When a 'father' turns out not to be, does the Act give priority to the (biological) mother? *Mulvany v Lane*

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***Mulvany v Lane* (2009) 41 Fam LR 418; (2009) FLC 93-404; [2009] FamCAFC 76; BC200950209 (Finn, May and Thackray JJ, 14 November 2009).**

Introduction

Mulvany v Lane is a case about a 5 year old boy, 'S', born during the parties' marriage. It was a relocation case: a Federal Magistrate had permitted the mother to take the child (then 5) to live with her in Hong Kong, and her husband appealed. In the result the Full Court found that the Federal Magistrate had made errors of law and allowed the appeal, ordering a re-hearing. The leading judgment is by May and Thackray JJ, Finn J expressing general agreement and adding some comments of her own.

The legal interest in the case arises from the fact that a few months before the hearing it emerged, for the first time, that the husband was not the biological father of the child S. He had 'conducted himself at all times as would a responsible and loving parent', and continued to do so after he learned that he was not the biological father. At the time of the hearing S continued to believe the husband was the father.[1]

What difference did it make that the husband was not the biological father?

If the Act had just said that the child's best interests must be the paramount consideration, the answer would have been clear enough. The fact that the husband was a father in all but biology would have been taken into account, and its importance would have been a matter for evidence. In the circumstances of the case, it would have been of relatively minor importance: the biological father being out of the picture, the husband would continue to occupy the place of a father in the child's life. Attention would have needed to be given to when and how the child was to be told, and to any implications for the longer term (health matters, whether either the child or the biological father would want to contact the other, etc). But in relation to sorting out the immediate relocation case, it would have been, I think, of minimal importance.

But when we turn to the Act, as we must, we find the elaborate guidelines bristling with the word 'parent'. Was the husband a 'parent'?

The Federal Magistrate said he was not a 'parent' within the meaning of the relevant provisions, and that ruling was not challenged: and, indeed, it appears

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1 The biological father was unaware of the child's existence and was 'not contactable': (2009) 41 Fam LR 418; (2009) FLC 93-404; [2009] FamCAFC 76; BC200950209 at [38].

to be correct.[2] The question was, therefore, how to interpret the guidelines in s 60CC in a case between a mother and a non-parent, albeit a non-parent who had embraced and would continue to embrace the role of a father.

The approach of the Federal Magistrate

Under s 60CC(2)(a) the first of the two 'primary' considerations is 'the benefit to the child of having a meaningful relationship with both of the child's parents'. At the trial, the mother had submitted that the legislature intended to distinguish between parents and non-parents. The Federal Magistrate accepted this, saying that 'the only "relevant" primary consideration is the benefit to the child of having a meaningful relationship with the mother'.[3] His Honour then posed this question, using it as a heading for the subsequent discussion: '*What outcome will best ensure that [the child] has a meaningful relationship with his mother?*'

The essence of the husband's appeal was that although the Federal Magistrate correctly held that the 'primary consideration' related only to the mother, he had then treated a meaningful relationship between the child and the mother effectively as 'a consideration which trumped or prevailed over all other additional considerations including the child's relationship with the Appellant Father'.[4]

In the Full Court, May and Thackray JJ agreed, holding that the Federal Magistrate had indeed done this, and it was an appellable error. The main difficulty was that he had not explained why this factor apparently prevailed over others. Their Honours said:

> it appears his Honour treated the one relevant 'primary consideration' to be the decisive factor. He did not expressly indicate whether that factor was determinative because it was a 'primary consideration' or because it was the factor of most significance. If it was the latter, we consider his Honour erred in failing to provide adequate reasons, as his judgment does not explain how he weighed that one relevant primary consideration against the additional considerations.
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> If it was the former, then his Honour erred in law. . .[5]

After reviewing the trial judgment, their Honours said:

> We are left with the impression that his Honour's discussion of the 'additional considerations' was undertaken as a benchmark against which to assess the decision already made that S should live in Hong Kong. We therefore accept that the maintenance of a meaningful relationship between mother and child did, in fact, 'trump' all of the other considerations. In some cases, this would be entirely appropriate. However, in the present matter we consider it was necessary for his

2 His Honour cited Anthony Dickey's text, *Family Law* 5th ed, *p*55), to the effect that the term 'parent' refers to a biological parent or an adoptive parent but 'does not include a person who simply stands in loco parentis to a child, even if he or she has acquired parental responsibilities for the child under the Family Law Act': see ibid, at [32].

3 See ibid, at [36].

4 See ibid, at [60].

5 Ibid, at [83]–[84]. See also at [85], putting it another way, that the Federal Magistrate had treated the maintenance of a meaningful relationship as determinative, 'not because it was the most significant factor but because it was the *primary* consideration'.

> Honour to have explained why this factor was of greater importance than the other considerations he was required to take into account.[6]
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> In placing what we regard as undue emphasis on the maintenance of the relationship between S and his mother, the learned Federal Magistrate appears to have overlooked the benefit to S of maintaining a 'meaningful relationship' with the father.

The wrong question

One source of what the Full Court said was the Federal Magistrate's faulty analysis seems to have been the much-discussed question that his Honour posed, namely, '*What outcome will best ensure that [the child] has a meaningful relationship with his mother?*'

This question, and his Honour's discussion of it, seems to have contributed to the priority he gave to the child's relationship with the mother over her relationship with her husband (the man who assumed he was the father, and had been treated as the father by the child and everyone else, but who turned out not to be the biological father). As we have seen, the Full Court saw this as an error.

But there is a separate problem with the question: it omits reference to the key word 'benefit'. As the Full Court pointed out:

> The question that truly arises from s 60CC(2)(a) is not 'What outcome will best ensure that S has a meaningful relationship with his mother', but rather, 'What is the *benefit to the child* of having a meaningful relationship with his mother?'[7]

Attaching weight to the primary and additional considerations

In the leading judgment, May and Thackray JJ made the following observations about interpreting s 60CC:

> 76. It is important to recognise that the miscellany of 'considerations' contained in ss 60CC(2) and (3) is no more than a means to an end. Self evidently, they are only matters to be *considered*. Of course, we accept they are of great importance, being the factors identified by Parliament as those the Court must take into account (when they are relevant). However, they must be applied in a manner consistent with the overarching imperative of securing the outcome most likely to promote the child's best interests.
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> 77. It needs also to be remembered that the importance of each s 60CC factor will vary from case to case. Whilst the list of considerations is lengthy, no list could ever encompass all the matters that experience demonstrates could be of relevance. This is no doubt why Parliament has included the catchall consideration in s 60CC(3)(m), namely 'any other fact or circumstance that the court thinks is relevant'. By this device, judicial officers may consider any matter which (within the reasonable range of discretion) could touch on the child's best interests. [. . .]

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6 Ibid, at [105]–[106].

7 Their Honours added, 'See in this regard the most useful discussion by Bennett J in *G and C and Independent Children's Lawyer* [2006] FamCA 994'. If modesty did not forbid it, I would also refer to 'The meaning of "meaningful": Exploring a key term in the Family Law Act amendments of 2006' (2008) 22(3) *AJFL* 175–96.

> 79. If the father had adopted S, his Honour would have been obliged to consider the benefit to S of having a meaningful relationship with him. If the father had been the biological father, but never lived with S, his Honour would still have been obliged to consider the benefit to S of having a meaningful relationship with him. Why should a different approach be taken because it was discovered that the boy was the product of an extramarital liaison?
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> 82. [Discussion about the status of the husband] is ultimately unhelpful. It diverts attention away from the central enquiry, which is to determine the outcome that will be best for the child. Instead, it focuses attention on semantic issues about whether relevant matters should be discussed by reference to one s 60CC factor instead of another. In our view, provided his Honour gave due weight to all relevant factors, it would matter not whether he considered the child's very important relationship with the father by reference to s 60CC(2)(a) or by reference to one of the additional considerations.[8]

Their Honours went on to quote from *Marsden & Winch* (2007).[9]

This is a passage of great importance for the interpretation of s 60CC generally. Especially in para 82, their Honours appear to be saying that the weight to be attached to particular factors depends on the facts, not upon whether or not they fall within the category of 'primary' considerations. Finn J expressed her 'general agreement' with their reasoning.

This is an attractive view, because it means that the court can apply the 'paramount consideration' principle in a straightforward way. And though some might argue that it gives insufficient meaning to the word 'primary', it now seems to be authoritative, given that it is a clear principle articulated by at least two and probably three members of the Full Court in *Mulvany*.[10]

Interpreting the first 'primary' consideration in parent vs non-parent cases

What does *Mulvany* tell us about applying the provisions of s 60CC in cases between a parent and a non-parent?

The Federal Magistrate had held that under s 60CC(2) 'the only "relevant" primary consideration is the benefit to the child of having a meaningful relationship with the mother'. This was accepted as correct by the appellant husband, and so was not argued in the appeal. But is it correct?

One part of the ruling was that the husband, not being the biological father or an adoptive father, was not a 'parent': so whatever the paragraph means, it did not apply to him. This point was conceded in the appeal, and accepted by May and Thackray JJ,[11] although Finn J was a little cautious about it.[12] But let's assume for present purposes that it is correct.

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8 Above n 1, at [76]–[82].

9 *Marsden v Winch (No 3)* [2007] FamCA 1364; BC200750076.

10 It is a nice point whether the court in *Mulvany* had intended to go further than the Full Court had done in *Marsden v Winch*. Note, in the passage cited by the Full Court, the words '[the trial judge] was of course obliged to place particular emphasis on the "primary considerations". This is not only because the legislature has identified them as "primary" but also because they are manifestly of the utmost importance in determining what outcome will best advance a child's best interests'.

11 Above n 1, at [75].

12 See ibid, at [16] per Finn J.

Once the husband is excluded, it's natural enough to assume that the 'primary' consideration is, therefore, the benefit to the child of a relationship with the mother. This is what the Federal Magistrate held, and what the appellant accepted was correct.[13]

The accuracy of this ruling was not really addressed by May and Thackray JJ (and they were not obliged to deal with it, because it was not an appeal point). Instead of saying whether they thought it was right or not, their Honours merely remarked, as we have seen, that such discussion is 'ultimately unhelpful'.[14] This phrasing again illustrates the important point they made about the significance, or non-significance, of 'primary': arguing about whether the primary consideration applies is 'unhelpful' presumably because the weight to be attached to factors depends on their importance in the circumstances, not whether they happen to fall within the 'primary' considerations in subs (2) or the 'additional' considerations in subs (3).

By contrast, Finn J did deal with the issue, saying that the Federal Magistrate had been wrong in applying the paragraph to the child's relationship with the mother. The relevant passage is this:

> In my opinion, it was not open to his Honour to interpret s 60CC(2)(a) in the way in which he did, that is, in effect to hold that where a child only has one parent participating in the parenting proceedings, it will be a primary consideration in determining the child's best interests, that the child have a meaningful relationship with that parent. The legislation does not say this. Indeed it could well be asked why, if his Honour was prepared to place an interpretation on s 60CC(2)(a) other than an interpretation clear on its plain words, did he not interpret the expression 'parents' to include the father in this case?[15]

Finn J does not say why the Federal Magistrate's interpretation was contrary to the 'plain words' of para (a), but I think there are two possibilities.

The first possibility relates to the omission of any reference to *benefit* in the proposition attributed to the Federal Magistrate. That omission is clearly wrong, because s 60CC(2) refers to the 'benefit' of the relationship being the primary consideration. This criticism, however, cannot be made of the words of the Federal Magistrate's ruling, because as we have seen, he actually said '*the only "relevant" primary consideration is the benefit to the child of having a meaningful relationship with the mother*'. However when Finn J summarised what his Honour had 'in effect' held, she may have had in mind the form of the key question[16] and other parts of the judgment. That is, Finn J may have meant that, read as a whole, the judgment had indeed made the mistake of treating the relationship, rather than its benefit, as the primary consideration.

The second possibility is that her Honour may have read the paragraph as applying only in cases involving both parents. Let's look at it:

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13 Ibid, at [60], quoting the appellant's submission: 'the learned Federal Magistrate identifies that the only relevant primary consideration is the benefit to the child of having a meaningful relationship with the Respondent Mother. The Appellant does not cavil with that proposition'.

14 Ibid, at [82], quoted above.

15 Ibid, at [12].

16 Ie, '*What outcome will best ensure that [the child] has a meaningful relationship with his mother?*'.

> 60CC(2) The primary considerations are:
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> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; . . .

The 'primary consideration' in para (a) refers to the child's relationship with 'both' parents, not with *either* of them. It follows, arguably, that where there is only one parent available, the paragraph simply does not apply.

This interpretation makes sense of the word 'both' in the paragraph, in contrast, say, to the reference to 'each of the child's parents' in para (b) of the 'additional considerations'. And it is consistent with the history of the legislation, which suggests that it was much concerned with children's relationships with both parents. As May and Thackray JJ point out, parliament probably didn't have in mind cases involving parents and non-parents.

It is possible that Finn J interpreted the paragraph in this way, leading to the conclusion that it did not apply, and the Federal Magistrate was wrong to say that it did. On the other hand, it might be thought that if her Honour had meant to express that view, she would have articulated it more fully. Another reason for thinking that her Honour may not have meant this is that the point had not been raised in the appeal.

In my view, whether or not it is what Finn J had in mind, this interpretation has a lot of merit. It seems a pity that this point was not raised in the appeal and canvassed in the other judgments, because it is very important. If it is correct to say that the paragraph only applied to the child's relationship with *both* parents, we get rid of the absurdity of saying that some sort of special importance must be given to the benefit of the child's relationship with one, but not the other, of the two adults who had acted as loving parents for the whole of the child's life. Affirming this interpretation would have been an elegant and entirely satisfactory way of disposing of the appeal.

But what about the significance of the word 'parent' in the 'additional considerations' of subs (3)?

Interpreting the 'additional considerations' in s 60CC(3) in parent vs non-parent cases

In the Full Court, Finn J criticised the Federal Magistrate for treating the husband as a 'parent' for the purposes of various paragraphs of s 60CC(3) — the 'additional considerations' — while not treating him as a parent for the purpose of the 'primary consideration' in s 60CC(2), saying that this unexplained and apparently inconsistent approach was 'a significant flaw in his Honour's reasoning'.

May and Thackray JJ made the same criticism, though they put it a little differently:

> In our view, his Honour was quite right to consider and make findings in relation to all of the relevant 'additional considerations' in s 60CC(3), even though he acknowledged some had no application to the father because they relate only to a 'parent'. However, for the sake of consistency it seems to us his Honour should have

> adopted the same approach when discussing s 60CC(2)(a). What occurred instead is that the father was treated as a 'parent' for some purposes but not others.[17]

The second sentence is a little surprising. The Federal Magistrate had held, and May and Thackray JJ accepted, that the father was not a 'parent'. It seems to follow inexorably that s 60CC(2)(a), which only refers to 'parents', cannot include him. It would have been plainly wrong for the Federal Magistrate to have held that the husband was a 'parent' within the meaning of the paragraph.

What their Honours seem to be suggesting is that the Federal Magistrate might have interpreted the word 'parent' wherever it occurs in s 60CC as meaning not only a parent but a person who has acted as a parent. With respect, that would be a difficult argument to make. The provisions of Pt VII distinguish at various points between parents, grandparents, persons with whom a child has been living,[18] and 'person concerned with the care, welfare or development of the child,'[19] and the Act goes to the trouble of saying that a parent includes an adoptive parent.[20] This is difficult to explain if 'parent' has a wide and flexible meaning capable of including the husband in the circumstances of *Mulvany*.

In my view it is reasonably clear that while the primary consideration in para (a) is indeed limited to people that fall within the legal definition of 'parents', various of the additional considerations allow the court to take into account other significant people.

It was therefore perhaps a little hard on the Federal Magistrate to criticise him for inconsistently holding that the word 'parent' included the husband in subs (3) but not in subs (2). It is clear from the appeal judgments that his Honour was aware that the husband was not strictly a 'parent' but nevertheless saw that the various 'additional considerations' effectively applied to him much as if he had been a parent. In this he was surely right. What he failed to do, perhaps, was to go through the provisions rigorously and painstakingly, specifying in each case precisely how they applied. While there were indeed good grounds for upholding the appeal, in my view, with respect, this particular criticism bordered on the pernickety.

So let's see how it should have been done. Among the 'additional considerations' in s 60CC(3), there are references to parents and to other people. Ideally, in parent vs non-parent cases the court needs to go through each paragraph explaining exactly how it applies; and *Mulvany* suggests that failing to do it with precision may involve appellate error.

Here are some examples, showing how the exercise would work on the facts of *Mulvany*:

> (b) the nature of the relationship of the child with:
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> (i) each of the child's parents; and
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> (ii) other persons (including any grandparent or other relative of the child);

The obvious meaning of the words is that the child's relationship with the

17 Above n 1, at [78].
18 Subparagraph 60CC(3)(d)(ii).
19 Section 65C.
20 Section 4.

mother falls under para (b)(i) and the child's relationship with the husband falls under (ii). No problem.

> (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;

Does this paragraph apply? I think not, although again the point was not considered by the Full Court. Since the husband is not a parent, *his* willingness and ability to facilitate does not fall under it. And, again because he is not a parent, the mother's willingness etc to facilitate a relationship *between the child and the husband* also falls outside the paragraph. Nevertheless, on the facts, of course both parties should facilitate the child's relationship with the other, and again, this can readily be taken into account under para (m), 'any other fact or circumstance that the court thinks is relevant'.

> (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

This paragraph may well apply to the mother ('*each* of the child's parents'), but does not apply to the husband. Again, the husband's attitudes to the child and to his responsibilities as having the role of parent are relevant under para (m), and on the facts here are obviously as important as those matters relating to the mother under para (i).

> (g) the maturity, sex, lifestyle and background . . . of the child and of either of the child's parents, and any other characteristics of the child . . .

As with para (c), this paragraph probably applies to the mother, and the characteristics of the non-parent can be included, and given equal importance, under para (m).

This sort of analysis, though tedious, would work with all the other references to 'parent' or 'parents' in the additional considerations. In each case, having shown that the relevant matter falls within the legislation, the court should explain, by reference to the facts, how important it was in reaching the end result. In the result, all relevant matters could be covered, and given the importance they deserved on the facts.

Finn J's criticism of the legislation

Finn J said:

> It is indeed unfortunate that given the now very detailed provisions of Pt VII and the acknowledgement in that Part of the important roles that persons who are not natural parents of a child can have in a child's life (see, for example, s 60B(2)(b)), that the legislation does not give some clearer indication of the weight to be attached to the child's relationship with a person other than his or her parent, compared with the child's relationship with the natural parent in the determination of proceedings between a parent and a person other than a parent.
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> As the legislation currently stands, and assuming that it is correct that 'parent' means only a natural or adoptive parent, it would seem that in a case such as this, the court can only reach its determination in parenting proceedings on an application of s

60CC(2)(b) (protection from harm) and of the additional matters in s 60CC(3) so far as they expressly or impliedly refer to a person other than a parent.[21]

While the detailed provisions of Pt VII are certainly problematical, it is curious that Finn J does not discuss the extent to which the reasoning of May and Thackray JJ (with which her Honour expressed general agreement) addresses these difficulties. Their Honours held, if I have correctly understood them, that the weight to be attached to various matters does not depend on whether they are 'primary' or 'additional', but on their importance in the circumstances of each case. If that is correct, it would seem possible for court at first instance to attach appropriate weight to each relevant fact, even if it is a tedious business sorting out how the word 'parent' applies to each provision, and what matters need to be included in the catch-all para (m). On this interpretation, the legislature has not in fact indicated what weight is to be attached to *any* factor, and, arguably, there would be questionable benefit if it attempted to do so.

Conclusions

This is an important decision, for a number of reasons:

1. The Full Court has given a clear indication that judicial officers should assess and explain the relative weight given to various considerations, having regard to their importance in the circumstances of the case. It is wrong to assume that 'primary considerations' will outweigh additional considerations. Indeed, the reasoning strongly suggests — perhaps controversially — that the weight or significance to be given to a factor is unaffected by whether it falls within the category of 'primary' or 'additional'. Perhaps it remains to be seen whether the Full Court really meant to go as far as that.
2. Finn J may have intended to express the view, obiter, that the primary consideration in s 60CC(2)(a) has application only in cases involving both parents; but whether her Honour did or not, it is submitted that that is a persuasive interpretation.
3. Trial judges need to be precise and painstaking in applying the words of the various paragraphs of the 'additional considerations' to the facts of each case.

In this case, essentially due to differences of interpretation, there had to be a rehearing: causing, no doubt, additional stress and costs for the parties, and disadvantage to the child. What went wrong, and how can we help prevent it from happening again?

The above discussion shows, not for the first time, the costs of the remarkable tangle of words that now constitutes Pt VII. While taken in isolation the various phrases and sentiments seem sensible enough, they are combined in a way that brings to mind the line from *A Midsummer-Night's Dream*: 'a tangled chain; nothing impaired, but all disordered'.[22]

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21 Above n 1, at [15]–[16].
22 Act 5, sc 1.

These days especially, Judges and Federal Magistrates dealing with family law face crowded lists, and frequently cases in which the parties are unrepresented or poorly represented. Almost all of the ordinary cases have settled, whether through the assistance of lawyers or community-based dispute resolution practitioners, or because one party has given up, and the cases coming to court tend to be difficult and hard-fought. Judicial officers at first instance must feel like motorists with a deadline, on slippery and dangerous roads. Given the inherent difficulty of their work, they should not have to waste time trying to sort out a tangle of legal provisions as well as sorting out the unavoidable difficulties of the cases.

But they do, because over the years, especially in 2006, the Act has been amended by piling on new amendments that lead to increasing complexity and confusion. It is a tragedy for everyone involved that intelligent people, doing their best in the pressures of a busy court list, come to grief in the treacherous waters of Pt VII. If experienced lawyers can get it wrong like this, imagine what it is like for ordinary litigants! What do their lawyers tell them? What do they understand? How many settled cases, or abandoned cases, reflect misunderstandings about what the law is?

We don't know the answer for sure, but it seems clear that there is considerable misunderstanding. Some of it is about the politically sensitive areas of equal parental responsibility and equal time with children,[23] but this case illustrates that confusion can also arise in situations that should be straightforward — situations where the difficult has nothing to do with difficult debates about parental equality and children's interests, but a lot to do with the legislature's failure to make itself clear.

The Act, particularly in Pt VII, is now in a state that cries out for a technical revision to simplify and clarify it.[24] *Mulvany v Lane* is just another indicator of the urgency and importance of this project.

23 Some insights into this can be seen in Australian Institute of Family Studies, *Evaluation of the 2006 family law reforms*, 2009, available on the website of the Attorney-General's Department.

24 *Family Courts Violence Review*, 27 November 2009, available on the website of the Attorney-General's Department.