
Family Court of Australia (Young J)
[2007] FamCA 1149
28 September 2007

Family law – child and parenting orders – relocation of child – Indigenous culture – traditions and kinship – best interests of child born of an Aboriginal mother and Anglo-Australian father – balancing the maintenance of emotional attachment with the child’s right to cultural connection

Facts:

The child ('E') was born in October 2004 of a relationship between the mother, a Western Arrernte woman, and the Anglo-Australian father. From approximately seven days after her birth the child lived with her paternal grandmother in the LaTrobe Valley. The mother had left the child in the care of her paternal grandmother and travelled to Central Australia to be involved in various important cultural ceremonies. There was a dispute between the mother on one side and the paternal grandmother and father on the other as to whom the child should live with and to contact and communication arrangements. The mother proposed orders that the child should live with her, and, if she were successful, that she and the child be permitted to relocate to the Aboriginal community of Ernabella, in the north of South Australia. The paternal grandmother and the father (who lives with the paternal grandmother) sought orders that the child should live with the paternal grandmother in the LaTrobe Valley, but with an exposure to the Indigenous Koori culture of that region and the introduction of a Western Arrernte male to teach the child her culture and language. The paternal grandmother and father raised concerns about the child being resident in the Aboriginal community of Ernabella because of risks of abuse and neglect.

Held, granting shared parental responsibility for the child to the mother, father and paternal grandmother, that the child live with the mother in the LaTrobe Valley until December 2007 and from that date the mother and child be permitted to

relocate from Victoria, subject to conditions as to residence and requirements for time spent with the paternal grandmother and father:

1. The right of an Aboriginal child to enjoy his or her Aboriginal culture is enshrined as a principle within the objects of the *Family Law Act 1975* (Cth) ('FLA'), s 60B(2)(e), and also as an additional consideration in determining what is in the best interests of an Aboriginal child under s 60CC. However, these factors must be balanced against other factors in the wider context of the best interests of the child: [54], [56].
2. For the purposes of FLA, ss 60CC(3)(h), 60CC(6), the maintenance of a child's 'connection' to culture encompasses an active experience of lifestyle, culture and traditions: [75]–[80]; *B & F and Ors* [1998] FamCA 239.
3. In the present case, there is a need to balance the competing claims of the child's emotional attachments to her paternal grandmother and the child's right to cultural connection: [83]–[93]; *Re: C P* (1996) 21 Fam LR 486 considered, *M & L (Aboriginal Culture)* [2007] FamCA 396 considered.
4. For the purposes of FLA, s 61F, kinship, as a concept and in its application, is relevant to the care, upbringing and best interests of a child. It is not limited to issues of parental responsibility. In the present case, it is in the child's best interests for her to be exposed to her mother's kinship and cultural practices: [94]–[98]; *M v L* [2007] FamCA 396 followed.

5. In the present case, a limited exposure, without parental direction or influence, to the Koori culture and upbringing in the region around the LaTrobe Valley is, on the evidence, entirely separate and distinct from the culture and traditions of E's parents and extended families: [108].

6. In disputes between parents and non-parents (eg, grandparents), the factor of parenthood is influential but does not create a presumption or required preference from which to begin an evaluation of the evidence: [110]–[117] *West & West* [2007] FamCA 546 followed, *Rice v Miller* (1993) FLC 92-415 considered, *Dennett & Norman* [2007] FamCA 57 considered, *Potts & Bims* [2007] FamCA 394 cited.

7. The factor of parenthood may be very significant in a dispute between a capable parent and a more capable grandparent: [118-119], *D & F* [2001] FamCA 382 applied.

8. For the purpose of making findings pursuant to FLA, s 61DA, relevant factors in the present case include social issues (including petrol sniffing, drug-taking and alcohol consumption) in respect of the Ernabella community, where the mother proposes to relocate E; women's business; and the time required for the child to spend in her homelands to develop a meaningful and proper understanding of her culture: [181]–[182], [211]–[212], [213]–[215].

9. The court should refrain from making value judgments as to the merits of differing cultural, religious or ethnic heritage issues. Where there are significant differences between the cultural heritage and identity of each parent, it is not for the court to prefer one over the other on that ground: [281] *Goudge* (1984) 54 ALR 514 cited.