FEDERAL CIRCUIT COURT OF AUSTRALIA

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| * CHAN & PHU | * [2013] FCCA 556 |

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| Catchwords:  FAMILY LAW – Children – parenting orders – interim orders – parental responsibility – sole parental responsibility – best interests of the child – child’s schooling – with whom the child should live – whether proposed orders are *“micro-managing parenting”* – courts should take a minimalist approach in making parenting orders – courts should only intervene when the welfare of the child will be advanced by making an order.  COSTS – Security for costs – application for security for costs. |

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| Legislation:  *Family Law Act 1975* (Cth), ss.11C, 11F, 60CA, 60CC, 61DA, 65DAA, 117 |

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| Cases cited:  *Chan & Phu* [2010] FMCAfam 1084  *Chan & Phu* [2012] FMCAfam 1300  *Goode & Goode* [2006] FamCA 1346; (2006) 36 Fam LR 422; FLC 93-286  *Nash & Reis* [2013] FMCAfam 11  *Re G: Children’s Schooling* [2000] FamCA; (2000) 26 Fam LR 143; FLC 93-025  *Scott & Kent* [2013] FCCA 127  *VR & RR* [2002] FamCA 320; (2002) 29 Fam LR 39; FLC 93-099 |

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| Applicant: | MR CHAN |

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| Respondent: | MS PHU |

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| File Number: | SYC 1714 of 2010 |

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| Judgment of: | Judge Scarlett |

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| Hearing date: | 14 June 2013 |

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| Date of Last Submission: | 14 June 2013 |

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| Delivered at: | Sydney |

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| Delivered on: | 18 June 2013 |

### REPRESENTATION

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| Solicitor for the Applicant: | Mr Tiyce |

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| Solicitors for the Applicant: | Tiyce & Partners Lawyers |

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| The Respondent: | In person |

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| Independent Children’s Lawyer: | Ms Webber |

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| Solicitors for the Independent Children’s Lawyer: | Legal Aid NSW |

