FAMILY COURT OF AUSTRALIA

WHISLER & WHISLER ***[2010] FamCAFC 18***

FAMILY LAW - APPEAL – FROM A DECISION OF A FEDERAL MAGISTRATE – Appeal against parenting and property orders – Challenge to property orders hinged upon the appeal against the parenting orders – Parties conceded that the spousal maintenance order ought be set aside
FAMILY LAW - CHALLENGE IN RELATION TO "EQUAL TIME" – Appellant challenged the parenting orders on the grounds that the Federal Magistrate failed to properly consider equal time, failed to order equal time when such an order should have been made and failed to give adequate reasons in respect of the decision as to equal time – A week about arrangement was considered by the Federal Magistrate and adequate reasons given for its rejection – Appellant submitted that the Federal Magistrate ought consider the concept of "equal time" not just a week about arrangement – No alternative proposals achieving "equal time" were proposed by either party
FAMILY LAW - CHALLENGE IN RELATION TO "SUBSTANTIAL AND SIGNIFICANT TIME" – Appellant submitted that the Federal Magistrate failed to properly consider substantial and significant time – Consideration given as to whether the orders achieved "substantial and significant time" with the appellant – Orders made did provide for "substantial and significant time" – Consideration of substantial and significant fell within the reasoning of best interests considerations – Express reasons would have been desirable – Path of reasoning is discernible and valid – Federal Magistrate is not bound to consider proposals of the Court's own creation where the parties' proposals contain arrangements meeting the child's best interests
Order set aside in accordance with the parties concessions – Appeal otherwise dismissed

Family Law Act 1975 (Cth) s 65DAA

Goode & Goode (2006) FLC 93-286
Saunders and Hammond (No 10) (2008) 38 FamLR 315
Starr & Duggan [2009] FamCAFC 115
Taylor & Barker (2007) 37 FamLR 461
U v U (2002) 211 CLR 238
Whisprun Pty Ltd (formerly Northwest Exports Pty Ltd) v Dixon (2003) 200 ALR 447

APPELLANT: Mr WHISLER

RESPONDENT: Ms WHISLER

APPEAL NUMBER: SA 53 of 2009

FILE NUMBER:	MLC 9819 of 2008
DATE DELIVERED:	17 February 2010
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Melbourne
JUDGMENT OF:	Warnick J
HEARING DATE:	10 February 2010
LOWER COURT JURISDICTION:	Federal Magistrates Court
LOWER COURT JUDGMENT DATE:	8 May 2009
LOWER COURT MNC:	[2009] FMCAfam 445

REPRESENTATION

COUNSEL FOR THE APPELLANT:	Ms Ben-Simon
SOLICITOR FOR THE APPELLANT:	JDB Law
COUNSEL FOR THE RESPONDENT:	Ms Phelan
SOLICITOR FOR THE RESPONDENT:	Nevett Ford

ORDERS

(1) That the appeal be allowed in part.

(2) That Order 24 of the orders of Phipps FM made 8 May 2009 be set aside.

(3) That the appeal be otherwise dismissed.

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

IN THE APPELLATE JURISDICTION OF THE FAMILY COURT OF AUSTRALIA AT MELBOURNE

Appeal Number: SA 53 of 2009
File Number: MLC 9819 of 2008

Mr WHISLER
Appellant

And

MS WHISLER
Respondent

REASONS FOR JUDGMENT

1. This appeal points up the tension between, on the one hand,

    - the capacity, indeed the duties of Courts considering parenting orders, firstly, to make the orders found to be in the best interests of the children, irrespective of the orders sought by each party and, secondly, to follow the "legislative pathway", which may involve compulsory consideration of equal time and substantial and significant time for children with each parent and, on the other hand;
    - the many pragmatic and forensic reasons for hearing a case within the parameters set by the parties.

2. Proceedings for parenting orders and property settlement between Mr and Ms Whisler came before Federal Magistrate Phipps. Each of the parties sought orders approximately the "mirror reverse" of those sought by the other.

3. His Honour ultimately ordered that the parties have equal shared parental responsibility, and that their two children, L, then six and W, then four and a half, live with the mother, spending time with the father each alternate weekend, Friday after school until Monday before school, for some hours each Wednesday, for half school holidays and on special occasions.

4. As to division of property, the "pool" was assessed at a very modest $243,000.00, approximately. The learned Magistrate assessed contributions at 55 percent by the husband and 45 percent to the wife, then adjusted by 15 percent in favour of the wife, on account of factors made relevant by s 75(2)

of the *Family Law Act 1975* (Cth), ("the Act"), to divide the property 60/40 in her favour.

5. Phipps FM also ordered:

> (24) That while the husband continues to receive the whole of the family tax benefit the husband pay to the wife by way of spousal maintenance the sum of $100.00 per week.

6. Against the parenting, property and spousal maintenance orders, the husband appeals

7. In the Amended Notice of Appeal, the grounds of appeal, including sub-grounds, spread over five pages. However, it is unnecessary to set them out in full, as the areas of dispute were refined during oral submissions.

8. The wife through her Counsel, Ms Phelan, concedes that Order 24, the provision for spousal maintenance, should be set aside.

9. Ms Ben-Simon, Counsel for the husband, acknowledged that the only basis of the appeal against the property settlement orders, was that, if the parenting orders were set aside, so should the property orders, because Phipps FM had, in making an adjustment under s 75(2) of the Act placed significant weight on the intended orders that the children live primarily with the mother.

10. Ms Phelan also concedes that if the parenting orders are set aside, so should be the orders for division of property.

11. In accordance with this position, Ms Ben-Simon acknowledges that, in so far as the Amended Notice of Appeal contains grounds attacking the basis of the reasons for the property settlement orders, these are not independent grounds of appeal, but are particulars of error which, together with the erroneously made spousal maintenance orders, demonstrate the deficiency of the judgment overall and so would not only support the setting aside of the property orders, if the parenting orders were set aside, but would encourage the setting aside of the parenting orders.

12. In the circumstances, I see no need for that support in relation to the property orders nor do I see that consideration of the alleged errors in relation to division of property will be of any assistance in addressing the grounds challenging the parenting orders.

13. As to those grounds, though none were abandoned, no submissions were made with regard to some and, in relation to others, Ms Ben-Simon accepted that the argument could be put no higher than that conclusions other than those made by the Federal Magistrate were open.

14. In the end, I summarise the complaints persisted with, as follows. That Phipps FM:

1. failed to properly consider the children spending equal time with each parent, failed to order equal time (when he should have so ordered) and failed to give adequate reasons in respect of his decision about equal time.

2. erred in failing to properly consider substantial and significant time for the children with their father.

In discussing these arguments, I will address aspects of the decision which are raised by Ms Ben-Simon as separate grounds, but which I think are subsets of the above propositions.

15. The course of the hearing before Phipps FM and the essential family history forms the context in which the arguments adumbrated are to be considered.

16. When the parties, who married in mid-2000, commenced cohabitation, the wife had with her G, her daughter from a previous relationship. She lived with the parties throughout their cohabitation, though spending time with her father.

17. The parties separated under the one roof on 30 June 2008, the husband finally leaving the former matrimonial home on 15 October 2008, to live with his parents.

18. Shortly after, orders were made that the children live week about with each parent.

19. The trial before Phipps FM was held in March 2009. A family report by a Ms D was received in evidence. She was not cross-examined and there was no other expert evidence. Though Ms Ben-Simon resisted any description of Ms D's evidence as unchallenged, the highest she puts her contentions in this regard is that, for example, the mother had told Ms D some things about which the mother spoke differently in evidence.

20. However, as Ms D was not cross-examined, there can be no suggestion that she was invited to re-consider any opinions she had formed, in the light of further developments. Similarly, Ms Ben-Simon suggested that some evidence before the Federal Magistrate, for example about the father's primary care of the children during some periods, could have founded findings contrary to opinions expressed by Ms D. Be that as it may, I accept that, as the term is commonly used, Ms D's evidence was unchallenged.

Did Phipps FM fail to properly consider the children spending equal time with each parent, fail to order equal time (when he should have so ordered) and fail to give adequate reasons in respect of his decision about equal time?

21. As to what each party sought, Phipps FM recorded that both parties proposed equal shared parental responsibility. Each party proposed that the children live primarily with that party, and spend time with the other parent on alternate weekends from after school Friday to beginning of school Monday, each Wednesday for two and a half hours after school (once the younger child

commenced school, with a different arrangement for him until the end of 2009), half school holidays and special occasion contact.

22. Neither party sought a continuation of the week-about arrangement save that, as Phipps FM said:

> 8. During final addresses counsel for the husband suggested that, although not proposed by either party, an alternative open to the court was the current arrangement, that is week and week about

23. As to the evidence of the Family Reporter, upon which his reasons disclose Phipps FM placed reliance, significant passages in his Honour's reasons include:

> 19. She identified the issues. She said that neither party supports the continuation of the present shared care arrangements. Both parents expressed concerns about the living arrangements in each household.
>
> 20. The wife expressed concerns about the composition of the paternal household, his grandparents and a disabled brother and sister. The wife had general concerns about the husband's ability to adequately care for the children and provide a routine for them.
>
> 21. The husband is concerned about the composition of the wife's household. In particular he is concerned about what he believes is the malign influence of [G] and the wife's capacity to adequately care for the children and provide a routine for them.
>
> 22. [Ms D] described the parental relationship as characterized by a lack of communication and hence some difficulty in discussing the children's issues. She said that basically the husband and wife see most situations differently and seem to have done so for number of years.
>
> 23. [Ms. D] reports that the wife acknowledges that the husband role has been that of "home dad", a role born out of "necessity" as "someone had to make a decision, and we needed money". The wife acknowledged that the children have a very good relationship with their father because, according to the wife, "he spent more time with them, and I hav'nt been able to do that".
>
> …
>
> 25. [Ms. D] says that the wife impressed as personable and friendly with a positive outlook on the world. …
>
> …

28. [Ms D] said that the husband came back repeatedly to the topic of the influence of [G] on his family life and his perceptions of [G]'s unacceptable behaviour. [Ms D] said that the husband's relationship with [G] seemed to be a real issue for him, bringing out negative responses. He described the relationship between himself and [G] by saying "we were at war".

…

30. [Ms. D] said that the husband appears to have some underlying anger. He consistently returned to the discussion about the malign influence of [G] on him and the family. She says that the husband impresses as somewhat socially isolated, with few supports in his life other than the paternal family and his relationship with his young children.

…

32. [Ms D] says that [L] has a close loving relationship with both parents. …

33. [Ms. D] says that [L] has a close relationship with her older sister [G]. [L] said she missed [G] “a lot” when [L] was living with her father.

…

36. [Ms D] says that reassuringly [L] does not have a preference for one parent over another, but her comments about her routine indicated that she does not like the 7 day interval in which she does not see the other parent.

37. [Ms D] said [W] indicated he was a happy boy. She considered, from his answers to questions, he has a good, reliable relationship with both parents.

…

41. [Ms D] says that [L], [W] and [G] played well together. They appeared to be a happy and familiar sibling group. There was very little difference in the way [L] and [W] related to each parent.

42. [Ms. D] recommends that the children live with the wife. Her recommendations for time with the husband have been adopted by the wife and are in the wife's proposals set out above.

…

44. [Ms. D] said that the spousal relationship seems to have been characterized by quite different expectations in each spouse, expectations which were not met by the other. She said the parental

relationship seems to have been marked by poor communication stemming from the long term spousal difficulties. [Ms D] says that for these reasons there is now no post-separation cooperative parental relationship either. This, [Ms D] says, makes it difficult for the parties to co-operate in a week about routine. [Ms. D] said there had been no indication during the course of the interviews that the relationship between the parents will improve in the near future.

45. She considered that the parenting of the children was further complicated by the husband's antipathy towards [G]. She considered that his views might possibly be an impediment to [L] and [W] having a relationship with their sister [G] unencumbered over time by their father's negative views of [G].

46. [Ms D] noted that the two parents live close to each other and both are likely to remain in the area. She considered this would benefit the children. [Ms. D] said that notwithstanding the short geographical distance the parties parent in isolation of each other without any planned, coordinated or integrated approach.

47. [Ms. D] considers there are some significant differences in the emotional capacity of each parent to parent the children.

…

49. [Ms. D] considered the husband as somewhat socially isolated, not engaged as he is in public life and still holding onto some anger about his life with the wife. [Ms D] considered it important that he did not speak very well of the wife.

50. [Ms D] considered the children's long-term relationship with their half sister needs to be nurtured, supported and encouraged. She said that given the husbands own views about [G] this might not occur if they live the greater part of the time with the husband.

24. Immediately following these passages, Phipps FM addressed matters under the heading "The husband". In part he said:

52. The husband describes himself as a "home dad". He considers that he should continue in the role he performed for two years between 2006 until the middle of 2008, when he was the children's principal carer. Prior to that time he had much of the care of the children, including [G].

25. When Phipps FM came to address "equal time", he did so under the heading "parenting and best interests considerations". He said:

69. Section 61DA of the Family Law Act 1975 (Cth) requires the court to apply a presumption that it is in the best interests of the children for

parents to have equal shared parental responsibility. The application of the presumption is agreed in this case. … I do not consider the evidence shows that there is sufficient to rebut the presumption.

70. Section 65DAA then requires that the court must consider whether equal time with each parent would be in the children's best interests and reasonably practicable, and if equal time is not appropriate, the court must consider whether substantial and significant time would be in the children's best interests and reasonably practical.

…

74. Section 65DAA sets out the matters the court must have regard to in determining whether it is reasonably practicable for a child to spend equal time or substantial and significant time with each of the child's parents.

75. The first is how far apart parents live. The parents at the moment live four kilometres apart. Travel between the two homes and to [L]'s school is easily done.

76. The next two matters are the parent's current and future capacity to implement the arrangement and capacity to communicate with each other and resolve difficulties that might arise.

77. [Ms D] said that the spousal relationship seems to be characterized by quite different expectations in each spouse, expectations not met by the other. She said the parental relationship seems to be marked by poor communication stemming from the long term spousal difficulties. [Ms. D] concluded that for these reasons there is now no post separation cooperative parental relationship.

78. Events during the time leading up to the final separation confirm this. The relationship broke down, but the parties could not reach agreement on how they would deal with the breakdown. The wife wanted the husband to leave the house. He did not want to. Eventually, events came to a head and he left. The parties have different parenting styles. The husband said to [Ms D] that his approach was that kids have to have boundaries. He considered that with the mother discipline is not there. This encapsulates the different parenting styles. The husband has a disciplined approach while the wife has a freer approach.

79. The requirements that the parents have the capacity to implement the arrangement and to communicate are not met in this case.

80. The fourth of the considerations is the impact the arrangement would have on the children. [Ms. D] considered that a secure base is

important for the children. The husband said specifically to [Ms. D] that the current routine of week about was not good for the children. The wife concurs. This requirement is not met.

81. Consequently, an equal time arrangement is not practicable.

26. In my view, there is no merit in the argument that the learned Magistrate failed to give adequate reasons for rejecting "week-about" and on his findings, that result was well open.

27. However, Ms Ben-Simon raises another aspect: the Federal Magistrate should have addressed the "concept" of equal time, not just an arrangement of "week-about". Asked whether she was suggesting Phipps FM should, for example, of his own selection, have considered "month-about", Ms Ben-Simon answers in the negative, but argues that he should have considered shorter periods of rotating care than week-about, such as 3 days/4days.

28. As this submission also applies to the argument that the learned Magistrate should have addressed various possibilities of "substantial and significant time", and in that respect, for reasons that will appear, the argument seems less abstract than in relation to the question of equal time, it will be considered in the following discussion.

29. For the present, I simply record that no party sought or even raised any other arrangement for equal sharing and there was no evidence directed to such arrangements and their consequences, such as changeovers in the middle of the school week.

Did Phipps FM err in failing to properly consider substantial and significant time for the children with the father?

30. As a preliminary point, I examine the question of whether the orders that his Honour made provide for "substantial and significant time" for the father with the children. Ms Ben-Simon complained about the orders in terms that suggest they did not amount to substantial and significant time, but made no detailed "measurement" of the provisions against the terms of s 65DAA(3) of the Act.

31. That subsection provides:

> (3) For the purposes of subsection (2), a child will be taken to spend ***substantial and significant time*** with a parent only if:
>
> (a) the time the child spends with the parent includes both:
>
> (i) days that fall on weekends and holidays; and
>
> (ii) days that do not fall on weekends or holidays; and
>
> (b) the time the child spends with the parent allows the parent to be involved in:
>
> (i) the child's daily routine; and

(ii) occasions and events that are of particular significance to the child; and

(c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

32. As earlier seen, the orders for the father's regular periodic time with the children meet the terms of paragraph (a) as they provide for both weekend, holiday and other days of contact.

33. The orders also provided for changeover for weekends at the school, for time with the father on Father's Day, Christmas Day, children's birthdays, for telephone contact at all reasonable times, that both parents be noted as "enrolling parents" and emergency contacts at the children's school, day care and extra-curricular activities, that both parents be at liberty to discuss matters relating to the children with each child's school teachers and the like and that each parent be at liberty to attend any significant school or like events.

34. In my view, these orders made are clearly for substantial and significant time between father and children.

35. One might argue that if, as has happened, an order provides for "substantial and significant time", no argument that the court failed to properly consider that concept remains open. However, again, Ms Ben-Simon argues that Phipps FM ought have made an order for more time between the children and the father.

36. To a large extent this is merely a suggestion that the Federal Magistrate failed to give proper weight to factors, in particular the "primary care" that the father had delivered. However, to some extent, it is an argument that derives from an absence of discussion of what constitutes "substantial and significant time" in the reasons for judgment.

37. After the discussion, most of which was set out earlier, about "equal time", the Federal Magistrate turned to "Best interest considerations". This is not the usual approach, which would see these considerations, which provide an essential base for the other steps that might need to be taken in reaching a result, discussed before the steps were applied. (see *Taylor & Barker* (2007) 37 FamLR 461 at [61]-[63] and *Starr & Duggan* [2009] FamCAFC 115 at [38] and [39].)

38. However, as I earlier indicated, the reasons for rejection of equal time are discernible and valid and appeared under a heading which included a reference to "best interest considerations".

39. Having turned again to "Best interests considerations", Phipps FM said:

> 82. The benefit to the children of a meaningful relationship with each parent will be met by either party's proposal.

…

85. [Ms. D] is the independent expert. I accept that [L] does miss [G], and that [G] is important in [L]'s life.

…

87. Both children have a very good relationship with each parent. Both have the capacity to care for their day to day needs. The husband doubts the wife's ability to do this. The paternal grandmother, who is well disposed towards the wife, considers that the wife has difficulty coping with the children. The husband is critical of the wife's parenting style. He claims it lacks boundaries.

…

89. [Ms. D] considered the husband somewhat socially isolated. The husband relies significantly on his family for support. He appears to have little social contact outside his family and the children. He does little outside the home and family. The wife on the other hand impressed [Ms D] as personable and outgoing with a positive outlook.

90. I conclude that the wife is better able to provide for the emotional needs of the children. They will have broader social contact and a principal carer with a more positive outlook on life if they live principally with mother.

91. Until the week about arrangement was put in place in October 2008 the children had lived with their whole lives with [G] as a sibling group. Their relationship with [G] is important. This is particularly the case with [L].

92. [Ms. D] identifies a particular issue concerning the children's relationship with [G]. The husband has a negative view of [G]. If the children are principally with him [Ms D] considered this might be an impediment to the children's relationship with their half-sister.

93. Family violence is a best interests consideration. I have referred to the incident where the wife acknowledges slapping the husband. This occurred in the context of the separation. Other than as an illustration of the relationship between the parties it is not now relevant to the current situation of the children.

94. I conclude that the children's best interests are met by the mother's proposal.

40. Thus, his Honour concluded his reasons for the parenting orders. True it is that there is no expressly identified consideration of "substantial and significant time". However, that does not mean it was not considered, but since

consideration was, in the circumstances of this case, a mandated step, clear identification of it was highly desirable.

41. Given the structure of his Honour's judgment, if his Honour has considered it, it is likely within his discussion, most of which was just set out, under the heading "Best interests considerations".

42. There are some features that support the view that his Honour did there address the question.

43. In the preceding section, as seen, in paragraph 70 his Honour had said:

> 70. Section 65DAA then requires that the court must consider whether equal time with each parent would be in the children's best interests and reasonably practicable, and if equal time is not appropriate, **the court must consider whether substantial and significant time would be in the children's best interests and reasonably practical.**
>
> …
>
> 74. Section 65DAA sets out the matters the court must have regard to in determining whether it is reasonably practicable for a child to spend equal time **or substantial and significant time** with each of the child's parents. [emphasis added]

44. Thereafter, as seen, his Honour considered equal time and immediately after, turned to "Best interest considerations". Again, as seen, the first paragraph of that consideration recognised that the mother's proposal for the father's time with the children would provide "[t]he benefit to the children of a meaningful relationship…".

45. This progression, joined to the fact that the orders did provide for substantial and significant time in my view, rebuts the proposition that his Honour failed to consider "substantial and significant time".

46. But, as seen, Ms Ben-Simon poses the argument that his Honour should have considered other and more extensive arrangements.

47. Touching upon this aspect of a Court's function when considering parenting orders, Gummow and Callinan JJ said in *U v U* (2002) 211 CLR 238 at [80]:

> But the court is not, on any view, bound by the proposals of the parties. The court has to look to the matters stated in s 68F and elsewhere in the Family Law Act in coming to a decision about the residence of a child, and the objective is always to achieve the child's best interests.

48. However, this statement does not suggest that the proposals of the parties are irrelevant to the court's enquiries or that the court must always consider alternative proposals of its own creation. Indeed, two sentences before the above statement, their Honours said:

We do not doubt that the Family Court is obliged to give careful consideration to the proposed arrangements of the parties.

49. In the same case , Hayne J said:

> [171] In these circumstances, it would be quite wrong to treat the decision that is to be made as confined to a choice between whatever may be the particular "proposals" that the parents may make for the residence of, and contact with, the child. So to confine the inquiry would, in this case, have required the Family Court to ignore admittedly relevant evidence that was led about what the mother would do if it were decided that the child should live in Australia rather than India. More fundamentally, it would confine the court's inquiry to what the parents suggested would be in the best interests of the child, regardless of whether those suggestions were informed, even wholly dictated, by the selfish interests of one or other of the parents. To confine the inquiry in this way would, therefore, disobey the fundamental requirement of the Act that the court regard the best interests of the child as paramount. Those interests may, or may not, coincide with what one or both of the parents put forward to the Family Court as appropriate arrangements for residence and contact.
>
> [172] That is not to say that the Family Court is to embark upon some roving inquiry about the matter, **unfettered by any regard for the evidence led and the matters which the parties seek to contest.** Due account must be taken of the fact that proceedings in the Family Court are conducted in a framework of adversarial procedure familiar to the common law. (I do not stay to consider how or to what extent that adversarial model has been modified by the Act or rules of court made under it.) [emphasis added]

50. Ms Ben-Simon referred to consideration of *U v U* in *Goode & Goode* (2006) FLC 93-286. There the Full Court of this Court said:

> [47] Similarly, even if the presumption of equal shared parental responsibility is not applied and neither party seeks an order for equal time (or by implication substantial and significant time), the Court is nonetheless required to consider, in determining what is in the best interests of the child, the arrangements that will promote the child's best interests. **Subject to according procedural fairness to the parties, this could include a proposal that neither party had advanced, if it was in the Court's view ultimately in the child's best interests for such an order to be made** (U v U (2002) 211 CLR 238; (2002) FLC ¶93-112 and Bolitho and Cohen (2005) FLC ¶93-224). [emphasis added]
>
> [81] … the legislative pathway must be followed.
>
> [82] In an interim case that would involve the following:

…

j) if the presumption is not applied or is rebutted, then making such order as is in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC; and

k) even then the Court may need to consider equal time or substantial and significant time, especially if one of the parties has sought it or, even if neither has sought it, if the Court considers after affording procedural fairness to the parties it to be in the best interests of the child.

51. Those statements address situations that might arise. Nothing there said obliges a Court to consider in every case all permutations that could constitute substantial and significant time.

52. As to the continued application of what was said by Hayne J in the passage from *U v U* quoted earlier, the qualification he noted was expressly referred to by the Full Court in *Saunders and Hammond (No 10)* (2008) 38 FamLR 315, where the Court said:

> [52] With regard to the final observation of Hayne J [referring to paragraph 172] in the passage above, **we consider that the introduction of Division 12A by the 2006 Act would at least reinforce if not expand the availability to the court of orders crafted from outside the proposals of the parties.** We say this because the division undoubtedly represents some movement away from the "adversarial procedure familiar to the common law". [emphasis added]

53. Again however, nothing there said means that the statements earlier highlighted in *U v U* about the significance of the proposals of the parties have diminished force.

54. Thus, notwithstanding the introduction into the Act in 2006 of Division 12A of Part VII, parties still, at least at the outset of trials, delineate the parameters of enquiry by the orders each seeks. I was not taken to any application, in the hearing before Phipps FM, of the powers in Division 12A which meant that those proceedings were not to be properly described as adversarial.

55. The duty on Phipps FM was to make orders in the children's best interests. Unless he considered that none of the orders posited by the parties would achieve that object, he was not bound to put forward his own proposals.

56. The father proposed no alternative for his time with the children (other than the belated proposition of equal time) if his primary position failed. The only proposals in that eventuality came from the mother. The father proposed the same arrangements for her time with the children, if his position prevailed.

57. Finally, I observe that the fact that a litigating parent, expressly or by implication, promotes for himself or herself a specific degree of involvement in children's lives, will usually speak powerfully about whether an order for any greater involvement is in the children's best interest. To some extent, moving outside the parameters set by the parties could make the court an arbiter of parental conduct, and its orders coercive.

58. In the instant case, Phipps FM was clearly satisfied that the parameters implicitly set by the parties provided arrangements that secured the children's best interests

59. An argument that Ms Ben-Simon puts in furtherance of the proposition that Phipps FM should have ordered more extensive time between the father and children, is that the Federal Magistrate should have followed the exact recommendations of the Family Reporter, a proposition that sits starkly beside her other submissions about his Honour's use of the family report.

60. Ms D's recommendations included that the children spend time with the father for a few hours on alternate Mondays, to break up the seven day period without the children seeing him, which would otherwise occur.

61. Ms D also said, under the heading "RECOMMENDATIONS":

> 116. Given the children's young ages their routine will need to be reviewed over time with the possibility of increasing their nights each fortnight with [the father].
>
> …
>
> 121. That the parents may need to attend upon mediation from time to time for a review of the children's routine.

62. I reject the proposition that, because of the observations about future review and mediation, orders were required about such matters.

63. As to the fact that the learned Magistrate did not include provision for the father spending alternate week contact with the children for a few hours, while it would have been preferable for Phipps FM to have said something about that recommendation, it was not part of the mother's proposal and Ms Ben-Simon did not suggest that the father placed any reliance at trial on the recommendation.

64. A judge need not specifically deal with every possibility raised in a case. As Gleeson CJ, McHugh and Gummow JJ said in *Whisprun Pty Ltd (formerly Northwest Exports Pty Ltd) v Dixon* (2003) 200 ALR 447 at [62]:

> …A judge's reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue. Judgments of trial judges would soon become longer than they already are if a judge's failure

to mention such facts and arguments would be evidence that he or she had not properly considered the losing party's case.

65. In so far as Ms Ben-Simon's argument attacks the weight that Phipps FM gave to various factors, she draws attention to his Honour's consideration of, or failure to consider:

- the children having a broader social contact and a principal carer with a more positive outlook on life if living with the mother,
- the fathers allegedly negative view of G and matters related to the relationship between G and the children of the parties,
- damage caused by the wife to the husband's car,
- the mother "assaulting" the father and forging his signature,
- asserted failures of the report writer to interview the paternal grandmother and
- the report writer basing her assessment on an unsworn affidavit by G's father,
- the short time between the parties' separation and the preparation of the family report and the improvement in communication between the parties since separation,
- an alleged proposal by the mother immediately following separation to relocate with the children to New South Wales.

66. I am not satisfied that the approach of the Federal Magistrate in respect of each of these matters was not open to him.

Conclusion

67. In accordance with the parties' concessions, Order 24 of Phipps FM's order will be set aside.

68. As I do not find merit in any of the other arguments on appeal, the appeal otherwise will be dismissed.

I certify that the preceding sixty eight (68) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Warnick

Associate:

Date: 17 February 2010