

Between: R Appellant/Husband and C Respondent/Wife [1993] FamCA 62 (25 June 1993); Russell & Close (Unreported, Full Court of the Family Court of Australia, Fogarty, Baker & Lindenmayer JJ, 25 June 1993) – Full Court of the Family Court of Australia

‘Allegations of sexual abuse’ – ‘Best interests of the child’ – ‘Interpreter’ – ‘Meaningful relationship’ – ‘Parenting proceedings’ – ‘Separate representative/independent children’s representative’ – ‘Unacceptable risk to child’ – ‘Weight to be given to impact of access on custodial parent’

Appeal type: Appeal against access orders.

Facts: Post separation, an access arrangement for the two children of the relationship was established. The relationship between the parties deteriorated and the mother refused to allow the husband access to the children. One child was found to have been sexually abused, but it was not possible to identify the perpetrator. The mother believed that the father was the perpetrator, however the trial judge was not satisfied that the father had sexually abused the child. The trial judge made orders giving the father unsupervised daytime access to the children to reduce the risk of the mother from making unfounded allegations in the future. The father appealed against these orders. The mother did not challenge the orders, but cross-appealed in relation to findings of fact made by the trial judge.

Issue/s:

- Whether it was open to the trial judge to make orders giving the husband unsupervised daytime access, where the court was not satisfied that the father had sexually abused the child

Decision/Reasoning: The appeal was allowed in part. Amendments were made to the trial judge’s orders, clarifying the father’s access period and altering the proposed changeover location. The mother’s appeal against factual findings made by the trial judge and the father’s appeal against daytime access were dismissed.

The Full Court found that the relevant considerations when making access orders in cases involving sexual abuse of children were whether sexual abuse had occurred, whether the perpetrator could be identified, the potential risk of harm to the child from sexual abuse, the potential benefit to the child from parental access and the impact of the custodial parent’s beliefs on the welfare of the children. The Full Court said that the custodial parent’s beliefs regarding the child’s exposure to harm are relevant to the extent that they are likely to adversely affect that parent’s parenting ability and that a subjective test is used to assess the custodial parent’s beliefs.

The Full Court was satisfied that it was open to the trial judge to draw inferences regarding the likely future conduct of the mother. As the trial judge had found the mother genuinely believed the child had been sexually abused, that it was highly likely the mother would make further allegations of sexual abuse against the father if unsupervised overnight access was granted and that this risk did not apply to unsupervised daytime access, it was at the trial judge's discretion to give the husband unsupervised daytime access.