### ORDERS

### UNTIL FURTHER ORDER:

1. All earlier parenting Orders are suspended.
2. The Response filed on 3 June 2013 is dismissed.
3. The Applicant Father is to have sole parental responsibility for making decisions about major long-term issues concerning the care, welfare and development of the child [X] born [in] 2001.
4. The child [X] is to live with the Father with effect from today.
5. The child [X] is to spend time with the Mother as follows:
   1. Each alternate weekend during the school term commencing on the first weekend after the commencement of the third school term in 2013;
   2. During the Autumn, Winter and Spring school holiday periods for one half of each such period and the Mother’s time is to commence by the collection of [X] from school on the Friday, or from the Father’s residence at 6:00pm if [X] is not at school, of the weekend that [X] would have spent with her mother under order (5)(a) above had there not been school holidays;
   3. Where any mid-term school holiday period extends for three (3) weeks, changeover will take place at 6:00pm on the Wednesday of the middle week at the Father’s residence;
   4. When school; holiday time between [X] and her mother concludes the Mother must return [X] to the Father’s residence at 6:00pm on the Friday; and
   5. In the event that [X] is spending weekend time with the Mother under these Orders and a public holiday or a pupil-free day occurs on either the Friday or Monday then the Mother’s time with [X] is to extend to include those days.
6. During the Christmas/January school holiday period [X] is to spend time with the parties in an alternating formula such that the holidays are divided into three (3) periods as follows:
   1. Period 1 will commence at the close of school on the last day of the school year and will conclude at 6:00pm on 23 December in each year;
   2. Period 2 will commence at 6:00pm on 23 December and conclude at 6:00pm on 14 January in each year;
   3. Period 3 will commence at 6:00pm on 14 January and conclude at 6:00pm on the day before the first day of the school term in each year;
   4. In each year ending in an even number thereafter the Father is to have the period from 23 December until 14 January (Period 2); the Mother is to have the period from the close of school until 23 December (Period 1) and from 14 January until the day before the first day of the school term (Period 3);
   5. In each year ending in an odd number thereafter the Mother is to have the period from 23 December until 14 January (Period 2); the Father is to have the period from the close of school until 23 December (Period 1) and from 14 January until the day before the first day of the school term (Period 3); and
   6. All changeovers will occur at the residence of the Father.
7. Notwithstanding the effect of these Orders [X] is to spend time with her mother each Mother’s Day commencing at 6:00pm on the Saturday evening immediately prior to Mother’s Day and concluding at the commencement of school on the Monday morning, with the Mother to collect [X] from the Father’s residence at the commencement of this period.
8. In the event that [X] is spending time with her mother under these orders on the Father’s Day weekend that time shall cease at 6:00pm on the Saturday immediately prior to Father’s Day when the Mother must return [X] to the Father’s residence.
9. In the event that Easter falls within a school holiday period then the Easter public holiday days are to be included in the school holidays for that year but in the event that Easter falls on a weekend outside the school holiday period then those days are to be treated as regular public holidays and the provisions of Order (5)(e) will apply.
10. The Mother is to spend time with [X] on [X]’s birthday where that day is a school day from the conclusion of school until 6:00pm that day when the Mother must return the child to the Father’s residence and in the event that [X]’s birthday falls on a weekend that she is otherwise with her father then she will spend time with her mother from 9:00am until 12 noon on her birthday and for this purpose the Mother must collect [X] from the Father’s residence and return her to the Father’s residence at the conclusion of that time.
11. In the event that [X]’s birthday falls on a weekend when she is in her mother’s care according to these Orders then [X] will spend time with her father from 9:00am until 12 noon and for this purpose the Mother must deliver [X] to the Father at the commencement of that period and collect her from the Father’s residence at the conclusion of that time.
12. The Father is at liberty to enrol [X] at [K] school to commence at the beginning of Term 3 on 15 July 2013 and for this purpose he is permitted to supply a copy of these Orders to the Principal or other appropriate person at the said school.
13. The Father is to be responsible for:
    1. The payment of all tuition and ancillary fees required to be paid to [K] school; and
    2. The provision of all necessary school uniforms and sporting clothes and equipment for [X] at [K] school.
14. Each parent must ensure that [X] attends all school sporting events and other activities that she required by the school to attend on weekends and during school holiday periods.
15. In the event of a medical emergency involving [X] the parent with whom [X] is staying or living according to these Orders must notify the other parent as soon as reasonably practicable by text message or telephone call advising the nature of the emergency and giving necessary details of any medical treatment.
16. The Father must notify the Mother of any significant accident, illness, hospitalisation or any circumstance requiring specialist medical treatment and advise the Mother of the location of the hospital and the name and address of any special medical practitioner involved in treating the child.
17. This Order is to operate as authority for any educational or other professional care provider for [X] whether school, medical practitioner, hospital or otherwise to release any information including school medical or other professional or development reports concerning [X] to both the Mother and the Father.
18. Each parent is at liberty to request the provision of any documents normally provided to parents direct from [X]’s school including but not limited to correspondence, school photographs and school reports.
19. The Father is to provide [X] with a mobile telephone for her personal use upon which the parents shall be at liberty to contact the child at any reasonable time whilst she is in the care of the other parent.
20. Each parent must do all things necessary to ensure that [X] can communicate with the other parent in accordance with her wishes including by ensuring that her mobile telephone is charged and has a credit balance.
21. Each parent must ensure that [X] is afforded privacy when she is speaking with the other parent on the telephone.
22. All communication between the parties is to be by email except in the case of emergency.
23. In the event that the mother is not able to spend time with [X] in accordance with these Orders then she must provide the Father with not less than two (2) weeks’ notice of her inability unless in case of emergency.
24. [X] is to spend time with each parent on the parent’s birthday where the birthday falls on a weekend when they are not with [X] from 10:00am until 10:00am the following day however in the event that the parent’s birthday falls on a Sunday then the parent who has the child in his or her care will spend time with the child until the commencement of school on the Monday.
25. Either party is at liberty to remove [X] from the Commonwealth of Australia for the purpose of an overseas holiday at times that the child is in that party’s care PROVIDED THAT both parties are restrained by injunction from taking [X] to any country about which the Department of Foreign Affairs and Trade has issued a travel advice on the Smart Traveller website in one of the following categories:
    1. Reconsider your need to travel; or
    2. Do not travel.
26. The Mother is to deliver [X]’s passport to the Father by 21 June 2013.
27. The Father is to retain the child’s passport except when it is required by the Mother for her to travel out of Australia as provided by Order (25) above in which case the Father must deliver the passport to the Mother no less than two (2) weeks prior to the proposed date of travel and the Mother must return the passport to the Father upon [X]’s return to the care of the Father.
28. In the event that either of the parties removes [X] from the Commonwealth of Australia for the purpose of a holiday that party must ensure that the other party is provided with an itinerary that details:
    1. Flight numbers including times and dates and full details of the return flight;
    2. Identity of the carrier; and
    3. An address and a contact telephone number for the period when the child is out of Australia.
29. The parties are each restrained by injunction from making any critical, disparaging or derogatory remarks about the other party or any member of the other party’s immediate family or household to [X] or in her presence or hearing whether by verbal, written or electronic means or from permitting third parties to do so.
30. The parties are each restrained by injunction from discussing these proceedings and [X]’s wishes with [X] or in her presence or hearing.
31. The parties are each restrained by injunction from showing to [X] or discussing with her:
    1. A copy of any Orders made by the Court;
    2. A copy of any document filed in the proceedings including but not limited to any Application, Response or any affidavit filed by or on behalf of either of the parties;
    3. Any document including any Memorandum or Family Report prepared by a Family Consultant or Court Expert; or
    4. A copy of the Court’s Reasons for Decision.
32. The Mother is restrained by injunction from taking [X] to see any counsellor or psychologist without the written consent of the Independent Children’s Lawyer or the leave of the Court.
33. Within fourteen (14) days of the date of these Orders the parties must do all acts and things and sign all documents and authorities necessary to enrol in and attend all required sessions of the Keeping Contact Program conducted by Unifam in Sydney.
34. Within fourteen (14) days of the date of these Orders the Father and the Mother must each provide the Independent Children’s Lawyer with written confirmation that he or she have registered for the Keeping Contact Program.
35. The parties must comply with all requirements of the Keeping Contact Program including but not limited to:
    1. Completing all requirements for intake into the Keeping Contact Program;
    2. Attending all sessions nominated by the facilitator of the Program;
    3. Participating in any courses or counselling recommended by the facilitator of the Program.
36. The parties are each to be liable for their share of the fees imposed by Unifam for participation in the Keeping Contact Program and must pay those fees upon request by Unifam.
37. The Independent Children’s Lawyer is granted leave to provide Unifam with a copy of these Orders.

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

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| FEDERAL CIRCUIT COURT OF AUSTRALIA  At SYDNEY |

SYC 1714 of 2010

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| MR CHAN |

Applicant

And

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| MS PHU |

Respondent

REASONS FOR JUDGMENT

# Application

1. This is an Application for interim parenting orders concerning the parties’ daughter [X], who was born [in] 2001. [X] lives primarily with her mother, but the Father, who is the Applicant, seeks that the Court should make an interim Order that [X] should live with him.
2. This is an unusual application to be made on an interim basis, but it is supported by the Independent Children’s Lawyer. Not surprisingly, the Mother opposes the Application.

