

In the Matter Of: N Appellant/Wife and S Respondent/Husband and the Separate Representative [1995]
FamCA 139 (20 December 1995); (1996) FLC 92-655; (1995) 19 Fam LR 837. – Full Court of the Family Court of Australia

‘Assessment of unacceptable risk’ – ‘Unacceptable risk’

Proceedings: Appeal against custody orders.

Facts: Not a family violence case, but it discusses principles in determining unacceptable risk in the context of sexual abuse allegations. In custody proceedings, the mother alleged that the father sexually abused their child and sought to have access by the husband to the child prevented. The trial judge was not satisfied on the civil standard of proof that the sexual abuse had occurred. However, he did not conclude that the abuse certainly did not happen. The mother was steadfast in her belief that the child had been abused by the father. The trial judge did not find the father unfit to have custody or access to the child by reason of sexual abuse or unacceptable risk of abuse, however, mitigated against the concerns and effect on the mother by making interim supervised contact orders.

Issue/s: Whether the trial judge erred in finding that the father was not an unacceptable risk?

Reasoning/Decision: The appeal was dismissed by majority. The Full Court held that the trial judge should not have made interim custody orders and failed to take into consideration the effect this would have not only on the child but also on the mother’s ability and capability to parent effectively. However, as the interim custody order was not challenged the Full Court did not set it aside. As regards to no finding of unacceptable risk, on the evidence, this was open to the trial judge.