

Rivas & Rivas [2010] FMCAfam 55 (1 February 2010)

Last Updated: 5 February 2010

FEDERAL MAGISTRATES COURT OF AUSTRALIA

← RIVAS & RIVAS →

[\[2010\] FMCAfam 55](#)

FAMILY LAW – Children – whether the father sexually abused step-daughter and/or showed her pornographic material – *Briginshaw* principle – disturbing photographs taken of one child by the other – whether there should be equal shared parental responsibility – with whom children should live – time children should spend with other parent – supervision – whether close relative should supervise.

[Family Law Act 1975](#) (Cth) [ss.60B](#), [60CC](#), [61DA](#), [65DAA](#)

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

Mulvany & Lane [\(2009\) FLC 93-404](#)

Bolitho and Cohen [\[2005\] FamCA 458](#); [\(2005\) FLC 93-224](#)

In the marriage of B and B [Suspension of access] [\(1988\) FLC 91-978](#)

Briginshaw v. Briginshaw [\[1938\] HCA 34](#); [\(1938\) 60 C.L.R. 336](#)

In the marriage of M and M [\[1988\] HCA 68](#); [\(1988\) FLC 91-979](#)

Lindsey and Lindsey [\[1995\] FamCA 117](#); [\(1995\) FLC 92-638](#)

Reifek v McElroy [\[1965\] HCA 46](#); [\(1965\) 112 CLR 517](#)

Helton v Allen [\[1940\] HCA 20](#); [\(1940\) 63 CLR 691](#)

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

Applicant: MR ← RIVAS →

Respondent: MS ← RIVAS →

File Number: LNC 795 of 2007

Judgment of: Roberts FM

Hearing dates: 5 & 6 March; 9, 10, 15 & 16 July;
13 August 2009

Date of Last Submission: 13 August 2009

Delivered at: Launceston

Delivered on: 1 February 2010

REPRESENTATION

Counsel for the Applicant: Mr P McVeity

Solicitors for the Applicant: McVeity & Associates

Counsel for the Respondent: Mr M Turnbull



Solicitors for the Respondent: McLean McKenzie & Topfer

Counsel for the Independent Children's Lawyer: Mr P Fitzgerald

Solicitors for the Independent Children's Lawyer: Legal Aid Commission of
Tasmania



ORDERS

(1) That all extant parenting Orders in relation to [Y] born [in] 2002 and [Z] born [in] 2004 ("the children") are discharged

(2) That MS  **RIVAS**  ("the mother") is to have sole parental responsibility for the

children.

(3) That the children are to live with the mother.

(4) That the children are to spend such time with MR  **RIVAS**  (“the father”) as may be agreed between the father and the mother, provided that the entirety of that time is spent in the presence of the father’s mother MS R (“the paternal grandmother”).

(5) That the time that the children are to spend with the father in accordance with the preceding Order hereof is not to commence unless and until this Court has approved the form of, and accepted undertakings given by the paternal grandmother in accordance with matters referred to in the Reasons for Judgment delivered 1 February 2010.

(6) That the mother must keep the father informed in relation to important matters pertaining to the welfare of the children, particularly in relation to health and education and for that purpose she must also:

- (a) authorise any medical practitioners or other health professionals who are involved with the treatment of the children or either of them to provide the father with any information that a parent may reasonably request; and
- (b) authorise the principals of any school that the children or either of them may attend to provide the father with any information, notices, reports and newsletters that a parent may reasonably expect to receive.

(7) That the father is permitted to telephone the children at reasonable times, but failing agreement between the father and the mother about the frequency of such telephone calls, then those calls are not to be more frequent than twice per week.

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

FEDERAL MAGISTRATES

COURT OF AUSTRALIA AT

LAUNCESTON

LNC 795 of 2007

MR  RIVAS 

Applicant

And

MS ← RIVAS →

Respondent

REASONS FOR JUDGMENT

1. These proceedings concern the welfare of [Y] born [in] 2002 (“[Y]”) and [Z] born [in] 2004 (“[Z]”) (“the children”).
2. Initially, the matter had been set down for hearing over two days. In fact, it was heard over seven days (in four different sittings in three different cities) and there were five additional interlocutory listings between the second and third hearing days. In my opinion, responsibility for the initial poor estimate of hearing time must rest with all the lawyers, because it appears that they all failed to inspect some very relevant photographs until the middle of the second day of the hearing (after the Court Expert had given evidence for the first time), notwithstanding that the respondent mother’s solicitor had alerted the other solicitors to the existence of those photographs nearly six months before the start of the hearing. Those photographs of [Z] were said to have been taken by [Y] and will be referred to in much more detail below. However, this matter would clearly have taken a very different course if the lawyers had considered the significance of those photographs long before the hearing started.
3. At the end of Counsels’ closing submissions in this matter, I commented that this case was probably the most difficult in my career so far. I have not changed my mind about that.

Applications

4. The applicant is MR ← RIVAS → (“the father”) and the respondent is MS ← RIVAS → (“the mother”).
5. The father sought orders which would provide for the parties to have equal shared parental responsibility for the children and that the children live equally with each parent on a weekly basis. He was still seeking those orders at the conclusion of the hearing.
6. At the start of the hearing the mother was seeking orders:
 - a. that the children live with her;
 - b. that she have sole parental responsibility for them;
 - c. that the father spend time and communicate with the children;
 - i. by telephone each Tuesday evening; and
 - ii. for one hour each Friday and two hours each Sunday on a supervised basis at the [N] Children’s Contact Service in [B]; and
 - iv. that the fathers’ time with the children be reviewed after twelve months.

7. During his closing submissions at the end of the hearing the mothers' counsel informed me that the mothers' proposal then was that because the contact centre in [B] would not be available on Saturdays there would need to be a supervised period of contact at the start and end of the father' time with the children for half an hour at the contact centre in Devonport, but the father should have unsupervised time with the children away from centre for four hours in between those supervised times. Her counsel said:
 - *...it really is a very difficult position for my client because her concern is real, her concern is great and my client is asking that you make a finding of unacceptable risk, but we are also dealing with the practicalities of young children that need to see their father, and my client does not believe it is acceptable for there to be no contact, and we are bound by the facilities that are on offer.*
8. The Independent Children's Lawyer ("ICL") stated that his recommendations were clearly dependent upon my findings. He said that if I find that the father is not simply an unacceptable risk, but "*a clear and present actual risk*" to the children, paragraph (b) of [subsection 60CC \(2\)](#) of the [Family Law Act 1975](#) ("the Act") should take priority. In those circumstances he said that he would recommend that the mother have sole parental responsibility and that there should be a "*cessation of contact between the children and their father*".

Terminology

9. In a 2008 decision[\[1\]](#), FM Walters said:
 - *Although the law now refers to a child "spending time" with a person (usually a parent) with whom the child does not live, I shall use – from time to time in these Reasons – the obsolete term "contact". I have elected to use the superseded term because it is both more convenient and less grammatically challenging to do so.*
10. In both *Carpenter and Lunn*[\[2\]](#) and *Chappell and Chappell*[\[3\]](#) slightly differently constituted Full Courts of the Family Court had expressed similar views when they said:
 - *... ... The new legislation replaced the legal concept previously known as "contact" with the concept of a child "spending time" with someone. The legislation, however, does not prohibit the use of the noun "contact" in its everyday sense. In these reasons, we propose to use "contact" interchangeably with expressions such as "spend time with". In doing so, we have not ignored the legislative intent, but rather have avoided the linguistic gymnastics that would otherwise have been necessary.*
11. In my view, those comments make grammatical and legal common sense, which I also intend to apply.

Background to the litigation

12. The father is 41 years of age. The mother is 37 years old and she has a child from her previous relationship, [X] born [in] 1991 ("[X]").