## Background

1. The parties began their relationship in February 1999. There is one child of the relationship, [X], who was born [in] 2001. The parties separated in [omitted] 2001, when [X] was only eight months old.
2. The Father formed a new relationship in 2002. He married his current wife, Ms C, in 2005. The Mother has not re-partnered.
3. There have been previous proceedings in the Family Court prior to the matter being dealt with in this Court. On 5th June 2003 Cohen J made orders dealing with parental responsibility, the child’s surname, residence and contact.[[1]](#footnote-2)
4. There were further proceedings in the Family Court that led to orders being made by Le Poer Trench J on 23rd October 2007. Those orders provided that:
   1. The parties would have equal shared parental responsibility for [X];
   2. [X] would live primarily with her mother;
   3. [X] would live with her father:
      1. Each alternate weekend from the conclusion of school on Friday until the commencement of school on Monday (extended to cover public holidays);
      2. For half of all school holiday periods;
      3. The weekends the child spent with her father would coincide with weekends when her mother had work commitments;
      4. On Father’s Day;
      5. For two hours on her birthday if a school day or three hours on weekend day; and
      6. On the Father’s birthday.
   4. All communication between the parties was to be by email;
   5. The parties were required to agree upon [X]’s attendance at a new school in 2009;
   6. The Father was to provide [X] with a mobile phone to talk to him as the Mother would not agree to the child using her telephone service for the purpose of speaking with her father;
   7. The parties were each permitted to take the child out of Australia for holidays upon giving the other party eight weeks’ written notice; and
   8. Other ancillary orders.
5. On 22nd March 2010 the Father filed an Application in this Court seeking to have the Mother dealt with for several alleged contraventions of the Orders of 23rd October 2007.
6. The parties were directed to attend a Child Dispute Conference with a Family Consultant under the provisions of s.11F of the *Family Law Act 1975* (Cth). The Conference was reportable under s.11C of the Act.
7. The parties saw the same Family Consultant who had prepared the Family Report for the proceedings in the Family Court in 2007, Ms M, although they attended separately. In her *Family Consultant Memorandum to Court* of 30th June 2010, the Family Consultant reported that they had managed to reach a partial agreement to vary the Orders. The Family Consultant commented that:
8. Mr Chan and Ms Phu have a very poor parenting relationship which is resistant to change – see previous Family Report, prepared by this Family Consultant (2007). They have very limited capacity to negotiate with each other and therefore need orders that specify very clearly what is expected of each of them in relation to the parenting arrangements for [X].
9. The parties attended Court on 2nd August 2010 and made oral submissions about how the Orders should be varied. The Father later filed an affidavit on 20th August with leave of the Court. A decision was handed down on 15th October 2010 varying the earlier Orders, providing that:
   1. [X] was to attend [N] School from the commencement of the first school term in 2013 and the parties were to do all things necessary to ensure her enrolment at that school;
   2. The Christmas school holidays were to be divided between the parties in a way that provided for the holidays to be divided into three separate periods;
   3. Each party was permitted to take [X] out of the country for an overseas holiday without the consent of the other but they were restrained by injunction from taking her to any country about which the Department of Foreign Affairs and Trade had issued a travel advice in one of the following categories:
      1. High Degree of Caution;
      2. Reconsider your need to travel; or
      3. Do not travel;
   4. The Mother was to retain the child’s passport except when it was required by the Father for the child to travel out of Australia; and
   5. Easter was to be treated as a normal part of the school holidays except when it fell on a weekend outside the school holidays (*Chan & Phu[[2]](#footnote-3)*).
10. Significantly, I commented in the Reasons for Judgment handed down on 15th October 2010:
11. The parties demonstrated in Court an antagonism towards each other that does not augur well for cooperation between them in the future over matters concerning their daughter.[[3]](#footnote-4)
12. Again, I said at [19]:
13. The applicant’s affidavit filed on 20th August 2010 covered a number of past issues which are not relevant to the matters to be decided, but confirmed, if any confirmation were needed, the degree of hostility between the parties.[[4]](#footnote-5)
14. On 5th June 2012 the Father filed an Application seeking to vary the earlier Orders so as to provide that:
    1. The child would change schools and attend at [K];
    2. The Father would pay all school fees in lieu of child support payments;
    3. That there would be a three week school holiday period between Term 2 and Term 3;
    4. That there should be regular mobile telephone contact;
    5. That the child’s passport should be held by the Father.
15. The Father sought an urgent hearing as the offer of a vacancy for the child at [K] was only open for a limited period.
16. The Mother opposed that Application. In a Response filed on 31st July 2012 she sought these orders:
17. 1. That the mother only be allowed to make decisions regarding [X]’s welfare and schooling, applicable immediately.
18. 2. The father is no longer permitted to engage the mother or [X] in discussion relating to the appropriateness of any high school.
19. 3. The father is not permitted to take [X] to any high school with the objective of swaying her opinion as to the suitability of the school, nor to attend an interview.
20. 4. The father is to undergo a psychological assessment and counselling in an attempt to curb his extreme narcissistic tendencies and unhealthy manipulations towards [X] and myself.
21. 5. Reduce the father’s fortnightly access to [X]. He is to return her on Sunday mornings rather than to school on Monday mornings.
22. 6. Change the regions where [X] is not permitted to travel only to the rating “Do not travel”.
23. 7. Telephone contact to be on alternate weeks only, normally Thursday, unless there are intervening circumstances, at which time contact will be Fridays.
24. 8. That the father reimburse the mother for any fees required to be paid as a result of this action, and that he pay all future fees related to any court actions he instigates.
25. In her affidavit in support, the Mother claimed:
26. In 2011, when [X] was in year 5, her father launched court proceedings identical to what he is doing now, a year later.[[5]](#footnote-6) He wants [X] to attend a private school of his choice and that he no longer have his wages garnisheed for child support payments. The court rejected this last year, and she was to attend her local school, [N] School. His motivation is, and always has been, to stop paying child support payments and every recommendation he makes includes this.[[6]](#footnote-7)
27. The parties were directed to attend a Child Dispute Conference. The conference took place on 25th September 2012. The Mother attended by telephone. No resolution was reached. The Family consultant noted the *“the intractable nature of the parental relationship”.[[7]](#footnote-8)*
28. The Mother had not attended Court on any of the occasions when the Application was mentioned. On 8th October 2012 the Father’s Application was listed for interim hearing on 14th November 2012. The Orders made that day included:
29. 2. The Respondent is advised that if she does not attend on the next occasion orders may be made in her absence.
30. The Interim hearing took place on 14th November 2012. The Mother did not attend Court.
31. On 6th December 2012 judgement was handed down, dismissing the Father’s interim application and ordering that the child’s interests should be independently represented by a lawyer under the provisions of s.68L of the *Family Law Act.[[8]](#footnote-9)* The decision to appoint an Independent Children’s Lawyer was made because:
32. It is clear that there is a long-standing and intractable conflict between the parties over the proper arrangements for their daughter.[[9]](#footnote-10)
33. The Independent Children’s Lawyer was duly appointed. On 11th March 2013 the parties were ordered to attend a child inclusive child dispute conference with a Family Consultant. This took place on 6th May 2013. The Mother did not attend, although it was noted that she had previously contacted the Court and advised that *“she was unable to attend another conference and, therefore, would not be attending”.[[10]](#footnote-11)* The child [X] attended the conference.
34. As a result of the matters contained in the Family Consultant Memorandum of 6th May 2013, the Father obtained legal representation and, through his solicitor, filed an Amended Initiating Application, an Application in a Case, and an affidavit in support on 30th May 2013.
35. The Application was listed for mention on 4th June 2013. On that day, the Mother attended Court and complained about being constantly being brought back into Court by the Applicant. It was pointed out to her that her appearance on that day was the first time she had attended Court since 15th October 2010.
36. The Application was listed for interim hearing on 12th June 2013. The Mother did not attend but sent an email saying that she would be available by telephone, giving a mobile telephone number. The Mother was telephoned and asked by the Court why she was not in attendance. I did not find her answer to constitute a satisfactory excuse. However, I was not prepared to conduct an interim hearing in her absence and adjourned the matter to 14th June for interim hearing. An order was made that:
37. The Respondent must attend Court or Orders will be made in her absence.
38. The Mother attended Court on 14th June 2013. Submissions were made by the Independent Children’s Lawyer, the Father’s solicitor, and the Mother, in that Order.

