Cases published August – November 2015[1]

Suskain & Materanzi [2015] FamCAFC 153 - 6 Aug 2015

Parenting – where the mother's contact is restricted to cards and gifts – where the father has sole parental responsibility – where the primary judge gave sufficient weight to the benefit of the child having a meaningful relationship with the mother and the child's need to spend time with siblings – where the primary judge gave appropriate weight to the views of the child and gave adequate reasons – where the primary judge considered all of the available options for the child to enjoy a meaningful relationship with the mother – where appeal has no merit – appeal dismissed.

Costs – where appeal is wholly unsuccessful – where the father seeks costs from the mother – where the sum sought is modest and the father is entirely self-funded – the mother should pay the father's costs at a fixed sum of $5,000.

Attorney General's Department & McGaffey [2015] FamCA 722 - 28 Aug 2015

Child abduction – Hague Convention – where the application was made more than 12 months after the alleged wrongful removal – where the child has autism – where the child objected to being returned but the family consultant opined that he was not mature enough for his views to be taken into account – where it was found that given the special circumstances of the child his attachment with the mother was very relevant – where the mother was settled and had better financial and medical supports in Australia – where there was evidence that autistic children do not respond well to change of routine – where the child is now settled in his new environment – where the Court considered exercising a discretion to return the child notwithstanding being satisfied the child is settled – where the Court declined to make a return order.

Leone & Cino (No 2) [2015] FamCA 724 - 28 Aug 2015

Courts and judges – bias – oral application by the husband for the trial judge to disqualify herself on the basis of a previous ruling unfavourable to the husband and a lack of confidence in the judge – test in Johnson & Johnson considered –orders made dismissing the husband's oral application.

Parenting – Independent Children's Lawyer – application by the Independent Children's Lawyer to secure payment of his costs by the parties – where the Independent Children's Lawyer is privately funded – where the parties agreed to the terms of the retainer – where the husband has failed to make payment to the Independent Children's Lawyer in accordance with that retainer – where the husband alleges that he did not agree to pay half of Independent Children's Lawyer's costs – where the husband has previously consented to orders that he pay the Independent Children's Lawyer's costs – interim orders made for the purposes of securing current and ongoing funding for the Independent Children's Lawyer.

Parenting – evidence – oral application by the husband that the Independent Children's Lawyer be prohibited from solely relying upon a family report and a psychiatric assessment of the parties at the final hearing – oral application by the husband that there be a further

[1] www.austlii.edu.au

family report and psychiatric assessment of the parties – where the husband has previously sought to obtain a second expert opinion and orders were made against the orders sought by the husband – where the production of a new family report and psychiatric assessment would cause undue delay and hardship to the parties and the children – orders made dismissing the husband's oral application.

Carlton & MacDougall (No 3) [2015] FamCA 716 - 31 Aug 2015

Parenting – parenting orders – where mother recently incarcerated and remains incarcerated as at trial – where unknown when mother will be released or likely outcome of current criminal charges – mother committed to stand trial on several criminal offences – parental responsibility and time and communication with mother – where mother has a lengthy history of instability of living circumstances and lifestyle – where father able to provide stability for the child – where order for the father to have sole parental responsibility in the best interests of the child – time and communication with the mother during period or periods of incarceration – orders for child to spend time with maternal grandparents to facilitate visits with the mother and child – orders for supervised time when mother not incarcerated – need for mother's circumstances to be explained to child by single expert psychologist – evidence of child achieving stability and progressing academically in the father's household – orders for child to live with the father.

Baines & Keen & Ors [2015] FamCA 720 - 31 Aug 2015

Practice and procedure – where the applicant father initially sought parenting orders between himself and the respondent mother in relation to their four children – where the Department of Family and Community Services intervened and removed the children from the care of the mother, and then from the care of the father, and placed them with the third respondent maternal grandparents – where the paternal grandmother was joined as the second respondent – where the Minister has had parental responsibility for all children since September 2013.

