

## Case update: Contact and unacceptable risk

Monday, 07 November, 2005

In a recent judgment, the full court confirmed the principles to be applied with respect to contact where there are child abuse allegations, but a positive finding of abuse cannot be made.

After a four-year marriage, there was one daughter of the marriage, E, who resided with the mother and had regular contact with the father. The mother also had two daughters from a previous marriage who lived with the parties during the marriage.

E made various comments to the wife, the maternal grandmother, and to a social worker, that raised the possibility the father had been sexually abusive towards her.

The trial judge determined that on the balance of probabilities, a finding that the father had sexually abused E could not be made, yet there was an unacceptable risk of sexual abuse to E if E were to have unsupervised contact with the father.

The full court confirmed the circumstances in which a discretionary decision may be overruled, and also confirmed a number of established principles including:

- a finding of sexual abuse should not be made unless a judge is satisfied to the highest standard on the balance of probabilities that abuse has occurred
- in making a finding in relation to the child of the marriage, her Honour was not required to consider evidence in relation to the father's relationship with his step-daughters
- the question of "unacceptable risk" is not dependent on a finding of sexual abuse. Where a positive finding of sexual abuse may decisively constitute unacceptable risk, the converse is not necessarily true. In this case, though her Honour could not make a positive determination that sexual abuse of E had occurred, she appropriately considered and weighed all the evidence to make a finding that there was an unacceptable risk to E should she have unsupervised contact with the father.

Their Honours noted the recent decision of *Fitzpatrick and Fitzpatrick* (2005) FLC ¶93-227, where the court emphasised the importance of maintaining a worthwhile relationship between a child and each parent. Their Honours stated (at para 112):

"We acknowledge that s 60B [*Family Law Act 1975*] emphasises the objects of Part VII of the Act and that generally children have a right to know and be cared for by both their parents ... The objects provision is, of course, subject to the exception that the provisions do not apply when it is or would be contrary to a child's best interests."

The case also raised the issue as to whether a social worker may be treated as an expert.

The court considered the witness' 23 years' experience in family therapy, the opinion of the family report writer in respect of her expertise, her responses under cross examination and the nature of her evidence (as an observer of E's actions and an independent witness of E's statements), finding she should be considered an expert for the purposes of the evidence she gave to the court.

*W and W (Abuse allegations: unacceptable risk)* (2005) FLC ¶93-235 will be published shortly in CCH's *Australian Family Law & Practice*.

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