Family Court Clarifies Meaning of Parents' Involvement in "Daily Routine" of Children

Court rules in relocation case that "substantial and significant time" with children does not necessarily mean involvement in "daily routine"

Introduction

The case of *Ulster & Viney* [2016] FamCAFC 133 (28 July 2016) heard in the Full Court of the Family Court of Australia (Strickland, Ainslie-Wallace & Ryan JJ) considered what is meant by "substantial and significant time" and specifically the element of "daily routine" a parent has in a child's life under s 65AA(3)(b)(i) *Family Law Act 1975* (Cth). Mr Ulster (*'Father'*) sought an appeal against orders made by Judge Bender permitting the children of 9 and 7 to relocate some 85 kilometers away to Gippsland with Ms Viney (*'Mother'*).

The Mother had full-time employment and family support in Gippsland, and the lower cost of real estate there compared to Melbourne meant she was able to buy a home. The Father argued that the relocation to regional Victoria would cause considerable disruption to the children's lives and would be detrimental to his ability to maintain a meaningful relationship with them. The basis of the Father's appeal was that the proposed orders allowing the Father to spend "significant and substantial time" with the children were misstated, in that the time proposed was not such as to enable him to be involved in the "daily routine" of the their lives.

Background

During the relationship the Mother was generally responsible for the primary care of the children and the Father was the financial provider. They accused one another of emotional, physical and verbal abuse; the crux of their conflict being their differing views on the children's academic and recreational activities. Particularly, the Father insisted the children practice piano in what the Mother regarded as excessive amounts for their young age. Before piano exams the parties' were in particular divergence about the children's hours of piano practice. This resulted in a heated conflict, which lead to their separation in June 2014.

In September 2014 the Mother lost her job for reasons beyond her control. Soon after she took up employment in Gippsland some 85 kilometers away, and unilaterally relocated with the children. The Father filed an Initiating Application seeking parenting and property orders. Soon after, during his time with the children, the Father refused to return them to the Mother's care and took them out of school.

This prompted the Mother to issue an urgent Application seeking orders to return the children to her primary care. The interim orders provided for the parties to have equal shared parental responsibility of the children, and for the children to live with the Father in each alternate week from after school Thursday to before school Wednesday and with the

Mother in each other week. The interim orders required the children to remain at their Primary School, which meant the Mother rented accommodation closer to the School in times she had care of the children.

The Family Report described the children as delightful and a credit to their parents. The parties' were both loving and committed and the Mother generally facilitated the Father's desire to be involved in the children's lives.

On 14 October 2015, Judge Bender allowed for the relocation and made an order for equal shared parental responsibility. The children were to live with the Mother and spend time with the Father on alternate weekends; alternate Fridays (from after school to 7:00 pm) and on special holidays. The orders resulted in the time the children had with the Father to be extremely limited and changed from being six nights per fortnight to only two. This high magnitude change according to the Father would erode and compromise the strong and sound relationship he had with the children. The orders also meant the children were to change primary schools, which the Father claimed would cause disruption and not in their best interests. The Father supported the Mother's intention to seek full-time employment, but argued she had not exhausted all options to obtain a job in Melbourne. The Mother argued the relocation was necessary for her to both financially and emotionally support the children.

The Appeal

The primary ground of the Father's appeal was that Judge Bender misstated the practical effect of the orders as providing the children to spend "substantial and significant time" with the Father. He contended that the orders did not satisfy a mandatory component of the test for "substantial and significant time", in that he was not part of the children's "daily routine" under s 65DAA(3)(b)(i). To facilitate the requirement of "daily routine", the Father argued he would need to be inextricably associated and actively participating in the regular activities each day or each weekday of the children's lives.

Judges Ainslie-Wallace and Ryan rejected the Father's narrow interpretation of "daily routine". Their Honours found that the provision does not limit the question of involvement in daily routine to school weeks, nor requires involvement in every aspect of the child's daily life. Their Honours accepted the Mother's argument that the provision is to be read in the context of a divided family where parents live separately and apart from one another. It does not require daily physical association with every procedure or activity.

The practical effect of the orders meant that the children spent time with the Father in significant block periods during school holidays, alternate weekends and special occasions. This gave the children approximately 95-100 nights annually in their Father's care and certainly provided him the opportunity to actively participate in their daily routine (albeit limited during a school week).

Judge Strickland dissented. He agreed with their Honours interpretation of “daily routine” but not for their reasons for rejecting the complaint of the Father that the orders did not provide for “substantial and significant time”.

The majority concluded that despite relocating a one and a half hour drive away, the children’s close and loving relationship with the father would continue albeit not at the level he sought. The appeal was dismissed and the Father was ordered to pay the Mother’s costs.