

M & L (2007) FLC 93-320; (2007) 37 Fam LR 317; [2007] FamCA 396 (4 May 2007) – Full Court of the Family Court of Australia

‘Aboriginal and Torres Strait Islander people’ – ‘Parenting orders’ – ‘Physical violence and harm’ – ‘Relevance of cultural evidence’

Proceedings: Appeal against parenting orders.

Facts: Both parents were Aboriginal and Torres Strait Islander, and lived in the NT, one close to Darwin, one quite remote. There was family violence where the father would physically and verbally abuse the mother. On one occasion the paternal grandfather punched the father for hitting the mother. The mother had been the primary care giver of the children. At trial evidence was led about the communities in which each parent lived. The trial judge found that the children would have a greater connection to their father’s culture by living with him.

Issues: Whether the trial judge had adequately considered the evidence of family violence and its potential effects on the children.

Reasoning/Decision: The Full Court held that there was inadequate consideration of the risk to the children given the father’s history of violence and alcohol consumption. The lack of consideration of the evidence that the children had been primarily cared for by the mother, and that there was no evidence that her care was lacking was overlooked, was also an error. A finding was made by the trial judge that the mother’s parenting was reliant on others in the community, referring to it as “collectivist”. He based his finding on an anthropological report quoted in another judgment. There was no anthropological evidence that the mother’s community engaged in such “collective” parenting, and that the mother was not, herself, the children’s primary care-giver. The trial judge’s finding that the best interests of the children would be met by them living with their father cannot be sustained when evidence of the mother’s adequate care, the fact she was the primary care giver and the father’s violence towards the mother, is balanced against the finding of the cultural benefits to the children of living in the father’s community.