

JURISDICTION : FAMILY COURT OF WESTERN AUSTRALIA
ACT : FAMILY COURT ACT 1997
LOCATION : PERTH
CITATION : WESTERN AUSTRALIAN NEWSPAPERS LTD AND
CHANNEL 7 PERTH PTY LTD and CUZENS [2016] FCWA 6
CORAM : THACKRAY CJ
HEARD : 4 FEBRUARY 2016
DELIVERED : 4 FEBRUARY 2016
FILE NO/S : PTW 3834 of 2001
BETWEEN : WESTERN AUSTRALIAN NEWSPAPERS LTD AND
CHANNEL 7 PERTH PTY LTD
Applicant

AND

HARLEY STEWART FRANKLYN CUZENS
Respondent

Catchwords:

Order for publication of proceedings

Legislation:

Family Court Act 1997 (WA) s 243(1)

Category: Reportable

Representation:

Counsel:

Applicant : Mr McCarthy
Respondent : Mr Bannerman

Solicitors:

Applicant : Seven West Media
Respondent : Bannerman Solicitors

Case(s) referred to in judgment(s):

S v R [2013] FCWA 52

1 West Australian Newspapers and Channel 7 Perth have applied today for
permission to publish information concerning proceedings between Harley Cuzens and
Heather Glendinning in relation to their three children, Grace, Jane and Jessica.

2 Mr Cuzens commenced proceedings in the Family Court in March 2007 seeking
that the children live with him. Up until that time, the children had been living with
their mother under the terms of an order made in 2002. This order had been made
with the consent of both parents. The order allowed Mr Cuzens to spend unsupervised
time with the children.

3 Ms Glendinning defended the proceedings, claiming that Mr Cuzens had
sexually abused the girls and that she had been a victim of domestic violence. The
issues were serious. The court therefore ordered the appointment of an Independent
Children's Lawyer to represent the interests of Grace, Jane and Jessica. The lawyer
who was appointed was one of the most experienced Independent Children's Lawyers
in Western Australia. The court also appointed an independent expert to investigate
the allegations and to provide expert evidence.

4 After the investigation was completed, the matter proceeded to a trial which
commenced in September 2007. The issues were so complex that the trial lasted
nearly two weeks. At the end of the trial, the judge found that the allegations against
the father were unsubstantiated, except for the fact that there had been some violence
for which both parties were responsible. The judge said that while "the father was not
perhaps the angel he maintains", she did not accept that he was a violent person or had
sexually abused the girls.

5 The mother was living in Dongara at the time. The judge ordered that while she
remained living in Dongara, the children must live with the father. This order was
made even though the girls had told the court expert that they would prefer to live with
their mother "because they believe she is kind, cares for them and does not get cross".

6 The judge's order allowed the children to visit their mother each third weekend
and for part of the holidays. These were the arrangements proposed by Mr Cuzens and
by the Independent Children's Lawyer. Mr Cuzens agreed that the girls had a very
close relationship with their mother and should see her regularly.

7 The judge wanted a psychiatric assessment of both parents. Therefore, before
making her orders final, the judge adjourned the case to allow the Independent
Children's Lawyer to enquire about how this could be achieved. When the matter
came back to court, the judge was told that for "financial and practical reasons"
a psychiatric report could not be prepared. It was agreed by all parties that there was
no alternative than to have orders made without the benefit of a psychiatric report.

8 The judge also made final orders restraining Ms Glendinning from:

- taking the children to any counsellor or professional for the purposes of
domestic violence counselling or sexual abuse counselling without an order of
the court or the consent of the Independent children's lawyer;
- questioning the children to obtain any disclosures about sexual abuse;

- denigrating the father or his parents to the children; or
- discussing the proceedings with the children or in their presence.

9 In September 2009, the mother recommenced the proceedings, asking that the children be returned to live with her. By that stage the father had moved to Broome, and was relying on a housekeeper to look after the girls. His arrangements were very different to those he had proposed when the judge made her decision.

10 The children met with the Independent Children’s Lawyer in December 2009 and told her that they were unhappy living with their father. They said they were being left unsupervised because of their father’s work commitments. The judge nevertheless ordered that the children remain with the father.

11 In March 2010, the mother again raised allegations of sexual abuse. The judge appointed an expert psychologist to carry out an investigation about this and a number of other issues. The psychologist interviewed the children individually in April 2010 and he quickly provided a preliminary report.

12 The children told the psychologist they wanted to live with their mother and spend half of the holidays with their father. Their reasons for this were because “they perceived the father to be struggling to care for them”. They described periods of absence by the father and they also expressed concern about his anger.

13 The psychologist said that the children had described their mother as being:

very nice, happy, someone whom they can talk to and as being highly emotionally available to them. A positive aspect for the mother was that they deemed her to be very understanding of their schoolwork and very positive about it, something which they felt their father struggled with.

14 The psychologist said:

There is no indication of any fear, concern or indication of abuse by any of the family members. ... I am not in a position to make any recommendations in this regard to where the children live and whom they spend time with at this time. All I can tell you is that the children clearly preferred to remain living with their mother for the reasons outlined above but remained extremely positive and keen about visiting their father, whom they believe can be a great deal of fun on holidays.

15 After receiving this report, the judge decided that the children did not have to go back to their father at the end of the May 2010 holidays. However, the arrangement was temporary only, pending the delivery of the expert’s final report. The children therefore continued living with the mother and spending time with the father during school holidays.

16 There was then a very long delay. This was beyond the control of the court. The court did not hear from either party or from the Independent Children’s Lawyer or from the expert until December 2010, when the court was asked to relist the matter to hear an argument about where Grace should go to school.

17 The dispute about Grace's schooling came to court in January 2011. The judge agreed with the father's position that Grace should live with the paternal grandparents in Perth and attend a school selected by the father.

18 The mother then appealed to the Supreme Court. Once again, the Family Court heard nothing of substance from either of the parents and neither of them filed affidavits that they were ordered to file in readiness for a hearing before the Family Court judge. It appears that their efforts at that time were directed towards the appeal in the Supreme Court.

19 The Family Court finally received the expert's report in May 2011. The expert said there had been a very long delay in preparation of the report because Mr Cuzens had refused to properly participate in the investigation. He had only been able to interview Mr Cuzens in January 2011. Regrettably, the expert then fell seriously ill and was off work for four months.

20 The expert's report needs to be read in full to understand the basis of his recommendation. In summary, however, he said that "given the stress of single parenting placed on the father and the lack of readily available consistent support for the care of the daughters by the father in Broome, the two younger girls should remain living with their mother in Dongara". He also recommended that Grace remain with her grandparents and that she be allowed to determine any change in her arrangements.

21 Mr Cuzens did not seek to challenge the report and he did not ask to bring the matter back to court. The Independent Children's Lawyer also did not seek to relist the matter. The court was therefore entitled to assume that all parties were content with the arrangement.

22 This was how the matter stood at the time Jane and Jessica were murdered in early December 2011. The Family Court has had no involvement since January 2011 other than a request received from the Independent Children's Lawyer just prior to the murder asking for the matter to be relisted "for directions" to obtain an order for an updated expert report. By that time, the judge who had dealt with the matter was terminally ill. The case was assigned to another judge who, on 29 November 2011, asked the Independent Children's Lawyer to advise if there was any urgency in the request as he had limited availability. Unfortunately, he did not hear back from the Independent Children's Lawyer before the girls were murdered on 5 December 2011.

23 The circumstances in which Jane and Jessica were murdered are currently the subject of an inquest in Geraldton. Yesterday, the Coroner released to the public a letter written by Grace, the older sister of Jane and Jessica, about what she has been told by her parents about what happened in the Family Court proceedings. The letter is a heartfelt statement of the terrible experience that Grace has endured over many years. Its maturity and eloquence are extraordinary for a person of her young age.

24 West Australian Newspapers and Channel 7 Perth wanted to publish the letter today, together with an account of the proceedings before the Coroner. However, they were correctly advised by their lawyer that to do so without the permission of the Court would breach the law. One other media outlet has already published the letter in

full, notwithstanding the clear requirements of s 243(1) of the *Family Court Act 1997* (WA) which provides:

- (1) A person must not publish in a newspaper or periodical publication or by radio broadcast, television or other electronic means, or otherwise disseminate to the public or to a section of the public by any means, **any** account of proceedings, or **of any part** of any proceedings, under this Act that identifies –
 - (a) a party to the proceedings;
 - (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
 - (c) a witness in the proceedings.

25 The prohibition against publication of proceedings in the Family Court is not absolute, because s 243(8) provides that s 243(1) does not apply to or in relation to

- (d) the publishing of a notice or report in pursuance of the direction of a court; or

...

- (g) the publication of accounts of proceedings, where those accounts have been approved by a court.

26 Section 243 of the *Family Court Act 1997* (WA) is an exception to the principle of open justice. It is a restriction imposed by Parliament and not by the Family Court. The underlying policy is to ensure that people do not feel discouraged from coming to the court for fear of having their private life made public. The law is also designed to ensure that children are not held up to ridicule or curiosity or notoriety. The law has been clearly explained by Duncanson J in *S v R* [2013] FCWA 52.

27 As the Chief Judge of the court, I would much prefer that the public be given full information concerning what actually happens in the Family Court day-in, day-out. This would help to dispel the many myths and misunderstandings about the work of the court. It would also expose the blatant lies of a small number of litigants who use social media and other means to give their side of their experience in the court and to blacken the name of their ex-partner.

28 In order to give a more accurate representation of its work, the Family Court publishes on its website anonymized versions of many of the more significant judgements. The court also has an open-door policy which permits journalists to read the judgments and to publish details of proceedings provided that the identity of the family is not revealed. This is a valuable resource, and the website is visited by tens of thousands of readers every year.

29 The information available on the website cannot capture the full extent or complexity of the court's work. The court deals with thousands of cases every year.

Increasingly, the court's core work involves parents who are drug addicted, violent, neglectful and who engage in a variety of criminal behaviour. Many of the court's clients are suffering from some form of mental illness. About sixty per cent of parents who attend Case Assessment Conferences have three or more serious risk factors.

30 Like every other member of the community, the judges and magistrates and court staff are devastated when they hear of the death of a child at the hands of a parent. In fact, the devastation felt by the court staff is, if anything, greater than that felt by many others in the community because of the enormous effort that has been made to try to make the child safe.

31 I know firsthand something of the experience of Mr Cuzens at the loss of his two beautiful, innocent daughters. I have met personally with him in Broome and shared his tears and his devastation at the loss of his children. I can only imagine how he and Grace and the other members of their family feel about their loss.

32 Regrettably, it seems it is only human nature to look for someone to blame when something terrible happens. The Family Court and the Department of Child Protection are obvious targets because the community invests a great deal of money in the legal and child protection systems and feel they have failed when something goes wrong. Institutions such as the Family Court and Department of Child Protection would like more resources to deliver the sort of service that the community expects. The reality, however, is that no matter how much more money is devoted to these services, they could never prevent tragedies occurring.

33 The court is presented daily with allegations by one or both of the parents that the other parent has sexually abused the children or has been violent or neglectful. The community expects that the court will treat such allegations seriously – and they are treated very seriously. In many cases the allegations are true. In other cases they are the result of misunderstanding or delusion. In others, the allegations are found to be contrived and malicious.

34 When such allegations are made the court cannot ignore them and the community would expect that the court would err on the side of caution. This requires careful investigation, usually involving the appointment of independent lawyers to represent the children and highly qualified experts to carry out an investigation. All of this takes time and in the meantime, the court has no means of knowing whether the allegations are true or false.

35 The court is often condemned either for believing or disbelieving allegations. For example, if it finds sexual abuse, it is condemned for stopping contact with the abuser who maintains his or her innocence. If it does not find sexual abuse, it is condemned by the person who alleged abuse for leaving a child in an unsafe environment. Unlike many of the cases that proceed in the criminal courts, there is usually no clear evidence available in Family Court cases about whether a child has been abused. The judges and magistrates are only human. They do what they can with what evidence they are given – and they do so keeping in mind that the primary consideration is the best interests of the child. Often, they are required to undertake this difficult task without the assistance of a lawyer representing each party.

36 The court had the benefit today of hearing eloquent submissions from Mr McCarthy who appeared for the West Australian and Channel 7. Mr McCarthy pointed to the clear public interest in the full story being known. He also drew attention to the importance of the public having faith in the judicial system. He agreed that it is vital that myths and misunderstandings about our legal system be dispelled by the public being given more information about what happens in the Family Court.

37 I welcome the media interest in this case with open arms. The court has nothing to hide. The court is proud of its efforts to resolve disputes between warring couples. The court is proud of the efforts it makes to appoint independent lawyers to represent the interests of children. The court is proud of the extent to which it seeks out the best available expert assistance in attempting to come to the right decision. And the court is grateful to its Family Consultants who work alongside the judicial officers to ensure that outcomes are influenced by the best social science evidence, so that cases are not resolved just on application of cold, hard legal principle.

38 West Australian Newspapers and Channel 7 Perth are to be commended for recognising and obeying the law by delaying publication of its report of the Geraldton inquest in order to obtain the permission of the court - which permission has been given readily and quickly. Their conduct in the matter should serve as an example to other media organisations who consider that they can reveal information about individual families involved in Family Court proceedings without permission.

39 Although the applicant sought permission only to publish an account of the proceedings before the Coroner in Geraldton, Mr McCarthy noted in his submissions that he would anticipate that the Family Court would wish in due course to make some comment. I had originally intended that the court would not make any statement on the matter until the Coroner had completed his investigations and published his report. However, given that the letter from Grace has now entered the public domain and been the subject of comment, I consider it is necessary for the preservation of the reputation of the court that West Australian Newspapers and Channel 7 Perth also have full permission to publish a fair and accurate account of this judgment.

40 I recognise that a newspaper cannot publish a judgment as lengthy as this, but it is in the public interest that its readers have the opportunity to read the whole of the court's decision. I have therefore made it a condition of my order for publication that the newspaper provides the website address of the Family Court so that the entire decision can be read by anyone interested. I am told by Mr McCarthy that the whole of the judgment can also be published on the newspaper's own website, and I would also welcome that occurring.

41 Grace's letter is a plea for all children involved in Family Court proceedings to have someone independent to talk to them about what is happening in the proceedings and to be their voice. This is one of the reasons the court appoints an independent lawyer to represent children where there are serious allegations of abuse. And as I have mentioned, the court did appoint such a lawyer for Grace and her sisters.

42 I wish that all children involved in proceedings could have their own independent lawyer, but this would be an expensive exercise and one which I doubt Government would be prepared to fund. However, in almost every case involving

school age children, the court arranges for the children to meet a Family Consultant or an independent expert so that their wishes can be heard and taken into account.

43 Grace would prefer that children have the opportunity to speak with an independent counsellor at the Family Court at any time during the proceedings. I truly wish it were possible for all children to be able to access expert help to deal with the devastating effects of family breakdown and abuse. Again, however, the cost would probably be more than Government would be prepared to fund. And the problem of such a service being attached to the Family Court is that some parents would coerce, bribe or subtly influence their children to report to their counsellor what the parent wants the court to hear.

44 There is, however, one proposal that emerges clearly from Grace's letter which Government might be prepared to fund if anything good is to come out of the deaths of Grace's sisters. We should no longer rely on parents to tell their children about the outcome in the court. There should be an independent service which can explain to children, who are those most affected, exactly what the court has ordered and the reasons why it made the orders. Such a service would be very expensive, but if Government was prepared to provide the funds, it would receive the full cooperation of the court.

45 A lawyer representing Mr Cuzens and Grace has advised the court today that they both consent to the orders I propose to make.

46 For these reasons, I make the following orders:

1. With the consent of **HARLEY STEWART FRANKLYN CUZENS**, and **GRACE CUZENS**, leave is granted to **WEST AUSTRALIAN NEWSPAPERS LTD and CHANNEL 7 PERTH PTY LTD**, to publish an account of proceedings in this Court compromising a fair and accurate report:
 - (a) of the Inquest into the death of Heather Glendinning, Jane Cuzens and Jessica Cuzens being conducted in the Coroner's Court of Western Australia; and
 - (b) the judgment of the court delivered today.
2. This order is made on condition that any television report indicates that the full judgment of the court delivered today can be found on the Family Court website and that any newspaper report indicates that the full judgment can be found at the Family Court website: *www.familycourt.wa.gov.au*

I certify that the preceding [46] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate