



Federal Magistrates Court of Australia -

Family Law

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J & G [2000] FMCAfam 8 (3 August 2000)

Last Updated: 21 March 2002

FEDERAL MAGISTRATES COURT OF AUSTRALIA

*J & G [2000] FMCAfam
8*

INTERIM ORDERS CONTACT - Section 65E, 68F(2) & 60B
(2)

Applicant: J P
J

Respondent:

E E
G

File No:

ZM 2598 of
2000

ML4765 of 2000

Delivered on:

3 August
2000

Delivered at:

Melbourne

Hearing Date:

1 August
2000

Judgment of:

Bryant
CFM

REPRESENTATION

Counsel for the Applicant:

Mr
Brown

Counsel for the Respondent:

Mr
Combes

FEDERAL MAGISTRATES

COURT OF AUSTRALIA
AT

MELBOURNE

ZM 2598 of 2000

**J P
J**

Applicant

And

E E G

Respondent

REASONS FOR JUDGMENT

Applications and summary of issues

1. This matter having been transferred to the Federal Magistrates Court of Australia, the issue for determination was interim contact by J P J ("the Father") to the child K J G born 26 March 2000 ("K") who is the child of the father and E E G ("the mother").
2. The orders sought by the father are contained his application for interim orders filed 5 May 2000. That application seeks a number of orders but the essence of those orders is contained in order 3 and is as follows:
 - (1) For one hour each Friday between 2pm and 3 pm until 1 October 2000 where upon contact take place every Friday from noon until 3 pm ;
 - (2) For three hours on the child's birthday between noon and 3 pm;
 - (3) For four hours on Good Friday between noon and 4 pm
 - (4) For five hours on 26 December each year between noon and 5 pm; and
 - (5) As may be agreed between the parties.
3. The amended response of the mother filed 16 June 2000 seeks that the father's application be struck out.
4. Thus, the issue between these parties in relation contact to K is a stark one. In essence, the father is seeking contact, age appropriate to a four month old baby who is still being breast fed, but designed to

enable him to establish and continue a relationship with her.

5. The mother's case as presented is that he should have no contact at all.

6. When pressed by me during the hearing to indicate what proposals the mother had for contact in the event that contact were ordered, her proposals were that there be contact:

(1) Between 2 pm and 3 pm on the second Wednesday in August of each year;

(2) For one hour on the Wednesday preceding the child's birthday in each year, such contact to take place at the home of and supervised by B E and S E of 12 W Street, K.

7. It was accepted by the mother that this contact would not enable the father and K to establish an ongoing relationship but would merely afford the opportunity for her to know who he was.

8. The mother also indicated that K would be brought up to know who her father was, and that he could bring gifts to her on these occasions but the value of such gifts should be limited to \$50.

Background facts

9. There was very little, if anything, in dispute in relation to the background facts to this case. The father was born in Sydney in 1952 and is 48 years of age. The mother was born on 18 February 1969 and is currently 31 years of age.

10. Both the father and mother were brought up as members of the  **Exclusive Brethren**  Community. Although both the mother and father had, prior to their relationship, married and had independent families of their own, they had been lifelong friends.

11. In April 1999 the father separated from his wife and their 3 children and left  **the Brethren** . At the same time the mother decided that it would be best for her, due to unhappiness in her marriage, to leave the marriage and pursue a relationship with the father outside the community of  **the Brethren** . They lived together between April 1999 and November 1999 and during that time K was conceived. In the case of each of the mother and father their respective spouses and children remained within the community of  **the Brethren** .

12. Subsequent to K's birth, the mother returned to her husband and children, and was received back into the community of  **the Brethren** .

13. An affidavit was sworn by D B B filed on 16 June 2000. Mr B is a member of  **the Brethren**  and knows both the mother and father. His affidavit provides the court with a brief outline of the history

teachings and practices of  **the Brethren**  and the current situation of the mother and father. The cardinal principal of teaching of  **the Brethren**  and way of life is the obligation to separate from evil. The practical effect of this is that members of their community live to a large extent separately from the general community. It is also a tenet of their beliefs that only those who act together and who separate from evil are able to join in common fellowship. This has the practical effect that if an individual has been guilty of misdemeanour and fails to repent, they will no longer be permitted to participate in the fellowship and cease to enjoy normal social intercourse with those who remain in the fellowship. This discipline which is known as "*putting out*" is done with a view to restoring the person who has been subjected to it. The discipline is essential to the fellowship and maintains its purity. It follows that when an individual is withdrawn from it becomes the obligation of their spouse, parents and kinsfolk to implement in domestic life the implications of the decision.

