

FAMILY COURT OF AUSTRALIA

ROSA & ROSA

[2009] FamCAFC 81

FAMILY LAW - APPEAL – CHILDREN – with whom a child lives and spends time with – where the Federal Magistrate did not allow the mother to relocate with the child from North West Queensland to Sydney – where the Federal Magistrate made orders for the child to spend equal time with each parent in North West Queensland – where the Federal Magistrate ordered that if the mother was not living in North West Queensland then the child would live with the father in North West Queensland and spend time with the mother as agreed – whether the Federal Magistrate gave adequate weight to a number of factors including the mother’s financial situation and emotional and physical isolation in North West Queensland – whether the Federal Magistrate’s orders imposed on the mother’s freedom of movement – whether the Federal Magistrate placed excessive weight on his findings that members of the mother’s family held a negative attitude towards the father – whether the Federal Magistrate erred in determining that the child should live on an equal time basis with each parent – consideration of the Federal Magistrate’s application of s 65DAA(5) of the *Family Law Act 1975* (Cth) – no merit found in grounds – appeal dismissed.

FAMILY LAW - APPEAL – Application to adduce further evidence – where mother sought to adduce further evidence about the risk of lead poisoning in North West Queensland – application dismissed.

FAMILY LAW - COSTS – circumstances did not justify an order for costs.

Family Law Act 1975 (Cth) ss 60CA, 60CC, 65DAA

Gronow v Gronow (1979) 144 CLR 513
Taylor & Barker (2007) FLC 93-345 [63]
Wiley & Wiley [2008] FamCAFC 153 [70]

APPELLANT:	Mrs Rosa
RESPONDENT:	Mr Rosa
FILE NUMBER:	TVC 1196 of 2007
APPEAL NUMBER:	NA 44 of 2008
DATE DELIVERED:	15 May 2009
PLACE DELIVERED:	Canberra

PLACE HEARD: Brisbane

JUDGMENT OF: Finn, May and Benjamin JJ

HEARING DATE: 5 August 2008

LOWER COURT JURISDICTION: Federal Magistrates Court

LOWER COURT JUDGMENT DATE: 1 April 2008

LOWER COURT MNC: [2008] FMCAfam 427

REPRESENTATION

COUNSEL FOR THE APPELLANT: Mr Jackson

SOLICITOR FOR THE APPELLANT: Antwan Lawyers

COUNSEL FOR THE RESPONDENT: Mr Page SC

SOLICITOR FOR THE RESPONDENT: Rod Madsen Solicitors

ORDERS

- (1) That the application by the mother to adduce further evidence be dismissed.
- (2) That the appeal by the mother against the orders of Federal Magistrate Coker made on 1 April 2008 be dismissed.
- (3) That there be no order for costs in relation to the appeal.

IT IS NOTED that publication of this judgment under the pseudonym *Rosa & Rosa* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT BRISBANE

Appeal Number: NA 44 of 2008

File Number: TVC 1196 of 2007

Mrs Rosa

Appellant

And

Mr Rosa

Respondent

REASONS FOR JUDGMENT

1. This is an appeal by Mrs Rosa, the mother, against orders made by Coker FM on 1 April 2008 in proceedings between the mother and Mr Rosa, the father, in relation to parenting arrangements for their child, M, who was five years of age at the time of the hearing before the Federal Magistrate which led to the making of the orders.
2. His Honour's orders provided for the mother and father to have equal shared parental responsibility for the child and for the child to live with the mother and father on an alternate weekly basis. The orders also provided that in the event that the mother was not living North West Queensland, then the child should live with the father and spend time with the mother as agreed. The effect of the orders was that the mother could not move with the child from North West Queensland to Sydney as had been her primary application before his Honour.

Background history

3. At the time of the trial, the mother was aged 34 years and the father 35 years. They had commenced a relationship in 1991 and were married in 2000. In 2002, their daughter was born.
4. In early 2007, the parties moved from Sydney to North West Queensland on account of the father's employment. In mid-August 2007 the parties separated, and at some point after that, the mother went back to Sydney with the child.

5. The father then commenced parenting proceedings in the Federal Magistrates Court and interim orders were made which provided for the return of the child to North West Queensland.
6. At the time of the trial before Coker FM both the mother and father were living in North West Queensland, with the child living with each parent on a week about basis.

Applications before the Federal Magistrate

7. At the commencement of his reasons for his orders of 1 April 2008 his Honour recorded in some detail (at paragraphs 2 to 10) the applications of the parties which were before him. It is not asserted that his Honour misunderstood the parties' applications. Those applications as recorded by his Honour can be summarised as follows.
8. The father sought that the parents have equal shared parental responsibility and that the child continue living with each parent on a week about basis. (This was to be in North West Queensland as emerges more clearly later in his Honour's reasons).
9. The mother also sought that the parents have equal shared parental responsibility, at least for "long term issues relating to the child".
10. The mother's primary proposal was that she be allowed to live with the child in Sydney, with the child to spend time with the father for specified periods during the year in either Brisbane or North West Queensland.
11. The mother's second proposal was that she would remain in North West Queensland and the child would live primarily with her, but that the child spend time with the father on alternate weekends, one night after school every fortnight and half of school holidays.
12. The mother's third proposal was that both she and the father would live in Sydney, with the child living primarily with the mother. Under this proposal, the child would spend time with the father on alternate weekends, one night after school every fortnight and half of school holidays.
13. As already mentioned, his Honour's orders provided for the child to remain in North West Queensland living week about with each parent, but that in the event the mother was not living in North West Queensland – and this is an important point which appeared to be overlooked in much of the mother's case before us – then the child was to remain living there with the father (and spend agreed or "facilitated" time with the mother).

The complaints contained in the grounds of appeal

14. It will be useful before referring to his Honour's reasons for his orders, to summarise the complaints contained in the mother's 21 grounds contained in the amended notice of appeal on which we permitted her to rely.
15. The first ground of appeal asserts that his Honour erred in failing to consider an arrangement whereby the parties could both live in or close to Sydney. This failure was said by counsel for the mother to be the basis of the appeal.
16. In an apparently similar vein, the second ground of appeal asserts that his Honour failed to give any adequate reasons why the father's preferred choice of residential location was superior to that of the mother's choice of residential location.
17. Further grounds assert that his Honour erred by failing to give any adequate weight to:
 - the financial status of the mother living in North West Queensland (Ground 3);
 - the emotional and physical isolation of the mother living in North West Queensland – or indeed any consideration to that matter (Grounds 4 and 5);
 - the mother's concern about the possibility of the existence of lead poisoning in the North West Queensland area (Ground 7), with it also being asserted that it was not open to his Honour to make a finding that the mother's stated concern about the possibility of the existence of lead poisoning in the North West Queensland area was not a genuinely felt concern (Ground 8).
18. Further grounds then assert that his Honour erred in:
 - making orders which had the effect of placing an imposition on the mother's freedom of movement (Ground 6);
 - placing excess weight on his findings that members of the mother's family held a negative attitude towards the father (Ground 9), with it also being asserted that it was not open to his Honour to make a finding that such a negative attitude would result in an almost automatic deterioration upon the child's relationship with the father (Ground 10);
 - that he failed to adequately address the practical expenses of the child spending time and communicating with the father if he remained in North West Queensland and she lived with the mother in Sydney (Ground 11);
 - failing to give any adequate reasons to support the conclusion that the mother wholly lacked any real appreciation of the enormous financial drain that would be put upon her as well as the father in relation to the

practical expenses of the child spending time and communicating with the father if he remained in North West Queensland, and she lived with her mother in Sydney (Ground 12).

19. Finally, there was a group of grounds (Grounds 13 to 21), which were described by counsel for the appellant mother as all relating to his Honour's determination that the child should live on an equal time basis with each parent. These grounds asserted that his Honour failed to:
- have regard to and articulate the matters specifically referred to in s 65DAA(5) of the *Family Law Act 1975* (Cth) ("the Act") (Ground 13);
 - give adequate reasons as to why an "equal time 'live with' arrangement" was practical (Ground 14);
 - take into account, or give adequate reasons, relating to the extent of the parties' capacity to communicate (Grounds 15 and 16);
 - take into account the father's lack of respect for the mother's capacity to parent (Ground 17);
 - take into account, or give adequate reasons, in relation to the parties' different approaches to parenting and in particular issues of education (Grounds 18 and 19);
 - take into account, or give adequate reasons, relating to the historical care arrangements, and in particular that the mother had been the child's primary caregiver prior to separation (Grounds 20 and 21).
20. Against the background of these complaints now made by the mother, we turn to a consideration of his Honour's reasons for his orders.

The Federal Magistrate's reasons for judgment considered against the grounds of appeal

21. In his reasons for judgment, after explaining the applications of each party, his Honour undertook an extensive review of the evidence.
22. He first referred to the evidence of the manager of the father's employer in North West Queensland. That evidence confirmed that the father was on a two-year contract (beginning in 2007) and that it was "very likely" that the father would be offered a renewal of the contract in December 2008.
23. His Honour then referred at considerable length to the evidence from members of each party's extended family. His Honour stated (in paragraph 23) that he "was most impressed with the paternal grandmother", and he immediately went on to say (in paragraph 24) that his assessment in relation to members of the mother's family was "unfortunately ... of a very different category and nature to that of my assessment of the paternal grandmother".

24. Having reviewed in some depth the evidence of various members of the mother's family, his Honour concluded:
41. ...As I said, in relation to each of the family members called on behalf of the mother, and required for cross-examination, I gained the distinct impression that there was an entirely lacking [sic] of any recognition of the importance of the father in the child's life.
25. His Honour also referred at length to the evidence given by Ms P, a family consultant, who in her family report had recommended a continuation of the parenting arrangements in place before the trial. His Honour summarised the family consultant's position as being that "the real matter was the need for there to be proximity [between the child and her parents]".
26. In his discussion of Ms P's evidence, his Honour returned to his concerns relating to the attitude of the mother's family to the father's relationship with the child, saying:
60. [Ms P's] response was telling in that she indicated that if the mother did not defend that or pull her family up in relation to such criticisms or comments, then it would be an issue of some real concern in relation to the positive reinforcement of the relationship. Finally, and of particular significance in relation to this matter, [Ms P] was asked whether there was any concern that she would have as a result of the mother, in her most recent outline, proposing that there should be a significant reduction in the time to be spent between the father and the child no matter how that relationship should be fostered. For example, in Sydney with both parents there, in North West Queensland with both parents there or with the mother in Sydney and the father in North West Queensland.
61. The report writer indicated that there was a real concern in relation to that. And commented, I think quite tellingly, that that proposal should have been, as she put it, "an early offer not a late offer". It showed a lack of understanding or assessment in relation to the importance of the relationship between the father and the child.
27. His Honour then discussed the oral evidence given by the mother and father, stating that he "was particularly impressed with both parents".
28. In the course of canvassing at considerable length the father's evidence, his Honour made the following observations:
- "it was clear that the father was, as best he could, working toward ensuring that there was a continued relationship between the child and not only ... the mother, but extended family" (paragraph 66);
 - "that his sole motivation in relation to this matter ... was directed to ensuring that the best interests and the welfare of the child were met by

the opportunity to continue a positive relationship with both parents” (paragraph 70);

- that he “was very determined ... to continue his employment in [North West Queensland] to the extent of indicating even that if the child were to be living with the mother in Sydney, that he would not consider alternative opportunities for work in the same field that he was working in as at this time” (paragraph 71).

29. This last observation would seem to have been by way of criticism of the father. However his Honour immediately continued:

71. ...The father may have seemed somewhat dogmatic but I also gained the impression that there was an overriding wish to further his career, not necessarily simply for his own aggrandisement but also to ensure that he was able to provide for his family and to ensure that, in particular, [the child’s] needs were met and properly provided for. I was generally impressed with the father in relation to these proceedings.

30. In relation to the mother’s evidence, his Honour said that similarly he “was impressed” with her and he continued:

72. ...[t]here is no doubt that she has taken on a very significant role in relation to the parenting of this child and has in almost all respects ensured that [the child’s] best interests have been met.

31. However, his Honour also commented in that same paragraph that he was:

...troubled with a number of matters also associated with the mother’s recognition and appreciation of the importance of the role of the father in relation to the child.

32. His Honour then reviewed at length (paragraphs 73 to 88) the mother’s evidence. That review led him to the following conclusions:

89. I gained the distinct impression that the mother was perhaps even unknowingly continuing to minimise and to fail to recognise the importance of the father in the life of this child...

90. The mother unfortunately gave me the distinct impression that she was somewhat self-centred also in her position with regard to the child. I gained the distinct impression that the mother’s view was that there was only one person of priority in relation to the relationship with the child, and that was her. It may be that she was, and remains the primary carer of the child. It may be that the relationship between the father and the child, and the mother and the child are different relationships but the mother’s apparent failure to recognise in any

way, shape or form, the importance to [the child] of growing up with a close and fostered bond and interaction with the father is telling and is troubling in relation to these proceedings.

33. Turning to “issues in relation to the law”, his Honour explained that the “starting point” is that the best interests of the child are the paramount consideration as recognised by s 60CA of the *Family Law Act 1975* (Cth) (“the Act”). Then referring to the presumption of equal shared parental responsibility in s 61DA, his Honour noted that in this case both parents suggested there should be “equal shared parental responsibility”, and he stated (at paragraph 95) that that is “the appropriate course”.
34. Then, as his Honour correctly explained in light of the presumption of equal shared parental responsibility, he had to consider the provisions of s 65DAA. It will be necessary later to set out in full the paragraphs from his Honour’s reasons where he considered s 65DAA. It is sufficient here to say that his Honour determined that the child should spend equal time with each parent.
35. His Honour then turned to the provisions of s 60CC, describing them as the embodiment of the objects set out in s 60B, noting that s 60CC(2) contained “primary considerations” and s 60CC(3) “additional considerations”.
36. In relation to the primary considerations, his Honour found that the only relevant consideration was “the benefit to the child of having a meaningful relationship with both of the child’s parents” (s 60CC(2)(a)). In this regard, his Honour reiterated his finding that there was a close relationship between the child and both the mother and the father, and he stated (at paragraph 102) that “it is essential that that be maintained”.
37. His Honour referred briefly to the other primary consideration, being the need to protect the child from physical or psychological harm (s 60CC(2)(b)), stating that the only issue of relevance in this case may be “the mother’s anguish and depression in being in [North West Queensland]”. In relation to this concern his Honour observed:
 103. ...But I am also mindful of the recommendations and indications of the report writer that such issues can, to a significant degree if not in their entirety, be dealt with by the mother and perhaps also the father addressing issues in relation to counselling both with respect to their relationship as well as, of course, particularly with regard to their own individual needs.
38. Turning to the additional considerations in s 60CC(3), his Honour first considered (at paragraph 104) the views of the child (s 60CC(3)(a)) and commented that the child is only five and that “she is not expressing any particular views”. However, he stated that it could be concluded that the child would wish to continue to have a beneficial relationship with both parents.

39. As to the next consideration, being the nature of the relationship between the child and the child's parents and other persons of significance (s 60CC(3)(b)), his Honour found (at paragraph 105) that although the child's "primary attachments are to her mother and her father", she also has "significant attachments to other family members and friends".
40. His Honour then noted the significance in this case of s 60CC(3)(c), which relates to "the willingness and the ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent", and he observed:
106. ... Whilst both parents have to some degree fallen short in what would be hoped could be occurring in this regard, I gained the distinct impression that they recognise the importance of the other parent though unfortunately, as is perhaps obvious from the comments I have already made, I gained the distinct impression also that the mother places far less weight on the importance of that relationship being fostered.
107. I was troubled as is clear from very many of the issues that arose in relation to the mother's appreciation of the father's role in the child's life ...
41. His Honour considered s 60CC(3)(d) as "also relevant", and he explained that it requires the court to consider any changes in the child's circumstances including the likely effect on the child of any separation from his or her parents. In relation to this matter, his Honour found:
108. ...Without a second's hesitation I would find that the circumstances which would arise if the mother to be living in Sydney and the father living in [North West Queensland] would have the most serious and detrimental affect [sic] upon the very close and important relationship that exists and which should be fostered and developed between this child and the father.
109. Unfortunately, the impression I get is that there would be little if any real encouragement of that relationship by the mother, and if anything, it would be discouraged by those family members having close interaction with the child if in the mother's care in Sydney. The impression that I gained, unfortunately, was that if the mother were to live in Sydney with the child, that there would be an almost automatic deterioration in the relationship between the father and the child and that that would be to the detriment of the child.
42. His Honour then turned to s 60CC(3)(e) which he considered "a significant matter", that matter being the practical difficulties 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. His Honour's consideration of this matter caused him to make some further criticisms of the mother, which we will later set out in the context of relevant grounds of appeal.

43. With respect to the next additional consideration, being the capacity of the parents to provide for the needs, including the emotional and intellectual needs of the child (s 60CC(3)(f)), his Honour commented (at paragraph 114) that he had:

...no doubt as to each parent's very real capacity to facilitate and to meet the child's intellectual needs though their approaches in relation to education might be slightly different.

44. Again in the context of this particular matter, his Honour reiterated his concerns regarding the mother's capacity to foster the child's relationship with the father:

115. Unfortunately as is perhaps obvious from the comments I have made, I do have some real concerns about the mother's capacity to properly appreciate the emotional needs of this child in relation to a fostered relationship and a developing relationship with the father. I gained the distinct impression that the mother lacked considerably a capacity to appreciate that need and that it was a factor again, weighing far more significantly in favour of the father's proposals than of those of the mother.

45. The next additional consideration his Honour regarded as "significant" was s 60CC(3)(i), being "the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents". He commented in this regard:

117. ... there are very many positives that both parents show in relation to their parenting of the child. But as is clear, it is of concern to me that there is a lack of appreciation on the part of the mother of the very real need to foster and develop a relationship with the father and that is a failing that gives rise to a concern as to the mother's proposals in relation to this matter.

46. His Honour then noted that there was a "catchall" provision at the end of s 60CC(3), being "any other fact or circumstance that the court thinks is relevant" (s 60CC(3)(m)). Importantly for present purposes, his Honour then said:

118. There are obviously concerns here in relation to the mother's emotional wellbeing in [North West Queensland], and of course, there are also financial concerns and considerations that arise.

47. His Honour then continued in relation to such concerns:

119. I am however, very much of the view that at the conclusion of these proceedings when orders are made, and there is a more settled and stable routine in place that the mother can address both those emotional and financial issues and of course, can also consider other alternatives with regard to assistance from the father. He must obviously be aware of the very significant disparity between his and the mother's financial circumstances and he recognised in some of the answers given in relation to this matter, that he would have the financial wherewithal to provide some additional support.

120. Whilst he may obviously be providing child support pursuant to the provisions of the Child Support Assessment Act, he would obviously need to also recognise that there was a need to provide appropriate assistance to the mother if she were unable to fully meet her own obligations.

48. His Honour then reached his overall conclusion:

121. In the end, however, as is perhaps obvious from the lengthy reasons that I have given in relation to this matter, I have come to the view that the father's proposals in relation to equal shared parental responsibility with the child living in [North West Queensland], most appropriately deals with those issues required to be considered in relation to ensuring that the child's best interests and welfare are met...

49. We think it important to observe at this point before we consider each of the mother's complaints concerning his Honour's decision, that his Honour's overwhelming concerns in this case were the need to preserve the child's relationship with her father and reservations he had regarding the mother's capacity to do this, particularly if the child was to be living at a distant location from the father. It must also be emphasised that his Honour determined – no doubt with these concerns in mind – that in the event that the mother chose not to live in North West Queensland, the child should remain there with the father.

The alleged failure to consider an arrangement whereby both parents lived in the Sydney area or to explain why North West Queensland was a preferred location to Sydney

50. As earlier mentioned the basis of the mother's appeal, according to her counsel, was (as contained in her first ground of appeal) his Honour's failure to consider an arrangement whereby both parties and the child would return to live in the Sydney area. As such an arrangement had been one of the mother's proposals before his Honour, it should, it was submitted on behalf of the mother, have been closely scrutinised by his Honour, particularly given the acknowledged

financial and emotional difficulties for the mother in remaining in North West Queensland.

51. However the reality which faced his Honour was, as pointed out by senior counsel for the father, that the father had made it clear in his oral evidence that he would not leave North West Queensland, and as also pointed out by senior counsel for the father, that the mother had given evidence that she would not leave the child.
52. The relevant passage in the father's oral evidence was as follows:

[COUNSEL FOR THE MOTHER]: ... Mr [R], if his Honour was to make an order in these proceedings that were consistent with the mother's proposal, that is, that [the mother] be permitted to live again in Sydney, her home city, and your home city for 18 years, with [the child], would you be minded then to consider, on the basis of those orders, trying to relocate somewhere closer to Sydney?---No.

So it would be your view that you'd make no attempt at all to, for example, transfer the position of employment you hold in [North West Queensland] if those orders were made?---That's true.

So [North West Queensland] must be very important to you?---Yes, it is.

I see. And it's your position that you are not going to make any attempt to try and investigate a transfer away from [North West Queensland]?---Yes, that's true.

Mr [R], your affidavit has annexed a number of pages that refer to your qualifications and it seems as though you have a number of qualifications associated with your position as an engineer, is that right, is that your occupation?---Yes, Mr Jackson, it is.

Yes, it is, right. And, just to help me here, what specific engineering is your qualification?---...

I see. And you've also, in your affidavit, annexed, again a number of pages here it seems, a large number of references to your work experience. Now you can't seriously be saying that, in light of your qualifications and your work experience, that the only work that you can find is in ... [North West Queensland]?---I could find work in other places, Mr Jackson.(Transcript 13 March 2008, p 41)

...

You would choose the former. If there was a choice between you staying in [North West Queensland], where you're working now with [the child not] living there permanently or, alternatively, being closer to [the child] if she lived in Sydney you would choose the former?---Yes, I would.

I see. This job is very important to you then?---Yes, the job is important to me, Mr Jackson.

Obviously. Why is it so important to you?---It's an interesting job, Mr Jackson. (Transcript 13 March 2008, p 42)

53. The relevant passage in the mother's oral evidence was then as follows:

Now, Mrs [R], if his Honour decided that [the child's] best interests would be best served in [North West Queensland], where she could have interaction with both parents regularly, would you nonetheless move to Sydney?---No.

So you wouldn't move to Sydney if his Honour thought she should stay in [North West Queensland]?---No, I wouldn't.

Why is that?---I'd never leave my daughter. (Transcript 14 March 2008, p 35)

54. These then were the positions of each party on the basis of which his Honour had to make his decision concerning the future living arrangements for the child having regard, of course, to the matters required to be considered under the legislation.

55. It is apposite here to repeat the observations made by his Honour in paragraph 71 of his reasons, where he both recognised that the father was not prepared to move to the Sydney area even if the child was living there, but also appeared to recognise that the father may have had some justification for his "somewhat dogmatic" response to any suggestion that he move from North West Queensland:

71. He was very determined, for example, to continue his employment in [North West Queensland] to the extent of indicating even that if the child were to be living with the mother in Sydney, that he would not consider alternative opportunities for work in the same field that he was working in as at this time. The father may have seemed somewhat dogmatic but I also gained the impression that there was an overriding wish to further his career, not necessarily simply for his own aggrandisement but also to ensure that he was able to provide for his family and to ensure that, in particular, [the child's] needs were met and properly provided for. I was generally impressed with the father in relation to these proceedings.

56. Against this background, there would have been no point in his Honour's giving any consideration to a proposal whereby both parties would live in the Sydney area. Decisions concerning the parenting arrangements for children are hard enough (particularly under the current legislation) without requiring the

court to consider scenarios which one or both parties have expressly rejected. The reasonableness of such a rejection may of course be relevant to the ultimate parenting decision to be made. But his Honour was clearly satisfied of the reasonableness of the father's position in this case. Accordingly, the mother's first ground of appeal has no substance.

57. The mother's second ground of appeal asserts that his Honour erred in not providing reasons, or adequate reasons, as to why the father's preferred choice of residential location was superior to the mother's choice. According to the written submissions of the mother's counsel, this second ground of appeal is similar to the first, in that this was a case in which the choice was between either the child living in North West Queensland, where she had only resided for just over a year, or living in Sydney, where she had lived for almost her first five years. It was also a case, it was submitted, in which the family consultant had recommended proximity to both parents with the actual location not being relevant (at least from the consultant's point of view).
58. If this second ground is directed to the situation in which the choice between Sydney and North West Queensland was to be made on the basis that both parents could, or would, live in either place, then it is misconceived. This is because, as already explained in connection with Ground One, the father was not prepared to leave North West Queensland for Sydney, even if the child was in Sydney. Any suggestion of a need for a comparison between the two places on the basis that both parents could be in either place is therefore misconceived.
59. If this ground is concerned with a choice between the child living on the one hand with one or both parents in North West Queensland, or on the other hand with the mother only in Sydney, considerations other than a comparison between the two places were of much greater significance – notable considerations being the need to maintain the child's relationship with her father and the mother's capacity to foster that relationship.
60. On either interpretation, Ground Two has no substance.

The alleged failure to give adequate weight to the mother's financial circumstances in North West Queensland

61. By Ground Three it is asserted that his Honour "erred in failing to give any adequate weight to the financial status of the mother living in [North West Queensland]".
62. In support of this ground, counsel for the mother referred us to the affidavit evidence of the mother concerning the grave financial situation which she faced in North West Queensland (including her caravan-type accommodation, which the father acknowledged was unsuitable for the child), and to the evidence concerning her better employment prospects in Sydney.

63. It is true, as was submitted by counsel for the mother, that his Honour's only reference to this important evidence from the mother was made at the very end of his reasons for judgment, where in paragraph 118 and in the context of the "catchall" provision of s 60CC(3)(m), his Honour referred in general terms only to there being "... in [North West Queensland] ... of course ... also financial concerns and considerations that arise".
64. His Honour then went on in paragraph 119 and 120 to suggest – perhaps somewhat optimistically, it might be said – that once the proceedings were concluded, the mother could "address both ... emotional and financial issues", and also to suggest that the father might provide additional support to her.
65. While the mother's evidence regarding her financial circumstances in North West Queensland is concerning, and would ideally have warranted some greater elaboration in his Honour's reasons, it has to be remembered that the challenge in this ground is one of weight only. Thus, given the very great concerns expressed by his Honour about separating the child from her father in light of his findings as to the attitude of the mother and her family to the relationship between the father and the child, it must be acknowledged that it is unlikely any greater weight which might have been given to the mother's financial predicament in North West Queensland, could ever have outweighed his Honour's concerns that the child should stay in close proximity to her father.
66. Again it is important to remember in this particular context, that his Honour was prepared to make an order (Order 8) that in the event that the mother was not living in North West Queensland, the child would live with her father. We are thus not persuaded that our interference with his Honour's decision would be justified on the basis of the apparently limited weight which he gave to the mother's financial situation in North West Queensland.

The mother's emotional and physical isolation in North West Queensland and the alleged imposition placed on her freedom of movement

67. Counsel for the mother argued as a group the grounds which assert that his Honour had failed to give any consideration (Ground 4) or adequate weight (Ground 5) to the emotional and physical isolation of the mother in North West Queensland and the ground which asserted that his Honour's orders placed an imposition on the mother's freedom of movement (Ground 6).
68. Much of what we have said in relation to the ground directed to the weight which his Honour gave to the mother's financial circumstances, also pertains to this group of grounds.
69. His Honour did refer, albeit briefly and only towards the conclusion of his reasons, to the mother's emotional well-being in North West Queensland. But again it is unlikely that any weight given to that matter would have outweighed

his Honour's concerns relating to the preservation of the child's relationship with the father.

70. Again it must be remembered that his Honour was prepared to make an order that in the event the mother chose to leave North West Queensland, the child should remain living with the father. Thus, as was in effect submitted by senior counsel for the father, his Honour's orders imposed no restraint on the mother's freedom of movement.

The claims concerning the existence of lead poisoning in the North West Queensland area and the application to adduce further evidence

71. In the course of his lengthy review of the mother's evidence, his Honour referred to her evidence regarding concerns which she had based on certain newspaper articles about the risk to children of lead poisoning in the North West Queensland area:

83. I gained the distinct impression that much of what the mother sought in relation to this matter was designed to facilitate her wishes rather than to, in any way, properly appreciate the need for there to be a close and binding relationship between the father and the child. The mother in her evidence was questioned about two articles that had been published in newspapers in North West Queensland... That in fact occurred before the mother had travelled with the father to take up the commencement of his contract there in early 2007.

84. The mother said that she had genuine concerns in relation to issues with regard to lead contamination and the possible harm that could occur to children. When the mother was pressed in relation to the issue, however, it became clear that those concerns were far less significant than, in fact, she had really indicated. The mother had known the situation for about 11 months since April of 2007 when, whilst surfing the net she had come across the articles. She had not had the child tested. She'd had the opportunity to do so. She used the evidence, apparently, of those concerns arising from the articles to justify the request to live in Sydney but, of course, had not backed them up with any real action on her part indicating that there were real issues of worry in relation to the child.

85. I was far more inclined to the view that the mother had fortunately come across those articles and saw them as a means of justification or one further means of justification for her living in Sydney rather than continuing to live in [North West Queensland] and thus facilitating the close proximity which the report writer had spoken of. I was not at all impressed by the mother's position in relation to that particular aspect of the matter.

72. By Ground Seven it is asserted that his Honour failed to give adequate weight to the mother's concerns about the possibility of lead poisoning in the North West Queensland area, and by Ground Eight it is asserted that it was not open to his Honour to make a finding "that the stated concerns about the possibility of existence of lead poisoning in or around the [North West Queensland] area was not a genuinely felt concern".
73. As pointed out by senior counsel for the father, there was no finding by his Honour in the terms asserted by Ground Eight. Rather his Honour's finding or conclusion was that the mother's concerns (which, according to his Honour, she had said were genuine concerns) were "far less significant than, in fact, she had really indicated". In these circumstances, neither Ground Seven nor Ground Eight have any real substance, at least as drafted.
74. However, before us the mother sought to adduce further evidence in order to establish not only that her concerns regarding the lead poisoning issue were genuine, but also as we understood her counsel's submissions, that it was a matter which demonstrated that the decision that the child should remain living in North West Queensland was erroneous.
75. The further evidence which was sought to be adduced on the mother's behalf, and which was opposed on behalf of the father, was a media release by Queensland Health/Queensland Government regarding the health risks from lead poisoning in the North West Queensland area and a report into the results of a blood-lead screening program of 1-4 year old children in North West Queensland which was published by Queensland Health/Queensland Government in May 2008.
76. We are not prepared to receive this further evidence for the following reasons.
77. First, even if such evidence could establish that the mother's fears regarding the risk of lead poisoning to children in North West Queensland were extremely well founded, we do not consider that such a finding would establish that his Honour's decision concerning the child's residence was erroneous, given the other considerations which supported that decision, and which are discussed elsewhere in these reasons.
78. Secondly, if the purpose of this evidence was to establish that the child who is the subject of these proceedings is at risk in North West Queensland, the evidence would not be sufficient to establish such a risk. We will therefore dismiss the application to adduce further evidence.

The attitude of the mother's family towards the father

79. By Ground Nine it is asserted that his Honour erred in placing excessive weight on his finding that members of the mother's family held a negative attitude towards the father. It is important to note that counsel for the mother conceded

in both oral and written submissions that it was open to his Honour to find that the mother's extended family held, to quote counsel, "negative attitudes, and indeed a lack of respect towards the father". Counsel was also prepared to concede the difficulties that a challenge to such findings based, as it was, only on weight would face in light of authorities such as *Gronow v Gronow* (1979) 144 CLR 513.

80. The more significant challenge in relation to the issue of the negative attitudes of members of the mother's family towards the father was contained in Ground Ten. By that ground it is asserted that it was not open to his Honour to find, as he did in paragraph 109 of his reasons (which we have earlier set out in full), that such negative attitudes "would result in an almost automatic deterioration in the relationship between the father and the child". It was submitted in support of this ground that the child had spent most of her life in Sydney (where the mother's relatives lived) and yet she had a close relationship with her father.
81. This submission, with respect, overlooks the fact that when the child and her parents had previously lived in Sydney, the parents were not separated. Neither had these clearly bitter parenting proceedings yet taken place.
82. It must, of course, be acknowledged that his Honour's conclusion that if the mother were to live in Sydney with the child there would be an almost automatic deterioration in the relationship between the father and the child, is no more than a speculative prediction. But such predictions often have to be made in parenting proceedings. With the benefit of hindsight, it would have been preferable for his Honour to have said "that it is likely that there would be an almost automatic deterioration in the relationship between the father and the child", rather than "that there would be...". However nothing of substance can really turn on his Honour's use of those words.
83. Thus we are not persuaded that either Ground Nine or Ground Ten should succeed.

The practical expenses of the child spending time with the father if he remained in North West Queensland and she was with the mother in Sydney

84. Grounds Eleven and Twelve assert respectively error on the part of his Honour in failing:
 - to adequately address the practical expenses of the child spending time and communicating with the father if he remained in North West Queensland and she lived with the mother in Sydney;
 - to give any adequate reasons to support the conclusion that the mother wholly lacked any real appreciation of the enormous financial drain that would be put upon her as well as the father in relation to the practical

expenses of the child spending time and communicating with the father if he remained in North West Queensland, and she lived with her mother in Sydney.

85. In his written submissions counsel for the mother explained that these two grounds are limited to the issue of the practical expense of the child spending time and communicating with the father if he remained in North West Queensland and she lived with the mother in Sydney, with it being submitted that this was an issue which the court must consider pursuant to s 60CC(3)(e) of the Act.
86. In support of these grounds, counsel for the mother drew our attention to paragraphs 111 and 112 in his Honour's reasons, which are as follows, but which should for completeness be read with paragraph 113:
111. Obviously also section 60CC3E [sic] is a significant matter. It requires that the Court give consideration to the practical difficulties 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. The mother, I thought, minimised to an extraordinary degree the financial and other difficulties associated with maintaining a relationship between the father and the child, if the child was to live with her in Sydney.
112. The mother, I thought, wholly lacked any real appreciation of the enormous financial drain that would be put upon her as well as the father and of course, the enormous physical drain that would be placed upon both parents but more significantly the child with one parent living in [North West Queensland] and one parent living in Sydney.
113. There was little appreciation of the effect that would be had upon the relationship between the father and the child if the mother were living with the child in Sydney and there was little, if any appreciation of the effect that would occur from limited opportunities following very significant travel to be spent between the father and the child. It is a matter that seriously impacts in relation to the determination of this matter.
87. We are uncertain as to the precise nature of the mother's complaint about paragraphs 111 and 112. But it would seem that it is that the criticisms of her in these paragraphs were made with no evidentiary basis.
88. If that be the complaint, we consider that it has little substance. This is because the mother was cross-examined at considerable length regarding the travel arrangements and the arrangements for the funding of such travel, which were

contained in her amended response and also in a document headed "Terms of Parenting Plans" (which was apparently proposed in the event that the mother moved to Sydney with the child).

89. Despite its length we now set out that cross-examination:

... Mrs [Rosa], ...[On] 22 February you file an amended response proposing the current arrangement, okay?---Yes.

...

Is there a direct flight from Sydney to [North West Queensland]?---No, there's not.

How do you get from Sydney to [North West Queensland] in the most cost effective way?---Via Brisbane.

Which carrier?---Qantas. Yes, Qantas.

Can [the child] travel unaccompanied?---Yes, she can via Qantas.

Is that what you would propose?---Yes.

So she would fly to Brisbane and from Brisbane to [North West Queensland]?---Correct.

Five times a year?---To [North West Queensland], yes.

Yes. And return?---Yes. There would be a flight - - -

Have you costed that?---Yes, I have and - - -

How much is it?---And there would be a flight attendant.

Okay?---Who would supervise her for the change over in Brisbane.

Supervising. Okay?---In flights.

How much - well, let me go back a step. Are you entirely comfortable with [the child] at her age being unaccompanied? You're comfortable with that?--Yes, I have some worries, but, yes.

Okay?---It's okay.

What's the five trips going to cost you on the best estimate you can make?--I wrote it all down.

Return?---I can't remember the total cost. I can't remember.

Have you written it down somewhere?---Yes, I have, I've written it all down.

Is it written somewhere where you can conveniently access it now?---Yes, it's in that room with my folder in my red port. I do apologise, I'm just not good with numbers.

...

MR BETTS: Your Honour, the documents I've called for have been produced. Mrs [Rosa], the document that sets out the costings of flights that you've provided is headed, "Terms of Parenting Plans", is this the right document?---That relates to the one if I relocate [the child] back down to Sydney.

Yes, okay. Just keep your voice up for the record. You've listed here:
Suggested visits would be 100 per cent to the client.

That's you.
Transporting both [the father] and [the child] to facilitate visits.

You've got:
Average cost one child travelling Sydney to [North West Queensland] return \$734.
?---Correct.

So that's \$367 each way basically. Where did you get that figure from?---Qantas, from the website.

Is that a cheap fare, is that - - - ?---No, it's the - it's not a fully flexible either. It's not the extreme. It's the average in the middle.

So 734 return from Sydney to [North West Queensland]?---Correct, for a child.

And that includes a stop over in Brisbane?---To change planes.

Okay. Well, are you sure you're not going in a little bit cheap on that cost, Mrs [Rosa]?---I went on the Qantas website and I did that.

Okay?---Based on their pricing and I even put in the dates of the suggested months that I was going to, for this calendar year.

Okay. What about the cost of the hostess accompanying or supervising? Is that included in that cost?---No, it's not included in that cost.

How much is that?---I didn't inquire how much that is.

You've got:

*The average cost of a child travelling Sydney to Brisbane return
\$154.*

?---Correct.

Are you sure that isn't a one way fare?---No, that's return.

So it's \$77 each way for a child?---When I was searching, yes, it was. But I believe it was in advance, so in advance of, if you do quite in advance bookings you can get the cheaper airfares.

Okay. Again is - - - ?---So I - - -

- - - the cost of the attendant allowed for in that?---No, it's not. Not in any of those pricing.

And the average cost of an adult travelling from [North West Queensland] to Brisbane return was 510?---From, sorry, [North West Queensland]?

[North West Queensland] to Brisbane return. Is that the cost of flying [the father] basically to Brisbane - - - ?---To Brisbane.

- - - for these three visits?---Yes, it is.

So on your calculations, five visits to [North West Queensland] unaccompanied is about 3700 return, five lots of 734?---Correct.

Give or take?---Plus the - - -

Plus whatever the accompanying is?---Plus the attendant.

And you've got three Brisbane return trips at 510 each for [the father], so there's another 1500?---In a 12 month period, yes.

So there's about 5200?---In a calendar year.

Sure. And a child travelling Sydney to Brisbane return three times at 154 is about another \$450?---Correct.

So you've got about five and a half thousand dollars in airfares on - would you accept that that's - as a general statement, that's what you've said here in this document?---Yes, it is a general statement.

Five and a half thousand and that is based on booking the flights pretty early?---Correct.

Is that what your figures are based on, pretty early bookings, there's no sort of weight bookings there?---Correct. But that can be done - - -

Sure?--- - - - because it's knowing of school holidays and all the dates.
I accept that. It can be done subject to whether there's any available tickets?---Correct.

So you're looking at five and a half thousand plus whatever the cost of the accompanying hostess or supervising hostess is?---Correct.

But you don't know what that cost is?---No, I don't. But I'm assuming it's going to be quite - it's minimal.

Why do you assume that?---Because it's - because they allocate - they don't - you're not paying for the staff member, an additional staff member, to - - -

You're paying for someone already on the flight - - - ?---Correct.

- - - to keep an eye on them basically?---Yes, you are.

And to walk them to the other plane as required?---Correct. As far as I'm aware.

Your Honour, I will tender that document...

...

MR BETTS: Mrs [Rosa], do you accept that even on those figures, and we're taking you at face value in this document, it's still a pretty significant expense for you?---It's not significant, but there's an expense.

Not significant?---No.

Well, you depose that you might be able to earn something like \$54,000 gross, don't you?---Correct.

In Sydney?---Yes.

I don't know what the net figure on that would be, but perhaps in the mid \$40,000 mark somewhere or low 40,000's. Does that sound about right to you?---Yes. I'm just guessing because I don't know.

You're not a hundred per cent sure?---I'm not a hundred per cent on the tax bracket.

Okay. Now, just in terms of your earnings, you've provided a bundle of documents that set out your pay. If I suggested to you that when we averaged them out it's closer to 378 net a week rather than 300, would you agree with that or does that not sound right to you?---Well, I thought it was more the \$300 mark, but I'll take - - -

Well the documents will speak for themselves?---Exactly.

I'll tender those, your Honour?---Okay.

...

90. In light of this evidence, it was open to his Honour to draw the conclusions which he did in relation to the mother's lack of appreciation of the financial burden involved in the child travelling between Sydney and North West Queensland. The physical burden on all concerned would be self-evident given the distances involved.

The “reasonable practicality” of the order for the child to live week about with each parent

91. The final nine grounds of appeal are all directed to the order for the child to live week about with each parent, or in other words, to live with each of the parents on an “equal time” basis, with the principal complaint being that his Honour had failed to address the matters required by s 65DAA(5) to be addressed in order to determine whether an equal time arrangement was reasonably practicable. It was asserted in particular that his Honour had failed to address the following four matters (only one of which, we note, is a matter referred to in s 65DAA(5)): the parties' inability to communicate; the father's lack of respect for the mother's parenting capacity; the parties' different approaches to parenting, especially education; and the mother's historical role as primary care-giver.
92. It will be useful to begin our discussion of these grounds by setting out the provisions of s 65DAA(1), (2) and (5) and then setting out the paragraphs from his Honour's reasons where he endeavoured to apply those provisions.
93. Sections 65DAA(1), (2) and (5) provide:

Equal time

- (1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:
- (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
 - (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
 - (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

...

Substantial and significant time

- (2) If:
- (a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and
 - (b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and
- the court must:
- (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
 - (d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
 - (e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

...

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

...

Reasonable practicality

- (5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:
- (a) how far apart the parents live from each other; and
 - (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
 - (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
 - (d) the impact that an arrangement of that kind would have on the child; and
 - (e) such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3)

provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

- (a) 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 (paragraph 60CC(3)(c));
- (b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity—the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

94. His Honour's application of s 65DAA should be seen as commencing with his reference in paragraph 95 of his reasons to the presumption of equal shared parental responsibility contained in s 61DA:

95. What must then be looked at, of course, is whether there is a basis upon which the presumption that arises pursuant to section 61DA of equal shared parental responsibility should be rebutted. There is no suggestion that that should arise here. In fact, both parents suggest there should be equal shared parental responsibility and of course, in the circumstances, I am from the comments I have already made, in agreement that that is the appropriate course.

95. Then relevantly for present purposes, his Honour continued in paragraphs 98 to 100:

98. In light of the presumption that there should be equal shared parental responsibility, I of course must consider those matters that arise pursuant to the provisions of section 65DAA. The Court must consider whether equal time with each parent would be in the child's best interests and is reasonably practicable, and if equal time is not appropriate then whether substantial and significant [time] would be in the best interests and reasonably practicable. If then [sic] parties remain in [North West Queensland] as the father suggests, then they are in the same locality. They are proximate to each other and there can be the opportunity for equal time which would be, in my assessment, in the best interests of this child.

99. More particularly I note that the recommendations of the report writer were also for a continuation of the existing arrangements which had been put in place by the parties following the orders which were made for the mother's return to [North West Queensland]. That was for a continuation of a week about arrangement. The report writer, of course, indicated that if the parties were in the same locality in some place other than [North West Queensland], that would of course be her recommendation.

100. It was clear, however, from the assessment of the report writer that there should be equal time. If not equal time, then certainly significant and substantial time [sic; semble “and”] that any proposal which had the parties living in different localities, thousands of kilometres apart would not be beneficial to this child. In my assessment, there is, if the father were to be living in Sydney or the mother living in [North West Queensland], a basis upon which there should be equal time spent with each parent and that it would be in the best interests of the child for that to occur.
96. It is true that in these paragraphs, his Honour did not expressly address the issue of whether an equal time arrangement would be “reasonably practicable”, nor can he be seen as addressing the matters which s 65DAA(5) requires should be addressed in determining the matter of “reasonably practicable”.
97. However, it is important to recall that it was only following paragraphs 98 to 100 that his Honour embarked upon his relatively extensive consideration of the matters in s 60CC, which are the matters to be considered in determining what arrangements will be in the child’s best interests. A consideration of the statutory provisions in this order was of course open to his Honour (*Taylor & Barker* (2007) FLC 93-345 [63]). (See also *Wiley & Wiley* [2008] FamCAFC 153 [70]).
98. A reading of his Honour’s application of s 65DAA without the benefit of having already read his important findings in relation to the relevant s 60CC matters may well explain the concerns which are embodied in Ground 13 to 21 regarding the adequacy of his Honour’s application of s 65DAA, and in particular s 65DAA(5).
99. We are satisfied that the four specific factual matters which are referred to in Grounds 15 to 21 and which are asserted on behalf of the mother not to have been adequately considered by his Honour, were considered by him in the course either of his consideration of the s 60CC matters or of his extensive review of the evidence at the commencement of his reasons, to a sufficient extent that our interference with his decision on account of any of those matters would not be justified. It will be recalled that the four specific matters alleged not to have been sufficiently considered were the parties’ capacity to communicate; the father’s lack of respect for the mother’s capacity to parent; the parties’ differing approaches to parenting; and the mother’s historical role as primary care-giver for the child.
100. The mother’s significant role in parenting the child was recognised by his Honour at the very outset of his review of her evidence. But even at that initial point, his Honour’s concerns regarding the mother’s appreciation of the importance of the father’s role had become apparent, as will be seen from the following passage of his Honour’s reasons:

72. Similarly, I was impressed with the mother. There is no doubt that she has taken on a very significant role in relation to the parenting of this child and has in almost all respects ensured that [the child's] best interests have been met. I was, however, troubled with a number of the matters associated with the mother's recognition and appreciation of the importance of the role of the father in relation to the child...
101. His Honour returned to these matters of the mother's primary carer role and his concerns regarding her appreciation of the father's role in paragraph 90, which it is convenient to repeat here:
90. The mother unfortunately gave me the distinct impression that she was somewhat self-centred also in her position with regard to the child. I gained the distinct impression that the mother's view was that there was only one person of priority in relation to the relationship with the child, and that was her. It may be that she was, and remains the primary carer of the child. It may be that the relationship between the father and the child, and the mother and the child are different relationships but the mother's apparent failure to recognise in any way, shape or form, the importance to [the child] of growing up with a close and fostered bond and interaction with the father is telling and is troubling in relation to these proceedings.
102. In the context of his consideration of the additional considerations in s 60CC(3), his Honour recognised the parties' different approaches to parenting, including in relation to education. Again in this context, he expressed some concerns regarding the mother's capacities as will be seen from the following passages in his reasons, which it is again convenient to here repeat:
114. Insofar as the capacity of the parents to provide for the needs of the child including their emotional and intellectual needs, I of course have already commented about the capacities of both parents in that regard. I have no doubt as to each parent's very real capacity to facilitate and to meet the child's intellectual needs though their approaches in relation to education might be slightly different. There is an appreciation by both parents of the need for this child to be given every opportunity to achieve whatever can properly be achieved.
115. Unfortunately as is perhaps obvious from the comments I have made, I do have some real concerns about the mother's capacity to properly appreciate the emotional needs of this child in relation to a fostered relationship and a developing relationship with the father. I gained the distinct impression that the mother lacked considerably a capacity to appreciate that need and that it was a factor again, weighing far

more significantly in favour of the father's proposals than of those of the mother.

...

117. The attitude to the child and to the responsibility of parenthood, however, are significant matters. I have commented upon the positive nature, and there are very many positives that both parents show in relation to their parenting of the child. But as is clear, it is of concern to me that there is a lack of appreciation on the part of the mother of the very real need to foster and develop a relationship with the father and that is a failing that gives rise to a concern as to the mother's proposals in relation to this matter.

103. Specifically in relation to differences between the parties in relation to matters of education, his Honour's earlier observations in paragraph 69 of his reasons, which need to be read in conjunction with paragraph 68, should be noted:

68. I gained the distinct impression that the father was going out of his way to do the best that he could. And whilst there were criticisms made in relation to the father and to his personality and, in particular, the forceful and direct nature of it, he was, as best he could, seeking to involve himself in the child's life and not to take an overbearing or dominating role in relation to the decisions to be made between he and the mother in relation to the child.

69. That was indicated, I thought, particularly in a series of questions directed to the father about the different approaches to education. He was asked how he might describe the differences between he and the mother. In light of the very determined nature of the father in achieving academic excellence, it was perhaps understandable that he indicated that he was mindful of efforts that might be made in relation to education but would seek to reward achievement. When asked what the mother's outlook might be and how it was different from his, I thought that he quite insightfully indicated that the difference would be that the mother would be more effort focused and determined to deal with issues in that regard rather than to deal with the actual outcomes of any determination.

104. His Honour's observations in the above two paragraphs are also instructive in relation to the mother's complaint that his Honour failed to take into account the father's alleged lack of respect for the mother's capacity to parent. This was a matter which his Honour had already discussed and apparently found to be without substance in paragraphs 45 and 46 in the course of his review of the family consultant's evidence:

45. It was interesting also that [the family consultant] was challenged in relation to very many of the findings that she had made in relation to this matter. It was particularly the case that she was challenged in relation to her statement in paragraph 31 with regard to the father making complaint about the child... suffering from both conjunctivitis and mouth ulcers. It was suggested that this was, as was put to the father on behalf of the mother, a lack of respect shown towards the mother and her mothering.
 46. The father, and I shall comment upon this a little later, was adamant that was not the case but rather was a concern in relation to the health of the child. And it was interesting that the assessment by [the family consultant] was of a similar nature. She indicated, in relation to those questions, that he seemed to have a genuine concern in relation to the health of the child. And when further questioned, indicated that it seemed to her to be much more out of concern for the child and of the mother, and the circumstances that she was in, than to be any serious criticism of the mother. Whilst the father used the term "lax parenting", [the family consultant] appeared to draw little of concern from the use of that term.
105. Generally in relation to the father's attitude to the mother, the following observations by his Honour are also instructive:
63. In particular, I was impressed with the fact that the father was cross-examined quite vigorously in relation to his personality, his domineering behaviours and his actions generally. He was asked however, whether subsequent to separation, he could accept that the mother would have certain feelings of confusion, anguish and isolation and whether the child would reflect those feelings of the mother.
 64. The father did not disregard them entirely. He acknowledged that there were possible situations where the child would feel the concerns of the mother and he acknowledged that the mother also would feel some of those concerns. But I gained the distinct impression, as I thought did the report writer, that there was still a compassion and a concern held by the father for the mother. And that whilst they had very different views in relation to what might be appropriate in relation to the arrangements to be made with regard to the child, there was still a degree of understanding and concern on the part of the father which reflected very well upon him in relation to such arrangements.
106. Finally, in this context of matters not adequately considered when ordering "equal time", there is the complaint that his Honour has failed to take into

account or to adequately consider the parties' capacity, or on the mother's case, incapacity, to communicate.

107. It has to be acknowledged that notwithstanding that "the parents' current and future capacity to communicate with each other" is a matter to which the court is directed to have regard in determining whether an equal time arrangement is reasonably practicable, it was not a matter which received very much consideration in his Honour's determination of this case.

108. However, it cannot be said having regard to paragraph 93 of his reasons that his Honour did not understand that there were problems in relation to the parties' capacity to communicate, and that this was a matter of concern to the mother:

93. The mother expressed concerns as to the effect of handovers and the lack of communication between she and the father. Both parents can do better...

109. But it is also clear from paragraph 97 of his reasons that his Honour, who had the benefit of observing the parties during the course of a three day trial, considered that these were problems which could eventually be overcome:

97. The suggestion of a domineering or overbearing personality on the part of the father may be a matter of some concern to the mother but I gained the distinct impression that the mother was just as forceful a personality in her own right as was the father. And that the fact was, that when the heat of these proceedings perhaps had come out of the relationship, that there were far better opportunities for interaction and communication between the parents, particularly when it came to making decisions in relation to the welfare and the best interests of the child.

110. It must also be remembered in connection with the parties' capacity to communicate, that both agreed that they should have equal shared responsibility. It must be assumed that they themselves consider that they could communicate for decision-making purposes.

111. But even if his Honour may have been unduly optimistic about the parties' capacity to communicate, we are not persuaded that their problems in communicating, would have resulted in an order for "equal time" not being made. It is absolutely clear from his Honour's reasons why he considered that an equal time arrangement was in this child's best interests. That option was available to him given the alternative terms of the mother's application, and also her evidence that she would not leave her child.

112. As we earlier foreshadowed, we would not be prepared to interfere with his Honour's decision on account of any of the matters raised in Grounds 13 to 21.

Conclusion and Costs

113. For the reasons which we have given the appeal must be dismissed.
114. Notwithstanding the failure of the appeal, we are not persuaded that the circumstances warrant the making of the order for costs, which was sought by the father in the event that the appeal was to be dismissed.

I certify that the preceding one hundred and fourteen (114) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court

Associate:

Date: 15 May 2009