13. The parties started their relationship before [X] turned four years old. They married in 2000 and [X] lived with the parties throughout the time that they lived together.
14. The children were born in 2002 and 2004 as set out above.
15. It is the mother's evidence that in or about September 2006 she found a note in [X]'s room written by [X]. That note is Annexure "A" to the mother's first affidavit and also to [X]'s first affidavit. With the grammar and spelling uncorrected, it reads as follows:
- *When I was about 9 my mum used to go out shooting every Wednesday night and I would have 2 stay at home with [Mr ← Rivas →] my dad.*
 - *I would cry everytime mum would leave because I was scared of my dad and I still am.*
 - *One of the reason's I was scared of him was because he used to take me to school ever day and if we had a fight or I told mum something I shouldn't when we were near the [S] turnoff he would hit me and pull this reall mean face and have a go at me about wateva I had done.*
 - *I had bruises all over my legs, chest and back but I never told mum and I still haven't. One day he hit me that hard on the chest that I was winded 4 over a minute and all he did was laugh at me.*
 - *But the main reason I am scared of him is when mum used to leave me with him he would make me do things to him. One night I was in bed on time at 7.30 and he came in and goes "you've been such a good girl 2nite u can have a reward" I didn't know wat it was but I said ok. Then he took off his trousers and I asked wat he was doin and he just said wait and c then he got on top of me and he held me there and told me to suck on his dick. I asked what would happen and he goes I duno but u're mum does it to me. He made me suck on it 4 ages and I didn't know what I was doin cause I was only 9.*
 - *When dad heard mum cum home he quickly jumped off and goes "if mum asks I was lying here with you ok don't tell her" and when mum came in she said that I smelt like dad and I told her that dad gave me a hug.*
 - *Another time something happened was on a Monday night mum had 2 go out 4 a party and I was 10. I had 2 b in bed at 8 o'clock but I wanted 2 stay up and watch the Drew Carey show and dad said I could if I sat on his knee, so I did.*
 - *Then he goes you can only watch it if I can see your boob and he pulled up my top and touched my boob and I didn't know what 2 do then all of a sudden he started sucking on my boob and I started to cry and screamed at him but he wouldn't stop and then I hit him in the face and he let me go and he said that if I ever told mum he would leave us and take everything we owned.*
 - *I still havn't told mum and I am scared that if I do and she says something to [Mr ← Rivas →], I am scared what he will do 2 me, mum or my sisters.*
16. It is the mother's evidence that on Sunday 17 September 2006 she spoke to [X] and asked her if the father had ever touched her inappropriately. She says that [X] cried and nodded, whereupon the mother and all three girls went to the maternal grandmother's house for the night. It seems to be common ground that the mother returned to the former matrimonial home the following day and had some further discussions with the father. Later that day a conversation took place involving the parties and [X], to which I shall refer below.

17. It seems also to be common ground that the parties agreed to attend further counselling with a counsellor who had already been assisting them in relation to their marriage difficulties.
18. The parties continued to live together until they finally separated in late October or early November 2007.
19. The father filed his Application on 11 December 2007 and it was set down for directions on 11 February 2008. The mother filed her Response on 8 February 2008.
20. After hearing the parties' competing interim applications on

21 February 2008, I made interim orders providing for the children to live with the mother and for the father to communicate and spend time with the children by telephone each Tuesday evening and for a minimum of two hours per week on a supervised basis at the [N] Children's Contact Service in [B] ("the Contact Centre"). I also made orders in the usual form for the appointment of an ICL.
21. On 30 May 2008 orders were made by consent appointing Mr John de Jong ("the psychologist") as a court expert to provide a report. His first report was released to all parties on 27 July 2008.
22. On 4 August 2008 the matter was set down for hearing in November 2008. However, the matter did not proceed at that time and, after some adjournments, the hearing commenced on 5 March 2009.
23. As is the usual practice in my court, the court expert psychologist gave evidence as the first witness. He was in the witness box for the whole of the first day and for more than an hour on the second day of the hearing.
24. After that evidence concluded, all counsel agreed that I should receive the photographs that the mother had referred to at paragraph 25 of her second affidavit. In that paragraph she said:
 - *In early September 2008 I was flicking through [X] 's camera and found photographs that [Y] had taken of [Z] without her underwear on in posed positions. I was absolutely horrified by these photographs and did not know what to do. ...*
25. The mother had instructed her solicitor to write to the other solicitors and a copy of that letter dated 12 September 2008 is annexed to her second affidavit. In part that letter reads as follows:
 - *My client is not content to move from the contact centre as she has recently found some alarming photographs on [X] 's digital camera taken by [Y]. The photographs depict [Z] in posed positions without her underwear on. These photographs were discovered by my client on Saturday 6th September 2008 and reported to me on 9th September 2008.*
26. The photographs and a CD containing the digital images of those photographs are Exhibit "M1". There are nine photographs numbered DSC00522 to DSC00530 ("the photographs").

27. On 6 March 2009 the matter was adjourned for further mention on 11 March 2009.
28. When I examined the CD containing the photographs on 7 March 2009 it appeared that all had been taken between 7.02 a.m. and 7.04 a.m. on 7 September 2007. (That subsequently turned out to be incorrect.)
29. At a further mention of the matter on 11 March 2009 I made orders restraining the parties and [X] from discussing the existence of the photographs or the taking of them with the children and further adjourned the matter for mention on 19 March 2009. I also directed the mother to file an affidavit by herself and/or an affidavit by [X] providing further particulars in relation to those photographs.
30. On 19 March 2009, I noted in Court that the date setting on [X]'s camera was one year "slow", and the time setting was twelve hours "fast". Consequently, it appeared that the photographs had been taken at approximately 7.00 p.m. on 6 September 2008 (and not on the morning of 7 September 2007 as I had originally thought). The further hearing was adjourned until May and the psychologist was given leave to inspect the photographs.
31. It is quiet clear that the photographs are disturbing, and during the hearing all counsel appeared to accepted that, in other circumstances, if one was found by the police to be in possession of such images, it is highly likely that one would be charged with the possession of pornographic material involving children. In a letter to the ICL dated 10 April 2009, the psychologist described the photographs as follows:[\[4\]](#)
- *In accordance with your request, on 9 April 2009 nine photographs were reviewed by the Writer at the Launceston Registry.*
 - *Seven of the photographs show [Z] on a double bed wearing a dress of some sort but with her underpants removed. In all of those photos [Z] is lying on her back with her legs spread and her feet well back close to her head. Six of the photos (522, 523, 525, 526, 529, 530) explicitly show [Z]'s genital region. One photo (524) taken from the side shows [Z] lying on her back with her feet up and shows her face and not her lower body. Two photos are less readily identifiable because no face is shown. One (528) is a close picture of a female child's genitalia where the child is sitting on the edge of the bed with legs spread apart. The other (527) is of a female child leaning face down over the edge of the bed.*
32. His descriptions of the photographs are accurate, save that they were apparently taken on a bunk bed and not a double bed. However, nothing turns upon that.
33. The psychologist went on in that letter to say:
- *The photos were apparently taken a week before [Z]'s fourth birthday. All but one photo (524) appears to be a deliberate photo of the genital region and for this reason the photos appear focused and purposeful. [Z]'s posture, lying on her back with legs spread and well back resembles a posture for sexual intercourse. Unless she has directly witnessed sexual intercourse in this manner, knowledge of that posture would be beyond [Z]'s developmental maturity. This suggests possible adult involvement in encouraging or directing [Z] to adopt these poses. Either [Z] has some prior experience of these postures, or she was instructed to adopt those postures at the time the photos*

were taken. A possible alternative explanation for [Z]’s posture in these photos is that it is not dissimilar to that adopted when a child’s nappy is being changed. This explanation seems less likely because all the photos, even the two not of a child lying on her back, are so deliberately focused on the genital region and hence appear to have a sexual quality.

34. On 23 April 2009 the listing for further hearing on 6 May 2009 was vacated and the ICL was granted leave to provide the Tasmanian Child Protection Authorities with a brief in relation to the matter because he had formed the view that he was bound to report the matter pursuant to [section 67ZA](#) of the Act.
35. On 30 June 2009 further orders were made by consent for the psychologist to provide a second report. That second report was released to all parties on 8 July 2009 prior to the hearing resuming the following day.

Documents relied upon

36. The father relied upon his Application filed 11 December 2007 and his affidavit filed 21 January 2009. He also relied upon an affidavit by his mother, filed on 28 May 2009.
37. The mother relied upon her Response filed 8 February 2008 and her affidavits filed 8 February 2008, 22 January 2009 and

17 March 2009. She also relied upon affidavits by [X] which were filed on 2 February 2009, 17 March 2009 and 18 March 2009.
38. The ICL relied upon the psychologist’s two reports.
39. In addition, a number of documents were tendered by all counsel.

Legal principles to be applied

40. Proceedings for parenting orders are governed by the provisions of [Part VII](#) of the [Family Law Act 1975](#) (“the Act”). The court must consider the best interests of the child as the paramount consideration^[5].
41. [Section 60B](#) sets out the objects of [Part VII](#) of the Act and the principles underlying those objects. The objects of [Part VII](#) are to ensure that the best interests of children are met by:
 - 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
 - protecting children from physical or psychological harm from being subjected or exposed to, abuse, neglect or family violence; and
 - ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
 - ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children. ^[6]

42. Except when it would be contrary to a child's best interests, some of the principles underlying those objects are that:
- children have the right to know and be cared for by both their parents; and
 - children have a right to spend time and communicate on a regular basis with both their parents and with other people significant to their care, welfare and development; and
 - parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
 - parents should agree about the future parenting of their children[7].
43. In determining what is in a child's best interests I must consider the matters set out in [section 60CC](#). It refers to "primary considerations" and "additional considerations".
44. There are two "primary considerations". The first is the benefit to the child of having a meaningful relationship with both parents, and the second is the need to protect the child from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence[8].
45. The court must also take into account those of the "additional considerations" that are relevant[9].
46. There has been some debate about whether the "primary considerations" should be given more weight than the "additional considerations". However, it is my view that each consideration, whether "primary" or "additional", should be given the weight it deserves in the light of the facts of the particular case. Indeed, I am fortified in that view by the joint judgment of May and [Thackray JJ in *Mulvany & Lane*\[10\]](#), in which their Honours said:
- *76. It is important to recognise that the miscellany of "considerations" contained in ss 60CC(2) and (3) is no more than a means to an end. Self evidently, they are only matters to be **considered**. Of course, we accept they are of great importance, being the factors identified by Parliament as those the Court must take into account (when they are relevant). However, they must be applied in a manner consistent with the overarching imperative of securing the outcome most likely to promote the child's best interests.*
47. The court must apply a presumption that it is in the best interests of children for their parents to have "equal shared parental responsibility" unless there are reasonable grounds to believe that a parent has engaged in abuse of a child of that parent's family or in family violence[11]. 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.[12]
48. If a parenting order is to provide that the parents are to have equal shared parental responsibility for the child, the court must:
- consider whether spending equal time with each of the parents would be in the best interests of the child and is reasonably practicable; and
 - if it is, consider making an order to provide for the child to spend equal time with each of the parents.[13]

49. However, if an order is to provide that the parents are to have equal shared parental responsibility but the court does not propose to order that the child is to spend equal time with each of the parents, then the court must consider whether it would be in the child's best interests to spend "substantial and significant time" with each of the parents and whether that is reasonably practicable.[\[14\]](#)
50. It is clear that the court is not restricted to the proposals put forward by the parties. See *Bolitho and Cohen*[\[15\]](#).
51. It is clear that much of the evidence in this case went to whether or not the children are at risk of abuse, and sexual abuse in particular.
52. The High Court and the Family Court of Australia have often stated that courts should not make orders that expose children to an unacceptable risk of abuse. It is also clear that 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 relevant child or children. The Court's consideration of the paramount issue must not be diverted by any perceived need to arrive at a definitive conclusion about the allegation of sexual abuse.[\[16\]](#) Further, the Court should not make a positive finding that such an 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*.[\[17\]](#)
53. In the 1988 case of *In the marriage of M and M* their Honours Mason C.J. Brennan, Dawson, Toohey and Gaudron JJ of the High Court said:[\[18\]](#)
- *Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a "risk of serious harm" (A. v. A. [1976] VicRp 24; (1976) V.R. 298 at p. 300), "an element of risk" or "an appreciable risk" (M and M (1987) FLC 91-830 at pp. 76,240-76,242; (1987) 11 Fam. L.R. 765 at pp. 770 and 771 respectively), "a real possibility" (B and B [Access] (1986) FLC 91-758 at p. 75,545), a "real risk" (Leveque v. Leveque (1983) 54 B.C.L.R. 164 at p. 167), and an "unacceptable risk" (In re G. (a minor) (1987) 1 W.L.R. 1461 at p. 1469). This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, 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. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.*
54. In *Lindsay and Baker*,[\[19\]](#) Bryant CJ said the following that was clearly intended to give guidance in relation to the application of a test of "unacceptable risk":[\[20\]](#)
- *The trial Judge discussed at some length, without apparent error, the standard of proof applicable to the allegations by the mother that the father had sexually abused the child and the unacceptable risk question (para 76 - 106). I agree with Finn J that it seems unnecessary for anything to be said beyond the broad general guidance given by the High Court in M and M [1988] HCA 68; (1988) FLC 91-979. That said however, the concept still frequently proves to*

be a difficult one to apply and the description by his Honour in paragraphs 78, 79 and 80 which are repeated below, in my view, provide a useful summary of what is required:

- “78. The so-called unacceptable risk test has become the standard used by the Family Court to achieve a balance between the risk of detriment to a child from sexual abuse and other forms of harm and the possibility of benefit to the child of unrestricted contact. Under the High Court's formulation in *M v M* [(1988) FLC 91-979; [\[1988\] HCA 68](#); (1988) 166 CLR 69], where a court makes a finding of unacceptable risk it is a finding that continued contact might do more harm than good or a conclusion that its perceived advantages are outweighed by the potential disadvantages. However, a finding of unacceptable risk in respect of unsupervised contact does not preclude a finding that there is no unacceptable risk to the child if supervised contact is ordered.
- 79. The relevant exercise is not a strictly legal one. It requires an assessment of the factors which might indicate the risk of any relevant harm to the child in the future.
- 80. Risks consist of chances and consequences. The more serious the consequences the higher the risk even if the odds of the happening of the relevant event are comparatively low. Conversely, it may be perfectly reasonable to take a risk on something in circumstances where, even though it is likely to occur, the consequences are comparatively insignificant and the potential benefits are worth it.”
- In each case the facts will need to be carefully assessed, not only as to whether they enable the court to make a finding that sexual abuse has occurred (or not occurred) but also, if the court cannot make such a finding, as to whether the facts establish that there is an unacceptable risk to the child if the contact being sought, or contemplated by the court, were to occur. This is consistent with the comments of Fogarty J in *N and S and the Separate Representative* (1996) FLC 92-655 at 82,714:
 - “In asking whether the facts of the case do establish an unacceptable risk the Court will often be required to ask such questions as: What is the nature of the events alleged to have taken place? Who has made the allegations? To whom have the allegations been made? What level of detail do they involve? Over what period of time have the allegations been made? Over what period of time are the events alleged to have occurred? What are the effects exhibited by the child? What is the basis of the allegations? Are the allegations reasonably based? Are the allegations genuinely believed by the person making them? What expert evidence has been provided? Are there satisfactory explanations of the allegations apart from sexual abuse? What are the likely future effects on the child?”

Issues of credit

55. There are many disputed factual matters in this case. Some of those disputes are minor, but some are of great significance. I propose to consider some of those more significant factual disputes before turning to the [section 60CC](#) considerations.

