**FEDERAL MAGISTRATES COURT OF AUSTRALIA**

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| *GAINES & GAINES* | *[2013] FMCAfam108* |

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| FAMILY LAW – Application to set aside family report – alleged bias and interference with preparation of family report – family report set aside. |

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| *Family Law Act 1975* (Cth) s.62G(2) |

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| *Hall & Hall* (1979) FLC 90-713  *Friscioni & Friscioni* [2010] FamCAFC 108  *Hannigan & Sorraw* [2010] FamCAFC 257 |

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| Applicant: | MR GAINES |

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| Respondent: | MS GAINES |

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| File Number: | DGC 444 of 2011 |

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| Judgment of: | O’Sullivan FM |

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| Hearing date: | 7 & 8 February 2013 |

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| Date of Last Submission: | 8 February 2013 |

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| Delivered at: | Dandenong |

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| Delivered on: | 8 February 2013 |

**REPRESENTATION**

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| Counsel on behalf of the Applicant: | Mr Lovering |

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| Solicitors on behalf of the Applicant: | Chris Woods & Associates |

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| Counsel on behalf of the Respondent: | Mr Meier |

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| Solicitors on behalf of the Respondent: | Meier Denison Guymer |

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| Counsel on behalf of the Independent Children’s Lawyer: | Ms Gordon |

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| Solicitor on behalf of the Independent Children’s Lawyer: | Reale Lawyers |

**THE COURT ORDERS UNTIL FURTHER ORDER THAT:**

1. The appointment of Dr X as a Reg 7, Family Consultant in this matter be discharged.
2. That both of Dr X’s family reports dated 15 June 2012 and14 January 2013 be sealed but remain on the court file and not be disclosed without further order.
3. That the transcript of Dr X’s evidence and Mrs X’s evidence be provided to the Director of Child Dispute Services for such action as is appropriate in light of the material in the transcript.
4. The child, [X] born [in] 1999 (“[X]”) live with the Respondent wife.
5. The Respondent wife forthwith enrol the child, [X] in school and ensure her attendance at school.
6. The parties shall not encourage or facilitate any party, including any of the children, from discussing these proceedings with the children or any of them including discussing where the children will live in the future.
7. Pursuant to section 62G(2) of the *Family Law Act 1975* the parties and the children of the relationship attend upon a family consultant nominated by the Regional Coordinator, Child Dispute Services in the Dandenong Registry of the Family Court of Australia on a date and at time/s to be advised for the purposes of the preparation of a family report, such report to be released as soon as possible before the adjourned date, and that:
   1. The Family Report to deal with the following matters:
      1. any wishes expressed by the said children and any factors (such as the said children’s maturity or level of understanding) that would affect the weight that the court should place on those wishes;
      2. the matters set out in ss60CC, 61DA and 65DAA of the *Family Law Act 1975*; and
      3. any other matters that the Family Consultant considers important to the welfare or best interests of the said children.
   2. The parties do comply with all reasonable directions as to attendance upon the Family Consultant as and when required by the Consultant.
   3. The Family Consultant has leave to inspect the Court file and all documents produced on subpoena once permission to inspect has been granted to at least one party or the Independent Children’s Lawyer (if applicable) in this matter.
   4. The solicitor for each of the parties (or, if unrepresented, then the party themselves) do deliver or cause to be delivered to the family consultant copies of the following documents:
      1. all relevant applications and responses filed by or on behalf of his/her client in the within proceedings;
      2. all relevant affidavits filed by or on behalf of his/her client in the within proceedings; and
      3. any intervention or restraining orders currently in force.
8. The family consultant be at liberty to inspect all subpoenaed material in these proceedings if required.
9. The matter be adjourned to 24 June 2013 at 10:00 am for final hearing (with an estimated hearing time of 2 days) at the Federal Magistrates Court of Australia at Dandenong.
10. The applicant shall file and serve any amended application and/or any further affidavit material upon which he seeks to rely upon at final hearing by not later than 28 days prior to the trial.
11. The respondent shall file and serve any amended response and/or any further affidavit material upon which she seeks to rely upon at final hearing by not later than 14 days prior to the trial.
12. The Independent Children’s Lawyer do file and serve all further affidavits and other material to be relied upon by them not later than 7 days prior to the trial.
13. All parties do file and serve an Outline of Case document in an appropriate form by not later than 72 hours prior to the trial date setting out the following:
    1. a list of the material relied upon;
    2. a brief chronology listing significant events;
    3. a list of contentions with respect to each of the considerations relevant to determining the best interests of the children (s.60cc factors);
    4. a list of other contentions relevant to the decision;
    5. whether the presumption of *equal shared parental responsibility* applies (s.61da), and if not the contentions relied upon;
    6. a list of the considerations relevant to considerations of equal and substantial parenting time (s.65daa);
    7. a list of other relevant considerations (including the relevant section number, eg ss.60cg, 61f, 65dab, 65dac, etc); and
    8. the actual orders sought.
14. The party responsible for the payment of any fee including a setting down or hearing fee do pay or cause to be paid such of the fees as shall be payable by that party in accordance with, and within the time specified in, the *Federal Magistrates Regulations 2000.*

**AND THE COURT NOTES THAT:**

1. In the event of non compliance by any party with the orders, directions, Rules or Regulations of this Court relating to:
   1. the filing of documents;
   2. the payment of any applicable filing, setting down, mediation or enforcement fee or fees; and/or
   3. any other procedural issues,

the application may be struck out, the proceedings may be directed to proceed undefended or the trial date may be vacated and the Court may direct that a further date not be fixed until all parties have complied with the said orders, directions, Rules and Regulations.

1. To the extent that it is or may be practicable to do so, a compliance check is to be carried out by an Associate or Deputy Associate of the trial Federal Magistrate, or by another appropriate court officer, shortly prior to the final hearing date.

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

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| **FEDERAL MAGISTRATES**  **COURT OF AUSTRALIA**  **AT dandenong** |

**DGC 444 of 2011**

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| **MR GAINES** |

Applicant

And

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| **MS GAINES** |

Respondent

**REASONS FOR JUDGMENT**

**(Revised from transcript)**

1. Before the Court today are proceedings between Mr Gaines (“the father”) and Ms Gaines (“the mother”). The proceedings involve a dispute over parenting orders for three children namely, [X] born [in] 1999, [Y] born [in] 2004 and [Z] born [in] 2007. The father is in his 40s and the mother is in her 30s. The parties married in 2000 and separated on a final basis in 2010.
2. The father commenced these proceedings by application filed in February 2011. The mother filed a response in July 2011. Since the proceedings were commenced there have been numerous interim orders, the most recent of which arose out of contravention proceedings brought by the father which resulted in orders on 10 September 2012.
3. The substantive proceedings for parenting orders under the *Family Law Act 1975* (“the Act”) had, pursuant to interim orders made on 22 June 2012, been listed for trial on Thursday, 7 February 2013.
4. On that day Mr Lovering, Counsel appeared on behalf of the father,   
   Mr Meier, Solicitor appeared on behalf of the mother and Ms Gordon, Counsel appeared on behalf of the Independent Children’s Lawyer.
5. There had been orders made in these proceedings pursuant to section 62G(2) of the Act for the preparation of a family report to assist the Court in being able to determine what was in the children’s best interests.
6. Dr X prepared two family reports. One report was released in June 2012 and another released in January 2013. Dr X is a reg.7, family consultant. Dr X’s qualifications are attached to the reports that he prepared.
7. Yesterday when the matter was mentioned in the call-over of the list Mr Lovering, who appeared for the father, indicated he had an application to make.
8. Mr Lovering told the Court the father’s application was of some considerable import as it was that the reg.7 family consultant and the reports prepared by that person should be discharged. The Court was told it was necessary for the Court to hear evidence from Dr X and arising from that, also evidence from his wife, Mrs X to consider the application made by the father. This was no dispute on the need to do so. The application was that the Court should discharge the family consultant, seal and disregard the family reports prepared by him.
9. In *Hall & Hall*[[1]](#footnote-2)[1] the Full Court of the Family Court of Australia made some general observations about the role of a family report:
10. *“(a) There is no magic in a Family Report. A Judge is not bound to accept it and there should never be any suggestion that the counsellor is usurping the role of the court or that the Judge is abdicating his responsibilities. In* Wood *(1976) FLC 90-098 at p. 75,447;* Harris and Harris *(1977) FLC 90-276; (1977) 29 F.L.R. 285.*
11. *(b) Family Reports are meant to be, and almost invariably are, valuable and relevant material to assist a Judge in forming his ultimate conclusions. When those views coincide with the judgment of the court, it is not because they have been accepted automatically but because the Judge has found them consistent with the rest of the body of evidence before him.*
12. *(c) While the counsellor's views will normally have weight with the court because of his expertise and experience, the counsellor does not usually have the same opportunity as the trial Judge to weigh the evidence, observe the demeanour of the witnesses in court under examination and cross-examination, and make findings of fact based on evidence before the court which might not have been available to the counsellor.*
13. *(d) Hence, the counsellor's assessment of the parties may often be based upon facts which the counsellor has accepted but which turn out to be wrong; or favourable or unfavourable views formed by the counsellor from interviewing the parties without the opportunity to test in depth the credit of persons who may in court, and under cross-examination, or in the face of evidence of other witnesses, prove to be of a different character from that which the counsellor has accepted.*
14. *…*
15. *(g) It follows that in some cases it may be desirable to question counsellors about the bases of their recommendations. Indeed, there will clearly be some cases where a practitioner would be failing in his duty to his client if he did not seek to test the recommendations of the counsellor in the light of instructions given to that practitioner. To cross-examine a counsellor is to do no more than to test an expert witness in the same way as any other expert witness may be tested or challenged. Naturally, the decision to cross-examine carries with it the usual hazards involved in cross-examining any witness but more particularly an expert.*
16. *(h) Where there is proper reason for cross-examination, the court will be assisted and, we have no doubt, so will the counsellors. No expert should cavil at any questioning of his role or the foundations of his opinions. We consider that it is always a valuable opportunity for the counsellor himself to examine and test his own methods under critical investigation. We draw attention to an article by Mrs. A. Marshall, Director of Court Counselling Sydney Registry -- ''Social Workers and Psychologists as Family Court Counsellors within the Family Court of Australia''. The article appears in the March 1977 edition of Australian Social Work, vol. 30 No. 1, p. 9 and at p. 11 appears the passage:*
    1. Family Law reg. 117 provides for the cross-examination of a counsellor in relation to the Report. It is seen as an advantage by counsellors that they can in this way be held accountable for the Report.
17. *(i) Finally, and most importantly, and as a matter of public policy, no party should leave the court with a belief that justice has not been done because an opportunity to test part of the evidence has been denied. In the case of* Harris (supra) *Fogarty J. said at FLC p. 76,474; F.L.R. p. 289:*
    1. It is in my view inimical to the proper workings of the Court and in particular to the proper carrying out of the functions of a welfare officer that it might be thought by practitioners or litigants that welfare officers or their reports occupy some special or privileged position before the Court unchallenged or unchallengeable but yet perhaps decisive of the issue. Custodial proceedings still basically fall to be determined by the Court in accordance with the traditional system of determining cases. Where a welfare report is delivered which contains either factual matters or matters of opinion which a party desires to challenge but is not permitted to do so that party may be pardoned for feeling that justice has not been seen to be done.
18. *Similarly, in* M. and M*. (1978) FLC 90-429 at p. 77,182; (1978) 30 F.L.R. (Notes) at p. 562, Marshall S.J., in adopting the views of Fogarty J. set out above, stated:*
    1. If the contents of such a report are not open to challenge by cross-examination the Court would leave itself open to the criticism of conducting a trial 'by report' rather than on the whole of the evidence.
19. *This Court is in full agreement with the views set out above.*[[2]](#footnote-3)[2]*”*
20. The decision in *Hall & Hall*[[3]](#footnote-4)[3] was considered by the Full Court of the Family Court of Australia in *Friscioni & Friscioni*[[4]](#footnote-5)[4]. In that case their Honours confirmed that, despite the time that had passed since the decision in *Hall & Hall*[[5]](#footnote-6)[5], it remains on point. This was confirmed by the Full Court in the case of *Hannigan & Sorraw*[[6]](#footnote-7)[6].
21. It is part of the professional role of a report writer, such as Dr X to, having interviewed the parties and the children, the subject of these proceedings, provide to the Court his findings and conclusions about the parties and the children. If relevant to make any recommendations they have as to what is, in their view, in the children’s best interests.
22. In this process someone like Dr X will often make positive or negative observations and assessments of the parties. That doesn’t in and of itself equate to bias. As is commonly the case in parenting proceedings where family reports have been ordered if a party doesn’t agree with the conclusions reached by the report writer or the basis for those conclusions they are able to challenge that report writer by way of cross-examination at the final hearing.
23. Usually a family consultant or family report writer will state in the report the persons he or she has interviewed or had discussions with, the date of those, what was said in the interviews or discussions and all of the observations made as to such interviews or discussions as part of the substratum of facts and assumptions underlying his or her opinion. Usually the parties will themselves also be witnesses or be available as witnesses so that they can be cross-examined, as can the family report writer, as to what transpired between them. Unfortunately for reasons which are clear from the evidence given by Dr X and his wife that won’t be possible.
24. As the transcript of the evidence of Dr X and his wife (who, I understand, is also a qualified psychologist) speaks for itself. There is a real question of interference in the process of the preparation of the report by Dr X. The evidence of Dr X and his wife and their answers to the questions in cross-examination, in my view, provide an ample basis for the application made on behalf of the father.
25. That Dr X and his wife conduct, as registered psychologists, a business is not unusual. That they practise individually as registered psychologists from that business is also unremarkable. However, the evidence that has been led before the Court yesterday and today, in my view, makes clear that what went on in this case detracts from the purpose of the Court asking a reg.7 family consultant to prepare an *independent* family report.
26. Dr X, throughout his evidence, repeatedly said that his report was his own opinion based on his observations and his view about the family. However, his evidence (as the transcript bears out) makes clear that the report could have been influenced by his wife, who was not, and was never intended to be, professionally involved with this family yet she was.
27. Mrs X’s involvement in this matter to the extent that it was contemplated was only ever as an administrative assistant to Dr X.   
    Mrs X’s evidence, however, makes clear the character and nature of her involvement with the family and one of the children who Dr X was tasked with preparing a report on went beyond this. As a result of   
    Mrs X’s actions the independence of the report has been compromised. If the parties’ presentation before the Court yesterday and today is any indication the most distressed and most affected of the children by this dispute is the child who Mrs X unilaterally engaged with. Given this Mrs X’s unauthorised involvement has not been child focused, despite her stated intentions in her evidence. It has not assisted in resolving the dispute.
28. However well-meaning or well-intentioned her involvement may have been and whether it was appropriate professionally is not a matter that this Court needs to reflect on. However, it has had a fundamental impact on the independence, efficacy and the value of the family report prepared by Dr X. I won’t opine in these reasons on the appropriateness or otherwise professionally of what it is that went on between Dr X and Mrs X or between Mrs X and the eldest child. That may be a matter for other bodies.
29. However, it is most unfortunate that as a result of what has occurred that the matter needs to be adjourned and another family report has to be prepared. That will have consequent disruption to other people waiting for matters in the Court and lead to longer delays for other families. It is also most regrettable because of the impression it could have given to the parties and the children who, so it appears, are so badly affected by the dispute between the father and the mother that the report was not independent or one in which Dr X only as the independent expert was involved.
30. In this case, the eldest child it appears has been looking to adults to be able to make decisions for her. In this case Mrs X whose intention may have been for what she thought had been proper purposes (even assuming that she had a duty of care, which I’m not convinced that she did) but her own evidence shows she took no proper steps to involve the relevant authorities and that involvement has compromised the report process.
31. What may have been well-meaning involvement has had quite the opposite effect. It appears there have been 81 text messages and who knows how many number of phone calls between one of the children involved in this case and Mrs X who is not officially involved with this family. It is unfortunate as a result that the independence and appearance of the independence of Dr X’s report has been affected by his wife’s involvement with one of the children, the subject of the report that he was asked to prepare. This went on without the knowledge of the parents and the Court and is most unfortunate. It also went on with Dr X’s tacit knowledge and this is also most unfortunate.
32. In this jurisdiction it is vital for the confidence of the separated families and the confidence that they place in this process that family reports are not only be done properly and professionally but also done objectively and independently. Further it is vital that professionals appointed by the Court are seen to be objective and independent. Unfortunately, it is impossible to come to that conclusion in this case that the reports have been prepared by Dr X because of what went on between Mrs X and the eldest child.
33. That has serious consequences for the future of this matter. The trial will have to be adjourned. The parties will wait months now before there can get another final hearing date. These children will have to see yet another family report writer. There will be delays not only for this family, but others.
34. There is an agreement between the parties as to interim arrangements. Counsel for the parties have been able to come to an agreement to that effect this afternoon. It has been made clear the parties have liberty to apply on seven days notice if the matter needs to be brought back for an urgent interim hearing. I will make the interim orders I am asked to make today by consent.
35. I will order to be sealed each of Dr X’s reports and they are not to be opened by anyone without further order.
36. I have not been asked to consider making any other orders today. I will order the transcript of Dr X and Mrs X’s evidence. I will direct that a copy of that transcript be provided to the Regional Coordinator of Child Dispute Services to take whatever action she believes is necessary, and I so order.

**I certify that the preceding twenty-six (26) paragraphs are a true copy of the reasons for judgment of O’Sullivan FM**

Date: 8 February 2013

1. [1] (1979) FLC 90-713 [↑](#footnote-ref-2)
2. [2] *Ibid* at 78-819 and following [↑](#footnote-ref-3)
3. [3] *Op Cit* [↑](#footnote-ref-4)
4. [4] [2010] FamCAFC 108 [↑](#footnote-ref-5)
5. [5] *Op Cit* [↑](#footnote-ref-6)
6. [6] [2010] FamCAFC 257 [↑](#footnote-ref-7)