Parenting – best interests – where the children have meaningful relationships with both parents – where the children have been exposed to psychological harm from being exposed to family violence during the course of the parties' relationship and post-separation – children's views – where there is no lack of commitment to the children in either parent – where the children are presently in a safe and protected environment in the care of the maternal grandparents, supervised by the Department – where the mother and maternal grandparents live an eight hour drive from the father – where the mother's parenting capacity has been restored – where the father's capacity to meet the children's emotional needs is limited by his own lack of insight into the impact of his behaviour on others – where there are current apprehended violence orders in place against the father – where orders made for the transition by the children to reside with the mother over the next 12 months – where children to spend supervised time with the father, on a graduating basis, for 18 months – thereafter the children to spend unsupervised time with the father on not less than one occasion per month – mother restrained from consuming alcohol at any time – father restrained from approaching the children, mother or maternal grandparents other than in accordance with the orders.

Parenting – where the secretary is to have parental responsibility for a further three years, solely for the first 12 months, and thereafter shared with the mother and maternal

grandparents – where after the expiration of that three year period, the mother is to have sole parental responsibility for the children.

Ashwood & Peters [2015] FamCA 974 - 1 Sep 2015

Parenting – interim orders – where the father seeks to have time with the child supervised by a private contact supervisor – where the mother opposes the father's application and seeks that his time is supervised by a contact centre – where the father has been incarcerated for sexual offences – where the mother alleges that the father has sexually abused the child – where the private supervisor proposed by the Independent Children's Lawyer has been informed of the nature of the allegations against the father and the father's history – where a contact centre would be unable to provide continued supervision services –orders made that the father spend time with the child supervised by a private contact supervisor.

Parenting – interim orders – application by the father to enforce orders that the mother give written authorisation to the child's treating medical practitioners and allied health professionals to communicate with the father – where the mother has only provided verbal authorisation – orders made that the mother provide the father with a list of the child's treating medical practitioners and allied health professionals and provide written authorisation for those practitioners and professionals to communicate with the father.

Joyce & Joyce [2015] FCCA 2502 - 2 Sep 2015

Parenting – father seeking an order that his children aged 11, 8 and 6 spend overnight and holiday time with him – mother proposing no time – where the father has a lengthy criminal record, perpetrated serious family violence during the relationship, has been jailed for assaulting the mother, uses cannabis and has a long standing problem with alcohol – where the father has several recent convictions involving the use or possession of a knife – where the court cannot be satisfied that the children will be safe if they spend unsupervised time with the father – consideration of whether an order should be made for supervised time and whether there will be any benefit to the children in maintaining any sort of relationship with the father – order made that the children spend no time with and have no communication with the father.

Janssen & Janssen [2015] FamCAFC 168 - 4 Sep 2015

Jurisdiction – where parenting proceedings commenced in the Federal Circuit Court of Australia – where interim hearing following which judgment reserved – where without giving judgment in the reserved interim hearing the judge transferred the proceedings to the Family Court of Australia – three months after the transfer the judge of the Federal Circuit Court made interim parenting orders in the reserved matter – where the mother appeals against the interim parenting orders – whether the primary judge had power to make orders after transferring the proceedings to the Family Court – where upon transfer there was no "proceeding" before the Federal Circuit Court – consideration of s19, 39(1) and 39(5) of the *Federal Circuit Court Act 1999* (Cth) – subject to exceptions contained in s19(2) of the *Federal Circuit Court Act* there cannot be parallel proceedings in each of the Family Court and Federal Circuit Court under the *Family Law Act 1975* (Cth) at the same time – where the Full Court found that after the Federal Circuit Court transferred the proceedings to the Family Court the Federal Circuit Court was not seised of the proceedings between the parties, and the subsequent parenting orders under appeal were made in excess of the Federal Circuit Court's jurisdiction – where the parenting orders were not made by a superior court of record – where

presumptions concerning the validity of an order made by a superior court of record without jurisdiction do not apply to the Federal Circuit Court – where the parenting orders under appeal are a nullity and must be set aside – appeal allowed.
Applications in an appeal – where applications to adduce further evidence were filed by both the mother and the father – where it is unnecessary to consider these applications as the appeal is allowed.
Costs – where the appeal succeeded on an error of law – where the parties and Independent Children's Lawyer applied for costs certificates pursuant to s6, 8 and 9 of the *Federal Proceedings (Costs) Act 1981* (Cth) – where the effect of the appeal is that there must be another hearing of the father's interim parenting application – where the Full Court is not satisfied that this further hearing satisfies the s8 requirement of "a new trial" – costs certificates ordered pursuant to s6 and s9.

Bernieres and Anor & Dhopal and Anor [2015] FamCA 736 - 9 Sep 2015
Parenting – overseas gestational surrogacy arrangement – where the surrogacy arrangement is commercial as opposed to altruistic – where the surrogate mother has no genetic link with the child – where consideration is given to the best practice principles determined in *Ellison and Anor & Karnchanit* [2012] FamCA 602 – where issues relating to exploitation, coercion or duress are considered – where it is reasonable to consider that the process was transparent and is credible.
Parenting – parenting orders – where the court makes an order for equal shared parental responsibility of the child – where the best interests of the child are considered – where it is accepted that the surrogate mother and her husband have no interest in or intention to seek a relationship with the child – where consideration is given to the process and in particular the purported contracted relationship between the applicants and the respondents.
Parentage – where both applicants seek a declaration of parentage under s69VA of the *Family Law Act 1975* – where the principal submission of the applicants is that the declaration should be made notwithstanding that the first applicant is not the biological progenitor of the child – where it is found that a declaration of parentage is not a parenting order – where consideration is given to whether the power exists to make an order for a declaration of parentage – where the general definition of parent is considered – where it is found that the court's power to make findings about parentage is not a stand-alone power but a power that can assist the court if the parentage of a child is in issue in proceedings – where the applicants are not able to gain any assistance from the Victoria legislation – where consideration is given to whether a superior court has inherent power to grant a declaration – where there was no need invoke the provisions associated with parentage testing orders – where consideration is given to "child of the marriage" – where there is no ambiguity to the interpretation of a "child of the marriage" and therefore it is not necessary to consider Article 3.2 of the United Nations Convention on the Rights of the Child – where consideration is given to the consequence of a biological connection – where a declaration of parentage is not made.

Paget & Crewell [2015] FCCA 2564 - 10 Sep 2015
Parenting – interim parenting dispute involving young children – significant issues regarding alcohol abuse by the father – a number of issues regarding the inadequate and or inappropriate conduct of lawyers in relation to the adequacy of submissions as well as contact with Chambers (failure to adhere to the Poirot instruction of "order and method") – role and

use of alcohol testing – father ordered in other court proceeding to undertake the Interlock program to prevent him using a car while intoxicated (interlock device to disable the car until the father satisfactorily passes a breathalyser test) – protective responsibilities of the Court to the children.

Raval & Raval [2015] FamCA 780 - 17 Sep 2015

Transfer – application for the review of a registrar's decision not to transfer the proceedings from the Family Court to the Federal Circuit Court – where there was a dispute between the parties about the complexity of the issues and the likely hearing time – where the respondent submitted that the applicant could not appeal from the Registrar's decision in relation to a transfer of proceedings due to s33B(8) of the *Family Law Act 1975* (Cth) – where it was held that the decision by the Registrar was an exercise of delegated power and that the application would proceed by way of hearing de novo – where the balance of competing factors set out in r11.18 of the *Family Law Rules 2004* (Cth) required that the matter remain in the Family Court – application dismissed.

Paggett & Cable [2015] FamCAFC 186 - 25 Sep 2015

Parenting – where the appellant father appealed final parenting orders – where the final hearing occurred in October 2013 but the evidence was re-opened in February 2015 and final orders made in March 2015 – where the appellant contended that delay caused the trial judge's discretion to miscarry – where delay of itself does not manifest appealable error – where the trial judge failed to give satisfactory reasons for ordering that the child spend less time with the father than he wanted, the family consultant recommended, and the mother proposed – where the trial judge failed to properly engage with the evidence on that issue – where the trial judge found the evidence rebutted the presumption of equal shared parental responsibility by reason of the parties' incessant conflict but still made orders requiring the parties to consult over the child's schooling – where the underlying contradiction showed the exercise of discretion miscarried – where the order made for the child's time with the father to be supervised for a short period was not reflective of the evidence and the trial judge erred in making that order – where the trial judge's failure to make prescriptive and enforceable orders was a material error – where appealable error established – appeal allowed – where there was no practicable option but to remit the proceedings for re-hearing – where, pending further orders following re-hearing, the appealed orders shall apply – where both parties were granted costs certificates pursuant to the *Federal Proceedings (Costs) Act 1981* (Cth).

Solonose& Squires [2015] FamCAFC 190 - 30 Sep 2015

Parenting – where the appellant appeals the orders providing for the venue the child is to spend time with the respondent, the requirement for both parties to consent to the enrolment of the child at high school and the restraint placed on the appellant from leaving the child alone with his brother – where the major issues in dispute were resolved by consent, the trial judge determined those remaining issues on the brief evidence of the parties and by having recourse to the family report and earlier affidavits filed by them – where there is no merit in the grounds of appeal as they relate to the venue the child is to spend time with the respondent and the requirement for both parties to consent to the high school the child is to be enrolled at – where there is merit in relation to the order made restraining the appellant from leaving the child alone with his brother – where it is not the case that a court order by way of injunction is the same as an undertaking given by a person to a Government

Department – where the trial judge needed to be satisfied that there were allegations that required such an injunction to be made and that did not occur – where it was not sufficient to make such an injunction because it would make the mother feel more comfortable – where the appeal be allowed in part – where it is unnecessary and inappropriate to remit the matter to the Federal Circuit Court of Australia for rehearing – relevant order set aside.
Costs – where the appellant sought a costs certificate pursuant to the *Federal Proceedings (Costs) Act 1981* (Cth) in the event that the appeal was successful on a point of law – where the respondent did not seek a costs certificate – where there were many grounds of appeal that were unsuccessful – application for a costs certificate by the appellant refused.

Danell & Saller [2015] FamCA 859 - 15 Oct 2015
Practice and procedure – interim proceedings – where the mother seeks that the single expert witness be discharged – where the single expert witness was appointed by consent and has provided a report in the parenting proceedings – whether the expert makes assumptions of fact where there is no evidence – whether the expert's reasoning is not transparent – whether the expert's report is prejudicial to the mother – whether the expert is biased – where the Court finds the mother has not utilised mechanisms available under the Family Law Rules to clarify the expert's report – where the expert is yet to be cross-examined in the proceedings – where the Court finds the mother has failed to establish that the expert is biased – application dismissed.

Public Guardian (Queensland) & Beasley and Ors (No. 2) [2015] FamCAFC 201 - 21 Oct 2015
Leave to appeal – where a failure to grant leave would effectively decide the substantive parenting proceedings without a hearing – where the parenting arrangements for the child would remain uncertain – where a substantial injustice to the mother would result if leave is not – leave to appeal granted – where the Public Guardian (Queensland) would not consent to act as the mother's litigation guardian and the mother's solicitors instead sought to dispense with compliance with the relevant *Federal Circuit Court Rules 2001* (Cth) – where the primary judge refused to dispense with the rules – per May J where the provisions of the *Guardianship and Administration Act 2001* (Qld) empowered the Public Guardian (Queensland) to do all things necessary for the mother and a litigation guardian is not required – where the court was satisfied the mother is bound personally by the orders – where a failure to dispense with the rules resulted in an outcome which was unreasonable and unjust and not in the bests interests of the child – per Austin J – where the trial judge's decision on a procedural point deprived the mother of her right to be heard – where the trial judge erred in concluding the orders would not bind the mother if a litigation guardian was not appointed – where the decision was unreasonable and unjust (per *House v The King* (1936) 55 CLR 499) – appeal allowed.
Application in an appeal – further evidence – where the Public Guardian (Queensland) sought leave to adduce further evidence regarding the current arrangements of the child – where the evidence is not in dispute (per *CDJ v VAJ* (1998) 197 CLR 172) – application allowed.

Sawyer & Sawyer [2015] FamCA 982 - 10 Nov 2015
Practice and procedure – application – dismissal – where final parenting orders were made by consent in 2012 – where the father has brought multiple contravention applications against the mother since the final orders were made – where the mother filed an initiating application seeking to vary the final orders – where the father brings an application to have

the mother's initiating application summarily dismissed – whether there has been a change in circumstances such that the mother's application should be permitted to proceed – application for summary dismissal dismissed.
Parenting – orders – variation – interim – where the mother seeks to vary the final parenting orders – whether it is in the best interests of the children for the orders to be varied at an interim hearing – application dismissed.
Legal practitioners – discharge – where the father seeks an order that the ICL be discharged – whether the ICL has been negligent and has demonstrated bias towards the mother – application dismissed.
Practice and procedure – where the father seeks an order that the family report writer be discharged and the report not be relied upon – where a different report writer had been engaged in the matter and had prepared the three family reports prior to the final consent orders in 2012 – where the ICL engaged a new family report writer when the matter came back before the Court – whether the family report writer was negligent – application dismissed.
Practice and procedure – transfer of proceedings – where a Judge of the Federal Circuit Court found that the mother contravened final parenting orders without reasonable excuse – where the matter was adjourned and subsequently transferred to the Family Court before the consequences of the contravention had been determined – matter transferred back to the Federal Circuit Court.

Worstell & Worstell [2015] FamCA 999 - 13 Nov 2015
Parenting – education – interim orders – interim application by the father seeking orders that the 12 year child old child of the parties attend boarding school commencing in Year 7, being the following school year – where the child is estranged from the father and has not spent time with him in accordance with the current orders – where the father believes that this is caused by the mother's attitude and that the removal of the child from the mother's household and her enrolment in boarding school would enable the rebuilding of the father-child relationship – where the child has expressed firm and consistent wishes that she does not want to attend the boarding school – where the single expert did not know whether a relationship between the father and child was achievable, even if the child went to boarding school – where there is no evidence that the boarding school, once fully informed of the child's circumstances, would accept the child's placement – father's application dismissed.

Bant & Clayton [2015] FamCAFC 222 - 25 Nov 2015
Parenting – where the trial judge did not err in treating the risk of psychological harm to the child if removed from the mother as a risk of family violence pursuant to the *Family Law Act 1975* (Cth), s60CC(2)(b) – where the rejection of the reliability of the father's evidence was a proper basis for finding that there was an unacceptable risk that if permitted to take the child out of Australia the father would seek to impose the law of his country of origin and that there was an unacceptable risk that the father would remove the child from Australia and retain her in a foreign jurisdiction contrary to the orders of the court – where the path to the trial judge finding unacceptable risk and that the father would do what the trial judge was concerned about was readily apparent – where the finding of unacceptable risk was plainly open due to the trial judge's rejection of the father's evidence and the finding that the father was an unreliable witness – where the trial judge's findings regarding the application of foreign law were limited to considerations regarding the best interests of the child – where

the rejection of the father's corroborative witness and the acceptance of the evidence of the mother and her witness plainly discredited the evidence of the father – where there was sufficient evidence for the trial judge to conclude that the father was not a reliable witness on disputed issues of fact – where the trial judge was entitled to refer to relevant historical facts in the proceedings – where the trial judge erred in failing to provide adequate reasons as to why the father's time with the child should be supervised – where the trial judge erred in failing to provide adequate reasons as to why the father's time with the child should be restricted – where there was no basis to conclude apprehended or actual bias by the trial judge – where the appeal is allowed in part – where the matter is to be remitted on the issue of time spent between the father and child.

Application in an appeal – where the father sought leave to adduce further evidence – where the father's failure to seek to reopen the proceedings prior to the delivery of judgment was fatal to his application – where the evidence was controversial – where the evidence did not demonstrate error by the trial judge - where the evidence would not have altered the trial judge's findings – where the evidence did not go to a crucial issue – where, due to the result of the appeal, it was unnecessary to receive the evidence – application dismissed – where the mother sought leave to adduce further evidence – where the appeal was allowed in part – where the evidence did not go to the issues raised in the successful grounds – application dismissed.

Costs – where the parties are to file and serve written submissions as to the question of costs.

Hilton & Department of Family and Community Services [2015] FamCAFC 223 - 26 Nov 2015

Child abduction – where child wrongfully removed from Norway – where return order made – where the appellant has a history of episodic anxiety and depression – where the appellant submitted that a return order exposed the child to a grave risk of psychological harm or placed in an intolerable situation due to the risk of deterioration of the appellant's mental health – whether the primary judge misconstrued r16(3)(b)of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) – where the primary judge determined r16(3)(b) is to be "narrowly construed" – where error established – where evidence of the mother's mental health relied on in her case accepted by the primary judge – where the error is not fatal as the primary judge did not apply a "narrow construction" – appeal dismissed.