

FAMILY COURT OF AUSTRALIA

WYLIE & WYLIE

[2013] FamCA 426

FAMILY LAW – CHILDREN – CHILD ABUSE

Family Law Act 1975 (Cth) s 60CC

Family Law Rules 10.15A

T & N [2003] FAM CA 1129;

M & M [1988] HCA; (1988) FLC 91-979

APPLICANT:

Ms Wylie

RESPONDENT:

Mr Wylie

INDEPENDENT CHILDREN'S LAWYER

Ms J Meade

FILE NUMBER:

TVC 1088 of 2011

DATE DELIVERED:

7 June 2013

PLACE DELIVERED:

Townsville

PLACE HEARD:

Townsville

JUDGMENT OF:

Tree J

HEARING DATE:

11, 12, 13, 14, 15, 18
February, 9, 10 April, 1
May 2013

REPRESENTATION

COUNSEL FOR THE APPLICANT:

Mr Fellows

SOLICITOR FOR THE APPLICANT:

Newman Family Law

COUNSEL FOR THE RESPONDENT:

Mr Middleton

SOLICITORS FOR THE RESPONDENT:

Dillon Lawyers

**COUNSEL FOR THE INDEPENDENT
CHILDREN'S LAWYER**

Ms Pagani

**SOLICITORS FOR THE INDEPENDENT
CHILDREN'S LAWYER**

Legal Aid Queensland

ORDERS

1. That all previous Orders and Parenting Plans be discharged.
2. That the father have sole parental responsibility for the major long term issues of the children X born ... 2007 and Y born ... 2007 (“the children”).
3. Notwithstanding Order 2 the father shall prior to making any long-term decision concerning the children or either of them:
 - a. give to the mother 14 days notice in writing of the proposed decision; and
 - b. invite the mother to express any view that she may have in respect of the proposed decision; and
 - c. give consideration to any view expressed by the mother; and
 - d. advise her of the decision he proposes to make.
4. The father shall not relocate the residence of the children away from Townsville without the consent of the mother or without an order of this Court.
5. That the children live with the father.
6. That these Orders are an authority for the medical practitioners, schools or day-care centres attended by the children to give each parent information about the children’s medical and educational progress and other related activities and supply them with copies of reports, photographs, certificates and awards obtained by the children (at that parent’s cost).

7. For the purposes of clause 6 the father shall keep the mother informed of the medical and allied health care professionals who are consulted by him in respect of the children.
8. Both parents shall encourage the children to build meaningful relationships with both the maternal and paternal grandparents and extended families.
9. The father is to ensure that the children attend counselling through Relationships Australia or such other organisation as recommended by Relationships Australia for such period as it recommended by that or those counsellors.
10. The mother attend upon her general practitioner for referral to an independent psychiatrist/psychologist which shall not include any witness in these proceedings and shall inform the father and the Independent Children's Lawyer of the person so engaged.
11. The Independent Children's Lawyer be at liberty to provide the following evidence tendered in the trial of this matter to the nominated treating psychiatrist/psychologist referred to above:-
 - a. Dr BB's reports and letters
 - b. Ms CC's reports and letters
 - c. Exhibit 12
 - d. The affidavit of the mother filed 9/4/2013
 - e. The father's trial affidavit
 - f. The mother's trial affidavit
 - g. This order
12. The children spend time with the mother at the Relationships Australia Children's Contact Centre once per week as arranged by that Centre in consultation with the parties.

- 13 In not less than 4 months from the date of this Order the mother shall obtain from and produce to the father a report from her treating psychologist and/or psychiatrist concerning her psychological and/or psychiatric progress.
- 14 Upon compliance with Order 13 the father and mother shall do all acts and things necessary to seek funding from the Legal Aid Office Queensland for the conduct of a Legal Aid Family Dispute Resolution Conference so as to discuss or attempt to resolve the future arrangements for the children to spend time and communicate with the mother.
- 15 Each parent shall keep the other informed of their residential postal and email addresses and of a telephone number that may be used for the purpose of communicating between them.
- 16 That pursuant to Sections 65DA(2) and 62(B) of the Family Law Act 1975 (Cth), the particulars of the obligations these Orders create and the particulars of the consequences that may follow if a person contravenes these Orders and detail of who can assist parties adjust to and comply with an Order are set out in the Fact Sheet attached hereto and these particulars are included in these Orders.
- 17 That all applications be otherwise dismissed.
- 18 That the Independent Children's Lawyer be discharged.

NOTATION:

- A. Without limiting the matters in respect of which the mother may seek psychological and/or psychiatric assistance it is intended that the mother will seek advice upon and counselling in respect of in particular the matters

referred to in paragraph 76 of the Report of Ms CC dated 5/2/13 and paragraph 4 of the letter of Ms CC dated 8/3/13.

- B. In the event that the mother has the support of her psychologist and psychiatrist in seeking further time including unsupervised time and communication with the children then the mother and father agree that she will be at liberty to apply for further parenting Orders without the need of arguing the threshold pursuant to the authority of Rice and Asplund.
- C. It is noted that for at least 2013, the children will remain attending DD State School.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Wylie & Wylie* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT

FILE NUMBER: TVC1088/2011

Ms Wylie
Applicant

And

Mr Wylie
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. After eight days of trial before me of fiercely contested competing parenting applications relating to the parties' six year old girls, the parties advised me that they had agreed upon consent orders. By then of course, a great deal of evidence had been received by the court, but by no means had all of the intended material been presented and tested.
2. Both the mother and father had each filed a Notice of Child Abuse or Family Violence. The mother's notice filed 17 August 2012 raised 36 incidents relating to grave allegations of sexual abuse by the father. The father's notice filed 18 October 2011 raised allegations that the mother was coaching the children to make untrue disclosures that he had sexually abused them.
3. The parties provided me with signed Terms of Settlement. In substance, they provided that the father have sole parental responsibility for the two children, save that there was an opportunity for input by the mother in relation to any long-term decision concerning either of them. Further, the orders provided that the children live with the father, and spend time with the mother at the Relationships Australia Children's Contact Centre once per week as arranged by that centre in consultation with the parties. These orders substantially mirrored the position of the father at trial, which was supported by the Independent Children's Lawyer. The mother's consent reflected a capitulation of her position at trial.
4. It was apparent that, although the consent was to final orders, the parties apparently had within their contemplation the possibility that further litigation may later ensue. I say that because notation B to the Terms of Settlement provided as follows: –

In the event that the mother has the support of her psychologist or psychiatrist in seeking further time including unsupervised time and communication with the children then the mother and father agree that she will be at liberty to apply for further parenting orders without the need of arguing the threshold pursuant to the authority of *Rice & Asplund*.

5. Because the parties were asking me to make consent orders during a hearing where allegations of abuse had been made, rule 10.15A of the Family Law Rules applied. That rule provides as follows: –

Consent parenting orders and allegations of abuse or family violence

(1) This rule applies if an application is made to the court in a current case for a parenting order by consent.

(2) If an application is made orally during a hearing or trial, each party, or if represented by a lawyer, the party's lawyer:

(a) must advise the court whether the party considers that the child concerned has been, or is at risk of being, subjected to or exposed to abuse, neglect or family violence;

(b) must advise the court whether the party considers that he or she, or another party to the proceedings, has been or is at risk of being subjected to family violence; and

(c) if allegations of abuse or family violence have been made-- must explain to the court how the order attempts to deal with the allegations.

(3) ...

6. The parties approach to the explanation of how the orders attempt to deal with the allegations differed. On the one hand, the father and the Independent Children's Lawyer contended that the proposed orders dealt with the allegations by requiring the time that the mother spent with the children to be supervised, thereby ameliorating the concerns identified by the father in his Notice of Abuse. Unsurprisingly, the father's position was that the mother's Notice of Abuse was groundless, and hence the order attempted to deal with her allegations by, in effect, refuting them. This position was supported by the Independent Children's Lawyer. On the other hand, the mother did not concede that her notice of abuse was groundless, but rather submitted that the settlement was pragmatic, in view of the way in which the trial progressed.

7. Given the completely opposing positions of the parties as to the question of abuse, and given that the trial had not concluded, there was some discussion as

to how the matter could best move forward. Particularly, the Court and the parties were each mindful that the Court needed to be satisfied that the orders were in the best interests of the children, and could not do so in a factual vacuum, however it could not resolve the competing allegations in a way which would be fair to the parties on the basis of the incomplete and not wholly tested material before it. In the ordinary course the way in which competing allegations of abuse are properly evaluated, and appropriate findings of fact made (in the absence of a concession by either party that the allegations made in a notice of abuse ought be rejected) is by the testing of that material during the course of trial. Here however, the parties were expressly abandoning any desire to press on with the trial.

8. It is clear that in an appropriate case, the court may refuse to make consent orders if it is not persuaded that they are in the best interests of the children. An illustration of that is *T & N* [2003] FamCA 1129. In that case, Moore J said as follows:

12. The affidavit evidence revealed a number of disputed facts on issues of significance. No findings could be made on those disputes without any of the evidence having been tested and I made it clear my comments were not to be interpreted as representing concluded views on disputed facts. To the contrary, long experience teaches that findings must abide the close of the evidence when everything is usually shown in quite a different light.
13. That said, the evidence it was now proposed not to test established on first appearance a risk to these children if those orders were made, and it was my opinion the magnitude of that risk was unacceptable (see High Court decision of *M v M* [1988] HCA 68; (1988) FLC 91-979. That flowed from the unchallenged evidence of Ms N about Mr T's conduct and included, in some instances, his own concessions. I shall summarise that shortly.
14. It is the statutory responsibility of a judge of this Court, pursuant to Part VII of the Family Law Act 1975, to make orders consistent with the interests of children. On what I had been presented, I could not say unsupervised contact between the children and Mr T would be consistent with their best interests. I therefore declined to give the imprimatur of this Court to the arrangements by making orders to that effect. The most I could see as consistent with my responsibilities was to accept parental consent to supervised contact only.
15. At the same time, I observed that parents are quite free to make such care arrangements as they choose, subject to State intervention on child protection issues, and notwithstanding the terms of any order of this Court Ms N and Mr T would be free to go away and agree informally about unsupervised arrangements. But I informed counsel that if formal orders were limited to supervised contact, I would also consider it my responsibility to refer this matter to the relevant Departments in both Queensland (where Ms N lives)

and New South Wales (where Mr T lives) so as to alert them to the prospect there may be an informal arrangement that would see these children in the unsupervised care of Mr T.

16. After some further adjournment to consider their position, counsel for the parties and counsel for the child representative presented orders limited to supervised contact. I made those orders by consent. The terms are set out later. Whether there is some other informal agreement, I do not know, but the matter will be referred as I said.
9. The situation confronting me is quite different to that which confronted Moore J. Perhaps most significantly, this was a trial in which the credit of the parties was a substantial issue. Considerable effort and energy was devoted by counsel during the course of the trial to testing the truthfulness of the parties by challenging their evidence by reference to contemporaneous records and subpoenaed documents. Although perhaps not by itself a significant matter, amongst the matters in contest was whether or not the mother had, during the course of the marriage, advised the father that she had been sexually abused by her brother as a child. She vehemently denied any such conversation with the father, and further, went to some lengths in her evidence to deny that any abuse had in fact been perpetrated upon her. However at the conclusion of day six of the trial, documents produced pursuant to a late-issued subpoena directed to a Townsville psychologist whom the mother had consulted, revealed that the mother had disclosed to her that indeed she had been abused by her brother, over many years, and culminating in her aborting a foetus conceived as a result of the abuse.
10. When after an adjournment of some weeks, the trial resumed before me, the mother gave evidence that in fact her earlier evidence denying both the fact of the abuse and the reporting of it to the father, were untrue, and her earlier evidence as to those matters was knowingly false. She sought to explain her lies on the basis that she was intending to protect her parents, who were also witnesses in the case, but knew nothing of the mother's abuse, from the enormity of the conduct of their son. Notwithstanding that explanation, her admission that she had lied to me during the course of giving evidence, when both parties were well aware that their credit was a major issue which I needed to resolve, was a matter that was likely to be given great weight by the court. It seems reasonable to infer that at least one of the reasons why the mother ultimately was prepared to settle the litigation on terms completely different to those which she was seeking, lay in part because of the realisation of the impact which her admission was likely to have upon the outcome of the proceedings. Indeed given that it appears as though she retains at least some expectation that in the future, assuming the events contemplated by notation B occur, there may be further litigation in relation to the parties' children, her consent to the orders may have had as a component of it a forensic decision, in

the event that such litigation ensues, to be able to embark upon it untrammelled by any previous findings of credit against her.

11. There were several other matters which, had the trial continued, may also have had some bearing upon whether the court was likely to be satisfied to the requisite standard that the father presented as an unacceptable risk to the children. Amongst those were what could be described as the mother's quite extraordinary allegations of sexual assault against her by the father. For instance, she asserted that he had raped her many, many times, although she had never made complaint to police in relation to any such events, nor referred to them in the material which she swore in support of an application for a domestic violence order against the father. Further, as to the allegations of the father's abuse of the children themselves, notwithstanding numerous notifications made to the Department of Communities, Child Safety and Disability Services and Queensland Police by the mother, and the investigation by both bodies of those allegations, they had never been found to be substantiated.
12. I am mindful that, without the full testing of all of the material, I cannot and should not make any findings in relation to the mother's Notice of Abuse. However unlike Moore J, I am in the position where the proceedings have progressed to a point, where I am satisfied, on the material before me, that the concerns which inevitably would otherwise flow from the mother's notice of abuse, have been sufficiently addressed by the evidence. Further, it is apparent that the mother, even though she does not concede that her notice is groundless, nonetheless does not seek to have the matters raised in it further litigated. I am therefore satisfied, given the consent orders, and given the state of the evidence before me, that the father does not present as an unacceptable risk to the children, and therefore there is no impediment to there being an Order as proposed that the children live with him.
13. That then leaves the question of whether or not the severe restriction which the proposed orders contemplate imposing on the children's time with the mother, can be seen to be in their best interests by reference to, amongst other things, the father's Notice of Abuse. Again, in the unique circumstances of this case, I do not think it incumbent upon me to proceed to make findings of fact in order to found the making of such Orders. Rather, I identify that the real question for my consideration is whether there is sufficient material from which, given the fact of consent to such a regime by the mother, and given the support of that regime by the Independent Children's Lawyer, I can be satisfied to the requisite degree that the restriction is justifiable as being in the children's best interests.
14. I do not propose to review in detail the material thus far in evidence before me which is germane to this issue. Suffice it to say that it demonstrates that on numerous occasions there have been disclosures made by the children in circumstances where it is strongly arguable that the mother has either coached

the children to make the disclosures, or has prompted them to make them. The mother was steadfast in her denial of any such behaviour on her part, and again this was a matter which stood to, in large part, be resolved by findings of credit in relation to the parties. In undertaking that task, the mother's admission of having given deliberately untruthful evidence to me would inevitably have loomed large.

15. Against that background I am sufficiently satisfied that the proposed orders which restrict the children's time with the mother, at least for the reasonably foreseeable future, to supervised contact of two hours per week, whilst regrettable, nonetheless reasonably deal with the allegations made against the mother by the father in his Notice of Abuse.
16. I am otherwise satisfied that by reference to the considerations in s.60CC of the *Family Law Act 1975*, and particularly the primary consideration specified in s 60CC(2)(b), the arrangements detailed in the Terms of Settlement are in the best interests of the children, and therefore will make the Orders as proposed.

I certify that the preceding sixteen (16) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Tree delivered on 6 June 2013

Associate:

Date: 7 June 2013