## Orders Sought

1. The Interim Orders sought by the Father are set out in his Application in a Case filed on 30th May 2013. Those orders are:
2. 1. That all existing orders are hereby discharged.
3. 2. That the father have sole parental responsibility for long term decisions concerning the care, welfare and development of the child [X] born [in] 2001 (herein after referred to as “[X]”).
4. 3. That [X] shall live with her father at all times she does not spend time with her mother pursuant to these orders.
5. 4. That [X] shall spend time with her mother as follows:
   1. (a) each alternate weekend from the conclusion of school on Friday until the commencement of school on Mo9nday commencing 21 June 2013;
   2. (b) during the autumn, winter and spring school holiday periods for one half of each such period, noting the holiday period, and the mother’s time shall commence by the collection of [X] from school on the Friday, or from the father’s house at 6:00 pm if [X] is not at school, of the weekend that [X] would have spent with her mother pursuant to order 4(a) herein had there not been school holidays;
   3. (c) where any mid-term school period[[11]](#footnote-12) is for 3 weeks, changeover shall occur at 6:00 pm on the Wednesday of the middle week and at the residence of the father;
   4. (d) when school holiday time between [X] and her mother concludes then the mother shall return [X] to the residence of the father at 6:00 pm on the Friday; and
   5. (e) in the event [X] is spending weekend time with her mother pursuant (to) these orders and a public holiday and/or pupil free day occurs on either the Friday, Monday or Tuesday then the mother’s time with [X] shall extend to include those days or any of them.
6. 5. During the Christmas school holiday period [X] shall spend time with the parties in an alternating formula such that the holidays are divided in three periods as follows:
   1. (a) Period 1 shall commence at the close of school on the last day of the school year and will conclude (at) 6.00 pm on 23 December in each year;
   2. (b) Period 2 shall commence at 6:00 pm on 23 December and conclude at 6:00 pm on 14 January in each year;
   3. (c) Period 3 will commence at 6:00 pm on 14 January and conclude at 6:00 pm on the day before the first day of school term in each year;
   4. (d) In each year ending in even number thereafter the father shall have the period from 23 December until 14 January (Period 2); the mother will have the period from the close of school until 23 December and from 14 January until the day before the first day of the school term (Periods 1 and 3);
   5. (e) In each year ending in an odd number thereafter the mother shall have the period from 23 December until 14 January (Period 2); the father will have the period from the close of school until 23 December and from 14 January until the day before the first day of the school term (Periods 1 and 3); and
   6. (f) All changeovers shall occur at the residence of the father.
7. 6. Notwithstanding the effect of these orders [X] shall spend time with her mother each Mother’s Day commencing at 6:00 pm on the Saturday immediately prior to Mother’s Day and concluding at school on Monday, the mother to collect [X] from the residence of the father at the commencement of this period.
8. 7. In the event [X] is spending time with her mother pursuant to these orders on the Father’s Day weekend that time shall cease at 6:00 pm on the Saturday immediately prior to father’s Day when the mother shall return [X] to the residence of the father.
9. 8. In the event Easter falls within a school holiday period then the Easter public holiday days shall be included in the school holidays of that year but in the event that Easter falls on a weekend outside the school holiday period then those[[12]](#footnote-13) shall be treated as a regular public holiday weekend and the provisions of 4(e) shall apply.
10. 9. The mother shall spend time with [X] on [X]’s birthday where such day is a school day from the conclusion of school until 6:00 pm on that day when the mother shall return [X] to (the) father’s residence and in the event [X]’s birthday falls on a weekend that she is otherwise with her father then she will spend time with her mother from 9.00 am until 12 noon on her birthday, the mother to collect and return [X] from the father’s residence and in the event [X]’s birthday falls on a weekend when she is in her mother’s care then [X] shall spend time (with) her father from 9.00 am until 12 noon, the mother to deliver [X] to the father at the commencement of that period and collect her from the father at the conclusion of that period.
11. 10. That (the) father shall be at liberty to enrol [X] at the [K] school commencing Term 3 on 15 July 2013.
12. 11. That the father shall be responsible for the payment of all school tuition and ancillary fees.
13. 12. That each parent shall ensure that [X] completes her homework during time she spends with them.
14. 13. That each parent shall ensure that [X] attends all school sporting events and other activities arranged by the school on weekends and during holiday periods.
15. 14. That in the event of a medical emergency for [X] the parent [X] is with shall contact the other parent as soon as immediately practicable by text message or telephone call advising the nature of the emergency.
16. 15. That each parent shall be at liberty to request provision of any documents normally provided to parents direct from [X]’s school including but not limited to correspondence,, school photographs and school reports.
17. 16. That the father shall provide [X] with a mobile phone for her personal use upon which the parents shall be at liberty to contact [X] at any time while in the care of the other parent provided such times and frequency are reasonable.
18. 17. That all communication between the parties shall be by email except in the case of emergency.
19. 18. That in the event the mother is not able to spend time with [X] pursuant to these orders then she shall provide the father with not less than 3 weeks’ notice of her inability.
20. 19. That [X] shall spend time with each parent on their birthday where that parent’s birthday falls on a weekend that they are not with [X] from 10.00 am until 10.00 am the following day however in the event such a day falls on a Sunday then the parent who has [X] for that day shall spend time with her until the commencement of school on Monday.
21. 20. That either party shall be at liberty to remove [X] from the Commonwealth of Australia for the purpose of an overseas holiday at times that [X] is in that party’s care PROVIDED THAT each party is restrained by injunction from taking [X] to any country about which the Department of Foreign Affairs and Trade has issued a travel advice on the Smart Traveller website in one of the following categories:
    1. (a) reconsider your need to travel; or
    2. (b) do not travel.
22. 21. that the father shall retain [X]’s passport except when it is required by the mother for her to travel out of Australia as provided in Order (2) herein in which case the father shall deliver the passport to the mother no less than 2 weeks prior to the proposed date of travel and the mother is to return the passport to the father upon [X]’s return to the care of the father.
23. 22. That in the event the parents remove [X] from the Commonwealth of Australia for the purpose of a holiday they shall ensure that the other party is provided with an itinerary which details flight numbers, times and identity of carrier including details of the return flight together with the address at which [X] will stay while on holidays and a contact phone for that period.
24. 23. That the mother shall deliver [X]’s passport to the father within 14 days of the date of these orders.
25. 24. That it is noted that the parties may agree to vary these orders at any time provided that agreement is reduced to writing which may include email.
26. The Mother, by her Response filed on 3rd June 2013, does not seek any final orders but seeks the following interim orders:
27. 1. That the father pays the mother security for costs of initially $50,000 up-front for professional legal representation to continue with the current proceedings.
28. 2. The father is not permitted to discuss court proceedings with [X] any further, cannot contact [X] before or after court appearances, and cannot schedule court dates to be close to his weekends with [X].
29. 3. That all of the father’s court applications be struck out.
30. 4. That the father pays all legal expenses for the children’s lawyer at Legal Aid.
31. The Independent Children’s Lawyer supports the interim orders proposed by the Father. In addition, she has submitted a Minute, filed in Court on the day of the hearing, setting out further proposed interim orders, which states:
32. **Parental Responsibility**
33. 1. The father notify the mother of any significant accident, illness, hospitalisation or other medical emergency involving or affecting [X] as soon as practicable, and advise the mother of all medical specialist medical treatment.
34. 2. This order is to operate as authority for any educational or other professional care provided for [X] (whether a school, doctor, hospital or otherwise) to release any information, including school, medical or any other professional or development reports concerning [X] to both the mother and the father.
35. **Communication**
36. 3. Each party do all things necessary to ensure that [X] can communicate with the other parent in accordance with her wishes, including by ensuring that her mobile phone is charged and has a credit balance.
37. 4. Each party ensure that [X] is afforded privacy when she is speaking with the other parent.
38. **Non-denigration**
39. 5. The father and the mother each be restrained from making any critical, disparaging or derogatory remarks about the other parent or any member of the other parent’s family or household to [X] or in the presence or hearing of [X], such order to include verbal, written or electronic means including email, text message, Facebook and other forms of social media.
40. 6. The father and mother each do all acts and things necessary to prevent any other person or persons from making any critical, disparaging or derogatory remarks about the other parent or any member of the other parent’s family or household to [X] or in the presence or hearing of [X], such order to include verbal, written or electronic means including email, text message, Facebook and other forms of social media.
41. **Other Restraints**
42. 7. The father and the mother each be restrained from discussing these legal proceedings, and [X]’s wishes, with [X] and also from discussing these legal proceedings in the presence or hearing of [X].
43. 8. The father and the mother each be restrained from showing [X], or discussing with [X], or in [X]’s presence or hearing:
    1. 8.1 A copy of any Orders made by this Court;
    2. 8.2 A copy of any document filed in the proceedings including but not limited to any Affidavit filed by either of the parties or any witness for either of the parties;
    3. 8.3 Any other document, including any Memorandum or Report, prepared by a Family Consultant or Court Expert for the proceedings.
44. 9. The mother be restrained from taking [X] to any counsellor, psychologist or any other health professional.
45. **Participation in Keeping Contact Program**
46. 10. Within 14 days of the date of this order the parties do all acts and things, and sign all documents and/or authorities necessary, enrol in and attend all required sessions of the Keeping Contact Program conducted by Unifam in Sydney.
47. 11. Within 14 days of the date of this order the mother provide the Independent Children’s Lawyer with written confirmation from Unifam that she has registered for the Keeping Contact Program.
48. 12. Within 14 days of the date of this order the father provide the Independent Children’s Lawyer with written confirmation from Unifam that he has registered for the Keeping Contact Program.
49. 13. The parties comply with all requirements for the Keeping Contact program, including but not limited to:
    1. 13.1 Completing all requirements of the Keeping Contact Program;
    2. 13.2 Attending all sessions nominated by the facilitator of the Program;
    3. 13.3 Participating in any courses or counselling recommended by the facilitator of the Keeping Contact Program.
50. 14. The parties are each liable for their share of fees imposed by Unifam for participation in the Keeping Contact Program and pay such fees upon request by Unifam.
51. 15. The Independent Children’s Lawyer be granted leave to provide Unifam with the following:
    1. 15.1 A copy of these orders;
    2. 15.2 A copy of the orders made following interim hearing in this matter.
52. The Court was told that the Father agreed with the Independent Children’s Lawyer’s proposed orders.

