

IN THE FEDERAL CIRCUIT AND FAMILY COURT
OF AUSTRALIA
AT NEWCASTLE

NCC 3896 of 2023

Stephen Christopher COOKE
(Applicant Father/Husband)

and

Heather Anne COOKE
(Respondent Mother/Wife)

CASE OUTLINE FOR THE RESPONDENT MOTHER/WIFE
INTERIM HEARING 11 APRIL 2024

1. The Respondent reads the following documents
2. Minute of Orders sought
3. Chronology
4. Summary of Argument
5. List of Authorities

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1. THE RESPONDENT READS THE FOLLOWING DOCUMENTS

		Dated
1.	Amended Response to Initiating Application	08.04.2024
2.	Affidavit of Heather Cooke	03.04.2024
3.	Amended Financial Statement of Heather Cooke	08.04.2024

2. MINUTE OF ORDERS SOUGHT BY THE RESPONDENT

In accordance with her Amended Response to Initiating Application Filed 8 April 2024:

- (a) Interim Parenting Orders as set out on pages 5 and 6 at paragraphs 1 through to 7; and
- (b) Interim Property/Financial Orders as set out on pages 6 through to 8 at paragraphs 8 through to 13.

3. CHRONOLOGY

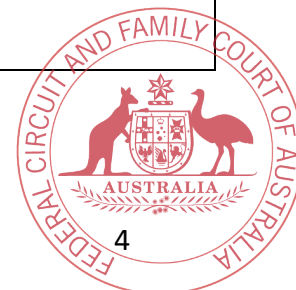
Date	Event	Reference
31 Jul 1978	Mother born, now aged 45.	M2
27 Oct 1981	Father born, now aged 42.	M3
Dec 2003	Mother completed Bachelor of Medicine at University of Sydney.	M14
2004	Mother began Internship	M14
2007	Mother commenced speciality in Cardiology.	M14
8 Jun 2008	Mother purchased 703/1 Como Crescent, SOUTHPORT QLD property for \$310,000. This property was purchased with 5% deposit and 95% home loan repayment.	M85



Date	Event	Reference
Jul 2011	Mother obtained work Visa for a Fellowship position in Canada.	M14 M86
Aug 2011	Parties commence relationship.	M4
May 2012	Parties commence cohabitation.	M5 M86
26 Sept 2012	Parties were married in Canada	M6
20 Aug 2014	Child Christian Finn Cooke born now aged 9.	M7i M16
Jul 2015	Parties and Christian moved to Australia from Canada. Father obtained temporary visitor's visa and was unable to work or enrol in University.	M19
Oct 2015	Father obtained Australian residency and obtained TFN to study computing at University. Mother commenced part-time work in private practice.	M20
Feb 2016	Father enrolled in an IT course run through RMIT in Melbourne. To allow the Father to study, Christian was enrolled in two (2) days a week at Kinda Kapers day care in Charlestown.	M21
27 Jan 2017	Child Joshua Finn Cooke born now aged 7. Mother went on parental leave.	M7ii M23
Aug 2017	Mother returned to work	M23
March 2022	Mother arranged psychological assessment for Christian with Mr Kane Becker at Oracle Psychology. The assessment pointed to a diagnosis of ADHD.	M34



Date	Event	Reference
June 2022	Christian diagnosed with ADHD. Christian was prescribed short acting Vyvanse for terms 2, 3 and 4, twice a day.	M35
31 Jan 2023	Christian's prescription changed to long-acting Ritalin taken once a day to assist him with concentration. Christian's behavioural issues continue and has become extremely dysregulated to the point of screaming and meltdown. Christian continues with learning assistance for dyslexia and dyscalculia.	M35
Jun 2023	Father diagnosed with anxiety and prescribed medication. Father refuses to take medication.	M37
Sep 2023	Father diagnosed with ADHD. Father's attitude was irritable, irrational, impulsive, paranoid and inattentive to the Mother and children.	M37
17 Nov 2023	Parties separate with finality Mother moved out of FMH and into rental property with the children.	M8 M52 M65
17 Nov 2023 to 12 Jan 2024	Children live with Mother and spent a few nights each fortnight with Father as arranged between solicitors through correspondence	M9
5 Dec 2023	Father files Initiating Application	
12 Jan 2024	Parties attended FDR and reached agreement for parenting arrangements for the children to live with the Mother and spend time with the Father as follows: (a) During Week 1, from conclusion of school (or 3:00pm) on Thursday to the commencement of	M10 M59



Date	Event	Reference
	<p>school (or 9:00am on the following Monday), and</p> <p>(b) During Week 2, from the conclusion of school (or 3:00pm) on Thursday to the commencement of school (or 9:00am) on the following Friday.</p> <p>The children spend one half of each school holiday period with Mother and one half with Father.</p>	
29 Jan 2024	First Return date before Judicial Registrar Furner	
5 Feb 2024	Mother files Response to Initiating Application	
29 Feb 2024	Child Impact Report prepared by Mr Drew Cowen	

4. SUMMARY OF ARGUMENT

1. These are multi-faceted interim proceedings wherein:
 - (a) Each party seeks parenting orders
 - (b) The father seeks an order for exclusive use and occupation of the former matrimonial home – in response thereto, the mother seeks the interim sale of the former matrimonial home and for the father to have exclusive occupancy pending sale.
 - (c) The father seeks orders for spousal maintenance as follows:
 - i. For the mother to meet the entirety of the “costs and expenses associated with the [former matrimonial home] including but not limited to mortgage and loan repayments, strata levies, utilities, rates and insurance”;



ii. For exclusive use of the Honda CR-V motor vehicle and for the mother to pay “as and when they fall due, all costs and expenses associated with this car including registration and insurance”; and

iii. Additional periodic spousal maintenance in the sum of \$1,457 per week.

(d) In response thereto, the mother proposes that she pay spousal maintenance as follows:

i. Pending sale of the former matrimonial home – the relevant outgoings.

ii. The mother agrees with respect to the spousal maintenance component of the father’s application concerning the Honda CR-V.

(e) The father seeks that the mother return – presumably by way of injunction – thereafter restrain her access to, certain sums of money. This is opposed by the mother.

(f) The father seeks an interim distribution of the sum of \$50,000.00. The mother agrees there should be an interim distribution, but in the amount of \$30,000.00.

2. In summary, and external to the parenting aspect of the interim proceedings, the issues in dispute are:

(a) Whether there should be an interim sale of the former matrimonial home;



- (b) The quantum of additional periodic spousal maintenance (if any) that the mother should pay to father;
- (c) Whether there should be any injunction restraining the parties' access to or use of funds; and
- (d) The quantum of any interim distribution payable to the father.

Parenting

3. The parenting aspect of the proceedings relates to the children Christian Finn Cooke, born 20 August 2019 – currently aged 9 years, and Joshua Finn Cooke, born 27 January 2017 – currently aged 7 years.
4. The parties separated on a final basis on 17 November 2023. Following attending Family Dispute Resolution in January 2024, the parties agreed on an informal basis, and thereafter implemented, an arrangement whereby the children live with the mother and spend time with the father five nights per fortnight, and a sharing of school holidays.
5. It is now the father's application on an interim basis that the children should live with him and spend time with the mother for four nights per fortnight. The father also proposes the sharing of school holidays.
6. It is the mother's proposal that the children continue to live with her and spend time with the father for **two** nights per fortnight, as well as each Thursday afternoon - a reduction in the time they currently spend.
7. The child Christian has a diagnosis of ADHD and the evidence bears out the manifestation of that condition in terms of his behaviour and his inability to self-regulate.



8. It is submitted that the basis of the father's application that the children live primarily with him - and at the same time visiting a substantial change to their care arrangements upon them – is opaque. At its highest, it seems to be that the mother is a busy professional and that her work hours are such that the children should not continue to live with her. The evidence does not support that outcome.
9. The parties have had the benefit of a Child Impact Report completed by psychologist Drew Cowen on 29 February 2024. In particular, Mr Cowen had cause to observe that there are “significant differences in the parenting philosophy and behaviour of each parent” and that in respect of Christian in particular, the “combination of ADHD and the destabilising effects of his parents separation make it challenging for Christian to navigate his emotions and relationships, leaving him feeling overwhelmed, with a sense of injustice and inequity” (CIR 55 & CIR 57 respectively).
10. Each parent's application makes provision for the children to have a relationship with each parent that is “meaningful” and to the extent the Act aspires. There can be, it is submitted, no relevantly determinatively question of risk.
11. That being so, it is submitted the Court would be more concerned about the tumult visited upon the children in upending their primary residence arrangements. It is likely to be destabilising, and needlessly so. In and of itself, this is a significant consideration, but it is submitted more so given Christian's particular diagnosis.
12. Further, not only does the father's application represent a significant change to the residence for the children, but as opined by Mr Cowen, a significant change to the type of primary parenting they will receive. That



is said without criticism of the father and his parenting style, but factually an observation insofar as it relates to s 60CC(3)(d) of the Act.

13. The mother's application also represents a change to the children's parenting arrangements. The change is probably less significant in that the children will continue to live primarily in the same home, however they will spend a reduced amount of time with the father.
14. It is appreciated that the Court may have an immediate disinclination towards reduction in the arrangements for the children to spend time with the father.
15. That said however, it is clear that each parent has a very different style and the father has engaged in behaviours that immerse the children in the conflict. Mr Cowen has already opined that Christian in particular is struggling with the fact of the parent's separation. There is evidence of loyalty demands being placed upon the children.
16. The conflict and inconsistency in parenting style between the two homes is more significant by reference to Christian's needs and diagnosis.
17. The mother's application still maintains a relationship with each parent that is "meaningful". It also insulates them against the contraindications of a substantial and significant time arrangement (see for example s 65DAA(5) of the Act).

Spousal Maintenance

18. The mother is liable to maintain the father to the extent that she is reasonably able to do so, if, and only if, the father is unable to support himself adequately (s 72 of the Act).



19. The aforementioned conditions in section 72 must be satisfied before the Court makes any order – thereafter it can make such order as it considers “proper” (s 74).
20. In so determining the propriety of any order, the ability of the mother to maintain the father, and the ability of the father to adequately support himself, the Court is to take into account the non-exhaustive list of matters in s 75(2) of the Act.
21. As is tolerably clear, discretion pervades the determination of each step in ss 72, 74, and 75 (see *Qin & Donato* at para. 18).
22. It is submitted that the father has not demonstrated an inability to support himself adequately.
23. Further, the mother continues to be the children’s primary carer and on her application, will continue to be so at the conclusion of this interim hearing. She also shoulders the burden of the parties’ financial responsibilities which must all be met from her income.
24. Those financial responsibilities equate to an inability of the mother to maintain the father.

Interim Sale of the Former Matrimonial Home

25. The mother does not propose to retain the former matrimonial home on a final basis.
26. It is not understood to be the father’s position that he will, or that in any event, he could realistically afford to.
27. It is for that reason the mother proposes the home be sold. The Court would also observe the significant financial burden upon the mother in maintaining



the outgoings on that property which she is being asked to maintain in addition to maintaining the father.

Injunctions

28. The father seeks the return of a number of sums the mother has removed from bank accounts. The mother has given her reasons for the use and application of those amounts as part of her ongoing conduct of her medical practice.

29. There is otherwise an abundance of property to meet both parties' entitlements pursuant to Part VIII of the Act.

30. The proper exercise of the Court's power under s 114 of the Act does not require that the parties endure a state of suspended economic animation pending finalisation of their property settlement proceedings. There is no evidence of any action on the part of the mother to defeat the entitlements of the father, and every indication that the mother would be in default of her otherwise lawful financial obligations if such injunctions were granted.

31. The father offers no undertaking as to damages in such circumstances.

Interim Distribution

32. The Court retains a discretion as to the quantum of interim distribution, if any, that it orders. As the Full Court made clear in *Strahan*, there needs to be a principled reason for the departure from the otherwise preferred position that any exercise of the Court's power under section 79 of the Act should be undertaken on a "once and for all" (my words) basis.

5. LIST OF AUTHORITIES

1. *Goode & Goode* (2006) 36 FamLR 422
2. *M & DB* (2006) 36 FamLR 454
3. *Qin & Donato* [2023] FedCFamC1A 223
4. *Strahan & Strahan (Interim Property Orders)* (2009) 42 FamLR 203



Dated: 10 April 2024

ASHLEY R BITHREY
Counsel for the Respondent Mother/Wife

