Kay & Jasper and Ors [2007] FamCA 1646 (14 December 2007)

Last Updated: 24 June 2009

FAMILY COURT OF AUSTRALIA

KAY & JASPER AND ORS *[2007] FamCA 1646*

FAMILY LAW – CHILDREN – Grandparents – Parents - The factor of parenthood- Best interests – Mixed sibling group – Mother unwell and not able to care for the children – Whether children should live with their respective fathers or as a sibling group with the maternal grandparents – Whether unacceptable risk of harm to one of the children – Whether risk of abduction of one of the children – Children to live with the maternal grandparents and spend time with their respective parents

FAMILY LAW – CHILDREN – Children's surnames – Factors relevant to use of a surname other than the children's birth surnames

Family Law Act 1975 (Cth) s 60CA, s 60CC, s 65DAA, s 68B

B & B (Family Law Reform Act) (1997) FLC 92-755
B v B (Re jurisdiction) [2003] FamCA 105; (2003) FLC 93-136
Bennett v Bennett [2001] FamCA 462; (2001) FLC 93-088
CDJ v VAJ (1998) 197 CLR 172
CJ v VJ (1997) FLC 92-772
Chapman & Palmer (1978) FLC 95-510
D & F [2001] FamCA 382
Dennett & Norman [2007] FamCA 57
Flanagan and Handcock [2000] FamCA 150; (2001) FLC 93-074
Flanagan v Handcock (2001) 181 ALR 184
Goode & Goode [2006] FamCA 1346; (2006) FLC 93-286
Hodak v Newman [1993] FamCA 83; (1993) FLC 92-421
Johnson & Page [2007] FamCA 1235
KN & SD & Secretary, Department of Immigration and Multicultural and Indigenous Affairs [2003] FamCA 610; (2003) FLC 93-148
M v M [1988] HCA 68; (1998) 166 CLR 69
Monticelli v McTiernan [1995] FamCA 33; (1995) FLC 92-617
N and S (1996) FLC 92-655
Re Evelyn (1998) FLC 92-807
Rice and Asplund (1979) FLC 90-725
Rice v Miller [1993] FamCA 87; (1993) FLC 92-415

parent,

although regard may be had to other matters.

60. Section 65DAA(5) of the Act provides matters to which the Court must have regard 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 including:
    - how far apart the parents live from each other; and
    - 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
    - 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
    - the impact that an arrangement of that kind would have on the child; and
    - such other matters as the Court considers relevant.

Prior parenting plans

61. Section 65DAB of the Act provides that the Court is to have regard to the terms of the most recent parenting plan (if any) that has been entered into between the child's parents if doing so would be in the child's best interests.

Other provisions

62. The Act provides several other provisions which may apply in a particular case and to which reference will be made if applicable in this particular case.

Weight

63. Matters affecting weight are primarily for the trial Judge to attribute in the exercise of his or her discretion, subject to any error of law in that exercise.

The evidence

64. It is not necessary that I refer in detail to the evidence.
65. Largely, I will deal with the evidence which I consider to be the most relevant and helpful when dealing with the statutory matters which I must consider.
66. It ought not be inferred, if the evidence of a particular witness or part of the evidence of any witness is not referred to, that I have not had proper regard to all of the evidence.

The principles relating to the "factor of parenthood" – the "parent v grandparent" cases

67. In respect of cases concerning grandparents, in *D & F* [2001] FamCA 382, the Full Court (Ellis, Kay and Warnick JJ), examined the application of the principles and cases by Purdy J in that case at first instance, under Purdy J's heading at first instance "Grandmother v Parent". See the Full Court's discussion at pars 28-31 and 45-57. It is useful to set out pars 30, 31, 55, 56 and 57:
    30. His Honour indicated that in *Re Hodak* Lindenmayer J set out the principle in terms which Purdy J saw as being entirely consistent with *Gronow v Gronow* [1979] HCA 63; (1979) 144 CLR 513, namely that the fact that one party was a mother would merely be an important factor to be considered but did not involve any particular principle.
31. His Honour saw *Rice v Miller* (above) as indicating the fact that one of the parties is the natural

parent is a factor to be taken into account but does not bring into play any particular principle.

...

55. We would agree with the observations of Stephen J in *Gronow v Gronow* (above) that there is danger in looking too closely to the sociological and psychological writings to determine the foundation of the observation that parenthood is a significant factor in determining with whom children should live. It is precisely this non-demonstrable important factor which was heavily relied upon by Purdy J.
56. There is a clear need in each case to understand the ramifications of applying the factor of parenthood. The factor may have little weight if the child has had no relationship whatsoever with the parent. It may be of little significance where the parent poses a real risk to the child's welfare. It may also not be a decisive factor in cases where other factors overwhelmingly outweigh it, but it may be very significant in a dispute between a capable parent and a more capable grandparent, and determinative in a dispute between a capable parent and an outstanding neighbour, foster parent, sibling or other person with a proper interest in caring for the child.
57. As the Full Court observed in *Rice v Miller* (above) at FLC 80,240:

"...the fact of parenthood is to be regarded as an important and significant factor..." ".

68. Mr George of Counsel, for Mr Green, submitted forcefully that since decisions such as *Hodak v Newman* [1993] FamCA 83; (1993) FLC 92-421, *Rice v Miller* [1993] FamCA 87; (1993) FLC 92-415 and *D & F* (above), the amendments to the Act which took effect on 1 July 2006 should be given effect, in priority to those decisions, which related to the provisions of the Act before those amendments so that **the mandate of the statute now, in relation to the best interests of children, is a focus on parents rather than other significant persons** so that, consistently with the amendments to the Act, "**the only orders consistent with the new provisions**" would be that H, N and Y live with Mr Green. Mr George, helpfully, provided in his written submissions references to, in particular, s 60B(1), s 60B(2) and s 60CC(2) and (3), s 61C, s 61DA, s 65DAA(1) and (2), s 64B(2) and other provisions, emphasising the statute's repeated references to the involvement of **parents** in children's lives. (Mr George's written submissions included, in referring to these provisions, the words "parent" or "parents" in bold, for emphasis).
69. However, when challenged during argument, Mr George conceded that there is nothing in that analysis to take away from my statutory function, having regard to s 60CA of the Act, in deciding whether to make a particular parenting order in relation to a child to regard the best interests of the child as the paramount consideration and that, in that exercise, I am required to consider the s 60CC factors, as well as have regard to the underlying objects and principles of the Act.
70. In *Dennett & Norman* [2007] FamCA 57 the Full Court (Kay, May and Boland JJ) dealt with a submission (see at par 55) that *Rice v Miller* (above) had been "statutorily overturned" by the parental responsibility provisions of s 61C. The Court was urged (see at par 56) to decide that "the current line of cases" (including *Hodak* (above), *B & B (Family Law Reform Act 1995)* (1997) FLC 92-755, *Rice v Miller* (above) and *Re Evelyn* (1998) FLC 92-807) was incorrect.
71. In dealing with that submission, their Honours referred (at par 59), with apparent approval, to *D & F*, par 56, set out above and (at par 60) concluded that the trial Judge correctly had applied "settled principles" in that case, firmly rejecting the submission as having no basis:

    60. In our view, the trial Judge correctly applied settled principles in the present case. Whilst it might seem that he preferred the grandparents he did so because of the evidence before him including balancing the potential parenting capacities of each party and in our view based on the expert evidence it was entirely clear that he should do so. In view of the very clear provisions of the *Family Law Act* and the cases to which we have referred we do not see any basis in this argument.

72. *Dennett & Norman* was decided on 13 February 2007, after the commencement of the amendments which took effect on 1 July 2006. However, the case was heard on 11 May 2006, before those amendments took effect. Thus, it is plain the Full Court was *not* considering the subject matter of the submission in light of the amendments which took effect on 1 July 2006. Despite this, even before those amendments took effect, there was a provision in the Act similar to what is now s 60CA (formerly s 65E) providing that in parenting cases the Court must regard the best interests of the child as the paramount consideration.
73. In my view, although, as put by Mr George, there is a "focus on parents" in the amendments which took effect on 1 July 2006, there is nothing in the new provisions of the Act to displace the principles in the line of cases referred to by the Full Court in *D & F* and in *Dennett & Norman* in relation to the factor of parenthood, which the Full Court in *Dennett v Norman* referred to as "settled principles" (at par 60), especially having regard to s 60B(1) and (2) of the Act, which deal with the objects of the Act and the principles underlying it. In particular, the provisions of s 60B(1) and (2), as they now appear, to the extent that they deal with parents, are themselves in the context of the best interests of the child, and the more general provisions in Part VII dealing with parents are subject also to s 60CA.
74. The statements of principle in the line of cases referred to by the Full Court in *D & F* and in *Dennett & Norman*, in my view, are not inconsistent with the amending provisions, reading the Act as a whole.
75. I am therefore unable to accept Mr George's submission that the new provisions to which he referred should be applied "in priority" to the decisions concerning the factor of parenthood which preceded the 1 July 2006 amendments so that "the only orders consistent with the new provisions" would be that H, N and Y live with Mr Green.

The statutory matters

Parental responsibility

H, N and Y

76. In relation to H, N and Y, the presumption in s 61DA that it is in the best interests of the children for their parents to have equal shared parental responsibility for them applies so that there should be an order for equal shared parental responsibility as between Ms Jasper and Mr Green. In particular, the presumption is not displaced by any of the matters in s 61DA(2). In my view, nor is the presumption rebutted (s 61DA(4)) because of the circumstance that Ms Jasper lives in Melbourne, nor by any conduct by Mr Green affecting the children's best interests. Further, both Ms Jasper and Mr Green are parents who wish to exercise parental responsibility for the children, in their best interests, and there does not appear to me to be any good reason to deprive the children of the benefit of an equal shared parental responsibility order.
77. Further, s 64B(2)(c) provides that a parenting order may deal with the "allocation" of parental responsibility for a child, s 64B(2)(d) providing that "**if 2 or more persons**" (a child can have only two parents) are to share parental responsibility for a child the parenting order may deal with the form of consultations those persons are to have about decisions to be made in the exercise of that responsibility. In this context, "person" is defined for the purpose of that provision (at the end of s 64B(2)) as including a grandparent. It is thus open to me to consider that Ms Kay also have equal shared parental responsibility for H, N and Y, that is, equally with the children's parents.
78. In my view, having regard to the history of the matter, including that H, N and Y have lived with Ms Kay now for more than 2 years, and the s 60CC factors, analysed separately below, it is in the children's best interests for Ms Kay, Ms Jasper and Mr Green to have equal shared parental responsibility for them.
79. In so deciding, I have considered and taken into account that Mr Read of Counsel, for Ms Kay,