## Evidence

1. The Father relied on the following:
   1. The Family Consultant Memorandum of 10th May 2013;
   2. The Family Consultant Memorandum of 29th September 2012;
   3. His Amended Initiating Application filed 30th May 2013;
   4. His Application in a Case filed 30th May 2013;
   5. His affidavits of:
      1. 5th June 2012;
      2. 21st February 2013; and
      3. 30th May 2013;
   6. *“All previous orders in these proceedings as regards the Mother’s non-attendance at court”[[13]](#footnote-14)*;
   7. *“All s.60I Certificates from these current and previous proceedings as regards the Mother’s refusal or failure to attend family dispute resolution”[[14]](#footnote-15)*; and
   8. The Family Report dated 11.7.2007 prepared for the proceedings in the Family Court before Le Poer Trench J.
2. The Mother relied on the following:
   1. Her Response filed on 3rd June 2013;
   2. Her affidavits of:
      1. 15th May 2013;
      2. 3rd June 2013; and
      3. 7th June 2013.
3. The Independent Children’s Lawyer relied on no other material than that already before the Court except for the Minute of Proposed Interim Orders handed up in Court on the day of the hearing.
4. The Father’s evidence is that on 29th February 2012 he discovered that the catchment area for [N] School had changed and that the only way that [X] would be able to attend the school would be by way of the selective entrance examination. If she were not successful, she would not be able to attend the school as she lived in what had become the catchment area for [M] High School. The Father was against that. His attempts to engage with the Mother over a choice of alternative schools had been unsuccessful and met with abuse.
5. His view was that [K], a private school, would be a very good school for [X]. He was prepared to pay the school fees, amounting to about $14,000.00 per annum but increasing to $23,000.00 per annum in Year 11, but would not be able to afford meet the current child support payments as well.[[15]](#footnote-16)
6. The Father deposed that he had had difficulty speaking to [X] by telephone. He had provided the child with a mobile telephone but the Mother only allowed *“a window of one per week…Outside of this time, [X] has told the father that the mother has locked [X]’s phone away in a cupboard”.[[16]](#footnote-17)*
7. The Father expressed the wish to speak to [X] on weeknights before 5:30pm, as the child is at home alone from after school until the mother returns from work at 5:30pm. The Mother has denied this request. The Father deposed:
8. [X] has stated to me that she misses Ms C[[17]](#footnote-18) and her father and wishes to talk to us more often.[[18]](#footnote-19)
9. The Father also complained that the Mother had breached Order 25A made on 15th October 2010, which restricted the countries to which the child could be taken, by taking her to Morocco in December 2011. Morocco carries a warning:
10. “Exercise a high degree of caution”.[[19]](#footnote-20)
11. In his affidavit of 21st February 2013, the Father expressed the wish that [X] should spend equal time in each household, saying that she has shown an ability to adapt to the requirements of living in two different households. He deposed:
12. Consistently over the past 5 years, [X] has asked her father if she can spend more time at his household. [X] is always happy and loves spending time at her fathers and step mothers house.[[20]](#footnote-21)
13. The Father also expressed concern about the Mother’s behaviour towards the child in:
    1. not allowing her to talk about what she does on holidays or when spending weekends with the Father;
    2. yelling at her or not speaking to her;
    3. making the child complicit in lies regarding a false address to enrol the child at [N] School;
    4. speaking disparagingly to her of him;
    5. threatening to reduce her time with her father; and
    6. leaving her at home alone during school holidays.
14. The Father annexed to his affidavit a print-out of an email from the mother dated Monday 10th December 2012, saying:
15. Should you by any chance be contacted by [N] School then tell them we moved to [address omitted] on 25 nov, 12 month lease. Enrollment there is not definite.
16. Do not reply to me, this conversation never happened.[[21]](#footnote-22)
17. The Father also attached to his affidavit a further email from the mother, dated 30th January 2013, addressed to him as *“Chan, [first name omitted]; [first name omitted] Loser”[[22]](#footnote-23)* on the same subject, saying:
18. Should you need to confirm [X]’s home address for any purpose with the school at all this year, you must give [address omitted] as our home address, no home phone connected. A mistake will mean that she loses this position. I will advise once this reverts to another address, most probably next year. Do not ruin it for her.
19. And do not reply to me.[[23]](#footnote-24)
20. The Father also annexed a print-out of his email to the Mother of 29th June 2012 with her reply that same day. The Father wrote:
21. During school holidays if you are looking at leaving [X] at home by herself during the day, she can always have the option of spending the day with Ms C or [X]’s grandmother [first name omitted]. This offer is always open assuming that they are available. Would prefer a couple of days notice.[[24]](#footnote-25)
22. The Mother’s reply appears that same day:
23. Go fuck yourself and stop sending me pointless messages. You are not permitted to communicate with me. Loser.[[25]](#footnote-26)
24. In his affidavit of 30th May 2013 the Father deposed that he and his wife Ms C have been married for eight years and she is supportive of his wish to spend more time with [X].
25. The Father reiterates his concerns about the Mother’s hostile attitude to him, which means that [X] has told him that she is not allowed to talk to her mother about what happens when she spends time with him. The child has told him that her mother *“hates”* him and refers to him as a *“pig”* and a *“loser”.*
26. He also reiterates his concerns about the Mother using a false address for the purpose of the child’s school, saying:
27. [X] has been required by her mother to lie to her school about where she lives so that she can attend [N] School. [X] has said to me that “She has to remember to say the right address if anyone asks her” and “I’m afraid I might make a mistake and say the wrong address”.[[26]](#footnote-27)
28. The Father also reiterates his concerns that [X] is hindered or prevented from telephoning him and that she spends time at home alone during school holidays.
29. The Father deposes that his wife Ms C has a strong and loving relationship with [X], as does he. He goes on to say:
30. My wife Ms C does not work outside the home and will be able to assist in my care for [X] before and after school as well as on weekends. [X]’s grandparents being Ms C’s parents also live within a close driving distanced at [omitted] and often have her stay on weekends and school holidays. Ms Phu does not have a relationship with her parents and does not have other family support, hence [X] is left alone in her mother’s care.[[27]](#footnote-28)
31. The Father also deposed:
32. The Father understands that [X] has a strong and loving relationship with her Mother despite their difficulties. The Father views it as critical that [X] continues to enjoy a close relationship with her Mother. The Father will actively encourage [X] to call her Mother during the week when she is living with the Father. The Father will also continue the practice of [X] being able to openly discuss what happens when she is in the care of her Mother.[[28]](#footnote-29)
33. The Mother, in her affidavit of 15th May 2013, sought that the Father’s applications should be struck out and that he should not be permitted to make any further applications, saying:
34. The father’s applications in this case have become more erratic and more desperate and do not consider [X]’s best interests. He is a bully, has no case and it’s time the court stopped giving him airtime and stopped forcing me to respond to his claims in his applications.
35. …
36. …Through a combination of incentives and fear, I have no doubt that he is manipulating her again to help the courts see him in a better light. I ask that the courts disregard the mediation[[29]](#footnote-30) and that [X] no longer be forced into such a position as I don’t believe she understands the full impact of the manipulation.[[30]](#footnote-31)
37. The Mother deposed that the Father had on a number of previous occasions declined to spend more time with [X], when she asked him to retain the child in his care for an extra hour on Sunday nights and on two occasions when she was required to travel overseas for work. She also stated that he *“sought to cancel his access to [X] on Tuesday afternoons and this was granted”.[[31]](#footnote-32)*
38. The Mother set out that she wanted to increase the amount of child support payable by the Father:
39. Increase child support payments from 737.92 per month to $5000 per month to be payable from the father to the mother, effective immediately.
40. There is no departure application before the Court and consequently the Court has no jurisdiction to make such an order.
41. The Mother went on to refer to her claim that the Father *“pays the mother a lump sum to cover costs for litigation, submitting forms, income discrepancies and counselling for [X].*
42. She stated:
43. It is disturbing that her father does not consider counselling for [X] to help manage this disruption and conflict even though he has the income to easily support it. It demonstrates where his priorities lie.
44. I intend for [X] to receive counselling and would like it to be funded by the father as this is due to his actions and behaviour. She should not be burdened by his actions and intentions as she grows up.[[32]](#footnote-33)
45. The Mother also sought an Order 5:
46. Reduce father’s fortnightly access so he picks her up at 5pm on Saturdays if he is not going to support her activities and homework commitments.
47. I have trouble getting [X] to take homework, projects and her [instrument omitted] to her father’s place to complete and practice. She just won’t do it. I can only assume that he does not support her school commitments, just like he does not support her personal commitments.[[33]](#footnote-34)
48. The Mother’s affidavit of 3rd June 2013 sets out her desire for the Father to pay security for costs in the sum of $50,000.00, saying that she had received estimates of $30,000.00 to $50,000.00 plus $10,000.00 for an interim hearing.
49. The Mother deposes:
50. 3. I will be filing costs applications at the appropriate time for all costs incurred as a result of the father’s continual court actions, mental and emotional anguish, and a bullying of [X] and myself.
51. 4. The father’s actions are mentally and emotionally abusive to [X] and he gives no regard for her welfare and long-term relationship with the mother.[[34]](#footnote-35)
52. The Mother reiterates her wish that the Court take action to stop the Father from proceeding any further, saying:
53. The father has proven himself to be untrustworthy and lacking in integrity…
54. …
55. To have him still trying to manipulate [X] and myself through the courts 12 years on is an abomination and a clear misuse of the legal system.
56. The father clearly has no case to take [X] away from an environment that she has been safe and happy in for her entire life…
57. The 12 years that I have been forced into the court system is enough. The courts owe me the courtesy of enabling me to obtain the right legal guidance without the excessive stress and financial burden this would cause [X] and I.[[35]](#footnote-36)
58. The Mother continues in this vein in her affidavit of 7th June 2013. she also points out that she has difficulty in attending court personally, and gives a mobile telephone number. She states:
59. It is not appropriate for the courts to force me to attend in person in this long-term battle when it clearly affects my livelihood, as well as my financial security and well-being.[[36]](#footnote-37)
60. The Mother also referred to the long history of the Father’s behaviour towards her, saying:
61. 26. The father’s behaviour cannot be overlooked in instigating all problems with me.
62. 27. He had an affair with his current partner and walked out on [X] and I when she was only eight months old. This was a shock to me, and he almost straight away entered the court system to cause me maximum distress and hardship.[[37]](#footnote-38)

