

## FAMILY COURT OF AUSTRALIA

**CARONE & YANTIS**

*[2011] FamCA 853*

FAMILY LAW – CHILDREN – Best interests of the child – Whether there is an unacceptable risk of abuse or violence – Whether there is an unacceptable risk of emotional harm – Allegations of drug and alcohol use – Weight to be given to the child’s wishes – Whether the father should be restrained from bringing the child into contact with the child’s godmother and aunt – Whether the mother should be restrained from bringing the child into contact with her former partner – Sole parental responsibility – Where the parents are unable to effectively communicate with each other.

*Leighton & Carey* [2010] FamCAFC 94

*Family Law Act* 1975 (Cth) Sections 60CA, 60CC, 61B, 61C, 61DA, 65DAA, 65DAC  
*Evidence Act* 1995 (Cth) s 140

<b>APPLICANT: MOTHER</b>	Ms Carone
<b>RESPONDENT FATHER:</b>	Mr Yantis
<b>FILE NUMBER:</b>	PAC          5829          of          2008
<b>DATE DELIVERED:</b>	3 November 2011
<b>PLACE DELIVERED:</b>	Parramatta
<b>PLACE HEARD:</b>	Parramatta
<b>JUDGMENT OF:</b>	Justice Loughnan
<b>HEARING DATES:</b>	5, 6, 7 July & 24 October 2011

### REPRESENTATION

<b>COUNSEL FOR THE APPLICANT MOTHER:</b>	Ms Conte Mills
--	----------------

<b>SOLICITOR FOR THE APPLICANT MOTHER</b>	Phillip A Wilkins & Associates
---	-----------------------------------

<b>COUNSEL FOR THE RESPONDENT FATHER</b>	Mr R. White
--	-------------

**SOLICITOR FOR THE RESPONDENT  
FATHER**

Tiyce & Partners  
Lawyers

**COUNSEL FOR THE INDEPENDENT CHILD  
LAWYER**

Mr W. Lloyd

**SOLICITOR FOR THE CHILD**

Gonzalez & Co

## ORDERS

1. That all previous orders be discharged.
2. That the father shall have sole parental responsibility for N Yantis born ... December 2002 (hereinafter “the child”).
3. Unless the parties otherwise agree, the child shall live with the mother as follows:
  - A. On a fortnightly cycle as follows:
    - i. on Thursday from after school until the commencement of school the next morning in the first week with the mother to collect the child from school at the commencement of her time with the child and to deliver the child to school at the conclusion of her time with the child.
    - ii. in the second week from after school on Friday until before school on Monday, and if the Monday is a public holiday, the mother shall spend time with the child until before school on Tuesday.
  - B. During the school holiday period as follows:
    - i. for the first half of the school holidays commencing at the end of terms one, two and three, commencing after the last day of the school term in even numbered years.
    - ii. for the second half of the school holiday periods commencing at the end of terms one, two and three in odd numbered years.
    - iii. for the first half of the school holiday period commencing at the end of term four, commencing after school on the last day of the term in even numbered years.
    - iv. for the second half of the school holiday period commencing at the end of term four in odd numbered years.
    - v. at such other times as agreed between the mother and father in writing.
4. If Fathers Day falls on a weekend when the child is not living with the father pursuant to these orders, the child shall spend time with the father on that weekend from after school on Friday until before school on Monday.
5. If Mothers Day falls on a weekend when the child is not living with the mother pursuant to these orders, the child shall spend time with the mother on that weekend from after school on Friday until before school on Monday.

6. That the child shall spend time with the father from after school or 3pm on Holy Thursday until before school on the following Tuesday in even numbered years.
7. That the child shall live with the father at all other times.
8. Unless otherwise agreed between the mother and father in writing, for the purposes of facilitating orders (3) to (7) inclusive herein:
  - A. The mother shall be responsible for collecting the child at the commencement of her time with the child pursuant to these orders:
    - i. from the child's school if the child is attending school immediately prior to the commencement of her time with the child; or,
    - ii. from the KFC restaurant at Suburb W if the child is not attending school immediately prior to the mother's time with the child
  - B. At the conclusion of the mother's time with the child pursuant to these orders, the father shall be responsible for collecting the child from:
    - i. the child's school if the child is attending school immediately after the conclusion of her time with the child; or
    - ii. the KFC at Suburb W if the child is not attending school immediately after the conclusion of the mother's time with the child.
9. The father is at liberty to enrol the child into S Public School or into such other school on which the parties agree, for the balance of his primary school education and in the event that the agreed school is an independent or parochial school, until the father has paid employment and can afford to contribute, the necessary school fees shall be paid by the mother.
10. The mother shall have telephone communication with the child each Wednesday between 6:00pm and 6:30pm with the mother to initiate the telephone calls and the father to facilitate all such calls.
11. The father and mother are restrained by themselves and/or their servants and/or agents from denigrating the other parent or the family members of the other parent in the presence and/or hearing of the child and shall remove the child from the presence of any other person who is doing so.
12. The father and mother are restrained by themselves and/or their servants and/or agents from physically disciplining the child.
13. The father and mother are restrained from consuming illegal drugs for 12 hours before and during any period when the child is in their care and

they are restrained from leaving the child in the care of any person who to their knowledge or observation has consumed or is likely to consume illegal drugs during those periods.

14. The parties are restrained from discussing any dispute between them in the presence or hearing of the child.
15. The mother and the father are to provide each other with the names and contact details of any medical practitioners treating the child as soon as possible and shall keep each other informed of any planned or emergency medical treatment received by the child as soon as practicable.
16. The father shall give the mother at least 6 weeks prior written notice if he proposes to have the child circumcised.
17. The father shall make available to the mother the child's school reports and copies of applications for the purpose of purchasing the child's school photographs at the mother's expense.
18. For the purposes of Order 3B herein:
  - a. school holiday time shall commence after school on the last day of the term and shall conclude at 10:00am on the last day of the school holiday period.
  - b. changeover during the halfway point of the school holidays shall be at 6pm on the middle day of the school holidays or in the event that the holidays contain an even number of days, on the day following the middle day of the holidays.
  - c. If a pupil free holiday falls on a day immediately preceding the first or last day or a school holiday, then that day shall be added to the school holiday period.
19. Any agreed alterations to these Orders shall be reflected between the parties in writing for which purposes email or SMS message shall be acceptable.
20. Both the parents are restrained from removing or attempting to remove the child from the Commonwealth of Australia, unless by order of this court or with the express written consent of the other parent.
21. That the Marshal of the Family Court of Australia and all officers of the Australian Federal Police and of the Police forces in the States and Territories of the Commonwealth of Australia are requested to give effect to these orders and to take all necessary steps to prohibit either party from removing or attempting to remove the child and to prohibit the child from removing or attempting to remove himself from the Commonwealth of Australia, unless by order of this court or with the express written consent of the other parent.

22. The Commissioner of the Australian Federal Police is requested to take all necessary steps to place the name of N Yantis, male, born ... December 2002 on the report watch list, also known as the PACE alert system, at all points of arrival and departure in the Commonwealth of Australia and to maintain that entry for 5 years from the date of these orders.
23. When the child is living with the mother pursuant to these Orders in excess of four days, the father shall be at liberty to contact the child by telephone between 6:00pm and 6:30pm on the fifth day that the child is spending time with the mother and every fifth day thereafter, and the mother shall facilitate such contact.
24. The Court Noted that the parties agree that the child should be educated at a Catholic School in the area of the home of the parent with whom he lives for most of the time.
25. The Court Noted that the mother agrees to pay the fees associated with the child's attendance at a Catholic School until such time as the father is employed and able to contribute.
26. The parties are at liberty to restore the matter before Justice Loughnan within 28 days of the date of delivery of judgment, or such further time as they might agree, upon notice to the Court and each other, in relation to any agreement about a change to the wording of the Orders or an argument that the wording does not reflect the reasons for judgment.
27. Pursuant to s 62B and s 65DA(2) of the *Family Law Act 1975* the particulars of the obligations these Orders create and the particulars of the consequences that may follow if a person contravenes these Orders are set out in the attached Fact Sheet.

**IT IS NOTED** that publication of this judgment under the pseudonym *Carone & Yantis* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT PARRAMATTA

FILE NUMBER: PAC 5829 of 2008

**Ms Carone**  
Applicant

and

**Mr Yantis**  
Respondent

**REASONS FOR JUDGMENT**

**INTRODUCTION**

1. N Yantis (“the child”) is 8 years of age. He is the son of Ms Carone and Mr Yantis. His parents did not live together on a full-time basis. He lived with his mother until January 2009 and spent time with his father. He lived with the father since then and spent time with the mother. The father proposes that the child continue to live with him and spend time with the mother each alternate weekend during school term, each alternate Thursday afternoon and for half the school holidays. The mother proposes that the child live with her and spend time with the father each alternate weekend during school term and for half the school holidays. Each of the parents seeks sole parental responsibility for the child. The key issues relate to the risks of harm to the child and the parenting capacities of his father and mother.

**APPLICATIONS**

2. By a Minute of Orders handed up by her counsel in the course of final submissions, the mother seeks:
  1. That the child [N Yantis] born ... December 2002 live with the mother.
  2. That the mother have sole parental responsibility for the child.
  3. That the child spend time with the father as follows:
    - (a) Each alternate weekend from after school Friday until before school Monday;
    - (b) For one half of each school holiday period being the first half in even numbered years commencing 2012 and the second half in odd numbered years commencing 2011;
    - (c) On Father’s Day from 9:00am until 6.00pm in the event that the child would otherwise be with the mother;

- (d) 5.00pm Christmas Eve until 5.00pm Boxing Day in 102 and each alternate year thereafter; and
  - (e) At other times as agreed.
4. For the purpose of changeover, the father shall collect the child from the child's school at the commencement of his time with the child and deliver the child to the child's school at the conclusion of his time with the child on school days and at all other times changeover shall occur at the McDonalds Restaurant at [Suburb W] or as otherwise agreed.
  5. That the mother shall keep the father informed at all times of matter relating to the child's schooling, health, medical treatment and appointments including the child's treating doctor, speech therapist and specialist as well as all extracurricular activities the child may be involved in.
  6. The father shall ensure that the child attends upon all medical and specialist appointments that may fall on a day that the child is spending time with him.
  7. That each party shall notify the other in the event of a medical emergency, illness or injury the child may suffer as soon as reasonably practicable whilst the child is in that party's care.
  8. That each party shall authorise any school that the child may attend to provide to both parties copies of the child's school reports, parent/teacher notifications, newsletters, school photographs and the like.
  9. That each party be restrained from denigrating the other or members of their respective families in the presence or hearing of the child.
  10. That each party be restrained from physically disciplining the child.
  11. That the child shall attend a Catholic School in the [western Sydney] District from 2012 as agreed or failing agreement at [P Primary School], and in 2015 [M College].
  12. That the parties do all things to ensure that [Ms C] does not come into contact with the child unless otherwise agreed between the parties.
  13. That the parties do all things to ensure that [Ms B] does not come into contact with the child unless otherwise agreed between the parties.

Notation: The Court Notes the mother will pay the fees associated with [the child's] attendance at a Catholic School until such time as the father is employed and able to contribute.

3. By a Minute of Orders included in his Case Outline document the father seeks:
  1. That all previous orders be discharged.
  2. That the father shall have sole parental responsibility for [N Yantis] born ... December 2002 (hereinafter "the child").
  3. That the child shall live with the mother as follows:
    - A. On a fortnightly cycle as follows:

- i. on Thursday from after school until 8:30pm [when?] in the first week with the mother to collect the child from school at the commencement of her time with the child and to deliver the child to the KFC restaurant at [Suburb W] at the conclusion of her time with the child.
  - ii. in the second week from after school on Friday until before school on Monday, and if the Monday is a public holiday, the mother shall spend time with the child until before school on Tuesday.
- B. During the school holiday period as follows:
  - i. for the first half of the school holidays commencing at the end of terms one, two and three, commencing after the last day of the school term in even numbered years.
  - ii. for the second half of the school holiday period commencing at the end of terms one, two and three in odd numbered years.
  - iii. for the first half of the school holiday period commencing at the end of term four, commencing after school on the last day of the term in even numbered years.
  - iv. for the second half of the school holiday period commencing at the end of term four in odd numbered years.
  - v. at such other times as agreed between the mother and father in writing.
- 4. If Fathers Day falls on a weekend that the child is not living with the father pursuant to these orders, the child shall spend time with the father on that weekend from after school on Friday until before school on Monday.
- 5. If Mothers Day falls on a weekend that the child is not living with the mother pursuant to these orders, the father's time with the child shall be suspended on this weekend from after school Friday until before school Monday.
- 6. That the child shall spend time with the father from after school or 3pm on Holy Thursday until before school on Tuesday in even numbered years.
- 7. That the child shall live with the father at all other times.
- 8. Unless otherwise agreed between the mother and father in writing, for the purposes of facilitating orders (3) to (7) inclusive herein:
  - A. The mother shall be responsible for collecting the child at the commencement of her time with the child pursuant to these orders:
    - i. from the child's school if the child is attending school immediately prior to the commencement of her time with the child; or,

- ii. from the KFC restaurant at [Suburb W] if the child is not attending school immediately prior to the mother's time with the child
- B. At the conclusion of the mother's time with the child pursuant to these orders, the mother shall be responsible for delivering the child to:
  - i. the child's school if the child is attending school immediately after the conclusion of her time with the child; or
  - ii. the KFC at [Suburb W] if the child is not attending school immediately after the conclusion of the mother's time with the child.
- 9. That the child shall be enrolled into [S] Public School for the remainder of his primary school education as at Term 3 in 2011.
- 10. That the mother be and is hereby restrained by herself or by her servants and/or agents from bringing the child into contact with the mother's friend, Mr [X].
- 11. That the father and the mother shall be and are hereby restrained by themselves and/or their servants and/or agents from denigrating the other parent or the family members of the other parent in the presence and/or hearing of the child and shall remove the child from the presence of any other person who is doing so.
- 12. That the mother shall have telephone communication with the child each Wednesday between 6:00pm and 6:30pm with the mother to initiate the telephone calls and the father to facilitate all such calls.
- 13. The mother and the father are to provide each other with the names and contact details of any medical practitioners treating the child as soon as possible and shall keep each other informed of any planned or emergency medical treatment received by the child as soon as practicable.
- 14. The father shall make available to the mother the child's school reports and copies of applications for the purpose of purchasing the child's school photographs at the mother's expense.
- 15. For the purposes of orders (3B) herein:
  - a. school holiday time shall commence after school on the last day of the term and shall conclude at 10:00am on the last day of the school holiday period.
  - b. changeover during the halfway point of the school holidays shall be at 6pm.
  - c. If a pupil free holiday falls on a day immediately preceding the first or last day or a school holiday, then that day shall be added to the school holiday period.
- 16. Any agreed alterations to these orders shall be reflected between the parties in writing for which purposes email or SMS message shall be acceptable.

17. That the parties be and are hereby restrained from discussing any dispute between them in the presence or hearing of the child.
  18. That the Commissioner of the Australian Federal Police and the Secretary of the Minister of Immigration shall take all necessary steps to immediately place the name of [N Yantis], male, born ... December 2002 on the report watch list, also know as the PACE alert system, at all points of arrival and departure in the Commonwealth of Australia. The Australian Federal Police maintain an airport watch of the said child and all flights leaving any international airport in all states and territories of the Commonwealth of Australia.
  19. That both the parents are hereby restrained from removing or attempting to remove the child from the Commonwealth of Australia, unless by order of this court or with the express written consent of the other parent.
  20. That the Marshall of the Federal Magistrates Court of Australia and all officers of the Australian Federal Police and of the Police forces in the states and territories of the Commonwealth of Australia are requested to give effect to these orders and to take all necessary steps to prohibit either party from removing or attempting to remove the child and prohibiting the child from removing or attempting to remove himself from the Commonwealth of Australia, unless by order of this court or with the express written consent of the other parent.
  21. When the child is living with the mother pursuant to these orders in excess of four days, the father shall be at liberty to contact the child by telephone between 6:00pm and 6:30pm on the fifth day that the child is spending time with the mother and every fifth day thereafter, and the mother shall facilitate such contact.
  22. That the child be permitted to spend time unsupervised time with his godmother, [Ms C].
- 
4. The mother's proposals changed at the point of final submissions. The amendments are reflected in the terms quoted above. It was then conceded in the father's case that he too would like the boy to attend a Catholic primary school but on the basis that, until he has paid employment, the payment of school fees would be a matter for the mother.
  5. There is no formal minute of the orders sought by the Independent Children's Lawyer ("ICL"). Learned counsel for the ICL said that the orders pressed on behalf of the child were in accordance with the father's general proposal with the child living with the mother every alternate weekend, one overnight in the off week and for half the school holidays and provision for special days. Injunctions are sought in relation to drugs, alcohol and physical discipline. It is not argued that the undertaking in relation to the child's godmother should be continued. The child should attend at S Public School or a Catholic School close to the father, on the basis that the mother pays the fees. An order was

sought on behalf of the ICL against the mother for costs in the sum of \$2,000. That application is resisted on behalf of the mother and time was sought to obtain instructions on the issue. I reserved the question of the costs of the ICL.

## **WRITTEN EVIDENCE**

6. The mother relies on:

Amended Initiating Application filed 18 May 2011

Affidavit of the mother sworn 13 May 2011 and filed 17 May 2011

Affidavit of Mr H sworn 6 May 2011 and filed 17 May 2011

Affidavit of Mr D sworn 16 May 2011 and filed 17 May 2011

Affidavit of Ms H sworn and filed 17 May 2011

7. The father relies on:

Response to Initiating Application filed 17 June 2011

Affidavit of the father sworn 11 June 2011 and filed 14 June 2011

Affidavit of Ms C sworn 9 June 2011 and filed 14 June 2011

Affidavit of Ms B filed 14 June 2011

8. A Notice of Abuse and Family Violence was filed by the mother on 22 September 2009

## **Expert Evidence**

9. The following expert evidence was relied on:

Report dated of Dr R dated 9 February 2010.

Report dated of Dr R dated 25 November 2010.

Magellan Report dated 9 November 2009.

Children and Parents Issues Assessment dated 12 March 2009.

## **THE HEARING**

10. The matter was listed for hearing over three days commencing 5 July 2011. The first day was taken up with cross-examination of the mother and concluded with the mother still in cross-examination on behalf of the ICL. At the commencement of the second day I asked counsel to prepare a trial plan to account for the remainder of the listed time and was told that the hearing required at least another 15 hours and perhaps 17 hours. Counsel agreed that the matter could not be contained within the remaining 10 available hours. I

then allocated 24 October 2011 to conclude the matter. No earlier dates were convenient to all counsel. Without objection from counsel, the father's cross-examination immediately followed that of the mother. That permitted a better comparison of the evidence of the parents. In circumstances where the matter was to be adjourned part heard I thought that would allow the parties to have the benefit of the testing of the main elements of each other's case and for the outcome of that testing to be put to the expert. The father's re-examination concluded at about 4.15 pm on the second day of the trial. The mother's supporting witnesses, Ms H, Mr D were cross-examined on the third day as was Dr R and at about 4.30 pm Dr R's oral evidence was completed. At about 5.00 pm on that day the matter was adjourned part-heard to 24 October 2011 for cross-examination of two supporting witnesses in the father's case, Ms C and Ms B and for submissions.

11. On 24 October 2011 Ms C and Ms B were cross-examined and submissions were made. Judgment was reserved, as were the costs of the ICL and the parties were excused on delivery of judgment.

#### **RELEVANT PEOPLE**

12. The child, N, was born in December 2002 and as at the date of the hearing he was 8 years of age.
13. The following are persons of particular significance in his life:
14. The mother was born in 1966 and, as at the date of hearing, she was 45 years of age. She works as a health care provider with O Community Care. She works on a permanent part-time basis from 8 am to 3 or 4 pm, Monday to Friday. She earns about \$2,500 per fortnight and can have a fortnightly surplus of \$500. She has casual employment with another Clinic and does the occasional afternoon shift until 10 pm. The mother has a child from a previous relationship, namely V. He was born in August 1992 and was 18 years of age when the hearing commenced. He lives independently of the mother.
15. The father was born in Iraq in 1974 and as at the date of hearing, he was 37 years of age. He moved to Australia in December 1999. He is unemployed.
16. Mr D is a friend of the mother. He lives in a western Sydney suburb, is 50 years of age and is unemployed. He told Dr R that he changed his name in 1988 at the request of his then fiancée because no one could pronounce it. He and the mother met on the internet in 2006, had a brief intimate relationship and lived together from 1 August 2008 until 21 January 2009. He and the mother both say that they have remained (just) friends since then. They see each other once or twice a week.
17. Ms C is the child's godmother. She is about 50 years of age and works as an administration manager and a part-time carer. She was a friend of the mother's

mother and has been a friend of one or more of the mother's sisters for many years. The mother has known her for about 12 years.

## **SHORT HISTORY**

18. The mother is 45 years of age and the father is 37. They commenced a relationship in 2001 and although they did not live together on a full-time basis, they finally separated in April 2007.

## **THE ISSUES**

19. Apart from parental responsibility and living arrangements, the ICL identified the following issues:
  - Is there an unacceptable risk of sexual / psychological abuse of the child?
  - The child's relationship with Ms C.
  - The mother's alleged drug and alcohol abuse.
  - The nature of the relationship between the child and the mother and father.
  - The parenting capacity of both parents.
  - Child's wishes and weight to be given to those wishes.
  - Allegations of violence and abuse between the parents.
  - Restraining orders with respect to Mr D and/or Ms C.
  - The allegations that Ms C involved the child in sexual touching.
  - Cultural issues pertaining to the mother and the father.
  - Whether Mr D constitutes a risk to the child's welfare and safety.
  - The father's alleged anger issues.
  - Whether the child's school should be changed.
  - Ability to facilitate a meaningful relationship with the other parent.
20. The mother's counsel identified the following additional issue:
  - Capacity of both parents, including whether any parent has a psychiatric condition which would affect capacity.

## **BACKGROUND FACTS**

21. The father came to Australia in 1999.
22. In 2001 the father was prescribed Zoloft by his doctor.
23. The mother has a child from a previous relationship, namely V, who was born in 1992.

24. The parties met in May 2001. They commenced a relationship but did not live together. The mother says that the father was verbally abusive toward her from the commencement of their relationship.
25. In January 2002, the father was treated in hospital. The mother says that he refused nursing care, and demanded that she shower and dress him and attend to his care. She says he became aggressive and hit her on around 15 occasions, saying that she was not providing him with enough care. The mother says, at this point, she was afraid to leave the relationship.
26. In June 2002, the mother informed the father that she was pregnant. She says that the father pushed V out of the room, slammed and locked the lounge room door and slapped and pushed her. The father says that the mother's pregnancy was a very difficult time for him because he is a strict ... Catholic and it is considered improper for a child to be born out of wedlock. He agrees that he was angry at this time but denies assaulting the mother. The parties then separated for a period of three months.
27. The child was born in December 2002.
28. The mother says that from December 2002 until mid 2005, the father did not want his family or friends to know about the child.
29. The father met the child for the first time in January 2003. The mother says she gradually allowed the father back into their lives. He apologised for his previous behaviour and, on occasion, gave the mother approximately \$50.00.
30. Between 2003 and 2005, the mother says that the father became increasingly verbally and physically abusive towards her and on occasion, demanded that she have sex with him. She says she was frightened and unsure of how to end the relationship.
31. In 2003, at the child's christening, Ms C became his godmother at the mother's request.
32. In mid 2005, the mother's brother, Mr Carone, told her that he had spoken to the father to request that he leave the mother and V alone. The parties separated at this time.
33. The father commenced spending one night a week with the child at mother's house.
34. In about 2006 the mother met Mr D through a social internet site.
35. In mid 2006 or in November 2006 the parties resumed their relationship.
36. In February 2007 the parties co-operated in having the child's name changed from N Carone to N Yantis.
37. In either January or April 2007, the parties separated.

38. In around April 2007, the mother commenced part time employment with A Company as a personal care assistant. During this time, the child was cared for by his godmother on Friday nights and was collected by the father on Saturday mornings. The father would then return the child to the mother on Sunday evenings.
39. The mother says that on 14 August 2007, after she ran in the City to Surf, the father came to her home and raped her. The father says that the parties had consensual sexual intercourse at that time.
40. In 2007 when the mother enrolled the child in T School for the 2008 school year she told the school that she had good support from the father. In cross-examination the mother said that she meant to convey only that he had agreed to pay the school fees.
41. At some time in 2008 the mother travelled to Queensland with Mr D leaving the child with the father and Ms C.
42. The mother's elder son moved out of the mother's home to live with his father.
43. In May 2008, the child commenced spending time with the father on alternate weekends. The father says he had been spending about one day each week with the child from May 2007.
44. In around mid August 2008, the father alleges that the mother's elder son disclosed to him that he had seen the mother and Mr D smoking drugs at her home.
45. The parents were invited to attend a meeting at the child's school on 22 August 2008 in relation to the child's speech. The father attended but the mother did not. The meeting was attended by the father, Ms Y (the Principal) and Mrs I. They waited 15 minutes for the mother and then the meeting proceeded in her absence. It was noted that the mother had told the school representative that she had the child assessed (in respect of his speech) but that despite several requests (to the mother) the school had not been provided with a copy of the report. From the school records<sup>1</sup> the concerns raised were:

Sounds: [The child] can't pronounce them but can display the sign  
 Words: [The child] cannot be understood easily; he has to repeat words a few times to be understood  
 Reading: [The child] can't be understood easily he has to repeat words.

Class Discussion:  
 [The child] can't be understood and has to be asked to repeat  
 Consequences: language development & reading are being hampered

[The child] is becoming anxious as he becomes more aware that he can't be understood.

---

<sup>1</sup> Exhibit 8.

[The child] is becoming more withdrawn in class discussion as he realises he will be asked to repeat his contribution

[The child's] feelings on the matter:

[The child] told his teacher he had seen someone who was helping him but, Mum said it was too much money

[The child] also said he doesn't feel good when people don't know what he is saying.

46. The school records note that the father gave an assurance that he would make an appointment with his GP to seek a referral to a Speech Pathologist. He said that he would inform the school of the date of the appointment.
47. On 3 September 2008 the mother attended at the school and was given the information provided at the meeting. The school notes record that she said she couldn't afford speech (therapy) and she didn't have time. She was told that there was free speech pathology through Medicare. The notes record that it was suggested to the mother that she should let the father make arrangements. The notes also record that the mother was happy for the father to organise speech therapy. She said that for her to take the child to speech pathology the appointments would need to be in her local area. The effect of the mother's evidence in cross-examination is that she had already taken the child to a Speech Pathologist who concluded that he had a mild lisp and a problem with a couple of words. In cross-examination the mother rejected saying anything to the child about not taking him to a Speech Pathologist due to the cost and insisted that she had been advised that nothing needed to be done. She also rejected that she had said anything about not being able to afford the cost of treatment to the school. The mother's comments as recorded by the school are inconsistent with her oral evidence. It is likely that the school notes are correct.
48. In September 2008, the father made arrangements for the child to see a Speech Pathologist. The school records note that and that he also made arrangements to see a Paediatrician.
49. The mother says that the father continued to be verbally abusive and make threats toward her throughout 2008.
50. On 1 October 2008, the parties attended mediation at a Family Relationship Centre.
51. In October 2008, the mother stopped allowing the father to spend time with the child.
52. On 16 October 2008 the father rang the school and asked if he could see the child at school as the mother had stopped him having access visits. He saw the child at school from 11.20 am to 11.30 am on 3 November 2008; from 10.50 am to 11.33 am on 10 November 2008 and from 10.45 am to 11.30 am on 17 November 2008.

53. On 17 November 2008, the mother says the child told her that the father had been attending his school to visit every Monday at lunchtime. She attended the school the next day to discuss the issue. The school records<sup>2</sup> that on 9 November 2008 the mother made an appointment about the father's visits. The notes record:
- I explained when he was visiting and suggested that as there were only 2 more visits (wk 9 & 10) maybe she should allow this. She agreed.
- [The mother] also told me that [the child] would be leaving the school at the end of the year and moving and not telling anyone where she was going. I explained that I needed to know which school [the child] would be attending. She said she would let me know.
54. On 1 December 2008, Mr D moved into the mother's home. The mother says she asked him to move in as she needed protection.
55. On 5 December 2008, by arrangement with the school but without the mother's permission, the father collected the child from school and took the child to see a Paediatrician. The father sent the mother a text message saying he had taken the child from school.
56. On 8 December 2008, the mother commenced these proceedings by filing an Initiating Application in the Family Court.
57. On 15 December 2008 orders were made by Judicial Register Johnston, as his Honour was then, in the following terms:
1. I order that the parties attend a Child Dispute Conference at this Registry at 9.00 am on 17 December 2008.
  2. I order that these proceedings be adjourned before me at 11.00 am on 17 December 2008.
  3. I order that the father deliver the child [N Yantis] born ... December 2002 at 5.00 pm today at McDonalds ....
58. The mother lived opposite the child's school. The mother and Mr D erected signs in the mother's front yard complaining about the school. The signs were erected on or about 15 December 2008.
59. Signs bore the following text:
- [text of signs omitted to comply with s 121 *Family Law Act 1975* (Cth)]
60. Some of the signs were written by Mr D and at least one was written by the mother. The idea to erect the signs may have come from Mr D. The mother concedes that in erecting the signs she acted irrationally and that she made a mistake in doing so. She denies that the reference to the father being an "Iraq man" was intended to prejudice the community against the father. Just stopping

---

<sup>2</sup> Exhibit 8.

there - that is likely to be untrue. It is difficult to imagine another reason for that detail to be included on a sign.

61. The mother denies that she intended to turn parents of children at the school against the father. That is likely to be untrue. The mother conceded that she and Mr D approached parents at pick up time about the issues to do with the child. She concedes that they should not have done that and that they should not have handed out letters to parents.
62. The mother says she did not consider that children would read the signs. If true, that was naïve. The signs were erected in the mother's front yard, across the road from the school.
63. In his oral evidence before me, Mr D said that, in hindsight, he too considers that the signs and the actions taken by him and the mother were inappropriate.
64. That matter was reported to DoCS by the school. It is alleged that parents and children at the child's school were subjected to abuse and harassment by the mother and Mr D. The mother and Mr D deny that allegation.
65. On or about 16 December 2008 the mother had Mr D deliver a letter to the school on her behalf. The letter contained words to the effect that she was too stoned and drunk to come to the school herself and was a very bad mother. Mr D says that he dictated the letter. The mother and Mr D say that she was neither stoned nor drunk but meant those comments, sarcastically.
66. On 16 December 2008, the father filed a Response.
67. It is alleged that Mr D made the child wear a school shirt that had been written on. The evidence<sup>3</sup> is not complete but it appears that on the back of the shirt was written, apparently by the child, "[N] Love the school" and "I love my teacher .....". The mother contends that the shirt was the child's initiative and that he intended to express genuine affection for the school and his teacher. Again, the school complained to DoCS.
68. On 17 December 2008, Judicial Register Johnston, made the following orders:
  1. That an Independent Children's Lawyer be appointed for the child [N Yantis] born on ... December 2002 and the Court requests the Director of the Legal Aid Commission of New South Wales to make the appropriate arrangements.
  2. That each of the parties forward forthwith to the said Director a copy of all documents filed by them in these proceedings.
  3. That these proceedings are adjourned to the Judicial Registrar's Duty List call-over at 9:30 am on 27 January 2009.
  4. That until 6:00 pm on 27 January 2009 the child [N Yantis] born on ... December 2002 shall live with his mother from 9:00 am each Monday until

---

<sup>3</sup> Exhibits 7 & 11.

5:00 pm each Tuesday and from 9:00 am each Thursday until 5:00 pm each Friday commencing on 22 December 2008 on the basis that the mother is to ensure that the child is not to be brought into contact with Mr [D].

5. That until 6:00 pm on 29 January 2009 the child shall live with his father at all other times, commencing from 5:00 pm on Friday, 19 December 2008.
  6. That for the purposes of changeover this shall occur at McDonalds Restaurant, ...
  7. That the Court notes that the details of Mr [D] have been included in a sealed envelope and placed in a secure place and are not to be made available to any person without an order of the Court.
  8. That pursuant to s.62B and s.65DA(2) of the Family Law Act 1975, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders.
69. The mother was present in Court but did not have legal representation. She says she did not realise that orders had been made or her obligations in relation to the child spending time with herself and the father.
70. The School Principal saw the child with Mr D that day.
71. On 19 December 2008, the mother and the child went on holiday to Wiseman's Ferry.
72. On 19 and 20 December 2008 the mother did not make the child available to the father pursuant to Court Orders.
73. On 22 December 2008 the father filed an Application in a Case for a recovery order and seeking full time care of the child and a Contravention Application.
74. On 24 December 2008, I made the following orders:
1. The Court deemed service sufficient of the father's Application in a Case filed 22 December 2008.
  2. It is noted there is no appearance by or on behalf of the mother at 10:15 am today.
  3. The Court was satisfied it is appropriate to deal with the matter on an undefended basis.
  4. That the operation of Order 4 made by this Court on 17 December 2008 is stayed pending further order.
  5. It is noted that the effect of that order is that the child [N Yantis] born ... December 2002 live with the father until 6:00 pm on 27 January 2009 and will not live with the mother or spend time with the mother until that date and time.

6. That the Marshal of this Court, all officers of the Australian Federal Police and of each of the Police Forces of the States and Territories of Australia be authorised and directed with such assistance as they may require and if necessary by force, to stop and search any vehicle, vessel or aircraft and to enter and search any premises or place in which there is, at any time, reasonable cause to believe that the child [N YANTIS] (male) born ... December 2002 may be found and to recover the child and to deliver the child to the father.
7. The Court requested that the Registry Manager of this Court at Parramatta, or his nominee, provide to Debra Harris, counsel pro bono for the father, the details contained in an envelope sealed at the direction of the Court on 17 December 2008 in relation to Mr [D] for the purposes only of that information being provided to authorities authorised pursuant to a Recovery Order issued today and not otherwise.
75. On 24 December 2008 the Police attended at the mother's home and spoke to Mr D. He gave them the mother's mobile telephone number. A Police Officer spoke to the mother.
76. On 31 December 2008, the father filed an Application in a Case.
77. On 2 January 2009, the mother returned from holiday with the child. She says that she was then verbally assaulted by the next door neighbour, Mr E, who screamed at her using words to the effect "*you are a slut...how dare you take a child away from a father...I am going to kill you*".
78. On 5 January 2009, the mother contacted a women's refuge and was told to go to Liverpool Police Station and that the police would then escort her and the child to the refuge. It is not clear whether that was done. It would seem strange that the police would assist the mother in that way, in the face of a current recovery order.
79. The mother stayed at the refuge until 20 January 2009. She returned home at midnight on 20 January 2009. At 2.00 am the next morning the Police arrived at the home. Mr D was sleeping in the lounge room at the front of the house and opened the door to the police. The police asked if the child was at home and initially Mr D said that he was not. The police pressed Mr D and he conceded that the child was at home. Mr D woke the mother. The police asked the mother to wake the child and to deliver the child to them. That took some time. The mother could not fully wake the child. She partially dressed him and the police took the child from the mother's home and delivered him to the father. The child has been mainly in his father's care since that time.
80. The father says that on that same day, his car was stolen. I gather that he sees a link between those events. Ms C and Ms B refer to damage to motor vehicles that they suggest was caused by the mother or Mr D or at their initiative.

81. The father says that when the child came to him he was constipated. The father asked his cousin to help. The cousin collected a suppository from a Pharmacy, delivered it to the father and the father put it in the child's rectum.
82. On 27 January 2009, the parties entered into consent orders in the following terms:
  1. That these proceedings are adjourned to the Judicial Registrars Duty List call-over at 9.30am on 16 March 2009 and for interim hearing on that day.
  2. All parties have liberty to issue at least 3 Subpoenae each.
  3. That until further order the child [N YANTIS] born ... December 2002 live with the father.
  4. That until further order the mother's time with the child be suspended.
  5. That the mother have telephone communication with the child each Sunday, Wednesday and Friday between 6.00pm and 6.30pm with the mother to initiate the telephone calls and the father to facilitate all such calls.
  6. That both the father and the mother be and are hereby restrained from removing [N Yantis] from the Commonwealth of Australia unless by an order of this Court and until further order the said child's name is to be placed on the Airport Watch list and the Independent Children's Lawyer provide a copy of this Order to the Australian Federal Police.
  7. That both the father and mother file and serve any further application and/or Response 14 days prior to the next return date.
  8. That the father and the mother be and are hereby restrained from discussing these Court proceedings with the child, the child's school principal and the child's classroom teacher.
  9. That the mother is restrained from entering upon the grounds [T School].
83. The mother says that she consented to those orders because she did not wish to see the child under supervision and without (her having) protection from the father. She did not wish for the child to form the view that she was dangerous for him to be with.
84. Mr D moved out of the mother's home in January 2009.
85. In February 2009, the mother was evicted from her home. The mother alleges that the father had contacted her landlord on several occasions and told him that the mother was living with a paedophile, smoking illegal drugs and that she had stolen the child from him.
86. Between February 2009 and July 2009, the mother says that the father denied her sisters (presumably Ms J and Ms H) access to the child approximately 10 times.
87. The father agreed to the child seeing his mother on her birthday – late March 2009.

88. On 4 March 2009, the parties attended a Legal Aid Conference. No agreement was reached.
89. It is the mother's evidence that in March 2009 the child told her that in January 2009 the father pushed something up his bottom and that made him cry. She did not inform the police or the Department of Community Services at that time but subsequently made reference to that disclosure in her Notice of Child Abuse filed in September 2009.
90. In April 2009 the father took the child for speech therapy.
91. On 28 May 2009, the mother says she was driving past the child's school on her way to work. She stopped the car and gave him a hug and kiss. That was a breach of the Court orders. The mother says that the father saw this and pushed her away.
92. The mother says that on several occasions throughout early 2009, during her telephone conversations with the child, he spoke of these Court proceedings. The inference being that the father or someone associated with him had discussed the proceedings with the boy.
93. On 9 June 2009, the mother was served with an Apprehended Violence Order (AVO). She sought the issue of an AVO against the father. Interim Apprehended Violence Orders were made on 8 July 2009 at the Local Court for the protection of the mother and the father from each other. Both applications were subsequently withdrawn.
94. In July 2009, the father undertook and completed the PPP parenting program.
95. On 23 July 2009 the father gave a police statement.
96. On 26 July 2009, the mother says that the father refused to allow the child to speak with her on the phone.
97. On 4 August 2009, the mother filed an Application in a Case seeking interim parenting orders.
98. From 22 September 2009 the mother saw the child under supervision on Friday afternoons.
99. On 22 September 2009 the mother filed a Notice of Child Abuse or Family Violence. In that notice the mother alleged:

6

1. Some time in the first half of 2006 I saw [Ms C] touch [the child] on the bottom in an obvious sexual way. She said "he has a very sexy ass" and "He is a big little boy isn't he".
2. Thereafter until Oct 2008 I saw [Ms C] touch [the child] around the genitals and on the bottom about 20 times.
3. Thereafter until Oct 2008 I saw [Ms C] ask [the child] and / or let him fondle her breasts about 20 times.

4. On 27 January 2009 [the child] told me that [the father] had pushed an object into his bottom and made him cry.

100. As to the alleged risk of abuse the Notice contains the following:

10

1. Whilst [the child] lives with [the father] & doesn't see his mother there are controls in place (or checks and balances) to protect [the child] from abuse described at part E paragraph 6.
2. Whilst [the child] lives with [the father] & doesn't see his mother [the father] is free to give [the child] to [Ms C] and she can continue to touch and fondle him as described at part E paragraph 6.

101. The first allegation in paragraph 10 of the Notice makes no sense. It may be that the mother intended to assert that there were "no controls in place.. (or checks or balances)".

102. As to the alleged family violence the Notice contains the following:

14

1. Rape on 2 occasions that were witnessed.
  2. Hitting kicking spitting & verbal abuse on about 50 occasions.
  3. 2 counts of pushing one onto the road.
- Note! Too many to list please refer to affidavits filed & described at paragraph 16.

103. As to the first allegation, in her affidavit the mother refers only to a rape on 14 August 2009. In cross-examination she explained that by "*witnessed*" she did not mean that someone saw the rape but that she told someone of the rape after the event.

104. As to the alleged risk of family violence the Notice contains the following:

18

1. Whilst the father is free to approach the mother to Court [the child] for access, the mother and [the child] are at risk of receiving his anger in the form of verbal and physical violence.
2. Whilst [Ms C] has uninterrupted access to [the child] the mother is subjected to her verbal abuse and contact.

105. On 28 September 2009, interim orders were made in terms agreed to by the parties as follows:

1. That the further hearing of all extant applications is adjourned before Registrar Bartlett to 10.00am on 11 November 2009.
2. That pursuant to S.91B of the *Family Law Act 1975* as amended the Director-General of the Department of Community Services be requested to intervene in these proceedings in relation to [N Yantis] born on ... December 2002 ("the child").

3. That the Department of Community Services is requested to prepare a Magellan Report as to the mother's allegations contained in her Notice of Child Abuse (Form 4) filed on 22 September 2009 and that such report be filed at this court no later than 2 November 2009, and Registrar Bartlett or the Court is to release that report to the parties when it is available.
  4. That Registrar Bartlett is to forward to the Director-General of the Department of Community Services by 4pm on 30 September 2009 a copy of all materials relevant to the current application and for this purpose leave is granted to release to the Director-General a copy of any Expert's Report or Family Report.
  5. That leave is granted to the Director-General to search the Court record and make a copy of any document relating to the proceedings, pursuant to Rule 24.13 of the *Family Law Rules 2004*.
106. Between approximately September 2009 and August 2010, the mother spent time with the child each Friday from 3.00pm to 6.00pm. This time was supervised by the mother's brother in law, Mr H.
  107. On 29 September 2009, the mother filed an Application in a Case seeking an injunction that the parties be restrained from allowing the child to have contact with Ms C.
  108. On 6 October 2009, Ryan J made the following orders:

**IT IS NOTED:**

1. That the Court notes the undertakings by [the father] which is Exhibit A and [Ms C] which is Exhibit B as set out hereunder:-

**EXHIBIT A**

I, [Mr Yantis] do hereby undertake to the Court to personally supervise any time to be spent between [the child N] and his Godmother, [Ms C].

**EXHIBIT B**

I, [Ms C] hereby undertake to this Court to accept the personal supervision of [Mr Yantis] of any time we might arrange for [the child N] to spend with me.

2. That the Court notes that the Application in a Case filed by [the mother] on 29 September 2009 is consequently withdrawn and dismissed.

**IT IS ORDERED:**

3. By consent that other than as is provided for in the interim orders made on 28 September 2009 [the mother's] Application in a Case filed on 4 August 2009 is withdrawn and dismissed.
4. That the father has leave to make an oral application for his costs in relation to the mother's Application in a Case filed on 29 September 2009.

5. That the Independent Children's Lawyer has leave to make an oral application for costs in relation to the mother's Application in a Case filed on 29 September 2009.
  6. That by consent the mother shall pay the father's costs of her Application in a Case filed on 29 September 2009 the sum of \$577.50 within three months.
  7. That by consent the mother shall pay the Independent Children's Lawyer's costs of her Application in a Case filed on 29 September 2009 the sum of \$577.50 within three months.
- 
109. Ms C concedes that she stayed with the child for some hours on one occasion after those undertakings were noted in circumstances where Ms B was present but the father was not. She said that the child was ill and crying out for her.
  110. On 2 November 2009 a Magellan report was provided by the Department of Human Services, Community Services. On 9 November 2009, the Magellan Report was released. The Department advised that the Director-General would not intervene in the proceedings.
  111. In November 2009 the father was prescribed Aropax for depression.
  112. On 11 December 2009, Registrar Bartlett made orders by consent that Dr R be appointed as the single expert in the matter.
  113. On 9 February 2010, Dr R's report was released to the parties.
  114. On 5 February 2010, the father says that he was assaulted by Mr D.
  115. On 10 February 2010, the mother says the child disclosed to her that he had been physically abused by the father.
  116. On 26 February 2010, the child was hospitalised having suffered an asthma attack.
  117. On 7 April 2010, the mother says the child told her that he had been left by his father at a man's house and that the man hit him.
  118. In May 2010 the mother completed a 5 session, post separation, parenting group "Keeping Kids in Mind" under the auspices of Centacare.
  119. In August 2010, the parties attended mediation. They agreed that the mother would spend unsupervised time with the child each Friday from 3.00 pm to 6.00 pm and that the child would otherwise live with the father.
  120. On 25 November 2010, Dr R released an addendum to his initial report.
  121. On 23 December 2010, the parties agreed that the child would spend time with the mother from Thursdays until Saturdays during the summer school holidays.
  122. On 30 March 2011, the mother says that the child disclosed to her that the father had "bashed" him.

123. On 22 April 2011, the child told the mother that the father was changing his school.
124. On a date that the mother does not identify she says that the child told her that the father asked him to observe Ramadan and not eat meat for 40 days. The father denies any such statement noting that by faith he is Catholic not Islamic. The mother was asked whether she believed that the father would impose an aspect of Islamic fasting on the boy. Her answer suggests that she never had any such concern. That begs the question, why did she raise it?
125. On 18 May 2011, the mother filed an Amended Initiating Application.

### **CREDIBILITY**

126. This case involved allegations of physical abuse by the father against the mother and the child. The alleged behaviours are said to have occurred in private or at least in the absence of any independent witnesses. There is nothing by way of official records from a doctor, hospital, police or criminal court. In those circumstances the credit of witnesses is important.
127. The mother gave her evidence with little affect. She seemed a very co-operative witness, to the point of agreeing to propositions put in cross-examination that make little sense of her case. Much of the mother's evidence makes no sense. For example the mother says she considered and considers Ms C a potential source of abuse of the child because of conduct the mother observed in 2005 and since and yet she relied on Ms Cy to baby sit the child over the following 3 years or so.
128. Ms H is the mother's older sister. She lives with her husband Mr H in the house they own in .... She works as an allied health care assistant. She suffers from Dyslexia and her affidavit is appropriately endorsed. She does not have a good memory for dates. She was not successfully challenged in relation to her evidence. She was asked if she had seen the father strike the child. She reported that he had hit the child when N was a baby. She said that the mother was present on that occasion. When she was told that the mother had given evidence that she had never seen the father hit the child, Ms H said something like "it was just a slap on the bottom - it was nothing." If it was nothing, why had she raised it? The details of the evidence of Ms H about the events following the alleged rape of the mother on 14 August 2007 do not fully accord with those of the mother. Both Ms H and the mother made the same mistake about the date. To some extent then, one of them relied on the evidence of the other, rather than their own independent recollection. I take it that Ms H set out to exaggerate her complaints against the father.
129. Mr D made concessions against interest – both against his own credibility and the mother's case. He conceded that he sought to mislead the police on 21

January 2009 when they came to his house at 2.00 am looking for the child. He conceded that he gave the mother poor advice in relation to her dealings with the child's school.

130. The father's evidence was not successfully challenged on any significant issue.
131. Ms C was cross-examined at some length and was not successfully challenged on any important issue. In particular she was not successfully challenged in respect of her denial of allegations that she had sexually assaulted the child. In final submissions it was conceded in the mother's case that I could not find that the events occurred or that there was an unacceptable risk to the child arising out of the allegations. She conceded that she had seen the child without the father's supervision on one occasion when the child was in pain and needed her. Having read the undertaking she gave more carefully, it might be said that she did not breach it. Her obligation was only to 'accept' the father's supervision. Nevertheless, the event in question was at least a breach of the father's undertaking and against the spirit of the notations made by the Court. I should say that Ms C did not take that point. She was unabashed about caring for the boy when he was in pain.
132. Ms B was not successfully challenged on any important issue. She thought that the father had been in attendance on the occasion that she and Ms C minded the boy while he was in pain. That is not Ms C's evidence. Nothing turns on that question.
133. Dr R gave evidence as the single expert and his credit is not in issue.

## **THE EXPERT EVIDENCE**

### **THE MAGELLAN REPORT**

134. The Court has had the assistance of a Report prepared by the then NSW Department of Community Services 2 November 2009.
135. The Report records 23 risk of harm reports in relation to the child. The dates in the narrative of the report are different to some of the dates in the table included in the report. Doing the best I can, I think that the record of notifications is as follows:

<b>Date of Contact</b>	<b>Primary Risk of Harm</b>
18 November 2002 (unborn)	Risk of physical harm
26 August 2008	Risk of sexual harm/injury
4 September 2008	Drug use by carer
3 December 2008	Risk of psychological harm

5 December 2008	Risk of psychological harm
6 December 2008	Legal guardianship issues
6 December 2008	Risk of sexual harm/injury
8 December 2008	Legal guardianship issues
8 December 2008	Psychological mistreatment
9 December 2008	Drug use by carer
9 December 2008	No harm or risk issues
15 December 2008	Risk of psychological harm
15 December 2008	Risk of sexual harm/injury
16 December 2008	Drug use by carer
16 December 2008	Drug use by carer
18 December 2008	Legal guardianship issues
29 December 2008	Emotional state of carer
29 December 2008	Risk of psychological harm
28 January 2009	Risk of sexual harm/injury
2 February 2009	Risk of sexual harm/injury
6 May 2009	Risk of sexual harm/injury
10 May 2009	Risk of sexual harm/injury
30 September 2009	Legal guardianship issues

136. The (unborn) child first came to attention in 2002 with a notification as to the mother being a suicide risk. There were no notifications between that time and 2008. The majority of the reports concerned periods when he lived with his mother.
137. Many of the notifications were not followed up by the Department and were seen as ‘for information only’. The report of 26 August 2008 related to the mother having a new partner with a history of drug use. The school was contacted and apart from a concern about the child not continuing with speech therapy, the school had no concerns. The Department closed the report.
138. The report of 5 December 2008 included an allegation that the mother’s partner was a sex offender. The report notes that police information confirmed the allegation and recent charge (I assume relating to Mr D) and that the DPP later dropped the charges. The report notes a concern that the mother was not aware of the charges.

139. The reports of 6 and 9 December 2008 related to drug use by the mother and Mr D. It was alleged that they had a telescope on their front veranda, pointed at the school. The Department could not contact the mother over this period.
140. The report of 16 December 2008 arose out of the signs erected in the mother's front yard. The report of 28 January 2009 had the telescope moved inside the house but still pointing at the school, through a window.
141. As to the mother's Notice of Abuse, the Magellan report records that the suppository incident had not been referred to the Department (presumably, apart from the Notice) and that the allegations in respect of Ms C were not investigated beyond contacting the child's school. As a result of that contact, the Department was told by the school that the child had become withdrawn at the end of 2008 and in early 2009 but that since then he had "settled / he is no longer withdrawn / he is residing with his father and is always well presented at school".

#### **THE EVIDENCE OF THE SINGLE EXPERT**

142. Dr R is a Child Adult and Family Psychiatrist. His primary report is dated 9 February 2010. The report is not provided under cover of an affidavit but no issue was taken with that fact.
143. Dr R interviewed the parties, the child, Ms C, Mr D and Ms H in January 2010. This was after the child had lived mainly with the father for about one year.
144. Dr R opined that the child has a close loving relationship with both parents. He thinks that both parents are capable and caring.
145. In Dr R's opinion, the father is very strict and appears to have an authoritarian aspect to his approach to the child but he also has a strong connection with the child. The father expressed a degree of anger and resentment. His background is from war torn Iraq. He lost his parents at an early age, moved to Greece as a refugee and then came to Australia. His only close relative is a brother in the United States. He has not had any relationships prior to his relationship with the mother and that was not stable, nor did it involve them living together. Dr R thinks that the father is consumed with the child and with his estranged relationship with the mother. He thinks that the father is very controlled emotionally and defended and yet emotionally vulnerable and fragile.
146. In Dr R's opinion, the mother has significant issues and dependent personality traits that are of concern but there is a close bond between mother and child and a strong attachment. She comes from a disrupted background – she lost a brother at a young age, has a sister with bipolar disorder and personality difficulties and had no contact with her natural father. Her mother was controlling. Dr R thought that the involvement of Ms C in the lives of the

members of the mother's family and in that of the child, has been inappropriate. The mother forms dependent relationships. Dr R mentioned those with her older sisters, with Ms C and with Mr D. Perhaps affected by learning difficulties as a child, she acted irrationally at times – making the school signs and not trying to understand and thereby ignoring, Court orders. Dr R did not accept that the mother has had a problem with the use of alcohol or illegal drugs. By the same token he did not accept any of the allegations of abuse – that would include the allegations of the mother against the father.

147. Dr R thought that the child was developing normally for his age. There have been signs of stress – bowel problems and anger outbursts but most likely they have been directly affected by the acrimony and battle between his parents. His speech problems are minor and should improve. He is intimidated by his father and is clearly more attached to his mother than the father. The child said he wants a 7/7 arrangement but Dr R thought that he really wants to spend more time with his mother than with his father.
148. Dr R formed the view that the allegations of abuse are not supported by clear evidence but that the child is at risk because of the battle between the parents.
149. In his main report Dr R canvassed the possible outcomes, more time with the father or more time with the mother and recommended an arrangement of virtually equal time – 4 days with the mother and 3 days with the father.
150. Dr R prepared an addendum to his report dated 25 November 2010 after reviewing material produced to the Court on subpoena. That material, particularly the school and police material in relation to Mr D lead him to change his recommendations. On reflection he thought that a shared parenting arrangement would not work as there is too much conflict between the parents. He thought that the mother has demonstrated more personality problems than the father and on the other hand, that he has demonstrated more stability than the mother. He remained concerned about the father supporting the mother's contact with the child given her lack of regard for him. He did not think that either parent is an unacceptable risk to the child but noted the mother's lack of stability and the (poor) choices she has made. In the latter regard he mentioned the fact that she had other relationships when she was with the father and that caused her doubt as to whether he was the child's father; her involvement with people such as Ms C and Mr D; and her (in)ability to choose healthy people to assist her in her life.
151. The revised recommendation from Dr R is that the child live mainly with the father and spend 3 weekends out of 4 and half the school holidays with the mother.

## THE ORAL EVIDENCE OF THE SINGLE EXPERT

152. Obviously the main challenges to Dr R's opinions came in cross-examination on behalf of the mother. He was asked about his observations that the child has a close relationship with his mother and confirmed that that remains his opinion. Dr R was asked about the child's wish to live with his mother. He thought that the child's stated wish for a 7/7 arrangement might have reflected him missing his mother after a period of living with his father. He thought that it was too difficult to compare the strength of the relationships between the child and each parent. Instead he noted that the child seemed keener to be with his mother on the day of the interview. Dr R said that the child needs and thrives on having a close relationship with his mother and father.
153. As to the observation on page 3 of the first report that Family Consultant, Dr WT, made to the effect had the child was concerned about upsetting his father and concerned about his father's reaction, Dr R said he thought the child was acutely aware of what both parents wanted and felt pressure from both parents.
154. Dr R was taken to his observations of a stiffness and formality between the child and his father and not with the mother and was asked whether the child could be intimidated by his father. He said that he saw the reaction (of the child to the father) more as a cultural difference. The child reported that he liked doing things with his father, going to movies and whatever. He said that there was not the close affection between the child and his father that was observed between the child and the mother. He wondered about cultural and sex differences. He noted that a close bond does not necessarily mean open affection and said that he did not try to interpret their affect too far.
155. When he asked the child about his parents, Dr R believed that the child did not want to express a strong view. The child knew his parents were in conflict. He was asked whether when he tried to engage the child in communication, the child was non responsive. Dr R was unsure about that proposition. He said that he thought the child was sad about not seeing his mother as much as he had previously and that was on his mind but he was still not expressing a preference for one parent over the other. There was a sense of longing for his mother but Dr R did not take that to mean a preference for her over the father. Dr R thought that there are cultural issues about the reactions.
156. Dr R did not think that one party alone was responsible for involving the child in the proceedings. He said that his concerns about both parents on that issue had lead to his observations about the possibility of the child needing to be placed in foster care.
157. Dr R noted that the child stood up to his father during the interview and had to cope with the father being angry with him. The mother's counsel asked Dr R if what happened was what Dr WT had observed – that the child was concerned with his father's reaction to the idea of him wanting to spend more time with

his mother. Dr R thought that Dr WT was partially correct. He thought that the child was under a degree of pressure (from the father) but was nevertheless able to express in the presence of his father, views that he knew his father would not like. Thus the child was able to suggest a 7/7 arrangement and coped with his father being angry with him. In Dr R's opinion, that was a sign of the child's resilience. Dr R thought that the child is also under enormous pressure from his mother.

158. Dr R agreed that the father could be said to have a controlling nature. Rather than a dominating personality, he thought the father has forceful views and has exercised influence over the police and others. Dr R did not resile from that opinion when told of the father's evidence that on 60% of school mornings he was unable to cause the child to eat breakfast.
159. Dr R was asked about his recommendations for sole parental responsibility to the father in light of the mother's allegations of verbal and physical abuse. Dr R thought both parents were equally responsible for the adverse events between them and the child, could not decide about the physical allegations but that they were both responsible for verbal abuse. He was asked about the allegations of physical abuse of the child that were said to have been made by the child. Dr R observed that the allegations have come from inappropriate questioning by the mother and that could have lead to untruthful answers from a child. He thought the broader picture is relevant. It would be different if there was credible evidence of that abuse. Even what were said to be spontaneous comments from the child are of no assistance because his views are so contaminated as to be unreliable.
160. Dr R agreed that if one parent sees themselves as the winner, can control the child, exclude the child from the other parent and dictate to the other parent then that would be a bad outcome for the child.
161. Dr R agreed that in Ms B and Ms C the father has aligned himself with people adverse to the mother or that they had aligned themselves with him. He is concerned that they represent a formidable team against the mother and that is a major problem. He thought that gave rise to two issues – the question of the amount of influence and contact that Ms B and Ms C should have with the child being a different issue to that of where the child should predominantly live. He agreed that there is potential for them to undermine the relationship between the mother and the child. If the Court feels that they are likely to undermine the relationship with the mother then Dr R thought the balance should sway towards restricting or eliminating their relationships with the child.
162. Dr R spoke about his initial recommendations and said that his change of mind came about as he realised the extent of the conflict between the parties. He decided it was such as to preclude a shared arrangement. Upon coming to that

conclusion he struggled to assess which proposal was more likely to allow the relationships with both parents to prosper. He noted that the mother had problems of stability, ups and down in her life and her background. Compared to those of the father he thought the mother's relationships had been more colourful than those of the father. The major relationship he formed in Australia was with the mother. He invested more than she did in that relationship. In that way they were at odds. He presumed, possibly because of cultural factors, that they were in a monogamous relationship - a different attitude to that of the mother.

163. He agreed that the mother's relationship with Mr D caused the father to become jealous and that was one of the main factors at the root of difficulties that arose in August, September and October of 2008. He thought that the mother responded to his reaction by cutting off time with the child and in turn the father then sought to secure the child.
164. As to his opinion that the father was more invested in the relationship with the mother than she was, Dr R was taken to the evidence that the father was opposed to the child and did not seek to have a relationship with the child and forbade the mother to reveal her pregnancy or the fact of the child to others, until the child was four and a half. He said it was his impression, once the child was a fact, the father did pursue a relationship with the child.
165. He agreed that the mother was the child's primary attachment figure in the early years. He agreed that the mother raising the child without assistance from the father, maintaining paid employment, and raising her elder son alone - shows her to be a person of some strength. However, he expressed a concern about how the mother copes under significant adversity; how she tries to resolve issues; her behaviour at the school; and the nature of her relationships, for example with Ms C, which raise issues of her judgment. He does have concerns about her judgment.
166. Dr R was asked about his opinion of the influence of Ms C and did not really answer the question.
167. Dr R said he was concerned to hear that the child was partially absent from school in 2010 on 96 occasions and in 2011 on 32 occasions while in the father's care. He said he would be concerned if the father does not place the child's education as a high priority.
168. Dr R would not venture an opinion as to whether one of the parents is dominant over the other. The mother feels overwhelmed by the father at times and recruits help from others which provides her strength. He thought dominance was a subjective measure. He conceded that reliance on others is a normal reaction.

169. Dr R was asked about a 7/7 arrangement. He said that he had initially underestimated the level of conflict between the parties. He said that a level of co-operation between parents is essential for a successful shared care arrangement. He said that if the Court found that the father is controlling, dominating and undermines the mother then the alternative would be for the child to live mostly with the mother. That would require the mother being able to promote the child's relationship with the father notwithstanding all of the problems she has had. He thought that the both parents had been responsible for bad behaviour.
170. Dr R was asked to agree that men are more often violent to women than the other way around. I take it that he was being asked if it is more likely than not that the mother's allegations were true. However, in his opinion, questions of physical strength and the physical consequences aside, violence in high conflict cases is initiated equally by men and women. He was asked about women underreporting violence in such cases and responded that in this instance the mother had not avoided the involvement of the police in the recent conflicts. He said that often the dynamic of underreporting is intended by the victim to protect the perpetrator and that is not said to be relevant here.
171. Presumably in aid of an argument, despite every other argument made on the mother's behalf, that the parents were getting along better in recent times, Dr R was asked whether his opinions would change if the father had recently allowed the mother more time with the child than the orders require. He thought that was a positive change but would not agree to change his recommendations.

## **SUBMISSIONS**

172. The case outline documents provided on behalf of the parents and the child contained no submissions.
173. Counsel for the ICL addressed the Court first. The ICL supports the father's proposals.
174. The father's counsel submitted that the child should predominantly live with the father, that he should have sole parental responsibility and that the child should spend time with the mother.
175. The mother's counsel submitted that the child should live with the mother, go to school near the mother and that the mother should have sole parental responsibility for him.

## THE LEGISLATION

176. Parenting proceedings are determined on the basis of s 60CA of the Family Law Act. It provides:
- In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.
177. The task of identifying appropriate parenting orders starts with parental responsibility.
178. Section 61DA creates a presumption in favour of equal shared parental responsibility. The presumption may not apply and if it does apply, it can be rebutted. Depending on whether an order will be made for equal shared parental responsibility or not, s 65DAA requires that the court consider orders for equal time or substantial and significant time.
179. Findings are made by reference to what is in the child’s best interests. The Act specifies in s 60CC the matters that are relevant to the determination of what is in a child’s best interests.
180. Section 60CC(1) requires the Court to consider the “primary considerations” and “additional considerations” articulated in ss 60CC(2) and 60CC(3) respectively.
181. Turning to the matters in s 60CC as they relate to these proceedings:

### Primary considerations:

*(2)(a) the benefit to the child of having a meaningful relationship with both of the child's parents*

182. The court should consider and weigh the evidence at the date of the hearing and determine how, if it is in a child’s best interests, orders can be framed to ensure the particular child has a meaningful relationship with both parents but depending upon factual circumstances, the present relationship may also be relevant.<sup>4</sup>
183. A meaningful relationship or a meaningful involvement is one which is important, significant and valuable to the child.<sup>5</sup>
184. Dr R thought that the mother has demonstrated more personality problems than the father and on the other hand, that he has demonstrated more stability than the mother. He does not think that either parent is an unacceptable risk to the

---

<sup>4</sup> *McCall & Clark* (2009) FLC 93-405.

<sup>5</sup> *Mazorski & Albright* (2007) 37 Fam LR 518.

child but notes the mother's lack of stability and the (poor) choices she has made.

185. It follows from the background facts, the opinions of Dr R and the fact that both parents seek orders that would leave the child with regular, overnight, unsupervised time with the other parent, that the child has a meaningful relationship with both parents.

*(2)(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.*

187. 'Abuse' and 'family violence' are defined terms.

188. Section 4 of the Act includes the following definitions:

*"abuse"*, in relation to a child, means:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or  
(b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

*"family violence"* means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

189. The allegations that fall under this provision are the mother's allegations that:  
a) the father put something up the child's bottom in or prior to January 2009.

As to this allegation, the mother's case makes no sense. It is her evidence that she had a conversation with the child on 18 March 2009 when he told her that he didn't eat much fruit and "*you know what that does to you*". From the context of the conversation set out in the mother's affidavit<sup>6</sup> I take it that the mother thought the boy meant he was constipated. She said "what" and reports that the boy went on to say "*You can't poo properly and dad really hurt me when he put something in my bottom and he made me cry*".

If she thought that the reported event was sinister, why did she wait from 18 March 2009 when the child made the disclosure, until 22 September

---

<sup>6</sup> Paragraph 63.

2009 when she completed the Notice of Abuse, to raise the issue with anyone? For all of the time between those dates the child lived with the father, unsupervised.

Further, a few days after filing the Notice of Abuse the mother agreed to orders whereby the child would continue to live unsupervised with the father. The most likely reason why the mother acted as she did is that she did not and does not believe that the child is at risk of sexual assault by the father.

There is nothing in the mother's evidence as to why the facts reported by the child could be suggestive of a sexual assault in any event. There is an obvious, benign explanation for the incident. In other words, that the suppository was inserted for the purpose of addressing the child's constipation rather than the father's sexual gratification.

It was put to her in cross-examination that she did not believe that the father sexually assaulted the child. The mother said she did.

b) in the first half of 2006 Ms C touched the child on the bottom in an obvious sexual way and said "*he has a very sexy ass*", that he had a "*hard on*" and "*He is a big little boy isn't he*". Thereafter until October 2008 she touched the child around the genitals and on the bottom about 20 times and asked or allowed the child to fondle her breasts about 20 times.

As to those allegations, again the mother's case makes no sense. Why did she knowingly allow Ms C the opportunity to repeatedly abuse the child? Surely if she thought the child was abused she would take action after one incident or after two incidents. The mother says that on many occasions the child came into contact with Ms C after the initial abuse in 2006. Ms C was a weekly visitor to the mother's home and the mother left the child to be minded by Ms C on many occasions – including for a period of some days when she holidayed in Queensland with Mr D.

The possible explanations would seem to be:

- that the mother invented or exaggerated her concerns;
- that the mother is correct but does not really believe that what occurred was harmful; or
- that the mother was overborne by Ms C or that for many years the mother was otherwise unable to protect the child from her.

If the third alternative applies, that is the very concern raised by Dr R. If the mother relies on that alternative then she should at least say so. Of course, that would raise the risk that the mother would in the future be incapable of protecting the child.

c) On 10 February 2010 the child told the mother that: *“Dad hit me hard. He went wack wack and didn’t stop. He yelled and screamed in my face and made me wet myself. I started crying. I was really scared. I hate my dad, I want to come home.”*

As to those allegations, the mother was not challenged about her evidence in cross-examination. It was put to the mother in cross-examination that the father never hurt or hit the child and that she did not believe that the father hit or sexually assaulted the child. The mother said she did. However the mother concedes that she has never seen the father hit or kick the child. There was no evidence of bruising, the need for medical treatment, nor any reports from a compellable notifier.

d) On 31 August 2010 the child told the mother that he had a sore chest. The mother was advised by the child’s counsellor that the father kicked the child in the ribs due to things the child said about the father to the ICL.

As to those allegations, the mother was not challenged about her specific evidence in cross-examination. As is the case for the preceding alleged incident, it was put to the mother in cross-examination that the father never hurt or hit the child and that she did not believe that the father hit or sexually assaulted the child. The mother said she did. However the mother concedes that she has never seen the father hit or kick the child. There is no evidence of bruising, nor of the need for medical treatment. There is no report from the child’s counsellor or any other compellable notifier about this incident.

f) On 29 October 2010 the child asked the mother: *“how come you told your lawyer that I said I fucking hate dad cause I can’t stay for two nights ... I got into trouble. Dad hit me and made me wash his car. I then went to bed with no dinner and had to sleep on the floor. [Ms C] came over to our house the next day and I got into trouble.”*

Again, as to those allegations, the mother was not challenged about her evidence in cross-examination. It was put to the mother in cross-examination that the father never hurt or hit the child and that she did not believe that the father hit or sexually assaulted the child. The mother said she did. However, as already indicated, the mother concedes that she has never seen the father hit or kick the child.

g) On 28 March 2011 the child told the mother: *“Dad grabbed me around the neck of my shirt and threw me to the floor. He bashed me all afternoon as I didn’t have the right uniform. It was the school cross country run. He made fun of me cause you bought me new runners and I didn’t wear them that day. I got into trouble from the school as well”*

As to those allegations, the mother was not challenged about her specific evidence in cross-examination. The mother deposed to the Police informing her that the child made no such disclosure to them. In cross-examination the mother said she was satisfied with that outcome. She agreed that there was no sign of bruising on the child. She conceded in relation to this allegation that the child was, at least, exaggerating.

h) On 30 March 2011 the child told the mother: *“Don’t call the Police again mum I got bashed up again. Dad said to me that what happens in his house stays in his house. You never tell anyone what goes on and never to your mum ... Dad was very angry asking me what I told you to make the Police come.”*

As to those allegations, the mother was not challenged about her evidence in cross-examination. It was put to her that the father never abused her, never hit her, never intimidated her and never harassed her. The mother said he did. It was put to the mother in cross-examination that the father never hurt or hit the child and that she did not believe that the father hit or sexually assaulted the child. The mother said she did believe that but conceded that she has never seen the father hit or kick the child.

i) From September 2001 to June 2002 the father slapped the mother at least 20 times when they went out together and said words to the effect “How dare you look at another man you whore.” In January 2002 the father hit the mother 15 times when she visited him in hospital. In June 2002 the father pushed the child V out of the house and then slapped the mother and pushed her to the floor and told her to have an abortion. From 2004 the father threatened and hit the mother, pushed her around and threatened her with violence from his friends. On Christmas Eve 2006 the father belted the mother across the face and sent her sprawling across the hallway floor. The father raped the mother on 2 occasions – once on 14 August 2007.

She was not challenged about her evidence in cross-examination. However, as to the allegations made about assaults in 2001 and 2002, there is no independent evidence to support the allegations - nothing from the police, a doctor nor any hospital records. In January 2003 an application was completed for priority housing<sup>7</sup> for the mother and she responded to questions about her application being urgent because of her being at risk. On that form she represented that she did not suffer from domestic violence, sexual assault, child abuse, threatening behaviour by another member of her household or torture and trauma. When asked

---

<sup>7</sup> Exhibit 5.

about that in cross-examination the mother said words to the effect “*but this was for housing not my personal life.*” This remark was not taken up in re-examination. It is difficult to understand why the mother would not rely on the fact of violent assaults, if they had occurred, in seeking secure housing. The mother did not offer an explanation.

As to the allegations of rape, the mother only gave evidence about one of the two alleged rapes. As to the allegation that the father raped the mother on 14 August 2007, the mother deposed that she arrived home on 14 August 2007, after running in the City to Surf, to find the father there with Ms C and the child. Ms C went home. The mother’s elder son and the child were watching a movie. The mother went to have a shower and when she came out, the father was in her bedroom and the door was locked. She says that the father then pushed her down, lay across her back and penetrated her against her will. When she pleaded with him to stop, he said words to the effect of “Shut up. I have my slut back you will have to do as I say. They kill women like you in my country”. The mother says she refused to allow the father in her home following this incident. Ms H says that on 15 August 2007 at about 9.00 am she went to the mother’s house and the mother was sitting on the veranda still in her night gown. Ms H says that she said “What is wrong? You look terrible. Is that blood all over you?” and that the mother said: “[The father] raped me and he was slapping his penis in my face. It hurt. He told me that he had finally got his slut back. I felt dirty and humiliated and I just want to die”. There is no mention in the mother’s affidavit of the father slapping the mother in the face with his penis and no mention of there being blood on the mother on the following day.

The father agrees that he saw the mother on that occasion but contends that he gave the mother a massage and that as a result of that activity they had consensual sexual intercourse.

14 August 2007 was a Tuesday. The fact is that the City to Surf was run on Sunday, 12 August in 2007 and not on 14 August. Nothing turns on that fact except it reveals that Ms H’s evidence was based, at least in part, on that of the mother, rather than on an accurate recollection.

In those circumstances I am unable to find that the mother’s allegations are true.

## **Conclusion**

190. Albeit in the context of a finding of sexual abuse, in *Leighton & Carey* [2010] FamCAFC 94 the Full Court discussed the principles relevant to findings about abuse in the following terms:

## Principles relevant to findings of sexual abuse

28. In considering this appeal it is important we refer to the principles relevant to a finding of sexual abuse. In *B and B* (1993) FLC 92-357, the Full Court reviewed the authorities at length and said at 79,777:

In *B and B* (1988) FLC 91-957, Baker and Maxwell JJ (with whom Nicholson CJ agreed on this point) considered the role of trial Judges in the Family Court when determining custody and access cases, with particular reference to those cases in which allegations of sexual abuse had been made. The appropriate law to be applied was as set out in the following passage which appears at pages 76,923-76,924:-

‘The Family Court is a civil court in which trial Judges are required to hear and determine cases in the course of which evidence of the parties and their witnesses must be analysed and findings made based upon the civil standard of proof, that is to say, on the balance of probabilities.

It is not appropriate for Judges of the Family Court to conduct cases in which allegations of child sexual abuse have been made as criminal trials which seek to establish the guilt or innocence of one of the parties in relation to allegations of sexual abuse with the consequential result being that if the allegation be proved, access will be suspended whereas if the allegation be not proved then access will be ordered.

In the course of the hearing of a custody or access application, the court may make one of the following findings in relation to an allegation of child abuse:

- (a) that the allegation is proved; or
- (b) that the allegation is not proved; or
- (c) there is insufficient evidence to determine either (a) or (b).

Any such finding, however, may not necessarily be the determinant factor in the ultimate decision. ...’ ...

29. In *M v M* (1988) 166 CLR 69 the High Court said at 76:

...it is a mistake to think that the Family Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the party for a criminal offence. Proceedings for custody or access are not disputes inter partes in the ordinary sense of that expression: *Reynolds v. Reynolds*; *McKee v. McKee*. In proceedings of that kind the court is not enforcing a parental right of custody or right

to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child. ...

Viewed in this setting, the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child. The Family Court's consideration of the paramount issue which it is enjoined to decide cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegation of sexual abuse. ...

In considering an allegation of sexual abuse, the court should not make a positive finding that the allegation is true unless the court is so satisfied according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw v. Briginshaw*. (footnotes omitted)

191. As to the standard of proof, the *Evidence Act* 1995 now incorporates the effect of *Briginshaw* in s 140 which provides:

**Civil proceedings: standard of proof**

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.

192. Turning to the issues before me, the mother's evidence is inconsistent, uncorroborated and her allegations makes no sense of her application.

193. In cross-examination the mother was asked if she was content that the child lived with the father between January and September 2009 and she replied "yes". The mother was asked if she was content that the child see his father unsupervised and she replied "yes". On the other hand it was put to her that the father never abused her, never hit her, never intimidated her and never harassed her. The mother said he did. It was put to the mother in cross-examination that the father never hurt or hit the child and that she did not believe that the father hit or sexually assaulted the child. The mother said she did.

194. The orders sought by the mother, which include overnight unsupervised time between the child and the father, including block periods in school holidays. Those proposals are inconsistent with the mother's allegations. If the father raped the mother and physically and verbally assaulted and threatened her on scores of occasions and if the father beat, verbally and sexually abused and neglected the child as the mother alleges, there is no justification for him to

spend any time with the child, let alone that it would be unsupervised. A bare order restraining the parents from physically disciplining the child, which is the only relevant order sought by the mother, is a manifestly disproportionate response to the behaviour described in the mother's allegations.

195. Dr R did not find evidence that supports a conclusion that either the mother or the child were the victims of physical assault by the father.
196. Other than in the context of disciplining the child, the evidence taken together does not support a finding that the mother or child were the victims of physical assault by the father. Nor, apart from that context, does it support a finding that there is an unacceptable risk that the mother or child were the victims of physical assault by the father. In final submissions learned counsel for the mother conceded those propositions.

### Additional considerations

*(3)(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;*

197. Dr R says that the child expressed a wish for a 7/7 arrangement. He also thought that the child really wanted to spend more time his mother. The child is 8 years of age and has been exposed to conflict between his parents for a significant period.
198. The mother reports that in May 2009 the child expressed a wish to change schools.
199. The records<sup>8</sup> of Ms K, Psychologist confirm that during sessions in 2010 and 2011 the child consistently expressed a wish to spend more time with his mother. For example on 3 October 2010 Ms K recorded:

[The child]: "I told my solicitor that I wanted to go to my mum's a long time ago. She didn't listen. I'm still at my dad's."
200. On 29 October 2010 Ms K recorded:

[The child] states that he doesn't enjoy being at his dad's but enjoys his mum's
201. On 11 February 2011 Ms Keegan recorded:

Would like to spend more time with mum. Late for school most of the time
202. On 25 March 2011 Ms K recorded:

Ms [K]: "What would you prefer?"

[The child]: "3 weeks mum; 1 week dad."

---

<sup>8</sup> Exhibit 18.

Would still like to see dad but not as much as mum.

203. On 21 May 2011 this exchange is recorded in Ms K's notes:

[The child]: "I want to go back to mum and mother's I want to see [V].

Ms [K]: "See mum every weekend?"

[The child]: "But I want to see mum more."

204. On the other hand Ms K has recorded the boy's expressed wishes that are inconsistent with the joint applications of his parents. For example on 8 April 2011 she recorded among other things:

He said his dad wants him to move school But he doesn't want to.

205. The child is 8 years of age and his upbringing has been compromised by conflict and separation from each parent, most importantly from his primary care giver, his mother.

*(3)(b) the nature of the relationship of the child with:*

*(i) each of the child's parents; and*

*(ii) other persons (including any grandparent or other relative of the child);*

206. In Dr R's opinion, the child has a close loving relationship with both parents. The father is very strict and appears to have an authoritarian aspect to his approach to the child but he also has a strong connection with the child. There is a close bond between mother and child and a strong attachment. The mother was the child's primary attachment figure in the early years.

207. It is the unchallenged evidence of Mr H that he has observed the child to be happy with his mother and to laugh and play with her.

208. Dr R remains concerned about the father's ability to support the mother's contact with the child given her lack of regard for him. He does not think that either parent is an unacceptable risk to the child but notes the mother's lack of stability and the (poor) choices she has made.

209. Ms C has been actively involved in the child's life since he was a baby. At the mother's initiative she was made the child's godmother and says that she takes seriously the promises she made at that time. She has bathed, fed, clothed and cared for the child. Until he was 3 or 4 years of age she bathed him, including washing his genitals. In later years she drew the child's bath and assisted him to wash himself. When the child stayed at her house he slept in her bed on occasions. He was frightened of the dark and did not like to sleep in her spare room. Ms C understood that the child slept in his mother's bed on occasions. For many years she saw the child three or more times a week. She currently

sees him about three times a week and regularly speaks to him on the telephone, both at her initiative and at his.

210. There is no significant evidence about the child's relationships with other persons.

*(3)(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;*

211. At various times the parents have not been willing or able to promote the other parent's relationship with the child. The mother cut off the father's time with the child in late 2008. Albeit largely through her own actions, the mother's time with the child after January 2009 was greatly restricted.

*(3)(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:*

*(i) either of his or her parents; or*

*(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;*

212. The child has predominantly lived with the father since January 2010. The father proposes that there be no significant change to that arrangement. The mother proposes that the child live with her for most of the time. In each case the parties propose that the child spend substantial time with the other parent.

*(3)(e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;*

213. The parties have elected to live 45 minutes apart and that has imposed practical difficulties. Until the final morning of the trial I was not told that either of them intended to move. It transpires that the mother would now like to move to the Suburb P area. It would be logical for the child to attend school near the place of his primary residence. Both parents drive and have access to a motor vehicle. The mother is in paid employment but the father is not.

*(3)(f) the capacity of:*

*(i) each of the child's parents; and*

*(ii) any other person (including any grandparent or other relative of the child);*

*to provide for the needs of the child, including emotional and intellectual needs;*

214. Dr R thinks that the father is very controlled emotionally and defended and yet emotionally vulnerable and fragile. He thinks that the mother has a dependent personality and poor judgment. The mother contracted gestational diabetes when pregnant with the child and since then has had Type 1 diabetes. The father was hospitalised for kidney stones just before the October 2011 listing.
215. It is likely that each of the parents have been unable to adequately provide for all of the child's needs at all times.
216. They have equal shared parental responsibility and yet have each taken the child to medical practitioners or therapists without prior notice to the other parent – let alone prior consent or such a referral being a joint endeavour. This is likely to have caused a degree of systems abuse of the child and would be dangerous and unacceptable for the future.
217. The mother variously asserts that the father does not provide the child with sufficient food or that the child is given inappropriate food, such as devon and cream sandwiches for lunch. She says that the child demands excessive food when he is with her and that she has noted (and photographed) inappropriate food in his school lunch box – for example peanut butter, which is banned by the school. Of concern is the father's concession that on about 60% of occasions he cannot convince the child to eat breakfast. "He is not a morning person." The father says that on school days he sends extra food with the boy to address the lack of breakfast. The father said that the child at 8 ½ years of age was 132 cm tall and weighed 40 kg. There was a question in cross-examination on behalf of the mother to the effect that the child had put on 15 kilograms since July 2011. That was not conceded and no effort was made to put that evidence before the Court. There is nothing from the school or any other compellable notifier on this issue.
218. On 25 February 2011 Ms K recorded:  
Mum organised paid lunches, school principal said there was no need. But mum wants to do it.
219. For the purposes of these proceedings the mother photographed the child over the period he has lived with his father. She submits photographs of the child with bruises on his legs; with torn or cut down items of school uniform and of what are purported to be the child's rejected school lunches. There is no explanation from the mother as to how she represented that process to the child. On a more positive note, there is evidence of her arranging for the child to buy lunch from the school canteen. Again it was suggested in cross-examination that those lunches might comprise sausage rolls and pies but there was no concession about that and no evidence was put before the Court about the nature of the lunches ordered by the mother. Although the complaint about torn

uniforms is addressed in her affidavit, the same affidavit makes no mention of why she did not simply provide appropriate items of school uniform herself.

220. It is the unchallenged evidence of the father that the mother returns the child to him from weekend visits in his school uniform. There may be a reason for that but no effort was made to present it through the mother's evidence. One could imagine that if not now, at some point the child may reflect on that circumstance and be embarrassed by it. When asked why that was the case, Ms H said that the father had failed to return previously bought items, jackets etc. As I say, there is no reference to that in the mother's affidavit. I am left with the impression that the mother was more interested in obtaining forensic advantage from the situation rather than in relieving the child's distress or embarrassment.
221. The mother conceded to me that some of the concerns she has raised, based on things the child has told her, are inherently unlikely. Nevertheless, those concerns are relied on in her case against the father. I have referred to the reported statement of the child to the effect that he would be denied meat by his (Christian) father by reference to Ramadan. The mother does not accept that allegation to be true. Another example is at paragraph 118 of the mother's affidavit where she reports:
118. [The child] has recently disclosed to me a number of incidents that have occurred to him in his father's care that have caused me concern. On 28 March 2011 [the child] said to me using words to the following effect: *"Dad grabbed me around the neck of my shirt and threw me to the floor. He bashed me all afternoon as I didn't have the right uniform. It was the school cross country run. He made fun of me cause you brought me new runners and I didn't wear them that day. I got in trouble from the school as well"*.
- I was concerned by this and contacted the police and Docs.
222. The mother deposed to the Police informing her that the child made no such disclosure to them. In cross-examination the mother said she was satisfied with that outcome. She agreed that there was no sign of bruising on the child. She conceded that the child was at least exaggerating. In that situation, why did the mother include the allegation in her case?
223. The mother readily and repeatedly conceded that displaying the signs she erected in her front yard in December 2008 was an inappropriate thing to do. The mother conceded that seeking to engage the school community in her dispute with the school was inappropriate. I must say that for my part, one can understand the mother's frustration and upset in circumstances whereby from her point of view, the school conspired with the father to take the child from her care. Of all of the concerning behaviours, the reaction against the school, albeit inappropriate, can be understood.

224. The same cannot be said for the mother's failure to provide the child to the father after the orders of 17 December 2008 and the fact that she retained the boy thereafter, knowing that the police were wanting to talk to her and to recover the child. The mother did not return the child to the father on 19 December 2008. The child was recovered by the police a month later, on 21 January 2009. During that period the mother allowed the child to come into contact with Mr D. The only options are that the mother deliberately defied the orders; that she did not understand the orders; or that she did not care about the orders. She knew through Mr D and through her own conversations with the police that the police were seeking to enforce the orders. Any suggestion that she initially misunderstood the orders is no longer available as an excuse once she knew the police were wanting to talk to her.
225. On the morning of 24 October 2011, for the first time in the proceedings, the mother changed her proposals in respect of the child's schooling. Instead of seeking that the child be retained at his current school, the mother wants him to attend P Primary School and later M College. I understand that proposal to depend on the boy living mostly with her. The mother said that she has spoken to that primary school in about August 2011 and ascertained that they would have a place for the child. She was asked about her late change of proposals in cross-examination and said that she had told her previous lawyers but first told her current lawyers on 24 October 2011. How was it that she knew to enquire of the school about an available place, in August 2011 but did not tell her lawyers until the date of final submissions? The mother says that it was her intention, once this case is over, to move out of the home of her sister, Ms H, and find appropriate 2 or perhaps 3 bedroom rental accommodation where she can accommodate her sons. It is remarkable and concerning that the mother would first advise her lawyers and the court of these proposals on the day fixed for final submissions, in a case that commenced in 2008 and had been adjourned part heard from July 2011. Obviously it was also unfair to the father and the ICL to amend her proposals in that way and it gave them no opportunity to investigate or consider the issues. I hasten to observe that there is nothing objectively wrong about the new proposal and indeed, unlike her previous position, it makes sense of the mother's long held antipathy to the Principal and staff of the current school, T Primary School. I should note that as opposed to the mother's complaints, there is nothing in the evidence before me to suggest that the Principal and staff of that school acted inappropriately or failed in their duty to the child and his parents. Further, in extending as she did through her counsel, her proposal to meet the fees for the P school or for a similar parochial school near the father if the child lives mostly with him, the mother's belated proposal appears to be principled and child focussed.
226. The father has not had as extensive an opportunity as the mother to care for the child but problems with his capacity are indicated in:

- While largely under the father’s care the child was partially absent from school<sup>9</sup> on 95 occasions in 2010 and on 32 occasions in 2011 to the July hearing dates. On 2 June 2011 a note<sup>10</sup> issued to the father from the school noting that the child had been late on 14 occasions, that this was disruptive to the class and that if he is late again, the child could be kept in at lunch time to make up for time lost and work missed. The father blames this on the distance from his home to the child’s school which he says takes about 45 minutes to drive. The partial absence notes completed by the father mostly record “thick traffic” or “slept in”. The father explained in cross-examination that the child is not a morning person and he (the father) is reluctant to wake him early. He also said that he gave priority to doctors’ appointments and such things over timely attendance at school. One can sympathise with the father’s difficulty in having the child at school on time when the child does not like to wake early and the school is 45 minutes from home but the child’s attendance record is not good enough. In 2011, where the reason given for the child being late was thick traffic or that the child or “we” slept in, the child was late by more than 30 minutes on average. Two occasions when he was about 2 hours late exaggerate the average but even without those days, he was usually more than 20 minutes late. For a boy who has significant other challenges in his life, that is unacceptable. I have no records from before 2009 to demonstrate the mother’s performance against this standard but of course the journey to school from her house was more like 2 minutes. Far from the allegation that he is an abusive autocrat, the father’s explanation suggests that he is either too lenient in relation to the child’s morning routine or in any event that he does not place sufficient priority on his schooling;
- Unlike Dr R, I think it is likely that the father has struck the child. The notes from Ms K are replete with complaints by the child about being hit by his father. The references include:
 

11 February 2011	angry at dad because he hits me and swears;
25 February 2011	dad hits me He gets angry at me. I don’t like him; [Ms C] thinks he’s a nice man. Sometimes painful not all the time. Smack on leg front
8 April 2011	dad hit me, slapped grabbed Tshirt;
5 May 2011	dad hasn’t hit him since last time; I get smacked all the time by dad when I muck up;
18 June 2011	dad grabbed [the child] by the Tshirt; hit [the child] on top of arm

---

<sup>9</sup> Exhibit 13.

<sup>10</sup> Exhibit 1.

- During cross-examination the father described his approach to discipline. He says that he benefited a PPP program and learnt about giving and withdrawing rewards. By way of example he said that he might give the child \$5 if he completes his homework; might give him money to perform chores around the house. He pays the child a dollar if he (the father) uses inappropriate language to or in the child's presence. On one hand this seems a very simplistic and potentially very expensive strategy but on the other it is not suggestive of abuse or neglect.
- The father suffers from depression and continues to be prescribed Aropax for that condition;
- Dr R records that the father pressed the child for responses to the Doctor's questions, invited specific responses and became angry, sometimes in the presence of the child, when those responses displeased him. I note that the father (like the mother) maintained an even display of good temper during the trial. It is worrying that when he knew he was being observed with the boy by Dr R, the father could not control himself better. Of course it was not only the father who sought to influence the child to make a statement or express a preference in favour of one parent. The mother too acted inappropriately in that regard. On a number of occasions during cross-examination the father referred to cultural differences between Australians of European background and those from his background. He agreed that he could be loud and said that was a cultural trait. He said that "his people" would talk all at once – ten people resulting in five conversations, where that might otherwise be seen to be rude.

*(3)(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;*

227. The child is an 8½ year old boy. He has been diagnosed with asthma and is treated with preventer and reliever medication.
228. The predominant influence on the child has been his mother. His father is from Iraq and his mother was born in Australia.
229. Dr R refers to a letter from Dr S from November 2002 to the effect that the mother had been diagnosed with a major depressive reaction – acute episodes to psychotic proportion, suicidal post partum. The mother was abused as a child and presents as having very poor self esteem. That is not to say that she is submissive. For whatever the reason and apart from the father, she has been involved in a high level of conflict with several members of her own family, her former next door neighbour; the Principal of the child's school and members of the school community. The signs in her front yard demonstrate that

she made no effort to hide her views or to limit her complaints about the school to private representations.

230. There is reference in Ms K's notes about the child being told by his father about Iraq, about him obtaining a passport and travelling to Iraq. There is reference in those notes to the child understanding that his father wants him to be circumcised. None of those matters form part of the father's case.
231. Dr R said that there are organisations that deliver cross-cultural training and that this might help.

*(3)(h) if the child is an Aboriginal child or a Torres Strait Islander child:*

*(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and*

*(ii) the likely impact any proposed parenting order under this Part will have on that right;*

232. This does not apply.

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

233. I have addressed this elsewhere in these reasons. The child has been loved and fed and clothed. However, there are aspects of the conduct of the parents that demonstrate a poor attitude to or a misunderstanding of the responsibilities of parenthood.

*(3)(j) any family violence involving the child or a member of the child's family;*

234. I refer to the earlier comments about family violence. Notwithstanding the opinion of Dr R the notes of Ms K suggest to me that it is likely that the child has been struck by the father, albeit perhaps in the course of what the father might have seen as appropriate discipline. Minds differ about the propriety, efficacy and acceptability of striking a child. However, in circumstances where parents do not agree or in any event where the Court is asked to exercise discretion in respect of parenting arrangements, the orders will require that the child not be physically disciplined.

235. As to her allegations of violence by the father against her, Dr R was specifically taken to the possibility that the mother did not report and therefore was unable to corroborate many of her allegations because of the father's violence. Dr R would not agree with that proposition. He noted that the mother had shown no reluctance to involve the police and other authorities in her disputes with the father.

*(3)(k) any family violence order that applies to the child or a member of the child's family, if:*

*(i) the order is a final order; or*

*(ii) the making of the order was contested by a person;*

236. There is no current Domestic Violence Order.

*(3)(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;*

237. The parties enjoy a very poor relationship, have virtually no capacity for direct communication or negotiation and at times, each has failed to comply with the letter or spirit of an order or undertaking. In those circumstances one could not be sanguine about my orders putting an end to litigation about the child. Perhaps it was for that reason that Dr R flagged at an early stage the possibility that the child should go into Care and not live with either parent.

*(3)(m) any other fact or circumstance that the court thinks is relevant.*

238. Nothing comes to attention here.

### **Parental responsibility**

239. Parental responsibility is defined by s 61B of the Act to mean “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children”.

240. If no order is made in respect of parental responsibility then the position as to the parents of a child is as follows:

#### **SECT 61C**

##### **Each parent has parental responsibility (subject to court orders)**

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.

Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the

parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Note: Section 111CS may affect the attribution of parental responsibility for a child.

241. An order for shared parental responsibility has the following effect:

**SECT 65DAC**

**Effect of parenting order that provides for shared parental responsibility**

(1) This section applies if, under a parenting order:

(a) 2 or more persons are to share parental responsibility for a child; and  
(b) the exercise of that parental responsibility involves making a decision about a major long-term issue in relation to the child.

(2) The order is taken to require the decision to be made jointly by those persons.

Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).

(3) The order is taken to require each of those persons:

(a) to consult the other person in relation to the decision to be made about that issue; and

(b) to make a genuine effort to come to a joint decision about that issue.

(4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

242. Presumably that must also apply to equal shared parental responsibility.

Discussion

243. Section 61DA provides:

**FAMILY LAW ACT 1975 - SECT 61DA**

**Presumption of equal shared parental responsibility when making parenting orders**

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

- (2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
  - (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
  - (b) family violence.
- (3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.
- (4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

244. Here neither of the parties seeks an order for equal shared parental responsibility. In the circumstances of this case, that is understandable.
245. In any event, there has been family violence (the child being struck) and therefore the presumption does not apply.

### Conclusion

246. The presumption that the parents having equal shared parental responsibility would be in the child's best interests, does not apply.
247. Although not directly addressed there has been reference in the evidence and during the trial to various issues going to parental responsibility. For example the type of schooling that the parents seek for the child, physical discipline of the child and the issue of circumcision is raised in the notes of Ms K. In that there has been no mention of the latter issue in the course of the trial I will simply preserve the opportunity for the mother to be heard on the question if it comes up. I will order that in the event that the father intends to have the child circumcised that he give the mother at least 6 weeks prior written notice so that she may consider the issue and either intervene with the father or apply to a court. Whatever might be said about the practice at birth, it not an insignificant procedure for an 8 year old boy. I will restrain both parties from physically disciplining the child. By physical discipline, I mean hitting or otherwise striking the child. Although the evidence is not unimpeachable, particularly that from the estranged elements of the mother's family, there is a risk that the mother has used illegal drugs. Although the matter was not specifically taken up in oral submissions I will order that the parties be restrained from consuming or using illegal drugs during or within 12 hours prior to any period when the child is in their care. There can be no complaint about that. They are not permitted to do so in any event.
248. Otherwise the father will have sole parental responsibility.

## Living Arrangements

249. Section 65DAA provides:

### **Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances**

#### Equal time

(1) Subject to subsection (6), if a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:

- (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
- (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
- (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

#### Substantial and significant time

(2) Subject to subsection (6), if:

- (a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and
- (b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and the court must:
- (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
- (d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
- (e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

(3) For the purposes of subsection (2), a child will be taken to spend ***substantial and significant time*** with a parent only if:

- (a) the time the child spends with the parent includes both:
  - (i) days that fall on weekends and holidays; and
  - (ii) days that do not fall on weekends or holidays; and
- (b) the time the child spends with the parent allows the parent to be involved in:
  - (i) the child's daily routine; and
  - (ii) occasions and events that are of particular significance to the child; and
- (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

#### Reasonable practicality

(5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:

- (a) how far apart the parents live from each other; and
- (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- (d) the impact that an arrangement of that kind would have on the child; and
- (e) such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

- (a) 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 (paragraph 60CC(3)(c));
- (b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity--the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

Consent orders

(6) If:

(a) the court is considering whether to make a parenting order with the consent of all the parties to the proceedings; and

(b) the order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child;

the court may, but is not required to, consider the matters referred to in paragraphs (1)(a) to (c) or (if applicable) the matters referred to in paragraphs (2)(c) to (e).

(7) To avoid doubt, subsection (6) does not affect the application of section 60CA in relation to a parenting order.

Note: Section 60CA requires the best interests of the child to be the paramount consideration in a decision whether to make a particular parenting order.

250. There will not be an order for equal shared parental responsibility. Therefore I must decide what living arrangements would be in the child's best interests.
251. As to what is in the child's best interests, I refer to the findings made in respect of the s 60CC matters. In particular I refer to the findings as to the primary considerations and (b), (c), (d), (e), (f), (g), (h), (i), (l) & (m).
252. Although both parents have completed parenting programs, their relationship is such that they cannot effectively communicate with each other. Those around them, including in this case, Mr D, Ms C and the elements of the maternal family that are estranged from each other, have not improved the parties communication and have overall, added to the conflict. The parents do not currently have and are unlikely to have in the future any capacity to implement a shared care arrangement. There remains a significant level of mistrust between the parents.
253. As to other matters the court considers relevant, these are civil proceedings and neither of the parents, nor the child's representative seek an order for equal time. Given the difficulties of enforcing the positive obligations of parenting, the fact that such an order is not sought by anyone could make it impracticable.
254. Both proposals include time for each parent that falls on weekend days and holidays and time that does not. In my view those proposals will allow each parent to be involved in the child's daily routine and occasions and events that are of particular significance to him. He can be involved in occasions and events that are of special significance to his parents.

## **OTHER ISSUES**

### **Ms C & Ms B**

255. Although it was a feature of the interlocutory proceedings, the mother did not seek an injunction until the last day of the trial in relation to the child being brought into contact with Ms C or Ms B.
256. Ms C is the child's godmother and has been a significant part of the child's life. Her involvement has been with the acquiescence, if not at the initiative of, the child's parents – for the first 6 years of the child's life, through the mother and since then, with the approval and support of the father. The mother asked her to be the child's godmother. The mother relied on her for financial support, physical care of the child, including minding the child overnight. The allegations of physical abuse made by the mother against Ms C are not born out. Nor can I find that there is an unacceptable risk to the child if he comes into contact with Ms C. As Ms C, albeit unresponsively, referred during her cross-examination – if she sexually abused the child more than 40 times over four years leading up to 2008, why did the mother permit that to happen and continue to rely on Ms C to care for the boy?
257. Ms C has had a greater role in the child's life than the average godmother. The child told Ms K that he thought Ms C wanted to be his mother. Ms C has had strong alliances with the mother and her sisters over the years and was a friend of their mother. She has also fallen out with individual sisters and the mother at various times. The mother and her sisters have not enjoyed unqualified mental health and the relationships between them have been dysfunctional and conflictive.
258. Dr R thought that the involvement of Ms C in the lives of the members of the mother's family and in the child's life, has been inappropriate. He noted that the mother forms dependent relationships and mentioned those with her older sisters, with Ms C and with Mr D. Dr R referred to the mother's involvement with people such as Ms C (and Mr D) and her inability to choose healthy people to assist her in her life. In his cross-examination Dr R agreed that in Ms B and Ms C, the father has aligned himself with people adverse to the mother or that they had aligned themselves with him. He is concerned that they represent a formidable team against the mother and that is a major problem. He thought that gave rise to two issues – the question of the amount of influence and contact that Ms B and Ms C should have with the child being a different issue to that of where the child should predominantly live. He agreed that there is potential for them to undermine the relationship between the mother and the child. If the Court feels that they are likely to undermine the relationship with the mother then Dr R thought the balance should sway towards restricting or eliminating their relationships with the child. From his first report it appears that the criticisms of Ms C relate to an over involvement in the lives of the

mother's family and in the child's life. The criticisms come from the mother, Ms H and Ms J. Ms H criticises Ms C for the allegations she has made against Mr D. Ms H tells us that she doesn't like Mr D either but does not agree (with Ms C) that he is a paedophile. At various times and for long periods at least Ms J and the mother, if not Ms H, have been friendly with Ms C and have supported her time with the boy.

259. Neither Ms C nor the father have made an application for orders for her to spend time with the child or communicate with him. The father does seek that the current interim restrictions be lifted, thereby permitting unsupervised time between the child and Ms C. Ms C was asked about this in cross-examination and said that she did not realise that she could apply for parenting orders. She said that in order to continue to play a part in the child's life, if necessary, she would seek a mediated outcome through the mother's solicitor and if that did not succeed she would obtain her own legal advice. Given that the serious abuse allegations could not be made out, the mother's case became based on concerns about Ms C being an agent of conflict and not promoting the mother's relationship with the child. Firstly, it should be noted that there is absolutely no indication that Ms C (or the father, for that matter) has succeeded in interfering with the child's relationship with his mother. The evidence suggests that they remain strongly attached to each other. Ms C was asked about promoting the mother to the boy and albeit that she did not have a sophisticated plan, she demonstrated that she had thought about counselling for them.
260. True it is that Ms C has become embroiled in the conflict between the father and the mother and between part of the maternal family against another part. She and Ms B were asked about family meetings. It was put to at least one of them that they called the meetings. One meeting was brought to attention and it transpired that the meeting had not been called by Ms C or Ms B but in fact by the mother's former solicitor. There is no doubt that Ms C and Ms B have had many conversations during which adverse comment has been made about the mother. However, every aspect of Ms C's evidence and indeed, the unchallenged history of the mother's life since the child was born, suggests that her focus has been on the child. A concerned focus on the child's welfare could in recent years have necessarily involved a criticism of the mother. Dr R says that the trigger for excluding Ms C from contact with the child is a finding that it is likely that she would undermine the child's relationship with his mother. I am not able to make that finding. Her level of involvement with the child may not be typical of other godmother's but this is not your typical family. There is no evidence on the basis of which I should restrain the father from bringing the child into contact with her. If the parents can be trusted to care for the child unsupervised, then they can be trusted to make judgments about the company he keeps when he is in their care.

261. Ms B is the mother's sister. She has been diagnosed with Bipolar Disorder and Depression and has attempted suicide on about 5 occasions. She lost her brother and her son to suicide. She is currently estranged from her sisters, Ms H and the mother, but says that she is reconciled with her other sister, Ms J. Ms B says that she fell out with the mother in about June 2008 after they both attended the funeral of Ms C's mother. She heard the mother swear at the child – “fucking get away from there” when the child was near the coffin. At the wake Ms B minded the child at the mother's request so that the mother could meet with Mr D. For a period of about 2 weeks in 2008 Ms B collected the child from school and minded him for the mother as the mother said she had jury duty. On occasions Ms B bathed the child. In about August or October 2008 Ms B minded the child at the mother's request. She noted that the mother was smoking a marijuana cigarette.
262. For a period after January 2009 Ms B collected the child from school and minded him while the father attended a TAFE course.
263. It is hard to understand the circumstances of the breakdown of the relationship between the mother and her sister Ms B. It is Ms B's evidence that in March 2009, Ms J called and asked her to arrange for the mother to see the child for her birthday. Ms B deposed that she had previously been harassed and verbally abused by the mother and was reluctant to facilitate the arrangements unless the mother apologised. Ms J told her that the mother had been angry and it would not happen again. Ms B then spoke to the mother on the telephone and the mother said: “You slut, you're dead, you mole. You should help me because you know what it's like to lose a child.” Ms B says that she responded: “Don't go there [mother's name]” and hung up. She says that she subsequently took the child to McDonald's to see his mother on her birthday. The reference to losing a child is strange because it is Ms B's evidence that the tragic death of her son, by suicide, was not until May 2009. Ms B says that the mother shouted at Ms C at her son's funeral: “What are you doing here? It's not your funeral, you shouldn't be here.”
264. There is little mention of Ms B in the mother's affidavit.
265. The mother's family is dysfunctional, has experienced the tragedy of suicide and a number of the members have had poor mental health. From time to time there have been rifts and alliances between the mother and her sisters. Neither Ms B nor the father have made an application for orders for Ms B to spend time with the child or communicate with him. Nevertheless there is no evidence on the basis of which I should restrain the father from bringing the child into contact with her. Again, if the parents can be trusted to care for the child unsupervised, then they can be trusted to make judgments about the company he keeps.

## **MR D**

266. The father seeks to restrain the mother from bringing the child into contact with Mr D. The situation with Mr D is somewhat different to that with Ms C and Ms B. Mr D readily conceded that his involvement with the school signs and the mother's letter to the school was inappropriate. He sought to mislead the police when they attempted to execute a recovery order. Despite the mother being restrained from permitting it, he came into contact with the child after the late 2008 orders. Dr R noted the mother's dependant personality and that she relied on Mr D. He noted that there was evidence to suggest that Mr D was involved in conflict with a neighbour (Mr E) and with his former partner Ms Z. Dr R noted charges in relation to Indian Hemp, stealing and driving with a high blood alcohol level. Dr R did not come to a concluded view about Mr D but said that his forensic history raises some issues of concern as to his potential influence on the mother.
267. As with Ms C and Ms B, Mr D does not seek orders whereby he could spend time with or communicate with the child. Nor does the mother. The mother says that she sees Mr D about twice a week. I cannot prevent Mr D being an inappropriate influence on the mother. To the extent that the mother is dependant on him, care is needed before the mother is destabilised by excluding her support mechanisms. In the circumstances the most appropriate course is to require that the mother not bring the child into contact with Mr D unless she is present at all times.

## **CONCLUSION**

268. I intend to adopt the thrust of Dr R's recommendations to the effect that the child live predominantly with the father. Those recommendations accord with the proposals of the father and those made on behalf of the ICL. Although he can be rigid in his attitudes, the father offers greater stability to the child at this time. In making those orders much of the evidence and the arguments made in the mother's case are rejected as unlikely and unreasonable. Albeit on the last day of the hearing the parents were able to agree about some principles in respect of schooling and it is heartening to know that they share the aspiration that the child will be educated in a particular environment. I have not restrained the parties in relation to bringing the child in to contact with certain individuals. Save for the orders about Mr D, those matters are left to the best judgment of each of the parents from time to time. The question of physical discipline has been raised and for obvious reasons I will restrain the parents in that regard.
269. The mother seeks that the child's name be retained on the watch list. The father would like to take the child to the United States to see his brother and first

cousins at some stage but cannot afford that now. He can foresee no need for travel until the child is in his mid to late teens. He too is worried that the mother might take the child overseas. The father has no objection to the order sought by the mother. In those circumstances I will make that order but provide for the parents to agree in writing to the contrary. In order to avoid embarrassment or inconvenience for the child in later years I will provide that the watch list entry remain for only 5 years.

270. These are loving parents and one can only hope that they will be able to support the child's need for a meaningful relationship with both parties.
271. I will allow the parties to restore the matter before me within 28 days of the date of delivery of judgment, or such further time as they might agree, in relation to any agreement about a change to the wording of the orders or an argument that the wording does not reflect these reasons.

---

**I certify that the preceding two hundred and seventy one (271) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Loughnan dated 3 November 2011.**

Associate:

3 November 2011