FAMILY COURT OF AUSTRALIA

CARLSON & FLUVIUM *[2011] FamCA 69*

FAMILY LAW – CHILDREN – Where the matter has a long litigious history – Where Mother has sole responsibility for the purpose of satisfying an order – Where Father has filed a contempt application, a contravention application and an application for a stay of order granting mother sole responsibility – Where Mother seeks to substitute adult due to accompany child on overseas trip – Application for stay of order dismissed – Contempt application dismissed where it deals with same issues as contravention applications previously dismissed – Principles of double jeopardy and Res Judicata – Mother's sole responsibility to be discharged one hour prior to child departing Australia for contact with his mother – Mother and Father to then have joint parental responsibility – Mother and Father to have day to day responsibility when child in their care – Maternal grandfather not to have contact with child

APPLICANT:	Mr Carlson
RESPONDENT:	Ms Fluvium
FILE NUMBER:	BRC 9490 of 2008
DATE DELIVERED:	9 February 2011
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Brisbane
JUDGMENT OF:	Barry J
HEARING DATE:	31 January 2011
REPRESENTATION	
COUNSEL FOR THE APPLICANT:	The Applicant Father appearing in person
COUNSEL FOR THE RESPONDENT:	The Respondent Mother appearing by telephone (not legally represented)
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER	Ms Toomey, Solicitor of Schultz Toomey O'Brien, Solicitors, appearing by telephone as the Independent Children's Lawyer

ORDERS (REVISED)*

IT IS ORDERED THAT:

(1) The Father's contempt application filed 23 November 2010 is dismissed.

(2) Save for count 4 the Father's contravention applications filed 23 November 2010 are dismissed.

(3)

a. this Honourable Court finds a prima facie case established in relation to count 4 of the Father's contravention application filed 23 November 2010;

b. in relation to count 4 of the Father's contravention application filed 23 November 2010, a technical breach has been found against the Mother with no penalty to be imposed.

(4) Paragraphs 1, 3 4, 6 7 and 8 of the Father's application in a case filed 6 January 2011 are dismissed.

(5) In relation to paragraph 2 of the Father's application in a case filed 6 January 2011, any time the child, **D** born … June 2006, is in Canada, the Mother is to ensure the child is not brought into contact with his maternal grandfather.

(6) Paragraphs 5 and 9 of the Father's application in a case filed 6 January 2011 are adjourned to the Appeals Registrar for the listing of the three applications for leave to appeal out of time before an Appeal Court Judge.

(7) The Father's application in a case filed 6 January 2011 for a stay of the orders of the 17 November 2010 is dismissed.

IT IS ORDERED UNTIL FURTHER ORDER THAT:

(8) One hour prior to the departure of the child, D, from Australia in accordance with the Order of the 28 May 2010, paragraph 2 of the Order of the 17 November 2010 is discharged and until further order the parents are to have joint responsibility for the care, welfare and development of the child.

(9) Each parent is to have responsibility for the day to day care, welfare and development of the child whilst the child is in the care of that parent.

IT IS ORDERED THAT:

(10) Pursuant to s 62B and s 65DA(2), the particulars of the obligations these Orders create and the particulars of the consequences that may follow if a person contravenes these Orders, and details of who can assist parties to adjust to and comply with an order, are set out in the document entitled "Parenting orders – obligations, consequences and who can help", a copy of which is annexed to these Orders.

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

FAMILY COURT OF AUSTRALIA AT BRISBANE

FILE NUMBER: BRC9490/2008

MR CARLSON
Applicant

And

MS FLUVIUM
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. The Applicant Father has filed four discrete matters for determination:
   i. application for contempt filed 23 November 2010;
   ii. application for contravention (eight counts) filed 23 November 2010;
   iii. application for a stay of order dated 17 November 2010 – this order gave the Respondent Mother sole parental responsibility for the subject child, D;
   iv. application in form 2 seeking seven separate orders.
2. The Mother has filed an application in a case dated 21 January 2011 with a supporting affidavit seeking to substitute a family friend, Ms M, in lieu of the maternal grandmother as the person to accompany the child, D, to Canada and return to Australia pursuant to earlier orders of this Court.
3. I propose to deal with the various applications in the order listed above.