## The Family Consultant Memorandum to Court

1. The Family Consultant raised a number of concerns in her Memorandum to the Court, prepared as a result of the Child Inclusive Child Dispute Conference. The conference was not attended by the mother. The Family Consultant spoke to the child, the father and, briefly, to the child’s stepmother.
2. In her Memorandum, the Family Consultant expressed concern about the impact on the child if the Mother were to react badly to the information contained in the Memorandum.
3. The Family Consultant set out in the Memorandum her account of her interview with the child:

* [X] enjoys attending [N] School, which she goes to despite living out of area (because her mother registered her at a different address from the one they live at). [X] said that she just needs to remember which address she is in registered in and to be careful. She said that she was unsure how it would be to change schools but she thought that she would keep in touch with friends. She added that she would not mind if she went to [K] but that this would depend on where she would be living.
* [X] indicated that she thinks that she would quickly get used to living with her father if such a decision were to be made for her. She saw no problems with doing so and thought that it might actually make things a bit easier for her to live with him, this being related to how she experiences her mother reacting to her in connection with her father. She became distressed when talking about this issue and it was evident that she finds it very difficult. It seems that [X] experiences her mother as being hostile to her having a loving relationship with her father and as reacting angrily when she sees or hears evidence of it. [X] does not view her father as having the same reaction to knowing about her love for her mother and she feels freer to love both of her parents in his company.
* [X] said that she thinks that her mother would initially be angry if she were to live with her father but would get used to it.
* [X] is worried, however, about her mother’s reaction to knowing that she wants to live with her father. Her apprehension would seem to have a basis in reality, given how unrelentingly angry her mother has felt towards her father over the years.[[38]](#footnote-39)

1. The Family Consultant also suggested that:
2. …it might be in [X]’s interests if it were possible to make the decision about where she lives without having to canvas her views any further, at least at this point in time.[[39]](#footnote-40)
3. It was this report that appears to have prompted the Father to file his current Application for interim orders.

