

Robins & Ruddock [2010] FamCA 35 (22 January 2010)

Last Updated: 8 February 2010

FAMILY COURT OF AUSTRALIA

← ROBINS & RUDDOCK →

[\[2010\] FamCA 35](#)

FAMILY LAW – CHILDREN- with whom a child lives – with whom a child spends time - finding of unacceptable risk – whether father’s time with the children should be supervised – domestic violence

FAMILY LAW – CHILDREN – parental responsibility – presumption of equal shared parental responsibility does not apply due to unacceptable risk – also not in the best interests of the child – mother to have sole parental responsibility

[Family Law Act 1975](#) (Cth) [ss 60B\(1\)](#), [60B\(2\)](#), [60CA](#), [60CC](#), [61C](#), [61DA](#) and [65DAC](#)

[Evidence Act 1995](#) (Cth) [s 140](#)

M and M [\(1988\) FLC 91-979](#)

Briginshaw v Briginshaw [\[1938\] HCA 34](#); [\(1938\) 60 CLR 336](#)

S and R (1999) FLC 92-834

Johnson and Page [\[2007\] FamCA 1235](#)

B and B [\(1993\) FLC 92-357](#)

Napier and Hepburn [\[2006\] FamCA 1316](#); [\(2006\) FLC 93-303](#)

McCoy v Wessex [\[2007\] FamCA 489](#)

APPLICANT:

Mr Robins

RESPONDENT: Ms Ruddock

INDEPENDENT CHILDREN'S LAWYER: P L Corby & Co.

FILE NUMBER: LNC 268 of 2007

DATE DELIVERED: 22 January 2010

PLACE DELIVERED: Hobart

PLACE HEARD: Launceston

JUDGMENT OF: Benjamin J

HEARING DATE: 10 & 11 December 2009

REPRESENTATION

COUNSEL FOR THE APPLICANT: Mr Tucker

SOLICITOR FOR THE APPLICANT: Grant Tucker

COUNSEL FOR THE RESPONDENT: Mr S Bishop with

Ms S Jones

SOLICITOR FOR THE RESPONDENT:

Bishops

**COUNSEL FOR THE INDEPENDENT CHILDREN'S
LAWYER:**

Mr J Waterhouse

**SOLICITOR FOR THE INDEPENDENT CHILDREN'S
LAWYER:**

P L Corby & Co.

ORDERS

1. All previous parenting orders be discharged.
2. The mother shall have sole parental responsibility for making decisions about major long term parenting issues for the children A born on the ... November 1999 and M born the ... March 2001 ("the children") subject to:-
 - a. the mother and the father will share the joint parental responsibility of the children in respect of the school each child attends and engaging with the children's school/s including attending parent teacher interviews, receiving school reports, school progress, behavioural issues, school circulars and newsletters, including attending school functions at school and general sporting and activities,
 - b. the mother keeping the father informed, where possible in advance, of any significant exercise of such parental responsibility regarding the children.
3. The children live with the mother.
4. The children will spend time with the father as follows:-

(a) during school term - each alternate weekend from after school Friday to the commencement of school on Monday.

(b) one half of all the school holidays.

(c) on Christmas Day from 3.00 pm to 4.00 pm Boxing Day in odd numbered years and 3.00pm Christmas Eve to 3.00pm Christmas Day in even numbered years.



(d) if it does not otherwise occur, on Father's Day from 9.00 am Sunday to start of school the following Monday.

provided that from 8.00 pm at night until 7.00 am in the morning there is some other adult person present in the house, during the father's overnight time, and the mother knows the name and age of that adult.

5. If the children are spending the weekend of Mother's Day with the father pursuant to these orders then, on that weekend, the time the children spend with the father shall cease at 9.00 am on Mother's Day.
6. Within twenty one (21) days from the date of these orders the Independent Children's Lawyer will arrange for of Dr R to explain the orders to them having regard to the reasons upon which these orders are based.
7. The parties be and are restrained from informing the children of the outcome of these proceedings pending Dr R's discussions with the children as set out in these orders.
8. Pursuant to s 65DA(2) and s 62B, 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.
9. All subpoenaed documents be returned to the persons or institutions from which they emanated and all exhibits are returned to the person or persons who tendered the same.
10. The appointment of the Independent Children's Lawyer be discharged twenty eight days from the date of this order.

IT IS CERTIFIED

11. Pursuant to [Rule 19.50](#) of the [Family Law Rules 2004](#) it was reasonable to engage counsel to attend

IT IS NOTED that publication of this judgment under the pseudonym  **Robins & Ruddock**  is approved pursuant to [s 121\(9\)\(g\)](#) of the [Family Law Act 1975](#) (Cth)

FAMILY COURT OF AUSTRALIA AT HOBART

FILE NUMBER: LNC 268 of 2007

MR ROBINS

Applicant

And

MS RUDDOCK

Respondent

And

INDEPENDENT CHILDREN'S LAWYER

REASONS FOR JUDGMENT

INTRODUCTION

1. These proceedings are about the parenting arrangements for A (aged 10) and M (aged 8). The parties separated in about 2006 and there has been significant litigation between them since that time.
2. The father was convicted of offences arising out of him downloading child pornography and the mother alleges that he has acted in an inappropriate way with at least one of their children and a step child.
3. The mother claims that the children are at unacceptable risk of abuse in the care of the father.
4. The father claims that the mother is endeavouring to undermine and damage his relationship with the children by making false accusations and allegations about him to the children.

THE ISSUES

5. There are numerous issues of fact between the parties.
6. The father seeks orders that the children live with their parents for equal time and they have equal shared parental responsibility.
7. The mother seeks orders that she have sole parental responsibility for the children and that the children spend supervised time with the father during the day and at such further times as agreed in writing. She also seeks a number of specific issues orders.
8. These proceedings were listed for hearing in July 2009, but as a result of an alleged disclosure by one of the children shortly prior to the start of the trial the hearing date was vacated. In July 2009 the Independent Children's Lawyer made recommendations which in turn the father had generally adopted.
9. The Independent Children's Lawyer was initially sceptical of the disclosure made by the mother in late July 2009. However, he subsequently submitted that some weight ought to be given to the opinion of Dr R. The view of the Independent Children's Lawyer changed

between July 2009 and December 2009. At the end of the trial the Independent Children's Lawyer made no specific recommendations, except for equal shared parental responsibility, as he said it was a matter for the Court to make findings of fact in relation to the respective evidence adduced by the mother and the father.

10. The Independent Children's Lawyer submitted that changeovers ought to be reduced. As a consequence of the evidence and having regard to that submission, I intend to make the time regular in the hope the father can provide appropriate supervision and spend regular time with the children. This will also apply over the school holiday period.
11. In some ways the father's approach to his relationship with the children is that it is about him, not the children. He gave evidence that in about July 2009 he allowed A into his bed. The father knew that there was an issue about him having the children in his bed, a consent order was made in June 2007 prohibiting him from sharing a bed with the children but that order was not continued when interim orders were made by me in June 2008. It is not clear whether the vacating of the prohibition was an oversight or a considered approach, in the circumstances I must hold it was the latter not the former.
12. The father gave evidence that the children went into his bed from time to time after the order of the Federal Magistrate was vacated. I have reservations about the reliability of the evidence of the father as to circumstance of the child going into his bed in July 2009. Between July 2009 and the December 2009 hearing, the father had the children stay overnight (supervised) and he did not take them to school the next day saying he wanted to spend more time with them. I find that his was more about his needs not those of the children. I make similar observations about his approach with the children attending choir.

BACKGROUND

13. The parties met in 1999. The mother had two children from a previous relationship, S and B aged about 14 and 13 respectively.
14. A was born in 1999, shortly after the parties commenced living together, and M was born in 2001.
15. The father was more significantly involved in the care of the children prior to separation than was the mother.
16. In June 2006 the mother discovered child pornographic material at the parties' home. She reported that discovery to the Police and terminated her relationship with the father. The father was subsequently charged with three offences in regard to that child pornography.
17. The facts to which the father admitted a plea of guilty to involved a video tape which the father had filmed from web pages. The video tape was a recording of various young girls, aged approximately 10 to 14 years, some were naked and some were in bikinis, which the father had downloaded from child pornographic web sites.
18. The father made an admission to the police, and that admission was part of the material which went before the Supreme Court, that he intended keeping the tape "to a certain degree".[\[1\]](#) He has since that time resiled from that statement.

19. The father had created electronic 'short cuts' or 'links' on his computer to the child pornographic site/s. The addresses or titles to those sites indicated that a majority of them were child pornography sites.

20. As a consequence of his plea of guilty the father was convicted of:-

(a) Accessing child exploitation material.

(b) Reproducing a child abuse product, namely copying pornographic pictures of young naked girls by way of video camera.

(c) Possessing child abuse products.

21. The father was convicted of those offences in the Supreme Court of Tasmania and he was fined \$1,000. In sentencing the father, the judge, said:-[\[2\]](#)

... Prosecuting counsel informed the Court that the State does not pursue an order in this case (an order to register the father under the [Community Protection \(Offender Reporting\) Act 2005](#)) and pointed out his [the father's] lack of prior offences and, she said, that the offences fall at the lower end of the scale of sexual offences in so far as concerns seriousness. Counsel for the accused [the father] submitted that he does not pose a risk of committing a reportable offence in the future and the Court should not invoke the Act. However, I am far from convinced by the submissions. I am particularly concerned that not only did he commit the offences but his chosen occupation was to work with children. I am not satisfied that he does not pose a risk of committing a reportable offence in the future.

22. As such, his name was placed on the Sexual Offenders Register for five years commencing late 2006.

23. The events following the parties' separation set out, in chronological order, what occurred. In April 2006 the mother found the video tape of the child pornography. Appropriately she reported the discovery to Tasmania Police. The father was arrested and charged with the offences referred to earlier. The father did not then see the children for some time.

24. The Tasmanian Child and Family Services Office arranged for a psychologist, Dr JH, to prepare a report about the father, insofar as his criminal behaviour impacted upon his interaction with children. Dr JH interviewed the father, administered a psychological test and conducted a psychological assessment with regard to the father's response to sexually explicit internet pornographic material. Dr JH was aware that the father had accessed child pornography and had made a video copy of some of that material.

25. Dr JH did not interview the mother nor did she interview the children. She wrote a report dated 22 July 2006 in which she concluded that the father does not represent any real threat to his children or children in general in the future. Further she concluded that she could see no impediment to the father having unsupervised time with his children.

26. After Dr JH's report was released the mother was informed that the children were safe in the unsupervised care of the father. Unsupervised time between the father and the children recommenced and developed.

27. In May 2007 the mother instructed her then solicitor to send a letter to the father about the children. Subsequent to that letter being sent the mother commenced proceedings in the State Magistrates Court seeking apprehended violence orders against the father. The father commenced proceedings in the Federal Magistrates Court and on 20 June 2007 orders were made the children live with the mother from after school Friday until Monday and otherwise live with the father. The mother filed an appeal in relation to that determination and obtained a stay of the orders. The appeal was heard by a single Judge exercising the appellate jurisdiction under the [Family Law Act 1975](#) (Cth) ("the Act"). The mother's appeal was subsequently dismissed.
28. The substantive proceedings were transferred to the Family Court and an Independent Children's Lawyer was appointed. In June 2008 a consent order was made providing that the parents have equal shared parental responsibility for the children and that the children live with the father and mother each having five days and each having two days. These equal time orders, together with other orders were made by me.
29. In December 2008 orders were made listing the matter for trial in the Launceston sittings commencing 21 July 2009.
30. An alleged disclosure was made by A on 23 July 2009 and as such orders were made on 27 July 2009 that the children's time with the father be supervised, such supervision only occurring at night.
31. In these reasons any statement of fact is to be regarded as a finding of fact unless the contrary intention is clear from the context.

RELEVANT LEGAL PRINCIPLES TO BE APPLIED

32. In exercising its jurisdiction in relation to children, the Family Court is bound by the provisions of the Act. This is a proceeding to which the provisions of Division 12A of [Part VII](#) of the Act applies.
33. The object of Act relating to children is to ensure that the best interests of the children are met. [Section 60B\(1\)](#) of the Act provides that this can be done by:-
 - (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
 - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
 - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
34. The principles set out in [s 60B\(2\)](#) that underlie those objects are that, except when it would be contrary to a child's best interests:-

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

35. Each of the parents of a child has complete but several parental responsibility for their child pursuant to [s 61C](#) of the Act. This is subject to any court order and must be considered in the light of the so called presumption arising out of the operation of [s 61DA](#) of the Act. [Section 61DA](#) is part of the amendments and became operative on 1 July 2006. The section provides that a Court must apply a presumption that it is in the best interests of a child for that child's parents to have equal shared parental responsibility^[3] for the child, subject to [subsections 2, 3, 4 and 5](#).

36. If the presumption is found to apply and is not rebutted, as not in the best interests of the child, an order must be made in accordance with [s 61DA](#) for equal shared parental responsibility. If not, the Court must make a declaration that the presumption does not apply and for reasons pursuant to subsections within [s 61DA](#).

37. The effect of an order which provides for shared parental responsibility, whether equal or not, is set out in [s 65DAC](#).

38. The question of the allocation of parental responsibility generally needs to be determined before the question of with whom the child lives and/or spends time with, and the degree of communication a child is to have with another person is determined (see [s 64B\(2\)](#)). This is because where the presumption of equal shared parental responsibility applies, the Court must consider whether it is in the best interests of the child to order equal, or substantial and significant time pursuant to [s 65DAA](#). In circumstances where [s 65DAA](#) does not apply because the presumption does not apply, there still should be consideration of whether in the factual circumstances, an order for equal, or substantial and significant time is appropriate.

39. Should parties be unable to agree about the living arrangements of a child, a court must, in determining whether it should make orders or in determining what orders should be made, have regard to the best interests of the child as the paramount consideration. [Section 60CA](#) the Act 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.

40. How a court determines what is in the best interests of a child is set out under [s 60CC](#) of the Act. From 1 July 2006, those best interests are determined under a two tiered approach pursuant to [s 60CC](#), that lists “*primary considerations*” and “*additional considerations*”. A court must consider the matters set out in [s 60CC](#) unless considering a consent order, in which case the Court may, but is not required to, have regard to the matters set out in [ss 60CC\(2\)](#) and (3) of the Act. Part of [s 60CC](#) reads as follows:

Primary considerations

(2) The primary considerations are:-

- (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistence with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

(3) Additional considerations are:-

- (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;
- (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);
- (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;
- (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;
- (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;
- (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;

(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;

(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);

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

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

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

(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;

(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;

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

41. A court must consider the [s 60CC\(2\)](#) considerations as "*primary considerations*". This does not mean that they inevitably outweigh the "*additional considerations*", but some weight must be attached to the term "*primary*". A Court must consider each of the additional considerations separately. A Court should have regard to all of the matters set out in [s 60CC](#) to consider how, together, they should give effect to either or both of the primary considerations in determining the child's best interests.

42. A court also needs to evaluate the nature and quality of the parent child relationship.

Are the children at unacceptable risk of abuse in the unsupervised care of the father?

43. The approach in deciding a case involving an allegation of sexual abuse was considered by the High Court in [M and M \(1988\) FLC 91-979](#). At page 77,080, the High Court said:-

... 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.

44. The High Court recognised though that findings on the question of sexual abuse will have an important, perhaps a decisive impact on the resolution of the ultimate best interest's issue.
45. As to the relevant standard of proof, the High Court comprising of Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ, emphasised that a judge should not make a positive finding that the allegation was true unless satisfied according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw v Briginshaw* (1938) 60 CLR 336.^[4] Their Honours cited the well known passage of Dixon J (at p.362 of *Briginshaw*):-

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

46. In *S and R* (1999) FLC 92-834 the Full Court of the Family Court warned that to establish a serious allegation such as sexual abuse, the "*utmost caution*" was needed, given the maker of the statement was a child who was not subjected to cross-examination and whose statement was incapable of being properly tested.
47. In *Johnson and Page* ^{[2007] FamCA 1235} the Full Court considered the applicable standard of proof. At paragraph 69, the Court cited with approval the approach taken by the Honourable John Fogarty in his paper entitled 'Unacceptable Risk – A Return to Basics' ((2006) ^{20 AJFL 249}). In particular, the Court said (at para 72):

We also agree with Mr Fogarty's view that reference to the [Evidence Act](#), rather than *Briginshaw*, is appropriate particularly having regard to [s 140\(2\)\(c\)](#) of that Act.

48. These proceeding were governed by the provisions of Division 12A of [Part VII](#) of the Act. Section 69ZT provides that some provisions of the [Evidence Act 1995](#) (Cth) ("the [Evidence Act](#)") do not apply. However, [s140](#) of the [Evidence Act](#) does apply and it provides:-

(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.

49. I must then consider the allegations of sexual abuse on the balance of probabilities taking into account the matters in [s 140](#) of the [Evidence Act](#).

50. In *M and M*, (supra) the High Court acknowledged there would be many cases in which it was not possible for a judge to make a positive finding that sexual abuse had taken place. He or she would then need to determine if there was a risk of sexual abuse, and assess the magnitude of that risk.
51. The Court went on to consider the magnitude of risk that would justify a judge in denying a parent access to a child, and concluded that the test was best expressed by saying that a court should not grant custody or access (now an order in relation to with whom a child will live, or spend time), if it would expose the child to “an unacceptable risk” of sexual abuse.
52. In *B and B* ([1993 FLC 92-357](#)) the Full Court referred to the “unacceptable risk” test in *M and M*, and added (at p. 79,778):-

The ‘unacceptable risk’ test is therefore the standard used by the Family Court to ‘achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access.’ In other words, where the court makes a finding of unacceptable risk it is a finding that the risk of harm to the children in having access with a parent outweighs the possible benefits to them from that access.

53. In the Full Court decision of *Napier and Hepburn* ([2006 FamCA 1316](#); [2006 FLC 93-303](#)) the question of unacceptable risk was considered by Bryant CJ, Kay and Warnick JJ. Their Honours Bryant CJ and Kay J said:-

79. The determination of whether the child may have been abused required some assessment to be made as to the father’s credit in relation to his strenuous denials that he has acted inappropriately with the child. The child’s evidence itself was incapable of being tested or necessarily being accurately interpreted. His Honour said that he was unable to reject the allegation as groundless. In doing so, he must by necessary implication have rejected the father’s strenuous denials, but nowhere does he explain why he has done so.

...

84. There remained an obligation on the trial judge to not only evaluate the harm that might befall the child if there is a future act of abuse, but to also evaluate the prospect of such an act occurring. This is not a search for a solution that will eliminate any prospect of serious harm. It is a search to balance the harm that will follow if the risk is not minimised and the harm that will follow if a normal healthy relationship between parent and child is not allowed to prosper.
99. Absent there being any reason not to accept the father’s denials, we are not persuaded that the evidence reasonably leads to a conclusion that unsupervised contact poses an unacceptable risk of harm to J.

Their Honours also said: -

82. What potential there was for these events to continue to occur if they had previously occurred in the past, might well be diminished by the bright lights that have been shone upon the parties and their conduct, in the course of these proceedings.
54. The determination of unacceptable risk exists remains a challenge for the trial judge.

55. In a decision of Brown J in *McCoy v Wessex* [2007] FamCA 489 Her Honour set out the legal principles involved in relation to allegations of sexual abuse.
56. Her Honour reviewed the law relating to unacceptable risk including the approach adopted by the Full Court in *Napier and Hepburn* (above) and *Potter v Potter* [2007] FamCA 350 and observed that:-

The Full Court noted (at para 79) that the determination of the question of whether the child may have been abused required some assessment to be made of the father's credit in relation to his strenuous denials that he had acted inappropriately with the child, and that even a finding to the allegations could not be rejected as groundless ought not lead inevitably to a finding of unacceptable risk.

57. What is clear is that trial judges have a significant obligation upon them to set out clearly the reasons why an assessment has been made as to the father's credit in relation to his strenuous denials. I have endeavoured to do so in this case.
58. In this current case before me I need to determine whether the father's past behaviour presents an unacceptable risk to the children in the future if they spend unsupervised time with him.

THE EVIDENCE

The expert evidence

59. Evidence was given by two clinical psychologists, Dr R and Dr JH. The experts gave their evidence concurrently.
60. Dr H's report was prepared as detailed earlier in these reasons. Dr R was appointed a single expert under the [Family Law Rules 2004](#) (Cth) for the purpose of preparing a report. Dr JH's report of July 2006 and Dr R's report of 3 November 2009 were both evidence.
61. Dr JH and Dr R were unchallenged as to their qualifications. I have formed the view, on balance, that I prefer evidence of Dr R. In this regard it is not that Dr JH's evidence is impeached, but that having regard to the limitations of her report in terms of time and in terms of the scope of the interviews I prefer the evidence of Dr R.
62. Dr JH's report is constrained in terms of its age and that she only interviewed the father and did not interview any other parties. Her report was circumscribed by the budgetary limitations imposed upon her by the Child Welfare Department. I am not confident that Dr JH had all of the information necessary for her to do a normal detailed report. This included the information that the father was involved in care of foster children over a significant period of time and had told the police and his approach in doing more than viewing of the pornography by way of saving the connections to the child pornography sites and the significant step of video taping images of naked children. Whilst Dr JH may have had part of that information she did not have the whole of it. **In addition I have some concerns about Dr JH's view, that the use of the internet combined with marijuana, was a "mindless activity" engaged in by the father"** [5] as an anxiety coping strategy. The father took the extra steps of making a video of the material and my broader assessment of the father that he provides or gives his evidence in a like manner.

63. Dr R interviewed both parents and the children; she observed the children with the parents and interviewed the mother's present husband. Dr R concluded a number of things about the father including:- [6]

- The father engages the children in negative discussions about their mother.
- There is a possibility that A may have received inappropriate sexual attention from the father.
- That the children are at risk of psychological and emotional harm from the father if he continues to engage with the children in inappropriate conversations and questions.
- Some concerns about the mother influencing the children's feelings towards the father.

64. Dr R is of the view that neither child should have unsupervised overnight time with the father, although there is no reason why they ought not to have unsupervised day time with the father. When questioned about this Dr R said:-

that the children are at an age and maturity where when awake, dressed and together it would be unlikely that the father would act inappropriate towards them. However, at night when they were perhaps asleep or partly asleep and not aware of each other's whereabouts they would be less secure.

65. As a general principal Dr JH agreed with this approach.

66. Dr R formed the view, and I accept, that the father was likely to experience poor impulse controls during times of high stress and high emotions. She bases this upon his risk taking behaviours in the past such as his chronic marijuana use and the downloading and copying of child pornography. Dr R says that this is evident in other ways in terms of his communications with his children, A in particular.

67. Dr R undertook psychological testing and concluded that the father suffers from "symptoms of anxiety, dysthymic traits and difficulties relating to drug dependence". [7]

68. Dr R's investigations were more extensive than those of Dr JH. Dr R had the opportunity and benefit of watching the interaction between the respective parties and the children and had a broader view of the family. Dr R also had the benefit of seeing and hearing the children, in particular A and her partial disclosure. In addition her report was much more recent than Dr JH's.

69. There was some debate about the general nature of people who download child pornography. Dr JH was of the view that there was a difference between those who acquired child pornography and those who downloaded it from the World Wide Web. Dr JH referred to a recent Swiss study which seemed to indicate that people who downloaded or observed child pornography were at no greater risk of subsequently acting out sexually with children than ordinary members of the community. From the research no clear conclusions seem to be available.

70. Dr R expressed the view that the father's steps in filming or recording the pornography onto a "tape" and saving the addresses was a further step, which was of concern.

The father's evidence

71. The father gave evidence in accordance with his affidavits filed 1 June 2007, 4 June 2007, 15 June 2008, 4 June 2009 and 7 December 2009. That material was read into evidence. He was not a particularly impressive witness. He was argumentative of counsel and in many ways was endeavouring to present his own case. He was critical of the mother and had little or no respect for her. He did not trust her.
72. He was cross-examined in relation to notes he had made in a communication book where he refused to make extra time available to the mother and went back to events which had occurred some time before. The communication between the parties is appalling. The father is partly responsible for that.
73. For example when M was going to have her tonsils out he had not responded to letters sent in July, it was only when an operation was scheduled in September that he contacted the doctors. The mother is also partly responsible for the poor communication between the parties. An example of this is when M was having her tonsils out the mother made the arrangements without providing the father with adequate notice, when she could have done so.
74. As I have said earlier the evidence of the father tends to deflect blame, make vague accusations, self serving and is sometimes argumentative. An example of this is his affidavit filed 7 December 2009.
75. I treat the father's evidence with great caution.

The mother's evidence

76. The mother gave evidence in accordance with her affidavits filed 18 June 2007, 8 June 2008, 16 July 2009, 7 December 2009 and 9 December 2009.
77. The mother asserted in 2001 that she found the father leaning over her daughter S and he was touching her. She said he had an erect penis and was perhaps masturbating. There is no issue that the mother has given a number of versions of this. The father admits that he was looking after the child at that time but denies any improper conduct on his part. The mother made no formal complaint about this incident until 2006. It is troubling that the mother allowed the father to have significant and unsupervised care of the children, including her children from a previous relationship, over that period of time.
78. The mother's explanation was that she was so dominated and controlled by the father that she could not take any steps to do otherwise.
79. After the father was charged with the offences relating to child pornography and after learning of the opinion of Dr JH the mother consented to the father spending unsupervised time with the children which developed into primary care. I am not critical of the mother in relation to this as I accept her evidence that she relied upon the Department's view that it was safe for him to care of the children. (This in fact reflected that which Dr JH had determined).
80. The mother was challenged as to why she took restraint order proceedings against the father in May 2007 after she had then had her then solicitor, Mr Murray, send a letter to him suggesting, amongst other things, equal time. The mother's explanation of this was that the father had taken more and more time and more and more control and she went to the

solicitor for assistance. She says the letter was sent without her complete approval. I have concerns about the quality of that evidence.

81. While I have some concerns about the mother taking those restraint order proceedings there is some level of understanding to it, bearing in mind her then frustration and lack of knowledge of the legal processes.
82. The mother was criticised by the father for allowing the children to come into contact with a Mr K, a convicted paedophile. The only evidence before me is that Mr K was a friend of her husband's family and, as soon as she found out about his behaviour and convictions, the children ceased having any contact with him at all and that she arranged to inform the father of this through the principal of the children's school. I see not reason for criticism of the mother in this respect.

Evidence of Ms SA

83. Ms SA gave evidence in accordance with her affidavit filed 9 December 2009. She was cross-examined by counsel for the father and the Independent Children's Lawyer.
84. Ms SA is employed by Child and Family Services as a Child Protection Worker. She is a Team Leader and has been employed in that capacity for four years. She has undertaken training in interviewing children who may have been sexually abused.
85. During cross-examination by the Independent Children's Lawyer she said that there was a poor relationship between the officers of Child and Family Services and the mother. This arose out of the mother's difficulty in accepting the determination made by Dr JH in relation to the risks the father may or may not have posed to the children.
86. When the mother first made her notification about the disclosure by A to her on about 23 July 2009 Ms SA left the investigation to police. When the Independent Children's Lawyer contacted her in August Ms SA said to him that she would not be pursuing the matter any further.
87. However, after receiving a second notice in relation to the same event, Ms SA said she was concerned that her initial enquiries were not sufficient. As a consequence she interviewed A again on the 1 October 2009 in the presence of a Laurel House worker.
88. In relation to that interview Ms SA said:-[\[8\]](#)

6. In the interview with me [A] did not volunteer any facts about the incident to us. She indicated that she loves her father and does not want to upset him, but she was not comfortable staying at her father's house at night, particularly on her own. She stated that she was happy with the current situation and her wish was that it remains as it was.

7. When I asked her if she would like to talk about the thing that happened to her with her father she got extremely distressed.

8. She had her teddy bear with her and she started feeding lollies to him furiously. She was very anxious and implored us "please don't tell Dad". "Don't tell anybody anything".

9. She indicated that she did not want to spend time alone with her father. We asked her why she didn't and she said "because of what I told the police". "I do not like it. It makes me feel weird". "I don't want to be alone with him". She kept repeating "please don't tell Dad".

89. Before the interview Ms SA had concerns about the mother's bona fides with regard to A's alleged disclosure. After the interview Ms SA formed a professional view that something had happened to the child. It was Ms SA's professional opinion was that there were no signs that A had been coached.

90. Ms SA then said that it was necessary for her to inform the Independent Children's Lawyer of what A said. Accordingly, she arranged to meet A on a second occasion to inform her of her intentions to speak with the Independent Children's Lawyer. In that meeting A became extremely distressed because the father would know what she had said and the Independent Children's Lawyer would also be told.

91. I accept her evidence and her qualifications.

Evidence of Ms U

92. An affidavit^[9] was filed by Ms U, a counsellor/educator employed by the Laurel House Northern Sexual Assault Group Inc.

93. Ms U gave evidence in relation to academic literature demonstrating a link between accessing child pornography and committing contact offences against children. She was not called to be cross-examined and did not see either of the children.

94. Having regard to the debate between Dr JH and Dr R when they gave concurrent evidence, I give no weight to the evidence of Ms U.

Evidence of Mr Ruddock

95. Mr Ruddock is the mother's present husband. He relied upon two affidavits filed 8 June 2007 and 16 July 2009.

96. He was not cross-examined and as such his evidence was admitted without controversy. In 2007 there were some allegations made in relation to his behaviour generally by the father. These were not pursued in these proceedings and were not relevant in the determination undertaken by me.

97. Much of the material contained in Mr Ruddock's second affidavit is of a hearsay nature and is not of significance in this determination. In his unchallenged evidence he said that the mother's older children, S and B, complained to him about the father pulling their ears and pulling their hair. He confirms the evidence of the mother that A and M had difficulties settling into the local area. He gives evidence that A and M are disruptive when they return from spending time with the father and often come back with minor illnesses.

Evidence of Ms V

98. Ms V gave evidence in relation to the allegations made by the father about Mr Ruddock's alleged behaviour. She rebutted those suggestions.

99. Included in her evidence was a statement from Ms U dated 14 June 2007. That statement said that Child and Family Services had recommended that the children attend Laurel House after the father had been charged with the offences referred to earlier. The children had counselling in relation to safe and unsafe touching and different relationships. That support has continued.

Witness Ms ML

100. Ms ML's affidavit[10] was admitted into evidence without controversy. It was indicative of the father being aggressive and violent up to 2007. The evidence is of little value

Witness Mr G

101. The father relied on an affidavit of Mr G filed 2 December 2009. This affidavit was of a "cheer squad" variety. It was admitted without controversy but I give it little or no weight.

Witness Mr W

102. The father relied on an affidavit of Mr W filed 8 December 2009. Mr W is a neighbour of the father and has observed the father with his daughters. Mr W's affidavit falls into the previous category of being a "cheer squad" variety.

Witness Ms J

103. Ms J is the children's paternal grandmother and she filed an affidavit[11] in these proceedings. In this affidavit the paternal grandmother said that the father is dedicated to his daughters and the children have a good relationship with him. That evidence was admitted without controversy.

Witness Ms Y

104. An affidavit was filed by Ms Y on 7 December 2009. The affidavit was filed because the mother had concerns about the father having girlfriends of the two children staying overnight. Mrs Y says she has no concern about her daughter staying overnight with the children and the father. She gives evidence about the children's behaviour and says she is not an expert, as such I give that part of her evidence little weight.

105. Ms Y says:-

I am fully aware of [the father's] history and the concerns that have been raised about his parenting.[12]

106. I did not have before me what details of the father's history Ms Y has. However, as her evidence was admitted uncritically, I am satisfied that Mrs Y is content for daughter to stay overnight at the father's home notwithstanding his conviction for child pornography and that he is on the "Sex Offenders Register".

The July 2009 disclosure

107. The father was concerned about the veracity of the alleged disclosure by A on 23 July 2009 to the mother shortly before the trial was due to start. The timing of the disclosure and the surrounding circumstances are of concern. The disclosure was allegedly made to the mother shortly before the trial and shortly after the Independent Children's Lawyer had informed the parties of his view that a shared parenting arrangement should remain in place.
108. When orders were made in June 2006 for the children to live with the father three nights a week and the father four nights a week the father consented to an order that the children not share a bed with him. The father had given undertakings or had entered into agreements with relevant welfare authorities with regard to the children not sharing a bed with him. When consent orders were made by me in June 2008 they did not contain that term.
109. I am satisfied that the father knew that there was a real issue about him sharing a bed with the children.
110. On 22/23 July A was staying overnight with the father. Her younger sister was away leaving the father and A alone at his house. A's disclosure, to her mother as set out in the mother's affidavit^[13] and in Dr R's report,^[14] has the father inviting her into the bed and badgering her. The father's evidence is not that this did not happen but that the child got into bed with him and went to sleep.
111. It makes no sense that the father would simply have the child get into his bed bearing in mind the unresolved questions of his appropriate or inappropriate behaviour, and having regard to the undertakings he made to the child welfare authorities and the consent order made by the Federal Magistrate.
112. The father gave evidence that each of the girls would often hop into his bed for a minute or two as they needed to go through his bedroom to the bathroom during the night.
113. I have concerns about the reliability of the father's evidence as to why the child got into bed with him and I accept that the child made a disclosure to the mother.
114. I am not satisfied the mother has meticulously and accurately disclosed precisely what the child has said and I am concerned that there may be some element of exaggeration to it.
115. However, I am satisfied that the father invited A into his bed and that A felt uncomfortable and that the father demonstrated affection towards her, in a way which was in all the circumstances inappropriate for a child of that age and in those circumstances. Accordingly I am satisfied there needs to be a measure of protection put in place for these children in terms of their time with the father
116. As recommended by Dr R the measure of protection is not needed to the extent as submitted by the mother. As such I will put in place night supervision, having regard to the evidence of Dr JH and Dr R.
117. The father has extensive experience in dealing with children at risk bearing in mind the family's involvement with foster care over a significant period of time. I am satisfied that there needs to be supervision at the home when the children sleep over. I am satisfied that

there needs to be a door on the children's bedroom which is capable of being shut at the request of the children. They should at least, until the youngest is 14, share the same room so that they can have the mutual support of one another. Such a finding predicates against equal time and against equal shared parental responsibility.

118. During evidence Dr JH said she was concerned that the child A had not been particular enough in her disclosure. This was not a concern to Dr R and on balance I prefer the evidence of Dr R. She considered whether the child had been coached and having regard to her, unchallenged, qualifications I accept her evidence that it was unlikely that the children were coached and I am satisfied from her evidence and from the evidence of the father that the children have been enmeshed in the conflict by him including his views about "what is fair" in terms of equal time, his feelings and his concerns, the extent that M worries about her father being lonely and alone.
119. The father asserted that he received a letter which he assumed was from the mother's husband (Mr Ruddock) which had an implicit threat of violence. He said the letter was mailed to him and it was "inadvertently" left in a place for the children to read and he subsequently lost the letter. This evidence is troubling.
120. If the father had believed there had been a death threat or implicit death threat from Mr Ruddock one would have thought he would have relied upon it in these proceedings, he did not. Even if he was appropriate to leave such a letter out for children of 10 and 8 years of age to read, it reflects very poorly on his parenting and is supportive of the view of Dr R with regard to the father engaging the children in these proceedings.

DISCUSSION

121. One of the most difficult aspects of this case was which of the parties to believe. Neither of the parties' evidence was entirely satisfactory. There is virtually no communication between the parties and they do not speak to each other.
122. I accept the submissions of the mother's counsel that the father is a forceful, dominant person who is keen to argue his case and has a very powerful personality. The mother on the other hand seems somewhat timid and self effacing. She is not a forceful person.
123. I am satisfied the father was dominant and was emotionally controlling of the mother during the course of their relationship. The father continued this approach after separation, including in the first few months of 2007, when he insisted that the children reside primarily with him.
124. The strength of the father's approaches can be seen in terms of his dealings with the children. The children stayed overnight, as arranged, and presumably with supervision. Instead of taking the children to school the following day the father kept them home so he could spend some time with them and eventually took A to school but kept M with him. This was about his needs not the needs of the children.
125. The children joined a choir and were enjoying that activity. The father required the children to choose between spending time with him or being involved in the choir. That was a terrible decision for the children to have to make and if they had adopted a view other than that of the father it would have been seen as an act of disloyalty to him.

126. I accept the evidence of Dr R whose observations of the father's character include that "it is likely that he has poor self control"[\[15\]](#) and that he has made various hurtful comments to A including "you are not my daughter; you don't love me".[\[16\]](#)
127. Dr R postulates that the father behaves in this manner, not in any pre-meditated way but, when he is in a state of high arousal and is unable to maintain self control. After observing the father in the witness box, and assessing his evidence I accept that evidence of Dr R. What is troubling about the father's actions in that regard is that he then endeavours to blame others for it.
128. In his affidavit filed 1 June 2007 the father endeavours to explain why he accessed the child pornography. His explanation seemed to fall into a number of areas, namely:-[\[17\]](#)
- A high pressured job.
 - Belief that his wife (the mother) was having an affair with another man.
 - Use of marijuana.
 - Little or no back up or support from the mother.
129. He told his solicitors that he immediately thought about deleting the tape although this explanation was different to what he said to the police.
130. The father in his affidavit filed 4 June 2007 made serious allegations about Mr Ruddock, who is the mother's present husband and who works with children. These included:-[\[18\]](#)
- Supplying illicit drugs and alcohol to children in his care.
 - Having relationships, more like an intimate personal relationship, with children in his care.
 - That he passed out drunk when caring for children.
 - He had impregnated a foster child aged 14 years.
 - Passing out on prescribed medication for 10 hours leaving his children unsupervised.
 - Having marijuana smoking apparatus at his home.
 - Other general low levels of complaint as to hygiene and care.
131. The father went on to suggest that Mr Ruddock had had a sexual relationship with one of the children in his care.
132. None of these allegations were pursued in cross examination, which is troubling.
133. The father, through his counsel, raised concerns about an allegation raised by the mother in November/December 2008 about the father having the children stay overnight. It was submitted that this was indicative of her behaviour of reporting the disclosure allegedly made to her by A on 23 July 2009. I find that the disclosures were different and that it was not a course of conduct by the mother.
134. The mother gave evidence of a concern she had of the father with her daughter S in about 2001. In her affidavit filed 8 June 2007 the mother says:-[\[19\]](#)

In or about 2001 I became concerned about his [the father's] use of the children as sexual objects. When [S] was about 5 I walked into her bedroom and found [the father] squatting at the side of her bed. Her pyjama bottoms were down. He was leaning over her and touching

her. When I spoke he jumped up and his penis was erect. I wanted to kick him out or leave but I didn't know where to go with the four children.

135. A different version was given to the police in which the mother said she was not sure whether the father's penis was erect and there were other differences.
136. No complaint was made about this by the mother to any appropriate authorities for some years. The father denied the event and said that his recollection of it was that he was simply checking the child who was sick. I prefer the evidence of the mother.
137. Counsel for the father said the 2001 allegation was fabricated. I do not accept that submission. At the time the mother first disclosed that allegation she clearly believed that the father would not have anything more to do with the children as a consequence of being charged with child pornography offences. The mother felt ashamed that she did not act protectively of her children as a consequence of her fear of the father and his intimidation of her. Whilst it is not without concern that she left it for so long, having regard to the dynamics of the relationship and her sense of powerlessness this explains why she did not disclose this earlier. I am satisfied the mother was truthful in giving that evidence.
138. The mother was criticised about her late complaint, about Dr JH, to the Psychology Registration Board. The mother's evidence, which I accept, was that she did not know until this year that she could make such a complaint. It is clear on her evidence, and on the evidence from Ms SA that the mother was very upset with the findings of Dr JH.
139. The father is anxious that the time be equal and I am satisfied that he has discussed this with the children and, M at least, has adopted his view. It is not their independent view. It is one which was given to them by the father.
140. I have considered whether the father should spend, equal or significant and substantial time with the children. Bearing in mind my concerns with regard to the children spending overnight time with the father, discussed earlier in these reasons, it is not in the children's best interests to spend equal or significant time with the father. There will need to be someone supervising the father when the time is to be overnight. As discussed elsewhere in these reasons that supervisor can be an adult friend. There needs to be someone else in the home of whom the children have knowledge of and regard to. The mother should also know who that person is.
141. Having regard to the evidence of S in 2001, the father's behaviour in downloading, saving and recording child pornography for some weeks, perhaps months, prior to April 2006, and the disclosure of A on 23 July 2009 I have concerns about his past behaviour. There was no doubt that notwithstanding all of the concerns the father invited A into his bed. The father conceded that this had happened on a number of occasions with both children.
142. I am satisfied that the father acts impulsively from time to time and that the children need some protection from him, particularly at night. I find that the risk of the father acting inappropriately with the children is significantly diminished when they are awake and alert and when the children are together.
143. I do not accept the father has been frank in terms of his evidence and I find that he is manipulative and disingenuous in the information that he provides.

144. I agree with the observations of Dr R that the father was opportunistic and had poor self control. As a result I intend to provide that the father's time with the children, at least overnight, is supervised. That supervisor need only be another person staying in the house. However, that other person should be an adult. It was suggested by Dr R that if the children were together they could protect each other. I do not accept that this is sufficient protection. The children have a close attachment to their father and I am concerned that if there is an opportunity that the children may not report or disclose troubling conduct to others. I find this notwithstanding the evidence that they have been provided with some protective skills in this area by the counsellors at Laurel House.

145. I have considered all of the facts and findings in this case in terms of the various factors of which I am obliged to consider under s60CC(2), (3), (4) and 4(a). I will address some of these particularly in regard to the various provisions however in reaching the conclusions I have considered all of the factors against all of the evidence and findings and vice versa

Section 60CC (3) Factors

(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;

146. The child M is too young and too immature to have her views taken into account. The child was not interviewed by the family consultant.

147. In terms of the views of the child A she does not wish to be with her father at night without someone else being present.

148. The father's counsel submitted that I should reject the views of A in relation to overnight stays as that seed was planted by the mother. I do not accept that submission. The clear evidence of Dr R was that there was no evidence of coaching.

149. Having regard to the history of this matter and having regard to her age and maturity I am satisfied that that is a reasonable view for her to have and that it in fact is her view. The evidence is that M has a far more robust character however she is only eight and a half and whilst her views are for equal time, as I have said earlier, I have found that they reflect the desire of the father, not necessarily that of the child.

(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);

150. The children have a good relationship with each of their parents. The father has been significantly involved with the children all of their lives and is close to them. The same is the position with the mother. Dr R's evidence makes that clear.

151. Having regard to all of the above I am satisfied that it is important that the children have a meaningful relationship with both parents. The children have a close bond with their parents and love them and enjoy their time with them.

152. The parties do not have a good relationship with each other and are barely able to communicate. The difficulties they have with A's need for removal of her tonsils and adenoids are indicative of that.

153. The mother has two children S and B from a previous relationship. It is important that the children maintain their relationship with their elder siblings.

(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;

154. The parties are not willing or able to communicate with each other or jointly parent the children. There is a real issue as to the father's enmeshing of the children in these proceedings in a positive sense and I find the mother does likewise but perhaps in more of a careless sense with regard to the children. In that regard I refer to the material [\[20\]](#) provided by the children's school principal.

155. Neither parent is willing nor has the ability to encourage a relationship between the other parent and the children.

156. The father, in particular, through his counsel was critical of A's reluctances to have overnight visits. The father attributed A's reluctance to being a result of the mother's coaching. As I have discussed elsewhere in my reasons from Dr R's evidence it was clear that there was no evidence of coaching by the mother. Having regard to that evidence and the father's quick response in blaming the mother I do not believe that the father would encourage a close relationship between the children and the mother.

(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;

157. There will be a detrimental effect on the relationship of the children and their father by virtue of this decision. However, their relationship with their father is good. He has been significantly involved in their lives and that relationship will be able to continue.

(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;

158. Initially there may be some practical difficulties for the father in arranging someone to be present when the father is to spend overnight time with the children. However, this will lessen over time and the inconvenience caused to the father must be weighed against the risk of the children spending unsupervised time with him.

(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;

159. Each parent is capable of providing for the needs of the children in a physical sense. However, as a consequence of their conflict the father and mother are at risk of causing significant emotional damage to the children.

(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;

160. This factor has been considered in a general way in light of all of the other evidence.

(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;

161. This is not a relevant consideration in these proceedings.

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

162. Both of the children's parents have demonstrated a poor attitude towards parenting. The difficulties they had with A's need for the removal of her tonsils and adenoids, which I have discussed elsewhere in my reasons, is indicative of this.

163. The mother's engagement of the children in the dispute also demonstrates a poor attitude to parenting. In that regard I refer to the material provided by the children's school principal.

164. The father, in particular, has demonstrated a poor attitude to parenting. This is evident from his evidence that he "inadvertently" left a letter containing an implicit threat of violence for the children to read. As I have said earlier in my reasons even if the father thought that it was appropriate to have left such a letter out for children of 8 to 10 years to read it reflects poorly on his parenting and is supportive of Dr R's view with regard to him engaging the children in these proceedings.

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

165. The mother obtained a family violence order against the father in 2007. While I am critical of the mother in relation to using that application instead of an application to the Federal Magistrates Court or the Family Court, I accept her evidence as to her sense of frustration and concern for her children arising out of the events over the preceding year. I accept the evidence of the mother that there is low level psychological and emotional abuse of her by the father throughout their relationship. That dominance and intimidation continued until about May 2007.

166. There was an issue about the father breaking into the mother's home. I am left with the mother's evidence on one hand and the father's on the other. The father says in his affidavit that he entered the property with his mother. His mother did not provide any evidence in support of that assertion. On balance I prefer the evidence of the mother.

(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;

167. As discussed earlier the mother obtained a family violence order against the father in 2007. The order was in force for a period of twelve months and has expired. I give it little weight in the circumstances of this case.

(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;

168. Because of the close bond between the children and their father I have reached the conclusion that the best interest of A and M are most likely to be served by an order that the father spend time with the children, but that any overnight time be supervised by another adult. This will address A's nervousness in relation to spending unsupervised overnight time with the father.

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

169. I have considered all of the relevant evidence before me.

Section 60CC(4) of the Act

(a) has taken, or failed to take, the opportunity:

(i) to participate in making decisions about major long-term issues in relation to the child; and

(ii) to spend time with the child; and

(iii) to communicate with the child; and

(b) has facilitated, or failed to facilitate, the other parent:

(i) participating in making decisions about major long-term issues in relation to the child; and

(ii) spending time with the child; and

(iii) communicating with the child; and

(c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

170. I have had regard to the events that have happened and the circumstances that have existed since separation occurred on the 21 June 2008.
171. In coming to the conclusions in these proceedings I have reflected on all of the evidence to consider the extent to which the children's parents have fulfilled or have failed to fulfil their responsibilities as parents as set out in s 60CC(4). In having regard to all of the material before me and all of the findings of fact I determine that in my view the best interest of the children are served by the orders set out at the commencement of these reasons.
172. Nothing new arises out of the considerations of the matters in s 60CC(4) and (4)(A) which have not already been discussed in detail in these reasons. I have dealt with almost all of those issues in these reasons so far.

CONCLUSION

173. Having regard to all of the factors under s 60CC and the findings set out above I am not satisfied that equal shared parental responsibility can work in this case. The parties cannot communicate and have not communicated for many years.
174. Having regard to all of those findings I determine that it is in the best interests of the children that the mother have sole parental responsibility provided she keeps the father informed, preferably in advance of any major issue and that the father be kept informed by schools, health care professionals and others as to the welfare and circumstances of the children. I make it clear that the father is able to talk to doctors and seek information from the doctors about them treating the children. Similarly the father is able to obtain information from schools and speak with the children's teachers.
175. In terms of care of the children I propose to order the children spend each alternate weekend with the father from after school Friday until the commencement of school Monday (or Tuesday if Monday is a pupil free day). I will provide that the children spend half their school holidays with the father. However, there will need to be someone supervising the father when the time is to be overnight. That can be an adult friend, it just needs someone else in the home of whom the children have some knowledge of and regard to. The mother should know who that person is.
176. I will make the normal orders in relation to Christmas Day, Mother's Day and the children's birthdays.
177. The mother sought a self executing order that any time the children spend with the father is to suspend if there is an adverse disclosure. I decline the making of that order as it would invite litigation and in essence seeks a delegation of the Court's powers to the mother.

I certify that the preceding one hundred and seventy seven (177) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Benjamin.

Associate:

Date: 22 January 2010

[1] Annexure “C” of the father’s affidavit filed 1 June 2007.

[2] Annexure “F” of the father’s affidavit filed 1 June 2007.

[3] Parental responsibility is defined by s61B to mean “*all the duties, powers, and responsibilities and authority which, by law, parents have in relation to children.*”

[4] *M and M* (1988) FLC 91-979 at 77,081.

[5] At Page 8 of Dr JH’s report.

[6] At pages 18 to 20.

[7] At page 16.

[8] Affidavit filed 9 December 2009.

[9] On the 13 August 2007.

[10] Filed 8 June 2007.

[11] On 8 December 2009.

[12] At paragraph 4.

[13] Paragraph 2 of the affidavit filed 7 December 2009.

[14] Filed the 4 November 2009.

[15] Page 17 of Dr R’s report filed 4 November 2009.

[16] Ibid.

[17] Annexure “D” at page 1.

[18] At paragraphs 14 to 21.

[19] At paragraph 6.

[20] Statement filed 21 July 2009