FATHER'S CONTEMPT APPLICATION FILED 23 NOVEMBER 2010

4. In this application under the heading "Statement of the alleged contempt" the Father asserts:

> "The Mother wilfully and knowingly publicised the case in the Canadian media, she knew of the injunction and was warned by her lawyers that going to the media was a breach of the FLA. She then asked a Judge on 25 March 2009 if she could publicise the matter in the Canadian media then when the Howard FM (sic) refused she immediately publicised the matter in the Canadian media."

5. The dates for the alleged contempts are the 2 November 2008, 9 February 2009, 25 March 2009, 3 April 2009 and 4 April 2009.

6. The relevant order was an order made by Federal Magistrate Howard on the 9 February 2009:

> "That an injunction issue preventing either party from discussing this case with any other person including the media but excepting their legal representation."

7. I have serious doubts that the order made by Federal Magistrate Howard was within power.

8. I contemplated stating a case for the Full Court to advise on this aspect as the order itself was never subject to any appeal and remains an order of the Federal Magistrates Court.

9. However, I am satisfied I am able to deal with the contempt matters on another basis.

First Count of Contempt

10. The first count of contempt is for the 2 November 2008.

11. Some of the annexures to the affidavit are not dated, in particular, annexure 2, but it seems common ground annexure 2 was the publication of the 2 November 2008.

12. As the Mother correctly pointed out this publication was prior to the making of the order and could not possibly constitute a contempt. I agree.

13. I note that in bringing the contempt matters before the Court the Father does not plead that the behaviour in each instance not only constituted a contravention of an order under this Act but involved a flagrant challenge to the authority of the Court.

14. At paragraph 2 of his affidavit sworn 12 November 2010 the Father deposes:

> "2. I had previously filed for contempt on this issue in, I believe, May 2009 but due to confusion and a lack of understanding of the law I withdrew that application and replaced it with a contravention application filed 22 June 2009. The Court has not addressed this matter. After recently seeking legal advice on the issue I am now recommencing the contempt application. All publications provided were published in written print and to the Internet."

15. On the 30 November 2010 reasons were published dismissing the contraventions alleged by the Father in the contravention application filed 22 June 2009.

16. The Father concedes in submissions on the 31 January 2011 that the four counts of contempt other than 2 November 2008 were all the subject of his contravention application of the 22 June 2009 which have now been dismissed.

17. Where the Mother has been the subject of contravention applications in relation to identical issues, it is inappropriate to bring an application for contempt.

18. The double jeopardy rule and ordinary principles of Res Judicata prevent the Father from once again litigating these complaints. The Father is seeking to appeal the dismissal of the contravention matters.

19. I would be of the view that the order of Federal Magistrate Howard is beyond the injunctive powers of the Federal Magistrates Court to issue an injunction in such broad terms, but do not find it necessary to base the dismissal of the contempt charges on that ground.

FATHER'S CONTRAVENTION APPLICATION FILED 23 NOVEMBER 2010 (EIGHT COUNTS)

First Count of Contravention

20. Order 23 made on 25 August 2009:

> "23. That the Mother and Father submit to random drug screening as prescribed by the Independent Children's Lawyer from time to time and produce results within fourteen (14) days of such request that drug testing shall be urine testing."

21. In his accompanying affidavit at paragraphs 2.1 to 2.2 the Father says:

> "2.1 Urine testing of the Mother in September 2009 wasn't done within the forty-eight hour given. Urine testing generally only gives accurate results of substance use of the previous forty-eight hours. This was explained to me when I enquired when I was tested. The sample was requested on the <u>7 September 2009</u> but the Mother's sample wasn't supplied until the 10 September 2009 Canadian time and when you factor in the fourteen hours time difference this was at least three days possibly four days after the test was ordered thus making the urine testing useless. This order wasn't complied with as prescribed by the ICL in fact [the mother] hadn't even given a sample until after she was supposed to provide the result (see exhibits A and B).
>
> 2.2 It is possible there was also issue with the urine drug test [the mother] gave in early 2010 but the results have never been supplied to us."

22. Annexure A to the affidavit of the Father filed on the 23 November 2010 in support of his contravention application is an email from the Independent

Children's Lawyer to the Father himself dated the 7 September. The Father has inferred that the Independent Children's Lawyer must have sent an email communication to the Mother at exactly the same time making such request. I am not prepared to draw any such inference. It would have been a simple matter for the Father to request this information from the Independent Children's Lawyer to confirm the date the email was forwarded requesting the sample.

23. In relation to the allegations in paragraph 2.2, this is not the subject of any alleged contravention of the Mother failing to comply with the urine test in 2010.

24. In the circumstances I propose to find no prima facie case established in relation to count 1.

Second Count of Contravention

25. I pointed out to the Father during the course of the hearing that requirements for parties to file affidavits are done in the form of directions. They are not Court orders made pursuant to the sections of the legislation. A failure to file affidavits within a stipulated time period can never amount to a contravention.

26. In relation to the directions, paragraph 3 of the Father's affidavit simply does not make sense. He says:

> "3. [The mother] did not file or serve her affidavit filed 15 February and 17 May 2010 concerning interim visitation at which the orders of 28 May 2010 were made prior to 12 January 2010."

27. The Father does not explain how orders of the 28 May 2010 were made prior to the 12 January 2010, but the matter is academic for the reason that directions can never constitute a ground for a contravention.

Third Count of Contravention – Failure to Supply Bank Accounts

28. The Father says that contrary to order 5 made on the 12 January 2010 that within seven days of the order the parties were to file and serve on the other parties copies of their bank statements and credit card statements for the last two years. In his affidavit the Father deposes:

> "On 10 February 2009 during a hearing [the mother] confirmed she had a bank account at TD Canada that was set up for a fundraiser she had and that the funds in the account are around $2,200 CDN were for her exclusive use and had spent these funds stating that there was only $10 left in the account yet she didn't disclose this account as ordered. She also had another account set up for fundraisers at CIBC which also has funds for her exclusive use which she didn't disclose to the court either. The Judge

asked the ICL Ms Hogan to investigate this after the admissions were made by [the mother] on the 10 February 2010. Nothing more happened.

The accounts not disclosed are CIBC (Canadian International Bank of Commerce) [account number …088 and TD Canada Trust (Toronto Dominion Bank) [account number …776]"

29. I can find no mention of this matter in the Federal Magistrates Court on the 10 February 2009. There was a mention of the matter on the 9 February 2009 and I have perused the transcript but there was nothing said about bank statements at that time.

30. In compliance with an order of the 12 January 2010 on the 29 January 2010 the Mother annexed bank account statements for an account with the CIBC being account number …232. She also annexed Visa Card statements as annexure B. I assume that this was served on the other parties.

31. It is the Father's assertion that admissions were made by the Mother on the 10 February 2009 during a hearing. There is no transcript as I have said for the 10 February 2009. There was a transcript for the 9 February 2009 before Federal Magistrate Howard but there was nothing about bank statements at that time. There have been over twenty separate hearings in this matter. The Father seems to give detailed evidence of admissions made by the Mother of particular bank accounts used for fundraising purposes.

32. I am not going to go through every hearing, particularly hearings that may have taken place in the Federal Magistrates Court, if the Father cannot give the correct reference where the evidence is to be found of the admissions made of the fundraising accounts. Accordingly, I do not find count 3 established.

Fourth Count of Contravention

33. The Father says this count was a breach of order 4 of the order of the 10 February 2010 as follows:

> "4. Within forty-eight (48) hours the Mother is to fax or scan to the Court and the other parties the four (4) letters referred to in her affidavit filed 3 July 2009 relating to [SP]."

34. On the Court file there is evidence that on the 11 February 2010 the Mother faxed to the Court the four documents in question. They are located on the Court file in this matter. There is no evidence whether the same documents were sent to the Independent Children's Lawyer.

35. The Father asserts that he did not receive these documents but from February 2010 until now there is no evidence that he has raised the issue by way of correspondence with the Independent Children's Lawyer, the Mother or the Court to enquire as to the Mother's compliance. Had he requested the

documents through the Court Registry copies could have been made available. The first step that he has taken is to file the contravention application of the 23 November 2010. There is no evidence established that the Mother has delivered copies of the four letters the subject of the order to the Father. I will call upon the Mother to see whether she admits she did not serve the Father, and in the event she did not serve, whether she says she has a reasonable excuse for failing to comply with the order.

36. I would point out that if the Mother says that she has forwarded the documents and the Father says she hasn't, the onus of establishing non-compliance with the order is on the Father. It is but one example of the old maxim – he or she who asserts must prove. The documents which were forwarded to the Court bear the facsimile number of receipt. It may be the Mother has a duplicate copy of having faxed the document to the Father or she can produce from her computer evidence that she has forwarded this material electronically to the Father, but absent proof positive where the parties are giving conflicting accounts, I would be unable to make a positive finding, at this point in time, that I accept the evidence of one party as against the other.

Fifth and Sixth Counts of Contravention

37. The Father asserts that the Mother has breached paragraphs 2 and 4 of the orders made the 16 February 2010. This order is annexed to the contravention application. Paragraphs 2 and 4 are in the following terms:

> "2. The Mother to confirm with […], IT Infrastructure Manager, Family Court, that she will be appearing at the trial of these proceedings by video link or personally by 23 April 2010 and that she has a system of communication with the Court acceptable to the Court's information technology personnel.
>
> 4. Personal attendance for the purpose of paragraphs 2 and 3 is to include attendance at a Registry in Australia equipped with video link facilities other than the Brisbane Registry."

38. The Father asserts in his affidavit in relation to counts 5 and 6 that:

> "[The mother] didn't attend as ordered nor did she seek leave to attend by phone on the 18 May 2010. She has not complied with this order."

39. This contravention falls into the same category as count 2, namely, it was a direction of the Court. It does not constitute a contravention of a child related order or a contravention for the purposes of s 112AD.

Seventh and Eighth Counts of Contravention

40. These relate to the Mother at this point in time not having fulfilled conditions imposed on her by order of the 28 May 2010 prior to her spending any time with the child, D. The Mother may or may not comply with the conditions, but certainly the fact that she has not done so to date cannot constitute a contravention of an order. The conditions were imposed as safe guards for the return of the child and it is a matter for the Mother whether she complies with such conditions if she is in fact able to comply with such conditions. The reality is if she does not comply with the conditions she will not be able to spend time with her son. In the present circumstances the allegations that the Mother has not fulfilled the conditions to date cannot constitute a contravention and the Father accepted as much and indicated he would not be pressing the applications for counts seven and eight. Why he did not indicate this prior to the matter being raised with him was not explained.

41. I find that of the eight contraventions pleaded I find a prima facie case has only been established in relation to the count relating to the four letters involving Mr SP, the Mother's former partner. I will call upon the Mother in relation to that count, but it would seem where the documents were certainly forwarded to the Court and there has been no request by the Father for a period of ten months in relation to this aspect, that at best any breach of the order by the Mother in failing to serve the Father could be classified as technical in the extreme.

FATHER'S STAY APPLICATION FILED 6 JANUARY 2011

42. In this stay application the Father seeks a stay of the order made on the 17 November 2010 giving the Mother sole parental responsibility for the child. In his affidavit he contends that in the event the child arrived in Canada and the Mother had sole responsibility for the child he could not invoke the terms of the Hague Convention. I do not accept that this is a correct interpretation of the law.

43. There is still in place an order for the child to reside with the Father subject to the child spending time with the Mother pursuant to the orders of the 28 May 2010. Therefore, the Father does have rights of custody. The Canadian authorities have in the past returned the child pursuant to an order under the Hague Convention. I have no doubt the Canadian authorities would once again so act if requested so to do on the basis that there is an order in place in Australia that the child is to reside with the Father other than for spending time with the Mother pursuant to the orders of the 28 May 2010.

44. I am minded to put in place an order that when the child has passed through Immigration for the flight from Australia to Canada but before the plane

departs then paragraph 2 of the order of the 17 November 2010 is to be discharged and the parents are to have joint responsibility for the child's long term, care, welfare and development.

45. So far as day to day decision making is concerned I note the terms of s 65DAE:

> "No need to consult on issues that are not major long term issues
>
> 1. No requirement to consult where not major long term issues.
>
> If a child is spending time with a person at a particular time under a parenting order the order is taken not to require the person to consult a person who:
>
> a. has parental responsibility for the child; or
>
> b. shares parental responsibility for the child with another person;
>
> about decisions that are made in relation to the child during that time on issues that are not major long term issues.
>
> NOTE: This will mean that the person with whom the child is spending time will usually not need to consult on decisions about such things as what the child eats or wears because these are usually not major long term issues."

46. Emergency medical attention would normally fall within a category of being unable to consult, but to notify the other party as soon as reasonably practicable.

47. If the order was to be stayed then the parties would have joint responsibility, in accordance with an order earlier made reversing the original determination by Federal Magistrate Howard that the Father have sole responsibility.

48. I do not accept it is appropriate to grant the Father sole responsibility or even joint responsibility at this point in time. By his applications, appeals and actions the Father has demonstrated he is opposed to the child going to Canada and seemingly will do all in his power to prevent that happening.

49. Although the terms of s 65DAE as previously quoted would normally be sufficient to govern the situation I propose to put in place an order giving each parent day to day responsibility for when the child is in their respective care. I will make an order in terms that one hour prior to the child departing from Australia the order of the 17 November 2010 granting the Mother sole responsibility is to be discharged and an order is to be put in place giving the parties joint parental responsibility.

50. For the reasons given I dismiss the Father's application filed on 6 January 2011 seeking a stay of the order of the 17 November 2010.

FATHER'S APPLICATION IN A CASE FILED 6 JANUARY 2011 (NINE PARAGRAPHS)

51. In this application the Father seeks nine orders. They are as follows:

- That the application filed 6 April 2009 be determined.

  I do not propose to set this matter down for a final hearing until the child has spent time with his mother in accordance with the earlier orders of this Court and/or the Full Court has had an opportunity to review the various decisions appealed from. Under present listing arrangements the matter could not be set down for a hearing within four to six months. The child could spend some of that time in the interim with his mother as was envisaged by the order of 28 May 2010.

- The Father seeks an order that the maternal grandfather not be permitted to come into contact with the D. An order was made by Federal Magistrate Howard on the 25 August 2009:

  > "That the child, [K] born […] July 2008 is not to come into contact with Mr [Fluvium] the maternal grandfather until further order."

  The Father alleges that the maternal grandfather has engaged in sexually inappropriate conduct towards the Mother and others. The Mother for her part says that whilst she is not prepared to discuss her own experiences, she is adamant that she would never place her children at risk, she would at all times act appropriately and accordingly such an order is unnecessary.

  More out of a need to assuage the Father's fears in this regard, I am of the view it is appropriate to put in place an order that the Mother not bring the child, D, into contact with the maternal grandfather. There is no evidence before the Court of the extent to which the maternal grandfather has spent any time with D in the past. The Mother did not elect to file any material in relation to this issue. I would be inclined for present purposes to accept the Mother's assurance that she would not be prepared to place the child at any form of risk but it is preferable that there be no time spent by D with the maternal grandfather for this first period of time.

- The third order sought by the Father is that the restraint prohibiting the Mother bringing the child into contact with the maternal grandfather be internationally transferred to Canada for enforcement. As I explained during the course of submissions, the Canadian Courts will only enforce their own orders. I know of no provision where the Court can send an order of this nature to Canada and it will automatically be registered there. Absent further particulars from the Father demonstrating how an order of this Court can be registered and enforced in Canada without the Canadian Courts giving the maternal grandfather the opportunity to be heard, I do not propose to accede to an application in these terms.

- The fourth order sought is that the orders of this Court do not interfere with the child, D, commencing school at the L State School on the 24 January 2011. The Court was informed that D has commenced school and is in his prep year. Clearly if the Court was to accede to this order it would automatically override the order made on the 28 May 2010 that the child spend a period of four to twelve weeks with his mother in Canada. An order in these terms would be a back door method of obtaining a stay of that order, in circumstances when a stay has previously been refused. The child is aged four. On one scenario he will travel to Canada for a period of four weeks and on another scenario it could be for a period of up to twelve weeks. The benefits to the child's emotional development in renewing his relationship with his mother on a personal basis far exceed any benefit to the child's educational development by missing four to twelve weeks of his prep year. If the Father is concerned he can obtain a copy of the syllabus that the child would be taught over the relevant period and forward it to the Mother. The Mother could obtain the syllabus and teach the child in Canada or the Father can ensure the child is brought up to date upon his return.

  There are many additional benefits to the child in travelling to a new environment where he would be exposed to a broad range of new experiences in the land of his birth.

- Paragraphs 5 and 9. Paragraph 5 seeks an order that the Court allow an out of time appeal of the Court's decision to not stay the orders of the 28 May 2010. An order was made on the 3 August 2010 dismissing the Father's application filed 14 July 2010 seeking a stay of the orders of the 28 May 2010.

  The Father also seeks to appeal out of time the orders made 17 November 2010 and 30 November 2010. I will refer these paragraphs of the form 2 applications to the Appeals Registrar who would normally list applications of this nature to be heard and determined by an Appeal Court Judge. The parties can expect to be advised in the fullness of time when that listing will be.

- Paragraphs 6 and 8. These are applications that I step aside from the further hearing of this matter. An application was made in these terms by Counsel for the Father on the 21 May 2010. Counsel addressed the Court at length and founded the application as one of apprehended bias rather than actual bias. On the 31 January 2011 the Father read at considerable length from submissions which I have marked as exhibit 1 in these proceedings. He makes many statements which pre-date the 21 May 2010. In a strict sense because the matter has been determined by me on the 28 May 2010, it is only matters arising since that date which would be relevant to any fresh application. As a matter of practicality I allowed the Father to make observations ranging over many aspects. The submissions made are

premised on the basis that his account of the facts must be correct. He seeks to have the Court, without a full hearing, find that the Mother has perjured herself. He has at times misquoted dates and factual circumstances. By way of one example only, the Father asserted that this was a case of bias because an order had been made by me for him to remain in Queensland. I pointed out that that order was not made by myself but in fact was made by Federal Magistrate Howard. He made it in circumstances (refer paragraph 18 of the order of the 25 August 2009) where an undertaking had been given by the father he was to live with his family at W and that undertaking was discharged.

At the hearing on the 18 May 2010 (at transcript page 4) the following appears:

> "HIS HONOUR: Paragraph 1 of the order of Howard FM of 9 February that the Father remain living in Queensland. That's an order. He's released from the undertaking to live with his parents in paragraph 3.
>
> MR SMITH: Yes, yes – that - - -
>
> HIS HONOUR: There is an application before the Court which I am assuming is discontinued where he is seeking relocation to Canberra.
>
> MR SMITH: No, that's not being proceeded with your Honour."

In the proceedings on the 31 January 2011 the Father suggested that he was representing himself at the relevant time and no such statement had been made. I am well aware that the Father was in Court at the relevant time and must have heard his Counsel say that his application to relocate to Canberra was not being pursued.

At paragraph 6 of his submissions in relation to the application for disqualification on the grounds of bias:

> "6. These applications go hand in hand and I would like to start by stating on record that I object to this being heard before Your Honour. I state I cannot get a fair hearing of this application or this matter period before Justice Barry the Judge I am seeking to be removed. I state this is an intolerable situation that should this application be rejected that decision itself could be deemed another demonstration of bias as I deemed the decision to dismiss a similar application in May 2010 was also."

To accede to this application on this ground alone would be to allow any litigant to insist on having a Judge removed simply because the Judge had made decisions adverse to that particular litigant at some stage of the

process and/or had previously refused an application by that litigant to disqualify himself or herself.

In his submissions the Father alleges bias by the Court in not ensuring the preparation of another family report as ordered in February 2010. That order was for Ms T to prepare the report. Having regard to the Father's comments about Ms T, I expect she would be the last person he would want preparing any report. There has been no application since that time for a further family report other than the arrangements made by the Independent Children's Lawyer for Mr O to assess the child's relationship with his mother after the child had been reunited with her for a number of weeks. There was no need for the preparation of a family report once the trial dates were vacated.

The question of disqualification is currently before the Full Court which will hear the matter at an appropriate time.

For present purposes I do not propose to step aside from the further hearing of this matter other than to refer the three applications for leave to appeal out of time to an Appeal Court Judge.

In arriving at my determination I note the Father objected to the report writer Ms T when he interpreted her report as being critical of him and he made application for the Independent Children's Lawyer to be replaced when he perceived the Independent Children's Lawyer was in same way critical of him.

- The Father rails at length about the Mother's non-payment of child support for the child, D, but as I understand the evidence he does not pay any support for the child, K. It seems that the Father's complaints in this regard only take account of one side of the issue.
- The remaining matter in the Father's form 2 application is an order that the maternal grandmother appear in person at the Brisbane Family Court. The only basis upon which the maternal grandmother could be required to appear is if she elected to be a witness in the matter. She has not done so to date. In any event, having regard to the fact that she is living in Canada it would be expected that an application for her to give her evidence by electronic transmission (even by telephone) would be successful.
- It is a concern that the application made for the maternal grandmother to appear in person may be a motivating factor in her decision not to travel to Australia to collect D.

  In the event the maternal grandmother changes her mind, she could be given a categorical assurance that she would not be held in Australia in any way at the time of her arriving to collect D and the time of returning D. The Court simply does not have jurisdiction in that sense over a witness. There

could be no subpoena issued to the witness as the matter has not at this point in time been set down for a fresh trial.

52. For the above reasons I propose to dismiss the Father's form 2 application filed 6 January 2011 other then for the paragraph being the restraint on bringing the child into contact with his maternal grandfather.

MOTHER'S APPLICATION FILED 21 JANUARY, 2011

53. By this application the Mother seeks that paragraphs 6, 7, 8 and 14 of the Order of the 28 May 2010 be discharged and substituted with the orders as set out in the application. The main effect of this is to substitute the name of the maternal grandmother with that of Ms M.

54. The application is supported by an affidavit by the Mother, an affidavit of the maternal grandmother and an affidavit of Ms M.

55. The maternal grandmother has determined she does not wish to travel to Australia because of altercations she alleges she has had with the Father by Skype transmission.

56. If the application is successful the child, D, will be accompanied by Ms M, a family friend, in travelling from Australia to Canada and return.

57. The Father had read the Mother's material but wished to have further time to prepare submissions and/or a response affidavit.

58. I adjourned the matter through to the 9 February 2011 when I will make a ruling on the Mother's application.

I certify that the preceding fifty-eight (58) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Barry delivered on 9 February 2011.

Associate:

Date: 9 February 2011

* The Orders have been revised by renumbering of Order 3 (a) and the inclusion of Order 3 (b).