Grimshaw & Thanh & Anor [2014] FCCA 2614 (14 November 2014)

Last Updated: 20 March 2015

FEDERAL CIRCUIT COURT OF AUSTRALIA

GRIMSHAW & THANH& ANOR *[2014] FCCA 2614*

Catchwords:
FAMILY LAW – Parenting – where the applicant is not the parent of the child – where the parents of the child are in an intact relationship – whether the applicant has standing to bring proceedings – where the parents seek that the application be summarily dismissed – where the application has no reasonable prospects of success – application summarily dismissed.

Legislation:
Family Law Act 1975, ss.4, 4AB, 43, 60B, 60CA, 60CC, 64B, 65C
Federal Court of Australia Act 1976, s.31A(2)
Federal Circuit Court of Australia Act 1999, s.17A
Federal Circuit Court Rules 2001, r.13.10

Church & Overton & Anor [2008] FamCA 953
KAM & MJR and Anor [1998] FamCA 1896
R & M [2002] FMCAfam 279
R & R: Children's Wishes [2000] FamCA 43; (2000) FLC 93-000
Spencer v The Commonwealth of Australia [2010] HCA 28; (2010) 241 CLR 118
SPS & PLS [2008] FamCAFC 16

The Honourable Peter Nygh, 'The New Part VII—an Overview' (1996) 10 *Australian Journal of Family Law* 1.

Applicant:	MR GRIMSHAW
First Respondent:	MS THANH
Second Respondent:	MR THANH

File Number:	SYC 7444 of 2013
Judgment of:	Judge Kemp
Hearing date:	24 October 2014
Date of Last Submission:	24 October 2014
Delivered at:	Sydney
Delivered on:	14 November 2014

REPRESENTATION

Solicitors for the Applicant:	Family Legal
Counsel for the First and Second Respondents:	Mr Lethbridge SC
Solicitors for the First and Second Respondents:	Watts McCray

THE COURT ORDERS THAT:

(1) The applicant's Initiating Application filed 16 December 2013 be summarily dismissed.
(2) If any party seeks costs, an appropriate written application may be made within 28 days of today's date, (supported by any documentary material) to be filed and served within that time period and a copy forwarded to my Chambers. The Court will then deal with that matter by way of written submissions. If no such application is made within the time period specified, there will be no order as to costs.
(3) All outstanding applications (save as to costs, including any reserved costs), otherwise, be dismissed.

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

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYC 7444 of 2013

MR GRIMSHAW

Applicant

And

MS THANH

First Respondent

MR THANH

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. These are proceedings in respect of the child, **X** ("the child"), born (omitted) 2006 and who is currently 8 years of age, at the time of the hearing.
2. The applicant is not the biological father of the child.
3. The respondents are the biological mother and father of the child and live together as husband and wife. The child lives with the respondents.
4. By an Initiating Application filed 16 December 2013, the applicant sought various parenting orders in respect of the child, both on a final and interim basis, inter alia, as follows:
   a. *That the child lives with the mother.*
   b. *That the child spends regular time with the applicant as determined by the Court.*
   c. *That the mother facilitates Skype and phone conversations between the applicant and the child at such times that the Court deems appropriate.*
   d. *That neither party denigrate the other while in the hearing or presence of the child.*
   e. *That each party notify the other of any changes to their address or phone number within seven days of such change occurring.*
   f. *That both parties shall permit the child to contact the other party at any time he wishes whilst he is in their respective care and shall facilitate the call upon the child's request.*
5. The applicant's Initiating Application named only the mother as the respondent. On the first return of that application, being 12 March 2014, a Response was filed by both the mother and the father, which sought orders that the applicant's Initiating Application be dismissed and that the applicant pay the respondent's costs on an indemnity basis.
6. On the first return date of the Initiating Application, Ms Bedford who appeared for the respondents, opposed any order for there to be a child dispute conference or a child inclusive conference. A timetable was provided for the parties to file and serve their affidavit material and the matter was then adjourned for determination of the threshold jurisdiction issue and summary dismissal argument. The respondents' costs were reserved. The parties' position with respect to the taking of any oral evidence was also reserved subject to compliance with directions for the filing of affidavits.
7. The matter was, subsequently, listed on 24 October 2014 for determination. On that occasion, Mr Thexton appeared for the applicant and Mr Lethbridge of Senior Counsel appeared for the respondent parents.

Hearing

8. The applicant relied on:-
   a. His affidavit affirmed on 2 October 2013 and filed on 16 December 2013.
   b. His affidavit affirmed on 24 March 2014 and filed on 26 March 2014.
   c. The affidavit of Ms D (the applicant's mother) affirmed on 31 March 2014 and filed on 2 April 2014.
9. The respondents relied on:
   a. The affidavit of the mother affirmed on 11 March 2014 and filed on 12 March 2014.
   b. The affidavit of the mother affirmed on 23 October 2014 and filed on that day, limited to paragraphs 1, 2 (not including the mother's affidavit affirmed 9 April 2014), 3 and 4.
   c. The affidavit of the father sworn/affirmed on 11 March 2014 and filed on 12 March 2014, limited to paragraphs 1 to 16.

[the father]" and his "only advice was to listen to [your] heart, not what you think". The applicant stated that the mother had accused him of not loving her "authentically". The applicant responded "being friends is inauthentic given she had already said we were soul mates and ... were planning on building our own family unit together".

92. Given that the child lives with the mother and father and they are his primary care givers, the Court accepts that it is not now in the child's best interests to facilitate a relationship with the applicant who is a third party and not a parent, when that relationship has the potential to destabilise the existing relationship between the child's biological parents, particularly having regard to the objects and principles of the Act. Significant weight is attached to that view in support of the respondent parents' position.
93. The Court is satisfied that it is not in the child's best interests to interfere in the way that the respondent parents, as the child's parents, are parenting their own child in the context of an intact family unit.
94. Accordingly, weighing up, on the one hand, the parents' adamant opposition to the applicant having any ongoing relationship with the child; their joint exercise of parental responsibility in not wanting the applicant to have such a relationship; the very limited relationship between the applicant and the child since July 2011, with the applicant spending no time with the child between June 2011 and January 2013 (save for 1 hour), limited time in the first half of 2011 and only 2 weeks in 2010; the potential for ongoing conflict and the potential risk that the applicant's proposal has to the mother's relationship with the father and the effect that that risk may potentially have for the child; and, on the other hand, the potential benefit to the child in having an ongoing relationship with the applicant; the Court is satisfied that the former matters substantially outweigh the latter.
95. Having considered the matters referred to above, and having given such matters the weight referred to and for the reasons set out herein, the Court is of the view that the applicant's application should be summarily dismissed as having no reasonable prospects of success and the Court will so order.

Costs

96. Section 117 of the Act sets out that each party shall bear his or her own costs, subject to the considerations in sub-section two.
97. Any order for costs must also be determined in light of the substantive judgment and the relative success or failure of the parties. This is naturally something which should be addressed after judgment is delivered. Both parties agreed that any application for costs should proceed on the basis of written submissions. On that basis, the Court proposes to give the parties 28 days in which to make any application for costs (including any written submissions).
98. The Court proposes to make the orders and directions in relation to any application for costs that might be made as set forth above.

I certify that the preceding 98105one hundred105105fiveninety-eightninety-eight (98) paragraphs are a true copy of the reasons for judgment of Judge Kemp

Associate:

Date: 14 November 2014