14. Children amongst  **the Brethren**  are given devoted attention from birth and are encouraged to be happy, conscientious and trustworthy. They participate from their early years in the meetings of  **the Brethren**  and although they attend government schools and learn to be part of the world, they are not of it. Where children are placed in circumstances different and/or opposed to what they have been brought up to value and cherish as being right, Mr B asserts that trauma and conflict result because a breach is made to the principal of separation from evil.

15. Family life is a central feature and  **the Brethren**  hold the sanctity of the family unit as vitally important. The father in this case has been amongst  **the Brethren**  for almost all his life but having left his wife, children and  **the Brethren**  is currently "*withdrawn from*". However, adherence to the beliefs and acceptance to living within the community of  **the Brethren**  has ramifications for a child who has one parent who is not of  **the Brethren**  and who is "*withdrawn from*". The father in these proceedings is in that position.

16. When the mother returned to live with R G and her children she was pregnant with K who was born on 26 March 2000. It is common ground between the parties that the father has not yet had any contact to K.

17. Both the mother and R G feel it is their responsibility before God to care for and bring up K in their Christian family with their 3 children. The G family live in the K area. The community of  **the Brethren**  support R G and his wife in bringing up K in a Christian family among  **the Brethren** .

18. There is no issue in this case that the G household will provide a warm, loving and supportive family environment for K and that the larger community of  **the Brethren**  will also provide a supportive community.

19. It is also common ground that the care provided for K by her mother in the household of Mr G and her other children is a household in which K will be well cared for nurtured and loved.

20. During the separation between the mother and R G she commenced proceedings in the Family Court of Australia seeking orders for contact to her children A, C and A. An affidavit sworn by the mother on the 18 June 1999 in those proceedings was tendered by consent and sets out, inter alia, the basis upon which she proposed that she have contact with her children notwithstanding that she was at that time no longer a member of the community  **of Brethren** . Despite acknowledging "*the difficulties involved in the children being members of  **the Brethren**  while I am not*" she deposed to the positive advantages of the children having a continuing relationship with her, and the fact that many of their playmates at school come from blended families and that the children were not so "*cocooned from society that my relationship with J would shock them, particularly as we continue to live our lives with Christian principles*".

21. She also indicated in the same affidavit that "*after separating from R and leaving  **the Brethren**  I have seen my father for the first time since leaving  **the Brethren**  over twenty years ago. I am extremely reluctant for this to happen to my children as well and greatly regret the loss of my father's care during my childhood*".

22. These proceedings resulted in final orders being made by consent in relation to contact and residence whereby the children were to reside with Mr G and the mother was to have contact with them for periods which included overnight periods.

23. I was informed by counsel however, that despite the orders having been made there were difficulties with the contact between the mother and her children and the husband's counsel submitted that her return to the household of her husband the children was in no small part to resume her relationship with them.

24. The mother has for some time been treated for depression. An affidavit was filed on her behalf by her psychiatrist Dr P and the psychiatrist had also sworn an affidavit on her behalf in proceedings which occurred last year between the mother and R G. She was then diagnosed as having major depression in remission but appeared to have improved in her affect during the period of separation from her husband. Whilst it is suggested that her psychological state is affected by her life events, it is not suggested that the mother's psychological state in any way impairs her from caring adequately for K.

25. In an affidavit filed 26 May 2000 the mother raises concerns about the father's mental stability. The events described by her whilst if true, indicate that he was , do not of themselves indicate any psychiatric condition nor was any other evidence called to support that assertion. On behalf of Mr J an affidavit from Dr P who apparently also treated him, annexing a report dated 6 June 200, was filed and indicated that in late 1999 he presented with a depressive reaction due to significant emotional trauma. The psychiatrist indicated at that at no time had he demonstrated evidence of a major psychiatric illness of a recurrent nature and that he had been well for the past 5 months.

26. The emotional psychological state of each party is not on the evidence a factor in this decision.

Issues

27. Neither party wished to have the other cross examined and to that extent the evidence of each of the parties is uncontested. The court appointed expert V P, a Clinical Psychologist, had filed an affidavit annexing a report dated 20 July 2000 and Mr P gave evidence and was cross examined on behalf of each of the parties.

The fathers case

28. The father's case was in essence that the objects of [section 60B](#) of the [Family Law Act 1975](#) should be implemented and that K had the right to grow up knowing and having contact with both of her parents.

29. Shortly before the mother went back to live with R G the father signed a document indicating that he accepted that the baby (when born) would be cared for in their household and he relinquished any rights to the child. Obviously this document is not binding on this court which must consider the applications before it in accordance with relevant provisions of the [Family Law Act](#) , in particular, [section 60B](#) (2), [section 65E](#) and [section 68F](#)(2).

30. The father submitted that the proposals that he had put forward for contact with K were appropriate to her age and sensitively crafted to ensure minimal disruption to her routine and that of the mother and her family. It was further submitted for the father however that the mother's circumstances are by no means fixed and that there was a degree of ambivalence about her return to the community of  **the Brethren** , the suggestion being that her return was largely motivated by her desire to be reunited with her children rather than an overwhelming return to acceptance of the community life of  **the Brethren** . It was further argued that the community does accept contact between children and a parent who has withdrawn as exemplified by the orders between the mother and Mr G last year. It was further argued that Mrs G sees herself as unique and almost powerless in the present situation.

31. It was submitted that unlike the mother's situation during her separation where her children already had a well established belief system which she was contravening, in this case K was "*unpolluted*" to use the word that was used by the father's counsel, by an existing belief system, and that if she grew up knowing her father then her belief system would include him, even though he was person withdrawn from  **the Brethren** . The concern expressed by the father was that unless some measures were taken to ensure that the father commenced a relationship with K, there would come a point at which her socialisation within  **the Brethren**  and her mother's household would have reached such a stage that it might not then be in her best interest to commence a relationship with him.

The mother's case

32. The mother's case was essentially that the tenets and beliefs of the community of  **the Brethren**  are such that it is simply unacceptable for any meaningful relationship with a parent who has "*withdrawn*" and the imposition of such a relationship will create such unresolvable conflicts for K both in the closer context of her family, and in the wider context of the community in which they live, that it would not be in her best interests.

33. It was submitted in relation to both Mr J and his children and Mrs G and her children that the orders for contact given the nature of their religion simply had not worked. However, it was conceded that this case was different insofar as the children of both the mother and Mr J already had a belief system which that parent was violating whereas K at this stage does not.

34. It was submitted for the mother that K would be subjected to pressures no child should be subjected to and that any benefit to K knowing her father would be more than outweighed by the trauma and conflict which it would create for her. Despite Mr J's indications that he would support the precepts of the church so as to minimise the conflict for her, it was submitted that the court could not have any confidence that he would do so or that she wouldn't be put at risk. It was submitted further that to expect other members of the community to take other than negative views of a "*outed*" person is unrealistic and this would create a situation for K where she would be "*riding between two worlds*".

35. It was argued that Mr P had not for the purposes of his report interviewed Mr G or the other children of the household and that without a very thorough investigation of their attitudes it would be dangerous in the extreme to commence a contact regime leading to the establishment of a relationship between K and her father.

36. The issue is thus a stark one, and the question is simply whether the benefits of knowing and having contact with her father are outweighed by the trauma and conflict created for K by the development of that relationship so that it could not be said that the contact regime proposed by the father was in her best interests.

37. Although the question is able to be put simply, it belies the complexity of the lives of these parties and K.

Evidence of the court expert

38. V P prepared a report in this matter dated 20 July 2000. For the purpose of that report he interviewed Mr J and Mrs G. When considering the background to the matter Mr P indicated that his understanding from Mrs G was that her contact with the three children was becoming more difficult and even though she was seeing the children, when approached by members of  **the Brethren**  community she agreed to leave the decision about contact to the children and that their decision to refuse the contact was

a significant contributing factor to her subsequent decision to return.

39. He goes onto say *"the other extremely important issue for Mrs G is that having gone through the conflict associated with contact to her own father, who by virtue of his decision was a person "to be withdrawn from" that she was fully aware of the difficulties and did not want the same for her own children"*.

40. Mr P noted that this was a significant issue insofar as Mrs G has had significant problems with depression throughout her life including her adolescence, and acknowledged the lack of involvement of her father contributed to her problems.

41. He further noted the Mrs G believed that her situation was unique and that whilst in other circumstances contact by a child to a parent no longer in the community may be possible, there were enormous conflicts and difficulties given their unique circumstances.

42. He highlighted the issue with the relationship between K and Mrs G's other children and the fact that K would raised by her and Mr G and the sorts of psychological pressures upon K to do with forced contact with Mr J when she understood Mr G to be her father.

43. Mr P noted that had been an extremely difficult meeting for Mrs G who felt *"intensely responsible and continues to be burdened by these issues"*. In his view the intertwined complexity of the issues for her are immense but *"I however was left with the strong impression that she continues to experience much ambivalence about her decisions and the major motivating factor entailed a position of self sacrifice for the sake of her children and her relationship with them"*.

44. Mr P noted that the position in which Mrs G finds herself deserves considerable sympathy but no more than that of Mr J. He has had no contact with his daughter and is confronted with the possibility he will have no involvement whatsoever in her life.

45. Mr J understands that because he is a person from whom  **the Brethren**  have withdrawn there should be no contact by any member of that community with him.

46. Mr P further noted that the issues in the dispute become more complex and intertwined the more they are reflected upon:

*" **The Brethren**  have strong religious beliefs and views which exclude Mr J from contact not only to K, but other members of the community including his ex wife and three children.*

*At one level, he lived his entire life as part of  **the Brethren**  and abided by these same beliefs and it might be suggested that he was fully aware of the consequences of his actions and that now his wish for contact with K is an attempt to combat what he now believes to be a oppressive and highly restrictive*

way of life.

Whilst I have no doubt that in part Mr J's wish for contact with K reflects the expression of important issues to do with the re-evaluation of his life and beliefs, he is also very genuinely and understandably wanting a relationship with his daughter".

47. Mr P went on to note that Mrs G had suffered a long history of depression and that *"contributing significant to her illness is the lack of contact to her own father, issues of loss associated for her, and personal problems leading up to her decision to leave with Mr J"*. He noted that whilst Mrs G believed  **the Brethren**  provided a community of care unparalleled in so far as the welfare of children is concerned but insofar as her own experiences are concerned the same community did not contribute positively to her mental health. His clear impression that the lack of contact to her own father had been a significant contributing factor to her problems. He says (at page 6) *"On the hand she quite rightfully highlights the enormity of the conflicts and pressures placed upon the children of this dilemma and yet on the other it may be that her own difficulties reflect a clear example of the longer term and adverse affects of such exclusion"*.

48. Mr P gave evidence that it was very important for K to have a relationship with her father and that in principle the formation of a relationship with her father was very important although it would be attended by difficulties for her. He acknowledged that the problems of socialisation are that they create pressures and he acknowledged the mother's position was that K living in their household would create an immense conflict for K and for Mrs G if K were to have an ongoing relationship with her father. He acknowledged that it was inevitable that she would grow up with a belief system that was inconsistent to that of her father and too an extent it including having a relationship with him in which she had regular contact.

49. However, Mr P indicated that in his view this case was different from situations involving older children who had already been socialised and the fact that K was so young and hadn't had an opportunity to internalise her belief system warranted a different consideration (than for example a situation where the parties leave having established a set of rules and a lifestyle for their children).

50. He suggested however that in K's case should she have contact with Mr J it would be part of her normal experience that is, that even though it would be contrary to the beliefs of  **the Brethren**  it would be the normal experience for her, and that the significance of the emotional conflicts would be less relevant over the next five or more years than in the case of older children who had more fully internalised these beliefs and were then confronted with the conflict. It is much more likely to be an issue of the reluctance of the adults in her world and the attitude and message they give to her about the contact with Mr J which is likely to be the problem than the experience for her in being part of a community in which she had half siblings on both sides of her family and by Mrs G's own admission, is a child of unique standing. He acknowledged that conflicts would be inevitable and the circular and recursive nature of the argument is unresolvable but said *"the issues of conflict and dissidence would only become relevant when she had internalised a single set of beliefs. It may be that a contact*

arrangement affords to her the only opportunity to integrate these different beliefs".

The law

51. In considering this matter I must have regard to [sections 65E](#), and 68F(2) and the objects in [section 60B\(2\)](#) of the [Family Law Act 1975](#).

Conclusions

52. This is not a case in which the child's wishes are relevant as she is a child of 4 months of age. It is not suggested there is going to be any significant change in her circumstances or a separation from either parent other than for the purposes of contact. Nor, is it the case where there is any practical difficulty connected with the maintenance of personal relationships with both parents. Other than in the broadest sense, and because Mr J is no longer a member of  **the Brethren** , is it seriously argued that he is not a person who could provide for the needs of K.

53. Despite their different positions and, despite the fact that Mrs G is opposed to any contact her resolve in that issue arises from the fact that she is a member of the community of  **the Brethren**  and not from any irresponsibility in relation to issues of parenthood. Similarly, it has not in my view been established that Mr J is motivated by anything other than a genuine desire to have a relationship with his daughter.