56. Some of the significant areas of factual dispute between the father and the mother and/or [X] are:
- whether or not the father forced [X] to perform oral sex on him when she aged approximately nine years;
 - whether or not the father indecently assaulted [X] during an episode of the Drew Carey Show;
 - whether or not the father inappropriately touched [X] at other times; and
 - whether or not the father showed pornographic material to [X].
57. In general, the father's response to all these allegations was set out in paragraph 34 of his affidavit as follows:
- *The respondent has made a number of allegations against me which I have found offensive and highly distressing. I deny that I have in any way acted inappropriately towards [X] or the girls. I in fact believe that I was less affectionate towards [X] as I was her step father and not a biological parent. I have at no time touched [X] inappropriately or showed her pornographic material.*
58. At paragraph 38 he also said:
- *I am concerned that the respondent and [X] have fabricated these allegations in an attempt to frustrate my application for shared care with the girls. The respondent first raised these allegations with me in the last 12 months of our relationship when our marriage was deteriorating and after we had finished marriage counselling. We continued to live together and I continued my role in caring for the children often alone after these allegations were made. The police were not involved with these allegations until after we separated and my solicitors began negotiations with the respondent's solicitors regarding arrangements for the children.*

The allegation that the father forced [X] to perform oral sex

59. This allegation first came to light when the mother found a note in September 2006 written by [X] ("the note"). The text of the note is reproduced at paragraph 15 above. In addition to acknowledging in her first affidavit that she had written the note when she "was fourteen (14) or fifteen (15) years old", [X] said the following in relation to this allegation against the father:[\[21\]](#)
- *I have a recollection of the incident when [Mr ← Rivas →] made me suck his penis and I can recall that he actually went out and went to the toilet and then came back into the room and ask (sic) me to continue what I was doing. I was terrified at the time.*
60. In his first report, the psychologist said:[\[22\]](#)
- *Asked directly about the allegation of forced oral sex described by [X], the father said he did not recall any incident of that nature. He questioned the veracity of the note written by [X]. He did not accept that it was written by [X]. Even if it was written by [X], he does not accept it was written without influence by the mother.*
61. In his oral evidence, the father maintained that he had never acted in an inappropriate sexual way towards [X].[\[23\]](#) He also stated that the reason why he had said that he

“did not recall” such an incident was because the question that he had been asked was about his recollection. He said:[24]

- *I had already told (the psychologist) that it hadn't occurred and when that specific question was put to be, it was actually asked in the same manner that I answered: “Do you recall blah blah blah?”, and my answer being “I do not recall”, is, in my opinion, an answer to his question. He asked me: “Do I recall?”; I told him, “I do not recall”.*

62. The psychologist was re-called on 16 July 2009 specifically to give evidence about the way in which he had framed the question that he asked the father in relation to forced oral sex. The psychologist could not recall the actual words that he had used and his notes did not assist him. However, he said that because the allegations were already known to the father, in that they were in the mother’s affidavit material, he would have been less likely to have framed his question to the father as one about his recollection. He added:[25]

- *I would ask him directly about the incident as to, you know, perhaps words to the effect, you know, “What do you say about the allegation of forced oral sex?”*

63. I am satisfied on the balance of probabilities that the father was asked a more direct question about the incident than the father was willing to admit. Consequently, I find his saying to the psychologist that he did not recall such an incident to be somewhat strange for someone who is claiming to be innocent of the allegation.

64. [X] was cross-examined at length by the father’s counsel and by the ICL. Throughout that cross-examination she consistently maintained that what she had said in the note was true. Further, in response to questioning by the ICL, she stated that there had only been one incident involving oral sex.

The Drew Carey Show incident

65. This allegation also first came to light when the mother found [X]’s note. In addition to what she said in the note, [X] said the following in her first affidavit:[26]

- *Mum left me with [Mr ← Rivas →] one Monday night and Drew Carey show came on at 8 30 and my bedtime was 8 and I was wanted (sic) to watch it and [Mr ← Rivas →] said I could if I sat on his lap so I did then he said he wanted to do one more thing and he pulled my top up from behind and reached round and started playing with my breasts then he turned me around on his lap and I said “Stop I’m going to bed and then he goes ‘It wont hurt’ and he pulled up my top and started sucking my breasts. I tried to force him off but he wouldn’t stop sucking and I finally got my top down and ran into my room and closed the door.*

66. The father does not address this specific allegation in his affidavit, other than in his general denials of any inappropriate conduct referred to at paragraphs 57 and 58 above.

67. At paragraph 42 of his first report, the psychologist said:

- *Asked directly about the Drew Carey Show incident, the father said it absolutely never happened. He accepted that he would have watched some*

television shows with [X] but he could not specifically recall watching this show with her. He said he was interviewed by Police CIB for over four hours during which he tried to be as helpful as possible by giving them as much information as he could.

68. When he was cross-examined by the ICL about this allegation, the father said it was “a fabrication” and “it never happened”.[\[27\]](#) He also said:
- *She says in her thing that I touched her breast and lifted her top and sucked it, and I can most certainly assure you that nothing even close happened.*[\[28\]](#)
69. He was questioned further about the allegation and maintained his position. When the ICL said to the father “Now she said that you didn’t let go, you pulled up her top and sucked on her boobs. Your response to that was that you absolutely denied that that happened?” the father responded: “Most definitely”.[\[29\]](#)
70. When she was cross-examined, [X]’s evidence was also consistent with what she had said in the note and in her first affidavit.

The allegation that the father inappropriately touched [X] at other times

71. **At paragraph 12 of her first affidavit, [X] said:**
- *Mum went to gun club every Wednesday night and I would cry every time she left because I new (sic) what was coming. [Mr ← Rivas →] would chase me around the house and pretend to tickle me but he would be groping my breasts and touching my lower regions trying to undo buttons all the time.*
72. At paragraph 21 she added:
73. [Mr ← Rivas →] only stopped touching me at the end of year 8 which was when I started to defend him off and when I started telling my friends about what he had done to me and started to stand up for myself.
74. When she was cross-examined by the ICL, [X] said:
- *The fondling went on for years.*[\[30\]](#)
75. She went on to say:
- *... the touching and stuff went on for years until I could fight back like, otherwise he’d just hold me down until – and yeah.*[\[31\]](#)
76. This general allegation was not specifically addressed by the psychologist in his first report, but that is not surprising because [X] had sworn her first affidavit six months after that report was released.

The allegation that the father showed [X] pornographic material

77. The mother first reported in relation to this allegation as follows:[\[32\]](#)
- *... [X] told me that [Mr ← Rivas →] showed her pictures in books of men and ladies doing things naked. She described where I should go to look for these books right down to what shelf and the packet containing overalls that they were under. Following her directions I was able to find the pornography*

books and saw the pictures she had described to me. I confronted [Mr ◀ Rivas ▶] with this and he said that she must have come across them when she was snooping. I asked why she would be snooping amongst his clothes in the top of his wardrobe and he explained that she must have been searching for hidden presents or something. I demanded that [Mr ◀ Rivas ▶] get rid of these books which he later told me that he had.

78. In her first affidavit [X] said the following:

- *[Mr ◀ Rivas ▶] had showed me some pornographic books and I then told mum about them. [Mr ◀ Rivas ▶] told mum that I was making it up, but I was able to take mum to the wardrobe and show her where the magazines were which were under some of [Mr ◀ Rivas ▶]’s jumpers.*

79. In his first report the psychologist said the following in relation to his interview with [X]:[\[33\]](#)

- *She said several other more significant incidents stand out from this background of generalised unwanted sexualised attention. One of her earliest memories of his inappropriate sexualised behaviour was when he showed her his pornographic magazine. He showed her where it was kept. She recalled sitting on the bed with him turning the pages and commenting on each picture. She said that four specific images are still vividly recalled by her in an unwanted, intrusive manner that still upsets her. [X] was observed to become tearful as she made this statement. There were also other signs of autonomic arousal that tended to confirm her statement. Asked to place the magazine incident in time, [X] immediately responded that it occurred when she was in grade three being taught by Ms G.*

80. In relation to his discussion about this allegation with the father, the psychologist said:[\[34\]](#)

- *Asked directly about the pornographic magazine incident described by the mother, the father refuted ever showing [X] those magazines, or leaving them in a place where [X] could find them.*

81. When he was cross-examined, the father denied showing [X] pornographic material.[\[35\]](#)

82. [X] was not cross-examined about this allegation.

Comment about credit

83. In his first report the psychologist said:[\[36\]](#)

- *Even though a positive finding cannot be made in relation to [X]’s allegations, the Writer’s concluded opinion is that a reasonable probability exists that the father exposed [X] to sexualised material and that he indecently assaulted her in the manner she has described. Her description of these experiences was detailed, used language that was age appropriate, and activated emotions and other indications of psychophysiological distress that were involuntary. No evidence was found that the disclosures were externally influenced. The accounts of her experience provided by [X] herself and her mother were consistent with the known psychological sequelae of this form of victimisation.*

The father's assertion that [X] would have told her mother anything adverse that had happened is not persuasive. Children generally do not talk about such experiences of sexual assault. Indeed, this phenomenon is well understood and termed 'childhood sexual abuse accommodation syndrome'. The explanation given by [X] of the father's behaviour toward her also suggests behavioural indicators known to be consistent with 'grooming'. In particular a poor sense of boundaries and an erosion of the parent-child differential appears to have been present in the father's interaction with [X], beginning with mildly inappropriate/apparently naive touching and exposure to sexualised images in a magazine. While the more serious allegations relate to a period of time when [X] was in grade three, she did report some continuation of unwanted sexualised touching that she says was witnessed by at least one friend when she was in grade seven.

84. The psychologist was cross-examined at length in relation to that first report during the first two days of the hearing and maintained his opinion in relation to what is set out above.
85. The father was in the witness box for nearly five hours, the mother for nearly seven hours and [X] for more than three hours. Consequently, I had good opportunities to hear their evidence and to observe their demeanours. I found [X] in particular to be a most impressive witness, notwithstanding that she was from time to time visibly distressed by the situation in which she found herself. In my view, she was not "faking it" at any time and her distress was real and understandable.
86. Consequently, when I consider the question of credit, I conclude that on the balance of probabilities the evidence of the mother, and in particular that of [X], is to be preferred over that of the father in relation to these matters. However, I do not come to that conclusion lightly, because the allegations against the father are very serious and, pursuant to the provisions of sub-section (2)(c) of [section 140](#) of the [Evidence Act 1995](#), I must take the gravity of the matters alleged into account. I am also aware from the decision in *Lindsey and Lindsey*[\[37\]](#) that sub-section (2)(c) incorporates dicta from cases such as *Briginshaw*,[\[38\]](#) *Reifek v McElroy*[\[39\]](#) and *Helton v Allen*.[\[40\]](#)
87. A passage of Dixon J's judgment in *Briginshaw* reads as follows: [\[41\]](#)
- *The truth is, that when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independent of any belief in its reality.*
88. When I consider all the evidence in relation to the matters referred to from paragraph 56 above, I find that I feel an actual persuasion in each case that things occurred as [X] has said they occurred. Clearly, significant consequences flow from such a finding.

The consequences of the credit finding

89. In his first report, the psychologist said:

- *However, having regard to all the facts, in particular the reports of the mother and [X], the possibility that the father presents with Pedophilia cannot be excluded. This disorder is characterised by sexual activity involving a prepubescent child. If it is accepted that [X]’s disclosures are a true account of the father’s behaviour, then the formal diagnosis of Pedophilia, Sexually Attracted to Females, Limited to Incest, Nonexclusive Type is enabled in the manner this disorder is defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).*
90. The psychologist was cross-examined vigorously by counsel for the father and when he was asked: “So you are really saying that if [X] is correct, he is a paedophile?” he responded: “That’s right”.
91. When it was put to him that the word “paedophile” created unfair weight in his report, the psychologist responded:
- *It’s not a word that I ever use without considerable care.*
92. I accept the evidence and expertise of the psychologist and reject the criticisms of both his reports and his evidence that were made by the father’s counsel in his closing submissions.
93. In my view, it follows from my acceptance of the evidence and expertise of the psychologist, that the father must represent a risk to the children, particularly as they are still pre-pubescent, being aged seven and five years old. It is my further view that the level of risk is sufficiently unacceptable for there to be no contact between the father and the children other than in full-time presence of a responsible adult. (I will refer to this further below.)
94. I would have come to that view even without considering the other allegations against the father that are to be found in the mother’s first affidavit, where she says the following: [\[42\]](#)
- *In November [Z] and [Y] were getting undressed ready for their bath and I ducked out of the bathroom to get their pyjamas. When I came back in [Z] was laying on top of [Y] and both were naked and she was kissing her and calling her little sexy girl. I questioned what they were doing and [Y] said that they were being sexy girls and putting their fanny’s together. When I questioned [Y], she said that she saw it on Dad’s TV on Home and Away;*
 - *On another occasion we had gone to the bathroom to get ready for a bath and [Z] had said lets take our clothes off and be sexy girls. I questioned her who showed you that rubbish and [Z] answered” daddy did”;* and
 - *In January 2008 we were again in the bathroom preparing for a bath, [Z] says to me “you don ‘t sex up the bum, do you mum? “. I beg your pardon. “you don ‘t sex up the bum do you? Sexy girls, sex other places, but not up the bum do they” No indeed they don’t. I was too scared to ask where that one came from.*
95. The father consistently denied that any such things happened while the children were with him.
96. **The psychologist said the following in relation to these allegations;**

- *On the basis that [X] was subjected to inappropriate sexualised behaviour, some risk exists that [Y] and [Z] may also be subjected to similar behaviour in the father's unsupervised care. This concern is further amplified by the fact that both [Y] and [Z] have already demonstrated age inappropriate sexualised behaviour that they say was acquired through interaction with the father. These behaviours have only been observed by the mother and, to the Writer's knowledge, they have not been corroborated by any other source. Open mouth kissing, the term 'girlfriend kisses', and 'sexy girl' behaviour that entails the girls lying on top of each other naked are not considered to be within the normal range of sexualised behaviour for children of these ages. The behaviours, if accepted as having occurred, suggest exposure to sexualised behaviour or material. They are consistent with the phenomenon of 'grooming' described above. The possibility that the father is responsible for encouraging these sexualised behaviours cannot be ruled out. The probability that [Y] and [Z] have been exposed to inappropriate sexualised behaviour by the father suggests a persisting pattern of such inappropriate behaviour over a number of years. One implication of this is that it suggests a likelihood of similar behaviour in the future.*[\[43\]](#)

97. He added:

- *A factor mitigating against the risk of harm described above is the possibility that, because the father formed an attachment relationship with [Y] and [Z], he may be less likely to incorporate them in any sexualised ideas. A further factor reducing the risk of harm is the likelihood that, once detected, sexual abuse is much harder to repeat. The direct attention to the father's sexualised behaviour in these proceedings may be a powerful deterrent to any further inappropriate sexualised behaviour.*[\[44\]](#)

98. In my view, these further allegations must only add to the concern that I have that the father represents an unacceptable risk to the children.

The photographs

99. In her second affidavit [X] says:[\[45\]](#)

- *In early September 2008 I was at home and I picked up my digital camera to have a look at the photographs on it. My recollection is that I picked the camera up from the microwave. If the camera is not in use it is normally kept on top of the computer desk as I am often uploading photographs from the camera to the computer.*
- *I was leaning up against the kitchen bench looking at the photographs to see what was on the camera and [Y] and [Z] were in their bedroom at the time. I cam (sic) across some pornographic images that I knew that I had not taken and my immediate reaction was that I blurted out "what the hell" and I called [Y] and [Z] out of their bedroom and asked them "what have you been taking photos of". When the children came out I did not show them the photographs, but instead again asked them what they had been taking photographs of. [Z] said to me "[Y] took them". I then asked them what the photographs were of and they just stood there and looked at me without saying anything. Neither of the girls spoke. I then called out to Mum who was in the lounge room and*

showed her the photographs. Mum was shocked and horrified by the photographs and immediately took the camera.

- *I was very upset with [Y] and [Z] and I told them they were not allowed to use my camera anymore.*

100. [X] also said:[\[46\]](#)

- *The girls often borrow my camera to take random photographs and they will take them off the desk or books or of their toys. It is, therefore, not uncommon for them to pick up the camera and use it.*

101. The mother's third affidavit corroborates the circumstances in which the photographs were discovered by [X].

102. By the time that the hearing concluded there appeared to be general acceptance that [Y] had taken the photographs of [Z] on or about

6 September 2008. I accept that [Y] did take those photographs at that time and that she was sufficiently experienced to take such photographs with an auto-focus digital camera of the type that was used. However, it is not her photographic ability that is of concern to me, but rather the content of the photographs. An accurate description of those photographs is given at the paragraph 31 above.

103. In his letter to the ICL dated 10 April 2009 (Exhibit "ICL6"), the psychologist also said:

- *All but one photo (524) appears to be a deliberate photo of the genital region and for this reason the photos appear focused and purposeful. [Z]'s posture, lying on her back with legs spread and well back resembles a posture for sexual intercourse. Unless she has directly witnessed sexual intercourse in this manner, knowledge of that posture would be beyond [Z]'s developmental maturity. This suggests possible adult involvement in encouraging or directing [Z] to adopt these poses. Either [Z] has some prior experience of these postures, or she was instructed to adopt those postures at the time the photos were taken. A possible alternative explanation for [Z]'s posture in these photos is that it is not dissimilar to that adopted when a child's nappy is being changed. This explanation seems less likely because all the photos, even the two not of a child lying on her back, are so deliberately focused on the genital region and hence appear to have a sexual quality.*

104. I must say at this point that photograph 530 makes it very clear to me that the photographs are not related to nappy changing.

105. The psychologist went on to say:

- *It is asserted that [Y] took these photos. Such purposeful photographing of a child's genitalia is, in the Writer's opinion, outside the range of naïve sexualised play that could normally be encountered for children of this age. This raises questions about how and where [Y] learnt about taking photos of girl's genitalia? If only [Y] was present when these photos were taken, and [Y] directed [Z]'s behaviour, how did [Y] acquire the knowledge to do so?*
- *The photos suggest possible adult involvement. Whether or not there has been adult involvement, and the nature of that involvement, can only be determined*

by careful interview of the children. That interview would be most effectively conducted by a Police Officer with training in the interview of children who have been subjected to inappropriate sexual conduct. Indeed, given the nature of the images, the Writer sees a mandatory obligation to notify the authorities about these photographs.

106. The psychologist made the following recommendation:

- *It is recommended that Tasmania Police be requested to review the photographs and conduct an interview with [Y] and with [Z] as soon as is possible. Detective C at [B] CIB is an appropriate contact for this purpose.*

107. The children were interviewed and the psychologist reported that Detective C has communicated with him by email as follows:

- *I've interviewed both girls and in short they both acknowledged [Y] took the photos of [Z] in [Y]'s bedroom (bottom bunk bed) at their current house. Neither girl could give a reason why they were taken, however below is a short summary on what each girl said:*
- *[Z]*

As soon as I mentioned 'photos', she wanted to go back downstairs. After a quick change of subject, she was happy to talk again. Said that [Y] took the photos and no one else was there. They were taken a long time ago - after Christmas. It was [Y]'s idea to take the photos, but she can't remember what [Y] said. The photos were taken in [Y]'s bedroom on the bunk bed. She hadn't seen the photos. They were taken on sis' camera ([X]). She hasn't done any similar photos before or since. No one else has taken photos like that or asked her to. No further disclosures on why they were taken in that position, etc.

- *[Y]*

Didn't want to be recorded (this occurred anyway, though consent was not gained on video). Took a while to speak at the beginning of the interview. Initially couldn't remember if she took them or not, then said she did. They were taken at home on [Y]'s bottom bunk bed. Were taken after Christmas. Were taken on 'sissies' camera ([X]). [Z] asked her to take them. She has never taken any other similar photos. She has not posed in the same way before or had photos taken of her like that. States [Z] comes into her room and looks at her and people naked and its disgusting. Sis ([X]) growled at them after the photos were taken and said 'you're dead' and made [Z] go to her room. Provided no further information on the photos and did not disclose why the photos were taken.

108. When she was cross-examined, [X] was quite certain that she would not have said "you're dead" to her sisters but nothing really turns on that.

109. In the Terms of Reference for his second report, the psychologist was asked "whether the photographs are more likely to be the result of naïve child behaviour or whether they are the results of adult influence". He concluded as follows:[\[47\]](#)

- *Some child behaviours can be considered to be self-directed and autonomous. Many other child behaviour repertoires are learnt from the modelled behaviour of others, or from the direction of other people. Children learn by*

observing the behaviour modelled by other people directly, or indirectly through media such as video and photo images.

- *It is possible that the photos were taken in the course of normal self-directed child sexual game playing, and that the use of a digital camera reflects the impact of access to new technology on childhood behaviour. The interviews with the children lends support to this conclusion.*
- *However, the Writer's view is that the behaviour shown in the photographs is not within the range of normal child sexual behaviour shown in Table 1. The photographs show a purposeful focus on close-up photos of [Z]'s genitalia and buttocks while she adopts certain postures that appear stereotypically sexualised; not the playful interest that could be expected of children of this age. Det. Const. C and Ms A are also of the view that the behaviour shown in the photos is not normal sexual behaviour for children of these ages.*
- *It is more likely that the photos reflect behaviour that the children have seen modelled, either personally or indirectly, or behaviour that was directed by another person. If the children have seen similar images of genitalia and nudity in photos or video material, then they could be expected to mimic that observed behaviour. If another person has previously photographed them in a similar manner, then they could be expected to mimic that behaviour. The remaining possibility is that the photography was directed by another person who instructed the children as to what to do.*

110. It was accepted by all that the photographs were taken at a time after the orders for the father's supervised contact were made, so the psychologist was asked "whether it is possible and if so explain the reasons for this possibility the children could retain a memory and/or replicate conduct arising from the direct influence of the father". His response to that was:[\[48\]](#)

- *Capacity for long term memory is established by the time a child is four years old. Individuals typically do not recall things that happened before they were three years old. Although infants can **recognise** sights, sounds, and smells they have previously encountered, the ability to **recall** an experience develops later. By age two and a half children describe specific past events. Such early memories, however, do not generally become part of autobiographical memory; the subset of episodic memory that represents individuals own life histories. By the time a child is three years old they can actively participate in conversations about past events. Experiences that are high in novelty (newness and interest) are encoded more strongly into long term memory and more easily recalled later. At the time the photos were taken both girls, but [Y] in particular, could well have retained memory for events that had occurred ten months prior.*
- *There are a number of ways in which the father could have directly or indirectly influenced [Y] to subsequently take the photographs of [Z]. If [Y] accidentally discovered pornographic images, or was shown pornographic images, or was the subject of or witness to similar photographs being taken in the father's home, then it is likely that she would have retained a memory of that experience.*

111. The psychologist was also asked to express an opinion whether it was possible that the children's conduct could have arisen from the direct influence of mother, and if so, to explain the reasons for that possibility. His response to that was:[\[49\]](#)

- *If [Y] accidentally discovered or was shown pornographic images, or was the subject of or witness to similar photographs being taken in the mother's home, then it is likely she would have retained a memory of that experience, and possible that she later replicated the behaviour observed by her. It is also possible, as noted above, that a person in the mother's home could have directed [Y] and [Z] to take the subject photos.*
112. The psychologist was also asked:[\[50\]](#)
- *If the Court Expert is of the view that the children could have possibly retained a memory and/or replicated conduct within the photographs which are a direct influence of the either the father or the mother what are the relevant facts, assumptions and/or premises relied upon by the Court Expert in determining the likelihood or otherwise of such opinion.*
113. In relation to that, paragraph 13 of his second report reads as follows;
- *The Writer is not in a position to conclude that either the mother or the father is responsible for influencing the children to take the photographs. However, it is the Writer's view that a reasonable probability exists the children were exposed to either sexualised material or the behaviour of others, either accidentally or deliberately, that influenced them to take the photographs, and that they could have retained a memory for such an experience for more than 10 months before copying that behaviour in taking the subject photographs.*
114. When he was cross-examining the mother, the father's counsel produced a number of photographs of the children in the nude.[\[51\]](#) The mother conceded that were taken by her. Counsel's clear intention was to suggest that the children's photographic exploits on or about 6 September 2008 could have resulted from behaviour learnt in the company of the mother. After comparing the photographs taken by the mother and those taken by [Y], I do not accept that. I agree with the psychologist's assessment of the children's photographs and repeat that he said:
- *The photographs show a purposeful focus on close-up photos of [Z]'s genitalia and buttocks while she adopts certain postures that appear stereotypically sexualised; not the playful interest that could be expected of children of this age.*
115. The photographs taken by the mother were clearly taken in fun and do not show "*postures that appear stereotypically sexualized*". I also refer again to the very suggestive pose by [Z] in photograph 530 in particular, and find that the photographs taken by the mother are of a very different character from that of the photographs taken of [Z] by [Y].
116. In my view, a much more likely explanation for the children's behaviour in taking the photographs is that they have been exposed to some pornographic material (accidentally or otherwise), either in a magazine or on a computer.
117. In this regard there is abundant evidence that the father was in possession of pornographic material both in magazines and on his computer. I have already accepted [X]'s evidence about his retention of pornographic magazines. Further, the father admits to having shown some pornographic material on his computer to a

young woman (wrongly described as his niece).[\[52\]](#) I also accept that that occurred after the mother had asked him to remove pornographic images from the computer.

118. In addition, the father conceded that the mother had discovered him very late at night masturbating in front of his computer.
119. The father attempted to suggest that the mother was also in possession of pornographic materials, but I accept her evidence that the particular materials were films “*more about sexual relations, trying to put relationships back together*” than pornographic films. I also accept her evidence that she had not actually watched those films prior to leaving them in the former matrimonial home at separation.
120. Having considered this evidence, I am of the view that a probable explanation for the sexualised behaviour of the children in relation to the photographs is that:
- they observed pornographic images (accidentally or otherwise) which had been retained by the father on the computer; and
 - they retained memories of that from a time before the orders for supervised contact were made.
121. However, given the gravity of that explanation, I am unable to say that I “*feel an actual persuasion of its occurrence*”. Consequently, I do not make that as a positive finding.[\[53\]](#)
122. I now turn to the matters that I must consider under section 60CC of the Act.

Primary considerations

The benefit to the child of having meaningful relationships with both parents

123. It is quite clear that the children have positive and meaningful relationships with their mother and with the half sister, [X].
124. In his first report, these psychologist noted the following:[\[54\]](#)
- *The children were observed in their interaction with the mother and [X] and secure supported relationships very clearly evident. The mother was practised and confident in her management of the children and they, in turn, were comfortable in their interactions with her. [X], too, appeared to be very confident and appropriate in her soothing and care of the children.*
125. The psychologist decided not to observe the interaction between the children and the father because substantial observations had already been made at the Contact Centre. In his oral evidence, the psychologist stated that he children have a significant relationship with their father.
126. The records of the Contact Centre show that:
- the children have responded to the father with smiles, hugs and kisses;
 - the children have shown no hesitation in allowing personal contact or closeness with the father;

- conversation between them usually starts as soon as the father arrives at the Contact Centre and it is free floating and spontaneous, initiated equally by the children and the father;
- when visits come to an end, their farewells are usually accompanied by hugs and kisses; and
- each of the children will often sit on the father's knee and tell him that they love him.

127. It is not hard to conclude that the children love their father very much. (Indeed, it was clear that both the mother and [X] were both well aware of this.) Consequently, this must be borne in mind when considering any restrictions in contact between the father and the children.

The need to protect the child from harm from abuse, neglect or family violence

128. As can be seen from what I have said above, I consider that there is an unacceptable risk that the children could be the subject of abuse and that therefore there should be no contact between the father and them, other than in full-time presence of a responsible adult. I shall return to that below.

Relevant additional considerations

The children's views

129. The children are not yet old enough to have a relevant view in relation to the matters that I must decide.

The children's relationships with the parents and other people

130. I have referred to the relationships between the children and the parties and [X] above. I do not need to say more.

131. During the hearing the father mentioned that he is now in a relationship with a woman who is very supportive of him. Unfortunately, that person did not swear an affidavit and was not a witness. Consequently, it was not possible to make any assessment of her. However, it is clear that the children do not have any relationship with her.

132. I am satisfied from the evidence of the father's mother that she has a loving relationship with the children. After I made orders that the father's contact with the children should be supervised at the Contact Centre, the father's mother took the initiative to arrange for visits at that Centre and that shows me that she is committed to continuing her relationship with them.

The willingness and ability of the parents to facilitate and encourage the children's relationships with the other parent

133. The psychologist reported as follows:
- *The father perceives the mother to be alienating [Y] and [Z] from him, employing the allegations of sexual abuse in a self serving manner toward this*

end. The Writer found no evidence to support this and, instead, the mother's behaviour was considered to be balanced and protective. The mother does not seek to prevent the girls from spending time with the father, and observed the positive efforts the father had made in recent months. The father, other than to say that the mother had a vendetta against him, did not criticise her parenting capacity and did not seek to restrict the children's time with her.

134. *The mother has clearly been willing to facilitate continuing relationships between the children and the father, notwithstanding that she believes what [X] says he did to her. That is very much to her credit.*

The likely effect of any change in the children's circumstances

135. It is clear from letters from the [N] Children's Contact Service to the ICL that the Contact Centre is not designed or funded to provide continuing long term supervised contact.^[55] Both letters state:
- *Alternatively, if risks remained high for the safety of children, and there is no likelihood for a family to move on from supervised visits, the CCS is occasionally asked to provide 5 to 6 supervised visits per year for children to maintain their sense of identity.*

136. It is clear therefore that if supervised visits can only continue at the Contact Centre, there will be a significant reduction in the amount of time that the children spend with their father. Given that the children have a close and loving relationship with him, that should be avoided if their safety can be maintained.

The practical difficulty and expense of the children spending time with and/or communicating with a parent

137. Other than the difficulties that are presented in continuing supervised contact, this is not a relevant factor because the parties lived relatively close to each other.

The capacity of the parents to provide for the children's needs

138. I have no concerns about the mother's capacity to provide for the needs of the children, other than what I consider to be a lapse in her protectiveness by instructing her counsel to propose that there be unsupervised daylight contact with handovers at the Contact Centre. While I appreciate that some of that time may be in the presence of other adults (like his mother and his new partner), that cannot be guaranteed.

139. *In his first report the psychologist said:*
- *The father's history of inappropriate sexualised behaviour and poor frustration tolerance does serve to significantly diminish his parenting capacity. He has, in the past, had difficulty managing his own emotions and sexual desire to the detriment of the children's needs of him as a father. He may have capacity to more effectively meet their needs in the future provided that he receives adequate psychological treatment.*

140. For obvious reasons, I have significant concerns about the father's capacity to provide for his children's needs. *There is an unacceptable risk that the father has a*

disorder that is characterised by sexual activity involving pre-pubescent children and incestuous sexual activity is not excluded. There must therefore be an unacceptable risk that the father may not be able to resist his sexual desires and may put those desires above the need for his children to be protected.

141. Having said that, I have no doubt that both parents are quite capable of otherwise providing for the children's day to day physical and educational needs.

The attitudes of the parents to the children and to parental responsibilities

142. Apart from what I said under the heading above in relation to what I see as a lapse in the mother's protectiveness, the mother has generally displayed a very good attitude to the children and to her responsibilities as a parent.
143. Given that I accept [X]'s evidence about what the father did to her when he was *in loco parentis*, I can only have significant doubts about the father's attitude towards his parental responsibilities.

Any family violence

144. The mother alleges that there was family violence from time to time and particularly about the time that the parties separated. Although the father denied it, in cross examination he conceded that the fights between himself and the mother became physical at times and there was some pushing and shoving. Further, he conceded that the children would have seen it, although he said that it would have been rare.
145. There was an occasion between the second day of the hearing and the resumption some time later that the mother attended at the father's home and assaulted him during an altercation.
146. [X] alleges that the father assaulted her on the way to school on numerous occasions but he only concedes that he slapped her on one occasion.
147. Having heard the evidence at length, I agree with the psychologist that the father minimises his involvement.

Whether it is preferable to make an order that is least likely to lead to further litigation in relation to the children

148. In his first report, the psychologist recommended that there be supervised contact between the father and the children for a period of twelve months, following which there should be a review by the ICL. At the start of the hearing the mother appeared to adopt that position. Clearly, that would mean that I should make only interim orders at this time.
149. I do not agree. This litigation has been ongoing for a considerable period of time and the parties and the children need some finality. I therefore propose to make final orders, which I will detail below.

Should there be equal shared parental responsibility?

150. In my opinion, the answer to this question is clearly “No”.
151. It is clear that the presumption in section 61DA does not apply in this case because I accept that the father has abused [X] at a time when she was a member of the family. Consequently, I should only make an order for equal shared parental responsibility if I consider it to be in the children's best interests. Frankly, I do not consider it in the best interests of these children for the father to share parental responsibility. In this regard, I do not need to repeat what I have said above about the father's attitude to parental responsibility and his capacity to provide for the children's needs.
152. Consequently, I will make an order that provides for the mother to have sole parental responsibility. However, the mother must keep the father informed in relation to important matters pertaining to the welfare of the children, particularly in relation to health and education.

With whom should the children live?

153. It is obvious from all of the foregoing that the children should live with their mother.

What time should the children spend with their father?

154. Clearly, this question encompasses not only how much time the children should spend with their father but also the conditions under which that should occur. In relation to the latter, I have already indicated that the father's time with the children should only be in the presence of a responsible adult. Clearly, that would include the staff of the Contact Centre, but I have set out above the limitations that visits there will impose. In my view, these children need much more time with their father than the Contact Centre is prepared to offer. Consequently, another responsible adult is required.
155. The father's own mother swore an affidavit and gave oral evidence on his behalf. In her affidavit she said the following:[\[56\]](#)
- *The applicant's solicitor has asked me to consider acting as a supervisor of my son's behaviour when the children spend time with him. The applicant's solicitor has explained to me that he will ask the Court to make an order authorising me to act as a supervisor and that he will ask the Court to seek my personal assurance or undertaking that I will carry out the task of supervision responsibly and in a way that makes the children absolutely safe.*
156. In her affidavit his mother indicated her willingness to act as a supervisor and to give an appropriate undertaking to the court, noting that “*giving an undertaking is similar to being a party to a Court Order and that if I broke the promises in the undertaking I could be subject to penalties imposed by the Court including a fine or imprisonment*”.[\[57\]](#)
157. In *B and B*,[\[58\]](#) Fogarty, Baker and Purvis JJ said:[\[59\]](#)
- *Both social science literature and experience demonstrate that it is generally inappropriate to have friends or relatives of the access parent as supervisors*

of access where any risk of harm to the children exists. (See, for example, Beverly James and Claudia Gibson, "Supervising Visits between Parent and Child", Family and Conciliation Courts Review, Volume 29 No. 1 January 1991, 73; William F Hodges, Interventions for Children of Divorce: Custody, Access and Psychotherapy (2nd ed) 1991; Wyatt and Powell, Lasting Effects of Child Sexual Abuse (1988); and Patton, Family Sexual Abuse: Front Line Research and Evaluation (1991).) Family and friends are not neutral but will usually, as is the case here, have an opinion as to whether any harm has occurred or whether any risk exists. They may therefore believe that close monitoring of the children is unnecessary. In a practical sense they cannot always be present and may fail to respond protectively to complaints of abuse or distress by the children. Supervisors must be available to the children for safety and support and be prepared to intervene on the children's behalf if an issue of protection arises during the visit. It is, in our opinion, unrealistic to expect a supervisor to undertake those responsibilities on a regular weekly or fortnightly basis for an indefinite period.

- *For the above reasons it is in most cases undesirable for friends or family of the access parent to supervise children during access periods in circumstances where either abuse has been found to have occurred or there is an unacceptable risk of abuse occurring.*

158. Clearly, having visits supervised by a close relative should be the exception rather than the rule. However, I note that the father's mother also said that following in her affidavit:[\[60\]](#)

- *I am a Christian. I have been a practising Catholic all my life. I attend Church more than once weekly The concept of a father or anyone abusing a child (including my son) is abhorrent to me.*

159. She went on to say:[\[61\]](#)

- *I do love my son but I also love my grandchildren and if I was in a situation where those two affections came into conflict because my son was placing the safety of my grandchildren in jeopardy, I would have no hesitation in reporting my son's conduct to both the Independent Children's Lawyer and the Police. I would also immediately stop any time that my son was spending with children ...*

160. Further, the father's mother was cross-examined and I found her to be an impressive and forthright witness, who meant every word that she said. I am therefore of the view that this is one of those exceptional cases where the father should be permitted to spend time with the children, provided that it is in the presence of his mother.

161. In those circumstances, the father's mother will need to provide an undertaking to the Court (in terms to be approved) prior to contact commencing. The undertaking will need to include terms that:

- she will not leave the children alone with the father at any time;
- she will immediately intervene to terminate the children's time with the father if she has any serious concerns at any time about the father's behaviour towards the children; and

- she will also make immediate arrangements for the return of the children to the mother.

162. Having determined that the father's contact with the children should be in the presence of his mother, it remains for me to determine how much time he should spend with them. In this regard, I am heartened by the evidence that following the adjournment at the end of the second day of the hearing the parties were able to arrange some contact without the need to involve their lawyers. Further, I note that the mother has been willing to deliver the children to the paternal grandmother's home for Christmas contact. Consequently, I am confident that the mother will facilitate such contact between the children and the father as is in their best interests. As a result, an order that the children spend such time with the father as may be agreed will suffice (provided, of course, that it is in the presence of the paternal grandmother).

163. There should also be telephone contact between the children and their father at reasonable times, but if the parties are unable to agree upon the days and times, I am of the view that it is reasonable for such communication by telephone to be limited to no more than two phone calls per week. However, I am confident that the mother will not place any unreasonable restrictions upon telephone communication between the father and the children.

I certify that the preceding one hundred and sixty-three (163) paragraphs are a true copy of the reasons for judgment of Roberts FM

Associate:

Date:

[1] *Mills & Watson* [2008] FMCAfam 2

[2] (2008) FamCAFC 143; (2008) FLC 93-382, Finn, Boland & Thackray JJ on 19 August 2008

[3] (2008) FLC 93-377, Warnick, Boland and Thackray JJ on 15 September 2008

[4] Exhibit "ICL6"

[5] Section 60CA

[6] See subsection 60B(1)

[7] See subsection 60B(2)

[8] Subsection 60CC(2)

[9] [Subsection 60CC\(3\)](#)

[10] [\(2009\) FLC 93-404](#)

[11] [Section 61DA](#)

[12] [Subsection 61DA\(4\)](#)

[13] [Subsection 65DAA\(1\)](#)

[14] [See subsections 65DAA\(2\) and \(3\)](#)

[15] [\[2005\] FamCA 458](#); [\(2005\) FLC 93-224](#)

[16] [See *In the marriage of B and B \[Suspension of access\]* \(1988\) FLC 91-978](#)

[17] [\[1938\] HCA 34](#); [\(1938\) 60 C.L.R. 336](#)

[18] [\[1988\] HCA 68](#); [\(1988\) FLC 91-979](#) at page 77,081

[19] [\[2007\] FamCA 1273](#); [\(2007\) FLC 93-347](#)

[20] [Commencing at paragraph 3](#)

[21] [Paragraph 31 of \[X\]'s first affidavit.](#)

[22] [Paragraph 41 of the psychologist's first report.](#)

[23] [For example see page 45, line 43 of the transcript for 9 July 2009.](#)

[24] [Transcript for 9 July 2009, page 58, commencing at line 4](#)

[25] [Transcript for 16 July 2009, page 337, commencing at line 9](#)

[26] [Paragraph 13](#)

[27] [Transcript for 10 July 2009, page 116, line 19.](#)

[28] [Transcript for 10 July 2009, page 119, commencing at line 16](#)

[29] [Transcript for 10 July 2009, page 122, commencing at line 10.](#)

[30] [Transcript for 16 July 2009, page 326, line 46](#)

[31] [Transcript for 16 July 2009, page 327, commencing at line 5.](#)

[32] [Paragraph 3\(m\) of her first affidavit.](#)

[33] [Paragraph 24 of the psychologist's first report.](#)

- [34] Paragraph 40 of the psychologist's first report.
- [35] Transcript of 9 July 2009 at line 13.
- [36] At paragraph 60.
- [37] *Lindsey and Lindsey* [1995] FamCA 117; (1995) FLC 92-638
- [38] [1938] HCA 34; (1938) 60 C.L.R. 336
- [39] *Reifek v McElroy* [1965] HCA 46; (1965) 112 CLR 517
- [40] *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691
- [41] *Briginshaw* at p.361
- [42] Paragraph 11(n), (o) and (p)
- [43] Paragraph 61 of the psychologist's first report.
- [44] Paragraph 62 of the psychologist's first report.
- [45] Paragraphs 3, 4 & 5 of [X]'s second affidavit.
- [46] Paragraph 9 of [X]'s second affidavit.
- [47] Paragraphs 6 -9 of the psychologist's second report.
- [48] Paragraphs 10 & 11 of the psychologist's second report.
- [49] Paragraph 12 of the psychologist's second report.
- [50] Order 1(c) of the Orders of 30 June 2009
- [51] Exhibit "F5"
- [52] Paragraph 62 of his affidavit.
- [53] See paragraph 87 above
- [54] Paragraph 52 of these psychologist's first report.
- [55] Exhibits "ICL1" and "ICL10"
- [56] Paragraph 8
- [57] Paragraph 10
- [58] (1993) FLC 92-357

[\[59\]](#) Commencing at page 79,780

[\[60\]](#) At paragraph 11

[\[61\]](#) At paragraph 12