## Submissions

1. The Independent Children’s Lawyer, Ms Webber, submitted that, whilst [X]’s parents separated when she was only eight months old, she has a close and loving relationship with each of them. Neither parent raises any concerns about the child’s physical care.
2. Whilst there is always the possibility that, if the Court were to decide on a final basis that [X]’s best interests lay with living with her mother, [X] would have to go back to her, the Independent Children’s Lawyer submitted that it was in the child’s interests on an interim basis that she should live primarily with her father.
3. The reasons for this submission are:
   1. [X] has expressed the view that she would like to spend more time in her father’s care;
   2. The child is aware of her mother’s hostility towards her father and to her having a relationship with him; the child has been given no freedom to develop a relationship with him;
   3. The Mother appears to be unable to distinguish her self from the child and sees herself and [X] as a team pitted against the Father;
   4. The Mother has recently sought to reduce the child’s time with her father, notwithstanding the fact that she concedes that [X] enjoys her time with him;
   5. Although the Mother asserts that [X] has been coached by her Father to say that she wants to spend more time with him, the Family Consultant, who is very experienced, saw no evidence of that; and
   6. [X] thought that it might be easier for her if she were to live with her father, who can offer a nurturing environment for her.
4. The Independent Children’s Lawyer also submitted that, as an interim arrangement, the Father should have sole parental responsibility for the child, as there has been a long history of the parents being unable to communicate.
5. The Father’s solicitor, Mr Tiyce, submitted that the decision in *Goode & Goode[[40]](#footnote-41)* is authority for the proposition that the *status quo* is not now where consideration of interim residence stops. The best interests of the child dictate that she should live with her father. He tendered a copy of the Family Report prepared for the proceedings in the Family Court in 2007, prepared by the same Family Consultant.
6. Mr Tiyce submitted that it was in the child’s best interests that she should live with her father and spend time with her mother for the following reasons:
   1. The Mother’s attitude to the proceedings shows that there is a *“siege mentality”* occurring in the Mother’s household;
   2. [X] knows that in her father’s house she is able to have a relationship with both parents but in her mother’s house there is a continuing hostility towards her having a loving relationship with her father;
   3. The Mother’s depiction of the Father as a bully has not been made out.
7. It was further submitted that the Father should have sole parental responsibility for the child as the parents cannot communicate.
8. He further submitted that the child cannot remain at [N] School in a situation where she has to lie about her home address. The Father will enrol her at [K] and will pay all the tuition fees. He submitted that there was no need for the Court to make a departure order, just an order requiring the Father to pay the fees.
9. Mr Tiyce also submitted that the Mother’s application for security for costs should be dismissed. The Mother is in employment and has provided no evidence about her incapacity to meet legal costs. The only financial information before the Court is in the Father’s affidavit material. The Mother is gainfully employed with a taxable income of $170,000.00. She currently receives child support payments of $14,000.00 per year. She has provided no evidence of any costs assessment other than her assertion about costs.
10. The Mother submitted that it would be in [X]’s best interests to stay living with her and maintain a relationship with her father. It would also be in her best interests to remain at [N] School where she is happy and doing well.
11. It is the Mother’s view that the child needs a counsellor, not a lawyer. To this end, she has arranged an appointment for [X] to see a child psychologist on Thursday 20th June at 6:00pm. She believes that [X] is being manipulated and coached by her father to say things that he wants but she does not really believe.
12. The Mother did not believe that the child was suffering any discomfort or anxiety about having a false address for the purpose of her school enrolment. She said that a lot of parents provided false addresses to secure a place for their child in a particular school, although she acknowledged that it was wrong.
13. Further, the Mother asserted that this Application was a further step in a campaign by the Father, trying to have his way. She believed that the Father was constantly oppositional to her and was inflexible with arrangements. The Father’s intentions are to do something that does not suit her and [X]. She claims he exhibits a lot of passive-aggressive behaviour.
14. The Mother explained that her behaviour in not attending Court for either hearings or Child Dispute Conferences was to keep a low profile. She believed that it was a “no-brainer” that the Father’s applications would not be successful.
15. The Mother also said that she had been “pushed around” by the Father and that she needed to be empowered. It was her intention to obtain legal advice.
16. The Independent Children’s Lawyer told the Court that she opposed the Mother’s proposal to take [X] to see a child psychologist.

## The Relevant law relating to Parenting Applications

1. In deciding whether to make a particular parenting order, the Court is required by s.60CA of the *Family Law Act* to regard the best interests of the child as the paramount consideration. The Court determines what is in a child’s best interests by considering the matters set out in subsections (2) and (3) of s.60CC of the Act.
2. The primary considerations in subsection (2) are:
   1. The benefit to the child in having a meaningful relationship with both of the child’s parents; and
   2. The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
3. There are additional considerations in subsection (3), from paragraphs (a) to (m) inclusive, of which several appear to be particularly relevant, including paragraph (a) itself:
   1. 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.
4. They have all been considered.
5. Subsection 61DA(1) requires the Court to apply a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child. This presumption does not apply in cases of abuse or family violence (s.61DA(2)). It will apply when the Court is making an interim order unless the Court considers it would not be appropriate (s.61DA(3)).
6. The presumption may be rebutted by evidence that satisfies the Court that it would not be in the child’s best interests to apply the presumption (s.61DA(4)).
7. If the presumption does apply, the Court is then required by s.65DAA to consider whether it is in the child’s best interests to spend equal time or, failing that, substantial and significant time, with each parent.
8. All of those matters have been considered, insofar as they are appropriate.

## Conclusions

1. The parties have been in conflict over their daughter since she was a baby. It is surprising that, after more than eleven years, the Mother appears to have *“maintained the rage”* against the Father for his actions in leaving the relationship. It is disturbing that she appears from her affidavits, her emails to the Father and her oral submission to the Court to see all of the Father’s actions as being directed against her personally. Her evidence does not suggest that she is able to separate herself and her feelings from [X] and [X]’s needs to have a relationship with her father.
2. The Mother’s accusations that the Father is a manipulative bully are not borne out by the evidence. Her claim that the Father is oppositional and deliberately makes decisions that are designed not to suit her and [X] is not substantiated by any evidence. What this claim does do is group her and [X] together, pitted against the Father. The Family Consultant does not identify the Mother as a “team” in that way.
3. Whilst the Mother claims that the Father is oppositional and exhibits passive-aggressive behaviour, the Father’s evidence suggests otherwise. The email conversation of 29th June 2012 annexed to the Father’s affidavit of 21st February 2013 set out at [42] and [43] above are illustrative of the Father’s claim that he is acting in a manner conducive to [X]’s welfare but the Mother’s response is frequently aggressive. The Father’s seemingly polite suggestion that [X] might like to spend some time with Ms C or Ms C’s mother when she is otherwise at home alone during the school holidays is met with the Mother’s fierce response:
4. Go fuck yourself and stop sending me pointless messages. You are not permitted to communicate with me. Loser.[[41]](#footnote-42)
5. The Mother’s abusive reply amply demonstrates her hostility towards the Father but does not show any consideration of [X]’s needs.
6. These are interim proceedings and a final hearing is yet to come. There will be a need for a full Family Report to be prepared by a Family Consultant.
7. It is not the case that the Court will automatically make orders that make no major change to the *status quo.* