
  - an unsafe large sea chest which had been near the child's change table in the applicant's home;
  - about an industrial sink which had sharp edges;
  - an assertion the child at age six months had been left in the bath alone while the applicant was in the next room;
  - that the applicant's dog was large and uncontrolled;
  - that the applicant's home unit was over three levels with an open stairway without a balustrade;
  - the use by unsuitable people of the applicant's granny flat; and
- the applicant's self-cutting and dissociative state, including the applicant's psychiatric admission to a Sydney teaching hospital in 1986.

33 The Chief Federal Magistrate then dealt with the evidence of the single expert (the expert). He recorded his findings, at [139] of his reasons, about the expert's opinion of the applicant's psychiatric history as follows:

> In relation to his professional view of the applicant's psychiatric history, I give it some weight as evidence of possible difficulties in the future, in light of the lack of other evidence provided in relation to this issue.

(We will later refer to other aspects of the Chief Federal Magistrate's reasons dealing with the expert's evidence.)

34 At [140] of his reasons, the Chief Federal Magistrate referred to the legal principles governing an application for parenting orders. He said:

> … Most importantly, s 60CA provides that the best interests of the child are the paramount consideration. However, of importance in this case is s 65C which recognises other significant persons who can apply for a parenting order.

35 He went on to explain, at [141] of his reasons, that although he had determined the applicant was not a parent of the child, he found:

> … that she is a person concerned with the care, welfare or development of the child as provided by s 65C(c) …

36 While the Chief Federal Magistrate did not ultimately find that the parties were de facto partners at the time of the child's conception, he carried out a thorough examination of the evidence necessary to make findings about a de facto relationship (as defined in s 4AA of the Act). Some of the Chief Federal Magistrate's findings are important to note in the context of considering the relationship between the parties and their respective relationships with the child. The Chief Federal Magistrate found:

- the parties were in "a relationship" until the date of actual separation in November 2006 (but were not in a de facto relationship in April 2005 when the child was conceived);
- the parties shared a common residence in the mother's home in an eastern suburb in 2003 or 2004;
- the mother lived in the applicant's warehouse complex prior to and following the birth of the child, that period being around 10 or 11 months;
- there was no sexual intimacy between the parties at the time of the child's conception;
- the parties were financially independent;
- the evidence demonstrated "a high degree of doubt as to the couple's mutual commitment to raising a child together";
- the applicant agreed the mother's brother would look after the child in the event anything happened to the mother;
- the parties signed a consent form associated with the artificial conception at the Sydney hospital;
- the applicant demonstrated a commitment to the mother both before and after the conception and after the birth of the child, including attendance at various prenatal activities, involvement on the day of the birth, and sharing of the care of the child at her residence;
- the applicant's evidence was that she reduced her work hours and shared in the care of the child during the first 10 months of her life;
- that there was a degree of mutual commitment to a shared life but at the time of the child's conception this commitment was more one of support by the applicant to the mother's independent decision to have a child and raise it as she saw fit.

37 In discussing whether he should make an order for equal shared parental responsibility, the Chief Federal Magistrate explained why it was he rejected the mother's submission that the child should spend no time with the applicant. He said (at [144]):

> … Clearly, the applicant has played a major role in the child's life. She was actively involved in caring for the child after birth and has continued to be a significant figure in the child's life. The evidence from [the expert] was that the child had an attachment to the applicant (although not in the clinical sense) which was described in the report as "warm and significant" and at hearing as "strong". Further, the child has on-going attachments to other members of the applicant's family and the evidence supports the importance of these attachments.

38 Immediately thereafter, the Chief Federal Magistrate, at [153], said:

> I must now determine the amount of time it is in the child's best interests to spend with the applicant and whether that time be supervised.

39 We note that the mother's counsel asserted, that the Chief Federal Magistrate, when defining the issues to be determined in [26] of his reasons, and again at this point of his reasoning process, committed appealable error in determining how much time the applicant should spend with the child rather than determining whether any order should be made at all.

40 The Chief Federal Magistrate then referred to the primary and additional considerations in s 60CC(2) and (3), other than s 60CC(3)(h) which clearly had no application.

41 The Chief Federal Magistrate's conclusions, at [194] and [195], are important. In these paragraphs he said:

> I find that the applicant is a person who is significant to the care, welfare and development of the child. The relationship between the child and the applicant is warm and they have a close attachment. The evidence of the family report writer is that it would be beneficial if the child had other significant attachments in her life besides her mother. Additionally, both the family report writer and [the mother] herself agreed it would be of some benefit to the child be exposed to a different parenting style.
>
> I have not granted as much time to the applicant as sought. I believe the time with the applicant is sufficient for the child to benefit from her on-going relationship with the applicant whilst at the same time not blurring [the mother's] role as her primary carer, and allowing [the mother] to exercise sole parental responsibility. I note that the child also has other people in her life such as her grandparents, uncle, cousins and day care group and the weekend monthly time will not take away her attachments to other persons. I have graduated the time spent in accordance with recommendations of [the expert]. I have made orders giving the child limited time with the applicant on special occasions such as birthdays but for limited periods so as not to exacerbate conflict between the parties or cause undue disruption to the child's routine which is important for young children. The parties are of course at liberty to agree on the child having additional time with the applicant or to make other arrangements by mutual agreement.

Relevant sections of the Act

42 Significant changes were made to Pt VII of the Act on the coming into operation of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (the amending Act). As we have already noted the de facto relationship provisions, including s 60H which we have earlier set out, also have significance to competing parenting applications by same-sex partners.

43 To properly appreciate the challenges made by the mother about the Chief Federal Magistrate's approach, both in respect of the asserted error of principle, and the asserted error of law, in applying various subsections of s 60CC(2) and (3), which subsections only refer to parents, it is helpful we set out the relevant provisions of the Act.

44 The objects and principles which underpin Pt VII are found in s 60B(1) and (2). These sections provide:

> (1) The objects of this Part are to ensure that the best interests of children are met by:

> (a) ensuring that children 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; and
>
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
>
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
>
> (d) ensuring that *parents* fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
>
> (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
>
> (a) children have the right to know and be cared for by both their *parents*, regardless of whether their *parents* are married, separated, have never married or have never lived together; and
>
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their *parents* and *other people significant to their care, welfare and development* (such as grandparents and other relatives); and
>
> (c) *parents* jointly share duties and responsibilities concerning the care, welfare and development of their children; and
>
> (d) *parents* should agree about the future parenting of their children; and
>
> (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(Emphasis added.)

45 We have emphasised in s 60B(1) and (2) those provisions which the legislature clearly intended only to apply to parents and also highlighted s 60B(2)(b) which emphasises the child's right to spend time with both parents and other persons. The matters in s 60B(2)(a) to (e) should be read conjunctively. While the emphasis placed on parents by the legislature is of particular importance, the relevance of the principle that a child spending time with people significant to their care, welfare and development must also guide consideration of relevant matters under s 60CC(2) and (3).

46 The touchstone in dealing with any application for a parenting order is, as recognised by the Chief Federal Magistrate, s 60CA. Although its numbering has changed as a result of the amending Act its text remains in its pre-amendment form. It provides as follows:

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

47 Section 60CC(1) provides, other than in the case of a consent order, a court determines what is in a child's best interests by considering the matters in s 60CC(2) (the primary considerations) and s 60CC(3) (the additional considerations). It is convenient we set out those sections, which are relevant to the second challenge to his Honour's orders:

> (1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

(2) 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.

Additional considerations

(3) Additional considerations are:

(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;

(b) the nature of the relationship of the child with:

(i) each of the child's parents; and

(ii) other persons (including any grandparent or other relative of the child);

(c) the willingness and ability of each of the child's *parents* to facilitate, and encourage, a close and continuing relationship between the child and *the other parent*;

(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

(e) the practical difficulty and expense of a child spending time with and communicating with *a parent* and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both *parents* on a regular basis;

(f) the capacity of:

(i) each of the child's parents; and

(ii) any other person (including any grandparent or other relative of the child);

to provide for the needs of the child, including emotional and intellectual needs;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

(h) if the child is an Aboriginal child or a Torres Strait Islander child:

(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and

(ii) the likely impact any proposed parenting order under this Part will have on that right;

(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by *each of the child's parents*;

(j) any family violence involving the child or a member of the child's family;

(k) any family violence order that applies to the child or a member of the child's family, if:

(i) the order is a final order; or

(ii) the making of the order was contested by a person;

(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(m) any other fact or circumstance that the court thinks is relevant.

(Emphasis added.)

48 Thus it may be seen that s 60CC(2)(a) and (3)(c), (e), and (i) refer exclusively to a parent or parents.

49 Section 61C sets out the legal position which prevails in relation to parental responsibility for a child (unless the provision is displaced by an order of the Court). Section 61C and accompanying notes are as follows:

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.

Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Note: Section 111CS may affect the attribution of parental responsibility for a child.

50 This section was not amended by the amending Act and is the provision the mother relied on to demonstrate that it was unnecessary for the Chief Federal Magistrate to make an order that she have sole parental responsibility in circumstances where he determined s 60H of the Act had no application.

51 Section 64B(1) sets out the meaning of a parenting order and s 64B(2) lists the matters which can be dealt with by such an order. The matters listed are not directed to parents but to a person or persons. Section 64B(2) provides as follows:

(2) A parenting order may deal with one or more of the following:

(a) the person or persons with whom a child is to live;

(b) the time a child is to spend with another person or other persons;

(c) the allocation of parental responsibility for a child;

(d) if 2 or more persons are to share parental responsibility for a child — the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;

(e) the communication a child is to have with another person or other persons;

(f) maintenance of a child;

(g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:

(i) a child to whom the order relates; or

(ii) the parties to the proceedings in which the order is made;

(h) the process to be used for resolving disputes about the terms or operation of the order;

(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

The person referred to in this subsection may be, or the persons referred to in this subsection may include, either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

52 Section 64C provides that a parenting order in relation to a child may be made in favour of a parent of the child or some other person.

53 We also note that Div 4 of Pt VII which deals with parenting plans commences with a provision which exhorts *parents* to agree about matters concerning the child. Section 63C defines a parenting plan as an agreement between the parents of a child. Subsection (1) does not include any provision for the making of an agreement between a parent and another person, although subs (2) provides that the plan may deal with arrangements about the person or persons with whom a child is to live or spend time with or the allocation of parental responsibility for a child.

Discussion

54 The mother's first challenge involves determination of three questions:

- Does the legislation require a two step approach?
- Does s 65C imply a hierarchy of applicants some of whose applications should receive less or no weight than others?
- Did the Chief Federal Magistrate fall into error in identifying issues of parental responsibility and time, rather than determining whether any order should be made at all?

55 There is no doubt that when an application is made by a person who is an undisputed parent (biological, adoptive, or recognised under s 60H) then no threshold test is required under s 65C and the only criteria relevant to the making of a parenting order is the child's best interests, which are the paramount but not sole determinant of the application.

56 The category of grandparent as a discrete category of applicant was inserted into the Act in 2000. That and other amendments made by the amending Act are intended to highlight the importance of grandparents in the life of a child. If grandparents' status is not in doubt the implication from the drafting of the sub-section is clear — a threshold test has no application.

57 Prior to the 1995 amendment to s 65C, the authorities were clear that if an applicant relied on being a person concerned with the welfare of a child, then such applicant did need to meet a threshold test. That continued to be the case when the wording of the sub-section was expanded to include not only the welfare of the child, but also consideration of "care" of a child and "development" of a child: see *M & A* [2003] FamCA 1340; *H v J* (2006) 204 FLR 79, per Brown FM. However, the pre-2006 authorities are clear once the applicant has established he or she is a person concerned with the care, welfare

or development of the child, the application, be it for orders for a child to live with that person, or spent time with him or her, is one to be determined in the best interests of the child.

58 Kay J in *Re Stevens and Lee* (1990) 102 FLR 108 referred to a preliminary issue in the context of discussing the question of whether a child will benefit from access (as spending time was then referred to in the Act) and said "[t]here then comes a second stage", referring to the category of cases where a child has a long-standing relationship with a person other than a parent, where a court would consider whether an order would best serve "the welfare of the child". His Honour then considered what he described as "a third tier of cases" where "no present relationship" existed between a child and an applicant but where there were significant biological ties (in the instant case a biological grandparent) and again discussed what benefit, if any, the child would gain from an order in favour of the applicant. However the categorisation of applicants espoused in that case is inconsistent with later Full Court authority.

59 The principles to be applied in parenting cases determined prior to the amending Act, both before and after the 1995 amendments, involving a non-parent were discussed by the Full Court in *Rice v Miller* (1993) 115 FLR 22 and *Re Evelyn (No 2)* (1998) 23 Fam LR 73. In *Rice v Miller* the Full Court (Ellis, Lindenmayer and Bell JJ) explained:

> … We are thus of the view that the fact of parenthood is to be regarded as an important and significant factor in considering which of the proposals best advances the welfare of the child. We would reiterate, however, that the fact of parenthood does not establish a presumption in favour of the natural parent nor generate a preferential position in favour of that parent from which the Court commences its decision making process. Each case must be determined according to its own facts, the paramount consideration always being the welfare of the child whose custody is in question.

60 In *Re Evelyn* the Full Court (Nicholson CJ, Ellis and Lindenmayer JJ) repeated with approval the statements in *Rice v Miller* as appropriate. Their Honours said:

> In *Rice v Miller* (1993) FLC ¶92-415 the Full Court adopted the reasoning of Lindenmayer J in *Re Hodak; Newman; Hodak* (1993) FLC ¶92-421 [(1993) 115 FLR 1] that while the fact of parenthood is an important and significant factor in considering which of the proposals best advance a child's welfare, the fact of parenthood does not establish a presumption in favour of a natural parent nor generate a preferential position in favour of that parent from which the Court commences the decision making process.
>
> Their Honours stressed that each case must be decided on its own particular facts with the welfare, (now best interests) of the child being the paramount consideration.
>
> Notwithstanding that the present case concerns a surrogacy situation, it remains clear, as a matter of principle, that there is no presumption in favour of a biological parent nor any presumption in favour of the biological mother where the child is female.

61 It now falls to consider whether, and if so, in what respects, has the amending Act changed those principles.

62 As we have already noted the amending Act introduced significant changes to the objects and principles underpinning Pt VII and to the matters which a court must consider in determining a parenting application. It also introduced the

presumption of equal shared parental responsibility in proceedings between parents, but not between a parent or parents and a grandparent, or a parent or parents and another person. Subparagraph (e) of the definition of "major long term issues" in s 4(1) (which definition was inserted by the amending Act) refers only to "changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent". Also of significance is the inclusion of new provisions which apply only to parents. These include s 65DAA(1) which section requires a court to consider whether the child spending equal time with each of the child's parents would be in the best interests of the child, and reasonably practicable, or if not, to consider under s 65DAA(2) whether substantial and significant time is in the child's best interests and reasonably practical, or that some other order should be made. Also relevant is s 60CC(4) which requires a court to consider the extent to which each of the child's parents has fulfilled, or failed to fulfil his or her responsibilities as a parent. In summary, each of s 65DAA(1) to (5) and s 60CC(4) refer only to parents.

63 Prima facie, somewhat inconsistently with the use of the word "parent" in the definition of "major long term issues" in s 4(1), s 65DAC (which section applies if two or more persons are to share parental responsibility) is not restricted to a child's parents.

64 Although prior to the amending Act the criteria to be considered in determining a child's best interests (s 68F(2)) referred in various subsections only to parents, the Act did not emphasise in the objects and principles underpinning the then Pt VII the strong focus on parents (parents having a meaningful involvement in the lives of their child) nor did it contain the primary consideration found in s 60CC(2) with its emphasis on a child having the benefit of a meaningful relationship with both parents.

65 The potential uncertainty as to the weight to be afforded to the additional and primary considerations in an application involving a person other than a parent was raised by Finn J in *Mulvany v Lane* (2009) 41 Fam LR 418. At [15]-[16] of her reasons, her Honour said:

> It is indeed unfortunate that given the now very detailed provisions of Part VII and the acknowledgement in that Part of the important roles that persons who are not natural parents of a child can have in a child's life (see, for example, s 60B(2)(b)), that the legislation does not give some clearer indication of the weight to be attached to the child's relationship with a person other than his or her parent, compared with the child's relationship with the natural parent in the determination of proceedings between a parent and a person other than a parent.
>
> As the legislation currently stands, and assuming that it is correct that "parent" means only a natural or adoptive parent, it would seem that in a case such as this, the court can only reach its determination in parenting proceedings on an application of s 60CC(2)(b) (protection from harm) and of the additional matters in s 60CC(3) so far as they expressly or impliedly refer to a person other than a parent.

66 Having regard to the lack of clarity in parts of the legislation as to the weighting which should be afforded to the various sections we have had recourse to the Revised Explanatory Memorandum to the amending Act (the EM): see *Acts Interpretation Act 1901* (Cth), s 15AB. Paragraph 1 of the EM sets out in broad terms the basis of the amendments. It includes the following statement (p 8):

> … The amendments promote the object of ensuring that children have a right to have a meaningful relationship and know both their parents and that parents continue to share responsibility for their children after they separate …

67 Paragraphs 39 and 40 of the EM explain the rationale for the amendments contained in s 60B(2)(b), (c) and (d).

68 The explanation of why the former s 65E was renumbered and moved to a more prominent position in the Act is contained in paras 44 and 45 as follows (p 13):

> *Subdivision BA — Best interests of the child*
>
> 44. Item 9 inserts a new Subdivision dealing with the best interests of the child into Div 1 of Pt VII. This will give greater prominence at the start of the Division to these issues which are relevant to a large range of issues. This is aimed to assist people making agreements to make all their post separation decisions with a child focus. The consolidation of the provisions close to the start of Pt VII is useful given the greater prominence to the best interests now in the objects and principles in s 60B.
>
> *Section 60CA — Child's best interests paramount consideration in making a parenting order*
>
> 45. Section 60CA moves the existing s 65E which provides that the court must regard the best interests of the child as the paramount consideration in deciding whether to make a particular parenting order to s 60CA in new Subdivision BA in Div 1, Pt VII (Children). The intention is to increase the visibility and emphasis of this important provision. This is consistent with recommendation 16 of the [House of Representatives Standing Committee on Legal and Constitutional Affairs].

69 In explaining the amendment encapsulated in s 60CC(3)(b) the EM states (at para 58):

> New paragraph 60CC(3)(b) replaces existing paragraph 68F(2)(b) with a modification. Existing paragraph 68F(2)(b) provides that where the court is determining the best interests of the child, it must consider the nature of the relationship with each of the child's parents and with other persons. This provision has been modified to include an explicit reference to grandparents or other relatives of the child. This change further ensures that the court recognises the importance of the relationships that the child has with their wider family, in particular grandparents. (page 15)

70 Similar explanations are given as to why s 60CC(3)(d) was inserted to replace the former s 68F(2)(c) and s 60CC(3)(f) was inserted to replace the former s 68F(2)(e).

71 In discussing the new presumption contained in s 61DA the EM at para 128 includes the following statement:

> The Government considers that it is important to ensure that a child has a meaningful relationship with both parents and that both parents participate in decisions about the child …

72 The explanation of the rationale behind the amendment to s 64B(2) to (4) is significant. We set out para 177 of the EM in full:

> Item 22 gives greater recognition to the important role that grandparents and other relatives play in a child's life and to the benefits to a child of continued contact with these significant people. In particular, s 64B(2) specifically provides that a parenting order may provide for a child spending time with or communicating

> with the grandparent or other relative of a child. This change is consistent with the amendments to facilitate greater involvement of extended family members in the lives of children.

73 The power to make the parenting order which a court thinks proper is contained in s 65D. The EM discusses this provision in para 192. That paragraph states:

> Section 65D provides the court with the necessary power to make a parenting order. Item 29 clarifies s 65D(1) by inserting a requirement that, in making a parenting order, the court should have regard to the presumption of equal shared parental responsibility and any parenting plans (ss 61DA and 65DAB respectively).

74 Subject to the inclusion of a reference to "other intended parent" in s 60H, we agree with Finn J's comments in *Mulvany v Lane*, and note that although the amending Act introduced detailed and complex provisions which a court must consider when determining whether to make a parenting order, or in refusing to make a parenting order, the amendments themselves do not:

- suggest any order in which the provisions must be considered; and
- direct any particular weighting or priority to any provision in the Part (although we note the division of the s 60CC factors into primary considerations and additional considerations. It is clear however from the EM that while the use of the word "primary" is intended to stress the importance of the considerations in s 60CC(2), in a particular case one or more of the considerations in s 60CC(3) may outweigh the primary considerations).

75 While there can be no doubt that the amending Act has placed greater emphasis on the role of both parents in the upbringing of their children, as we are presently advised, all applications for parenting orders remain to be determined with the particular child's best interests as the paramount but not sole determinant. Our reasons for upholding this view include the following matters:

- the unaltered provision dealing with best interests (s 60CA) and the positioning of the section in the Act;
- the recognition in s 65D(1) that ultimately a court should make such parenting order as it thinks proper; and
- that no provision was included in the Act suggesting greater or lesser weight should be given to any particular applicant.

76 Experience and common sense demonstrates that the vast majority of applications for parenting orders will be brought by one of a child's biological parents, with the other parent the respondent to the application. But there are also situations where one or both parents are deceased or otherwise unavailable or unsuitable to fulfil the duties of parenthood. Often in the latter circumstances a relative of the child will appropriately seek parenting orders.

77 Further, just as in 1976 Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 recognised changing societal "norms" in rejecting the notion of a presumption in favour, or any preferred role, of a mother to have custody of a child, particularly of a female child, the Act in its present form enables a court dealing with a parenting application the flexibility to recognise and accommodate "new" forms of family, including families with same-sex parents, when making orders which are in the best interests of a child who is part of such a family.

78 Children who have been brought up in these new forms of family may be children who fall within s 60H. There will also be children who, while not conceived with the consent of the co-parent (or as described in the legislation the "other intended parent"), have effectively been treated as a child of the relationship of a same-sex couple. Such children may be the biological child of one parent born, before the same-sex relationship commenced, but whose substantial parenting experience has been from each of the same-sex "parents". More commonly, they may have been conceived as the result of a private agreement with a known donor and without formal consent documentation. These children's best interests are the paramount consideration to be taken into account, not the circumstances of their conception or the sex of their parents.

79 In summary, in dealing with any parenting application by a person interested in the care, welfare or development of a child, a court will determine that application applying the relevant provisions of Pt VII to determine whether making (or not making) a parenting order would be in the child's best interests.

80 That was the course adopted by the Chief Federal Magistrate. Having considered the applicant's involvement with the child, the child's warm attachment to the applicant and extended members of her family, and her parenting style, the Chief Federal Magistrate, in the exercise of his discretion determined that it was in the child's best interests that she spend time with the applicant. Although the Chief Federal Magistrate in [22] appears at that stage of his reasons to have foreshadowed that, after dealing with the question of parental responsibility, he would move to consider "time to be spent", and not whether or not any order should be made, it is clear from an overall reading of his reasons, and in particular [144], he considered, and rejected as not in the child's best interests, the mother's position that there should be no order made in the applicant's favour.

81 At the conclusion of the hearing counsel for the mother submitted that greater caution was required of a court determining a parenting application involving a person other than parents and grandparents. She submitted the legislation encouraged a more cautious approach when the application included a member of the group she described as "others". Whilst we readily acknowledge the importance of the relationship between a child and his or her parents, we cannot give blanket endorsement to this submission. As is clearly demonstrated in the case law, each parenting case turns uniquely on its own facts: see eg *Mulvany v Lane*. The Act does not contain a specific provision requiring consideration of no order unless in the best interests of the child as does s 1(5) of the *Children Act 1989* (UK). Rather it requires the making of orders which promote the child's best interests as the paramount consideration. In some cases, which we accept are likely to be infrequent, the best interests criteria may dictate a child live with a person to whom they are not biologically related and for that person to have an order for parental responsibility.

82 We do not consider any error of principle by the Chief Federal Magistrate has been established in his approach to the application.

83 In summary we would answer the questions posed at [52] as follows:

(i) a two step approach is appropriate in dealing with an application for parenting orders brought by a person other than a parent, a child, or a grandparent. In other words is the applicant a person concerned with the care, welfare or development of the child (step 1) and if so, what order should be made in the best interests of the child. This

consideration may lead to an order for parental responsibility, an order a child live with, spend time and or communicate with the person, or that no such order be made (step 2);

(ii) s 65C does not prescribe a hierarchy of applicants. The application falls to be determined under s 60CA guided by the objects and principles in s 60B(1) and (2) and based on consideration of relevant matters under s 60CC(2) and (3); and

(iii) there was no appealable error by the Chief Federal Magistrate in his approach to the applicant's application.

Asserted error of law in taking into account provisions of s 60b and s 60cc only applicable to parents

The submissions

84 In her submissions the mother's counsel noted that the first and fourth objects in s 60B(1) refer only to parents. She submitted that the Chief Federal Magistrate was in error, having recognised the conflict between the parties as a reason not to make an order for shared parental responsibility, by making orders for the child to spend time with the applicant. Counsel submitted if a finding of conflict of the nature accepted by the Chief Federal Magistrate had been made in a case between two parents, this finding "would leave the issue of time to be spent in doubt", and in this case which involved, not a parent, but a former partner, any risk of exposure of the child to conflict or abuse should have been avoided by dismissing the applicant's application.

85 The mother's counsel also submitted that the effect of the Chief Federal Magistrate's orders was to give the applicant "rights" but none of the responsibilities of parenthood. In face of the mother's opposition to the applicant spending time with the child it was asserted the time order was "counter productive" to the mother meeting her responsibility to provide adequate and proper parenting to the child.

86 The mother's counsel also asserted the learned Chief Federal Magistrate had fallen into error by considering matters relevant under s 60CC(2)(a), as well as s 60CC(3)(c), (e), (g) and (i) and (4). In summary, she submitted that where no order for parental responsibility had been made that the Chief Federal Magistrate should not have considered those provisions of s 60CC(3) which relate to parents, but should only have had regard to s 60CC(3)(b), (d), (f), (l) and (m) (which provisions relate to parents and other persons significant to the care, welfare or development of a child).

87 In respect of s 60CC(4) the mother's counsel submitted that error was established because the Chief Federal Magistrate should not have made an adverse finding about the mother reducing the applicant's time with the child, as the mother had no "obligation" to facilitate a relationship between the child and the applicant.

The Federal Magistrate's consideration of the object and principles, and s 60CC factors

88 At [154] of his reasons, the Chief Federal Magistrate summarised the provisions of the Act which are relevant to determining a child's best interests. The Chief Federal Magistrate's discussion was, at this point of his reasons, generic rather than specific to the applicant's application.

89 At [155] and [156], under the heading "The benefits to the child of having a meaningful relationship with both the child's parents", the Chief Federal

Magistrate referred to the fact that the child had a loving relationship with the mother. He went on to explain that he had determined the applicant was not a parent of the child under the Act "and consequently this section does not apply to the applicant". The Chief Federal Magistrate then explained "[c]ertainly the applicant has played an important role in the child's life and I have considered her a person of significance to the child's welfare".

90 In [157] and [158] of his reasons, the Chief Federal Magistrate addressed the second primary consideration (s 60CC(2)(b)). He set out his findings in relation to the mother's evidence of inappropriate behaviour by the applicant in smashing a plate in the child's presence. The Chief Federal Magistrate determined the incident was an isolated one, and that he had not formed the view the parties would "negatively interact with each other in front of the child to a level which may constitute psychological harm".

91 In dealing with the additional considerations, the Chief Federal Magistrate addressed s 60CC(3)(b) under the heading "The nature of the relationship of the child with each of the child's parents; and other persons". This was clearly an important and pivotal matter in the application, and the Chief Federal Magistrate discussed the matters relevant to it in the following six paragraphs. Again under this heading he noted that the applicant was not a parent for the purposes of the Act, nor was there any evidence she "currently stands as a parental figure to the child" (at [163]). The Chief Federal Magistrate went on to record:

> … The family report writer at hearing indicated that the applicant's attachment observed was not in the clinical sense of that between child and mother/father.

92 The Chief Federal Magistrate then proceeded to discuss the child's relationship with extended members of both the applicant and mother's families but did not set out any findings in relation to either party's evidence in that regard.

93 Under the heading "The willingness and ability of each parent to facilitate, and encourage, a close and continuing relationship between the child and the other parent", the Chief Federal Magistrate said, at [167], "[t]he applicant has given evidence that she would encourage a relationship between the child and the [mother]".

94 The Chief Federal Magistrate went on to discuss and make findings about the evidence of the mother's behaviour and concluded her actions evinced an intention to remove the applicant from the child's life.

95 Having noted that there had been compliance by both parties with interim orders and the relationship between the parties had been civil, the Chief Federal Magistrate said (at [170]):

> … I do not think that there would be any difficulties with prescribing a contact regime between the child and the applicant so far as contact between the parties is necessary.

96 The Chief Federal Magistrate noted a concession by the mother that she was concerned the child would miss her relationships with the other children at the applicant's residence (the applicant's grandchildren). He recorded that the mother did not agree there was "a 'strong relationship' between the applicant and child by February 2008" (at [171]).

97 The Chief Federal Magistrate concluded his findings under the heading above described saying (at [171]):

> Although the [mother] may not want a relationship with the child, I am of the view that she will comply with orders and appreciate advantages to time with the applicant.

98 The Chief Federal Magistrate then proceeded to consider the likely effect of any change in the child's circumstances, including the likely effect on her of any separation from the mother or "other person with whom he or she has been living". He set out his conclusions under this topic at [172] and [173]. It is appropriate we set out those findings, which were of significance, in full:

> I am of the view that contact with the applicant would be beneficial to the child. However, the child has spent the last year in the sole care of the [mother] and there has been no evidence to lead me to the conclusion that substantially increasing the time with the applicant would have any benefit to the child.
>
> Although there has been some evidence that exposure to a different parenting style maybe beneficial to the child, this does not mean that the exposure to a different parenting style need be substantial. Due to the difficulty between the parties communicating, their different parenting styles and the [mother's] role as the primary carer, it would be in the best interests of the child not to be in a position where she is confused by different parenting styles or unwittingly causes conflict with the [mother] as a result. Time with the applicant is in my view beneficial for the child but only to the extent that different parenting styles do not cause problems for the child.

99 The next matter of significance considered by the Chief Federal Magistrate was the capacity of the mother, and any other person, to provide for the needs of the child.

100 At the commencement of his discussion of this topic the Chief Federal Magistrate recorded the mother's evidence that she suffered from chronic fatigue syndrome, which was exacerbated when she was stressed. However, he went on to note that no submissions had been made as to whether this would affect her parenting capacity. Of relevance in this appeal is the Chief Federal Magistrate's discussion about the applicant's psychological health. At [178] the Chief Federal Magistrate said:

> The evidence indicates that the applicant had been able to care for the child during 2006 and during the times she has had care of the child. There has been no evidence tendered which indicated that her psychiatric health has adversely affected her care of the child. I note the situation where she voluntarily entered hospital and left [Ms K], as a child, to be cared for by others, which indicates the applicant had been able to identify her inability to care for [Ms K] at the time and made appropriate arrangements. The applicant gave evidence that she regularly sees a counsellor and has maintained stability over the last two years, without any incidents. Additionally, the family report writer indicated there was a possibility that the applicant's condition may reduce with age. I see nothing in the applicant's mental history which would be potentially harmful to the child if she were to have care of the child for a period.

101 The Chief Federal Magistrate ultimately concluded that any time spent by the applicant with the child should not be supervised and that both parties had the capacity to provide for the needs of the child, including emotional and intellectual needs.

102 In dealing with the matters under s 60CC(3)(g) (the maturity, sex, lifestyle and background of the child and either of the child's parents and any other characteristic of the child the Court thinks relevant), the Chief Federal

Magistrate commenced his discussion by explaining the child was conceived via artificial insemination and recorded the mother had allowed the child to meet a half-sibling from her "genetic connection with the sperm donor on around 6 occasions". The Chief Federal Magistrate recorded his findings which were that the parties would deal with issues relating to the child's conception in a manner that was sensitive and in the best interests of the child.

103 In dealing with the attitude to the child and to the responsibilities of parenthood demonstrated by each of the child's parents, at [187], the Chief Federal Magistrate said:

> In relation to the applicant, I also find she has generally shown positive attitudes to parenting. The applicant appeared dedicated to caring for the child in 2006 and after that time established patterns of play for the child, such as going to the park, painting, visiting the applicant's sister's bead shop, riding a bike or playing dress up.

104 The Chief Federal Magistrate concluded "[t]he evidence of both parties indicates they have tried to look after the child well according to their own values" (at [189]).

105 The Chief Federal Magistrate then turned to consider s 60CC(4). Section 60CC(4) is in the following terms:

> (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
>
> (a) has taken, or failed to take, the opportunity:
>
> (i) to participate in making decisions about major long-term issues in relation to the child; and
>
> (ii) to spend time with the child; and
>
> (iii) to communicate with the child; and
>
> (b) has facilitated, or failed to facilitate, the other parent:
>
> (i) participating in making decisions about major long-term issues in relation to the child; and
>
> (ii) spending time with the child; and
>
> (iii) communicating with the child; and
>
> (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

106 The Chief Federal Magistrate commenced discussion of this section noting that (at [190]):

> The applicant is not a parent of the child and this consideration is not relevant on these facts, especially since I make findings that the [mother] should have sole responsibility for the child.

107 However, he went on to note that the mother had gradually reduced the time the child spent with the applicant so that she would have no relationship with her. The Chief Federal Magistrate said (at [191]):

> … This is particularly unfortunate as the [mother] agreed the child had a strong attachment to the applicant and was concerned about the child's relationship with the children in the applicant's extended family. The [mother] indicated it was due to the safety risks to the child and that she had deliberated over the matter for some time.

108 The Chief Federal Magistrate set out his conclusions in [194] and [195] of his reasons. We have already set out those paragraphs.

Discussion

109 It is clear from the passages of the Chief Federal Magistrate's reasons, the relevant portions of which we have set out or summarised above, that he was exquisitely aware as a result of his finding that the applicant did not satisfy the requirements of s 60H of the Act, that those subsections of s 60CC(2) and (3) which refer exclusively to a parent were not matters he was required to consider in his assessment of the child's best interests.

110 We observe here that on its introduction in 1976 the Act (the then s 64) did not prescribe matters which a judge was required to take into account in determining best interests (welfare) of a child. The Court had the power under s 64(2) to place the child in the custody of "a person other than a party to the marriage". The predecessor of s 60CC(3), s 68F(2), was first introduced into the Act in 1996 and has been subsequently amended. Similar provisions are found in s 1(3) in the *Children Act 1989* (UK) and s 5 of the *Care of Children Act 2004* (NZ). While s 68F(2) provided a list of criteria to be taken into account in determining best interests, it did not have the strong focus on parents of its successor s 60CC(2) and (3).

111 While the Act is, since the introduction of the amending Act, more prescriptive than the prior legislation in mandating matters a court must take into account in determining best interests it is clear that s 60CC(3)(m), which provides a court must consider "any other fact or circumstance that the court thinks is relevant", gives a broad opportunity to a court to consider many diverse matters relevant to the welfare of a child, and may have particular relevance when dealing with an application by a person other than a parent.

112 The flexibility afforded by s 60CC(3)(m), and the ability to deal with aspects of the application under s 60CC(3)(f) involving a party who was not a parent was explained by Moore J in *Potts v Bims* [2007] FamCA 394 at [8]: see also *Mulvany v Lane* at [76] and [77] per May and Thackray JJ. Although the passage from Moore J's judgment is lengthy, we think it accurately encapsulates the relevant legal principles to be applied when determining a parenting application which involves a non-parent/s. It is as follows:

> The provisions about children's arrangements are to be found in Part VII of the *Family Law Act 1975*. The concept of best interests of the child is at the heart of it and that is designated to be the paramount consideration in making any parenting order. Some Part VII provisions refer to "parent/s" which, given the word's ordinary meaning and in the absence of an expanded definition or some other descriptor such as "party", means a number of sections do not apply when assessing "best interests" in proceedings that are not between parents but between a parent and a non-parent [eg. relative]. Section 60B(1) and (2) set out the objects of Part VII and the principles underlying them. However, a number are expressed to apply to "parent/s" and so are excluded in proceedings of the latter kind. For example, paragraphs 60B(1)(a), (c), and (d) fall away and what remains is paragraph (b); namely, the object of protecting children from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence. Similarly, paragraphs 60B(2) (a), (c) and (d) fall away as underlying principles and there remains paragraph (b); namely, ["except when it would be contrary to a child's best interests"] "children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as

> grandparents and other relatives)". With objects and underlying principles as a guide, the determination of what is in a child's best interests requires the court to consider both "*primary considerations*" and "*additional considerations*" set out in s 60CC. But again the use by the legislature of the word "parent/s" in a number of those considerations operates to exclude those factors in proceedings between a parent and non-parent. Falling within that group is the *primary consideration* in paragraph 60CC(2)(a) and the *additional considerations* at paragraph (c), (e), and (i). However, that does not mean those considerations are to be ignored if the facts of the case raise them as issues because they can be addressed under other considerations such as paragraph (f) [capacity to provide for needs] or, if nowhere else, under paragraph (m) [any other fact or circumstance relevant]. On that same analysis, the presumption of equal shared parental responsibility imposed by s 61DA and, if it applies and the order is to provide for equal shared parental responsibility, consideration of the child/ren spending equal time or substantial and significant time, as set out more particularly in s 65DAA, are not prescribed pathways in the reasoning process towards a best interests conclusion in proceedings between a parent and non-parent. Nonetheless, the particular applications may make it necessary to address those outcomes in any event.

113 The mother is critical of the Chief Federal Magistrate in his consideration of s 60CC(2)(a) on the basis that, as he had determined the mother should have sole parental responsibility, he should not have had regard to the applicant because "she was clearly not of sufficient significance to be considered under this sub section". In her submissions in respect of s 60CC(3)(b) the mother's counsel (p 13) asserted the Chief Federal Magistrate was in error in failing to have regard to the fact the mother asserted the applicant's role as a co-parent as one of recent invention. The mother's counsel's complaints about the Chief Federal Magistrate's treatment of s 60CC(3)(c) and (4) contained a similar theme — namely that the mother had no obligation to facilitate a relationship between the child and the applicant.

114 We accept it was unnecessary for Pascoe CFM to make an order that the mother have sole parental responsibility for the child, or that she live with her, by reason of the mother's undisputed position as the child's sole parent recognised in s 61C(1), however we note the mother does not seek to have those orders set aside. We do not accept however, merely because the mother had sole parental responsibility, that no order for the child to spend time with or communicate with the applicant was the only available outcome.

115 The issue of family violence was considered by the Chief Federal Magistrate and dismissed as an isolated incident. No challenge is made to that factual finding. The assertion that in similar circumstances involving two parents no order would be made is not, in our view, sustainable (unless what is implied by this submission is that a finding of family violence would rebut the presumption of shared parental responsibility). In many cases involving biological parents, particularly those involving very high conflict and an inability of parents to communicate at all, a court will determine that one parent have sole parental responsibility, or responsibility for one or more aspects of parental responsibility, but still make orders for a child to spent time with and communicate with the other parent.

116 Our reading of counsel for the mother's written submissions in respect of the Chief Federal Magistrate's consideration of s 60CC(2) and (3) factors which refer to a parent are otherwise principally directed to what we would generally

regard as issues of weight, or the asserted failure to take into account relevant matters in the exercise of discretion. The limits on appellate interference in these circumstances are well known: see *Gronow*.

117 A careful reading of the Chief Federal Magistrate's reasons discloses that he:

- recognised the provisions which deal only with parents;
- considered matters relevant to the child and the parties by use of the framework provided in s 60CC(2) and (3) guided by the objects in s 60B; and
- carefully examined and gave such weight as he deemed appropriate, in the exercise of his discretion, to relevant matters.

118 Here the Chief Federal Magistrate found that the applicant did not satisfy the definition of a de facto partner at the time of the child's conception. However with the mother's agreement, she had an important role, akin to a parent, in the child's life for a significant period of months after her birth.

119 In short, we are satisfied that the Chief Federal Magistrate based his consideration of this child's best interests on his determination of relevant matters. In accordance with well recognised principles an "overly critical, or pernicky" examination of his reasons is not appropriate: *AMS v AIF* (1999) 199 CLR 160 at 211 per Kirby J; see also *In Marriage of A and J* (1995) 127 FLR 79 at 87-89. We accept other judicial officers may have given more weight to the matters the mother raised, such as her sole financial responsibility for the child and matters relevant to the child's sense of identity as she matures and questions the role of the applicant in her life, but that is not the test. We also accept that the Chief Federal Magistrate could have referred to relevant matters which would normally be considered in respect of a parent, by specifically referring to those matters under s 60CC(3)(f) and (m), but we do not accept he fell into appealable error by using the framework of s 60CC(2) and (3), with appropriate qualification, to arrive at his ultimate determination. We are satisfied there is no merit in this challenge.

Asserted errors associated with the expert evidence

The report writer's evidence and the Chief Federal Magistrate's consideration of that evidence

120 The expert, an expert appointed under reg 7 of the *Family Law Regulations 1984* (Cth), was commissioned to prepare a single expert report. It is not in dispute that the expert mistakenly understood the applicant was in a de facto relationship with the mother and thus entitled, at law, to an order for parental responsibility.

121 The expert gave oral evidence and was cross-examined.

122 The Chief Federal Magistrate dealt with the expert's evidence in [133]-[139] of his reasons for judgment. He commenced his discussion of the evidence by recording that the expert is a clinical psychologist and was appointed under reg 7 to prepare a report. He explained that the report was dated 10 November 2008 and had been prepared following interviews with the applicant and mother on 5 November 2008.

123 At [134](a) the Chief Federal Magistrate discussed the expert's oral and written evidence. We now summarise the expert's evidence:

- "[i]t seemed likely the child does have a warm and significant attachment to [the applicant]";

- the attachment between the child and the applicant was not an attachment "in the clinical sense but as a term for interaction or relationship or strength of bond";
- the applicant would provide an alternative parenting environment which included a strong sense of community;
- the parties had considerably different parenting styles and values with the applicant subscribing to more "traditional" and "child-centred" methodologies;
- the parties had very different personalities; and
- the applicant's disassociated experiences would be highly distressing to her and an observer. The mother's concerns about such conduct were "considerable", the dissociative state was treatable and general "dissipation of the condition could occur from the age of 60".

124 The Chief Federal Magistrate noted the recommendations in the report were, if an order was made for the child to spend time with the applicant, it should provide for gradual increase in time and there should be a "care and safety plan" (the Chief Federal Magistrate noted that neither party sought the option of a care and safety plan).

125 At [137] the Chief Federal Magistrate explained that the expert's response to a question from the mother's counsel "indicated that he did have an assumption that both parties were parents, and that it may possibly change his view if this were not the case".

126 At [138] and [139] the Chief Federal Magistrate set out his conclusions in respect of the expert evidence. We now set out [138] and repeat [139]:

> I give weight to [the expert's] observations as to the attachment between the applicant and the child and that the parties had different parenting styles.
>
> In relation to his professional view of the applicant's psychiatric history, I give it some weight as evidence of possible difficulties in the future, in light of the lack of other evidence provided in relation to this issue.

The mother's submissions

127 In her written submissions the mother's counsel framed her attack about the Chief Federal Magistrate's consideration of the expert's evidence on three bases. First, she submitted he was in error in describing the expert as a "clinical psychologist". Second, that the attachment referred to between the child and the applicant would have been more significant if it had been a clinical attachment. Third and, it appears to us, her principal complaint was that if the assumption made by the expert was that the parties were parents, his report was flawed. In other words, she submitted that this mistaken impression permeated the whole report and the expert's recommendations.

Discussion

128 The expert's qualifications were set out in his curriculum vitae annexed to his report. The expert disclosed in his curriculum vitae that he held a Bachelor of Arts (Psychology), Master of Arts (Clinical Drug Dependence) and Master of Arts (Family Therapy). His professional associations included registration as a psychologist in New South Wales and the Northern Territory and membership of the Australian Psychological Society.

129 We accept the expert does not hold tertiary qualifications as a clinical psychologist. However, as noted by the applicant's senior counsel, his expertise

was not challenged at the hearing. Whilst Pascoe CFM's description of the expert may be in error, we do not accept that factual error has any significance to the Chief Federal Magistrate's ultimate orders, or to the integrity of the report. We note the expert did not purport to offer any clinical diagnosis of the applicant's dissociative condition or any condition of the mother.

130 The expert's oral evidence disclosed that, notwithstanding the applicant had not spent time with the child for a period of approximately six months, save for some limited time on a Saturday morning, he observed a strong attachment and a warm interaction between the child and the applicant. His oral evidence was accurately summarised in the Chief Federal Magistrate's reasons. Although the expert's concession recorded in [137] of Pascoe CFM's reasons is accurate it must be regarded in the context of the whole of his evidence.

131 In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743, Heydon JA (as his Honour then was) referred to circumstances in which an expert's report will be admissible in proceedings. Whilst that part of his Honour's judgment deals with admissibility, it has relevance to this ground. His Honour said:

> … so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; *it must be established that the facts on which the opinion is based form a proper foundation for it*; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded …

(Emphasis added.)

132 We have already concluded that the expert had relevant expertise to prepare the report, albeit he is not a clinical psychologist. An examination of the transcript of the expert's evidence discloses that while he assumed that the applicant had the right to apply for an order for equal shared parental responsibility (as in fact she did) and that his assumption about the parties being parents was based on his understanding of the legal status of the parties, he said he did not think his views would have changed if his assumption was incorrect (transcript, 26 November 2008, p 91). Further, he indicated that he had in the course of preparing his report viewed all the affidavits and subpoenaed material before he had conducted his observations of the parties.

133 In these circumstances, we do not accept that his report was fundamentally flawed being a report based on a misconception of the applicant's legal status as a parent. He made appropriate concessions in his oral evidence. Further, we are satisfied that what the Chief Federal Magistrate relied on in his reasons were the matters alluded to by him in [138] and [139] which we have set out at [126]. Of particular significance was the expert's observations of the interaction between the child and the applicant. The expert made it very clear that when he referred to "attachment" he was not using that word in the sense discussed in the social science literature, such as the description "insecure attachment": see Joan B Kelly and Michael E Lamb "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children" (2000) 38(3) *Family and Conciliation Courts Review* 297. In other words, he was not

suggesting that the child had a primary or even secondary attachment to the applicant, rather he used the word to describe an observed warm relationship between the child and the applicant. The Chief Federal Magistrate clearly recognised exactly the type of relationship to which the expert referred, and gave that matter the weight he discerned, in the exercise of his discretion, it should be afforded.

134 The Chief Federal Magistrate was entitled to accept as correct the evidence of the warm interaction or attachment between the child and the applicant, to accept the applicant's different parenting style had benefits to the child, and to give positive weight to these matters and balance them with concerns about the applicant's psychiatric history. Again, we are satisfied there is no merit in this challenge.

Asserted failure to take into account the effect of the orders on the mother and the limitations the orders placed on the mother

The submissions

135 The mother's complaint about this aspect of the Chief Federal Magistrate's reasons overlaps to a degree with her concern that the Chief Federal Magistrate, in effect, gave inappropriate weight to the benefits to the child of a long-term relationship with the applicant, particularly in light of her prior psychiatric dissociative mental condition. In her submissions, the mother's counsel noted that "[t]here was no current or historical evidence as to the state of mental health of the [applicant]" (submissions, p 30).

136 It was further asserted that the Chief Federal Magistrate, whilst recognising the completely different parenting styles of the parties, and that those differing styles had the potential to cause significant conflict, gave inappropriate weight to the benefit of different parenting styles, and insufficient weight to the conflict between the parties.

137 The issue of the applicant's psychological health was subject of careful consideration by the Chief Federal Magistrate at [177]-[179] of his reasons.

138 Amongst other matters the Chief Federal Magistrate noted:

- there was no evidence which indicated the applicant's psychiatric health had adversely affected her care of the child;
- the applicant regularly saw a counsellor and had maintained stability over the two previous years;
- there was nothing in the applicant's mental history which would be potentially harmful to the child if the child was in her care "for a period"; and
- the mother allowed the applicant to care for the child on an unsupervised basis on occasions even after she imposed a supervised time regime.

139 The findings which we have summarised above were open to the Chief Federal Magistrate on the evidence before him. As we have already noted, these challenges are matters going to weight. We also note the concession of the mother in cross-examination to the effect she agreed it would be a benefit to the child for her to experience a style of adult/child interaction that was different from her own (transcript, 25 November 2008, p 74).

140 In dealing with the mother's ability to cope if the orders were made, we note the mother adduced no expert evidence that she would be unable to cope in the event an order was made in favour of the applicant. The Chief Federal

Magistrate dealt as best he could with the mother's assertions about chronic fatigue syndrome and stress in [175] of his reasons, where he noted no submission had been made to him that this condition and its sequelae would or could affect her parenting capacity. His decision to permit the applicant to spend limited time with the child in these circumstances cannot be criticised.

141 At [169] and [170] of his reasons, the Chief Federal Magistrate referred to the fact that the mother explicitly sought there be no orders made for the applicant to have time with the child and that she did not want any future relationship of any nature with the applicant. In dealing with this assertion, the Chief Federal Magistrate noted there had been compliance with the interim orders and the relationship between the parties had been civil. The Chief Federal Magistrate concluded (at [171]):

> … Although the [mother] may not want [the applicant to have] a relationship with the child, I am of the view that she will comply with orders and appreciate advantages to time with the applicant.

142 The Chief Federal Magistrate was, however, careful to limit the time which the child should spend with the applicant.

143 The evidence before the Chief Federal Magistrate did not disclose this case to be one which fell to be determined having regard to the principles discussed in *R v C* (unreported, Family Court (FC), No SA 45 of 1992, 25 June 1993) and *In Marriage of A* (1998) 146 FLR 188. There was no expert evidence that the mother's parenting would be so compromised that she would be unable to effectively parent the child.

144 The final argument advanced on behalf of the mother was the asserted adverse impact on her lifestyle (and indirectly that of the child) imposed on her by reason of the specific time periods to be spent by the child with the applicant.

145 The Chief Federal Magistrate's orders, while providing for an introductory regime, allowed the child to spend time with the applicant from December 2009 every third weekend of the month from 10.00 am on Saturday to 4.00 pm on Sunday. Other limited special occasion time was ordered, including time on the applicant's birthday, the child's birthday and on Boxing Day each year or as otherwise agreed between the parties.

146 It was asserted on behalf of the mother that the fact the orders continue through school holiday periods preclude her from having block school holidays with the child, and absent agreement between the parties, that the mother is responsible for all delivery and collection of the child during periods she is to spend time with the applicant.

147 It is relevant to note at the time of the making of the orders the child was three years old and would not be attending school for at least another two years. Regular periods of time with the applicant (albeit not as frequently as would be generally ordered for a parent) were age appropriate. The Chief Federal Magistrate's orders included a provision for the parties, who had displayed up until the time of the hearing an ability to communicate in a civilised and child-focussed manner, an opportunity to agree to arrangements between them for delivery and collection of the child to the applicant's residence.

148 While we accept that orders could have been crafted which provided for

longer term arrangements for the child once she commenced school, we do not consider the Chief Federal Magistrate's determination not to do so in this unusual case amounts to appealable error.

Costs

149 At the conclusion of the appeal we sought submissions on costs. Senior Counsel for the applicant submitted in the event the mother's appeal was dismissed we should make an order that the mother pay the applicant's costs. The mother's counsel sought, in the event the appeal was dismissed, that the mother be given an opportunity to provide written submissions and to perhaps file a financial statement. We propose to allow the parties to file any submissions on which they seek to rely in respect of costs of the appeal and will provide the necessary timetable in our orders.

Orders accordingly

Solicitors for the appellant: *Dettmann Longworth, Lawyers*.

Solicitors for the respondent: *Inner City Legal Centre*.

TAMARA BOONE