

## ***Theophane & Hunt* [2014] FamCA 1038 (24 November 2014) – Family Court of Australia**

'Family reports' – 'Impact of loss of relationship with parent' – 'Independent children's lawyer' – 'No contact orders' – 'Parenting orders and impact on children' – 'People with mental illness' – 'Protection of the parent' – 'Protection orders' – 'Rape' – 'Self-represented litigants' – 'Sexual and reproductive abuse' – 'Statutory framework' – 'Systems abuse' – 'Vexatious proceedings'

Proceedings: Application for final parenting orders.

Facts: The parties had one child together. During the relationship, the mother alleged that the father often forced her to have non-consensual sex with him. The parties separated and the mother obtained a DVO against the father. The mother initiated proceedings seeking parenting orders and over the next four years a number of parenting orders were made and amended. However, after an incident at handover, the wife formed the belief the husband would abduct or remove the child from her care, and she attacked the father whilst in a dissociative state. She was convicted of unlawful wounding and sentenced to 18 months imprisonment, and immediately released on probation.

The applicant father sought orders for sole parent responsibility for the child, who would live with him and spend supervised weekend and school holiday time with the mother. He argued that the mother presented an unacceptable risk of sexual, physical and emotional harm to the child (the mother suffered sexual abuse as a child). At the time of these proceedings, the father was committed to stand trial on six charges of rape of the mother and one charge of grievous bodily harm against the mother.

The mother sought orders, supported by the Independent Children's Lawyer, that she have sole parental responsibility for the child, who would live with her and spend no time, nor have any contact or communication with the father. She later amended her orders and sought to include provision for a card or letter for her birthday and for Christmas. The mother sought no contact as she believed any continued interaction between her and the father in relation to the child, was likely to adversely affect her capacity to parent the child.

Issue/s: What parenting order was in the best interests of the child?

Reasoning/Decision: Orders were made providing for the mother to have sole parental responsibility for the child and sole custody of the child, and for the father's access and communication with the child to be limited to postal correspondence twice a year until the child turned eighteen. His Honour also made a vexatious litigant order against the father, restraining him from bringing further proceedings without leave of the court.

In relation to making a no contact order, his Honour stated that it is a serious matter that a child neither spend time with nor communicate with a parent. Accordingly, such orders ought to be restricted to cases where the outcome is plainly mandated in the best interests of the child, and no other regime of orders is appropriate or workable. Three scenarios were considered in which 'no contact' orders had been made in the past. First, these orders are commonly employed where the Court is satisfied that a parent poses an unacceptable risk of harm to a child. Second, 'no contact' orders have been made where the other parent entertained a genuine, but not necessarily reasonable, belief that such a risk of harm existed (on the basis of protecting the child from the consequences of that parent's belief): *Re Andrew*. Finally, this approach was taken one step further in *Sedgley & Sedgley* where the Court held that while the welfare of the child may require some continuity of contact with the non-custodial parent, the need for peace and tranquillity in the custodial parent's household may be a more compelling need for the child. However, a Court would only cut the relationship between the child and parent on such a ground with considerable hesitation (see [55]-[58]).

The best interest considerations in s 60CC let the court to determine the child live with her mother. His Honour accepted that by time the child turned 12 she would likely come into conflict with the father and was at real risk of harm from his coercive, controlling, dominating and self-serving personality traits (see [177]-[178]). Further, the father was to have no contact with the child except for a card/letter at Christmas and on the child's birthday. It was found that the father deliberately calculated his interaction with the mother with a view to destabilising her mental health conditions, and even the smallest opportunity for debate or conflict with the mother would be seized upon by the father. If the mother was required to continue to interact with the father in any form of co-parenting, there was a substantial risk that she will either attempt to kill herself, attempt to kill the father, or both.

It was ultimately decided that the prospect and magnitude of the risk of harm to the child if her mother was required to maintain contact with the father far outweighed any benefit the child would obtain by a continuation of any time or communication with her father. It was held that the best interests of the child lay with making a no contact order.

In relation to family violence, his Honour was satisfied that on occasion the father had engaged in non-consensual sexual intercourse with the mother. However, it was both unnecessary and undesirable to make a finding regarding the father's conduct in relation to the criminal offence of rape (see [168]-[169]). However, the father's controlling and domineering behaviour was considered and had bearing on the court's decision for no contact (see [170]-[171]).

Note: this case was confirmed on appeal, see *Theophane & Hunt and Anor* [2016] FamCAFC 87.