54. The matters in section 68 F(2) which in my view have relevance in this case are:

- (b) The nature of the relationship with the child with each of the child's parents and other persons;
- (f) The capacity of each parent or any other person to provide for the needs of the child including emotional and intellectual needs;
- (g) The need to protect the child from an psychological harm;
- (k) Whether it would be preferable to make an order where it would be less likely to lead to the institution of further proceedings in relation to the child.

55. In relation to the latter there is nothing to suggest that the making or not making of an order in this case would directly lead to further proceedings.

56. The other sections that I have highlighted must all be considered in the context of the mother's life both in the context of her household with her husband and children and the broader community in which she lives.

57. I am satisfied from the evidence of Mr P that, it is in the interests of K to have such contact with her father as would enable her to form a relationship with him. The difficulty in this case however is that [section 60B\(2\)](#) is subject to a situation where it would be contrary to a child's best interests.
58. Given that the general principal is that it would be in K's interest to know and have contact with her father the question in this case is whether because of the other factors surrounding the household and wider community in which she lives, it would be contrary to her best interests for that to occur.
59. It is clear that there will be conflict for K as well as for the mother if an order for contact is made.
60. As far as the mother is concerned however there is no evidence to suggest that contact would render her unable to provide ongoing care for K or that the contact between K and her father would have a deleterious affect on the relationship between the mother and her husband and children. There was ample opportunity for Mr G to an affidavit indicating his position yet he has not done so. An affidavit filed 26 May 2000 the mother says *"in light of our Christian beliefs introducing J J into K's life is going to be very difficult particularly for her two sisters and brother and if not handled very carefully could cause difficulty to K within the family"*.
61. In an affidavit filed 16 June she says *"I am very concerned about how the children will deal with the knowledge of J J's paternity of K. I recognise that K and her siblings need to know about K's paternity, but I believe that knowledge needs to be introduced gradually over a long period of time with a lot of community and family support"*.
62. There is no evidence to suggest that the difficulties, although real for the adults and the other children, will be as difficult for K especially if she is given support in the contact with her father. In that regard I am given some comfort by the mature attitude of the relevant adults in this case. Despite his membership of  **the Brethren** , Mr G reached agreement with his wife about contact arrangements with their children when she was *"withdraw"* from  **the Brethren** .
63. Mrs G herself understands because of the problems she had with lack of contact to her own father, the serious issues that could arise for K in the future if she is denied contact with her biological father. Furthermore, when faced with an unhappy relationship Mrs G was prepared to leave the community of  **the Brethren**  albeit that the loss of her children appears to have been reasonably decisive in her reason to return.
64. Dr Neal who is Mrs G's personal medical practitioner and known her for all of her life swore an affidavit on her behalf which was filed on 26 May 2000 and in which he said *"I believe E is committed to the community but is not overborne or influenced by members of the community"*.
65. In my view the evidence indicates that both Mr and Mrs G are people who despite their beliefs are capable of handling the situation carefully so as to minimise the difficulty for K within the relationship.

66. As far as K herself is concerned she is at this stage unsullied by a belief system which would presently cause her difficulty. She has the opportunity as Mr P indicated, to absorb her differences which include the relationship with her father as part of her normal experience even though it is contrary to the belief of the community in which she is residing. This presents her with the opportunity to integrate those different beliefs and to lessen the significance of the emotional conflict which might confront older children with more fully internalised beliefs system. In his evidence, Mr P commented that *"it is much more likely to be a reluctance of the adults in her world and the attitude and message they give to her about the contact with Mr J which is likely to be the problem"*. However, as far as her immediate family is concerned I am satisfied that having regard to way the adults have conducted themselves thus far in the proceedings that they would do their best to minimise conflict for K which is at this stage more speculative than real.

67. As Mr P said in his evidence it is impossible to *"crystal ball gaze"* and is of no greater assistance in determining what orders should be made for K now, to consider whether at some future time the conflict might be greater, than it is to consider the long term effects of the absence of a relationship with a biological parent.

68. In my view all of the matters in this case, [section 60B\(2\)](#), section 65 and [section 68F\(2\)](#) I am satisfied that it would be in the interests of K to form a relationship with her father and to this end to have contact with him which would enable that relationship to develop.

Orders

69. The proposals made by the father for contact with K appear to me to be sensible and appropriate arrangements. However, I am conscious of the fact that when asked to comment on what contact regime she would submit should occur, should contact be ordered, Mrs G was unable to give instructions other than make the proposals referred to earlier which do not address the formation of a close relationship.

70. Accordingly before I make orders I am prepared to hear further argument on the precise form of the orders including the venue for contact.

I certify that the preceding seventy-two (72) paragraphs are a true copy of the reasons for judgment of Bryant CFM

Associate:

Date: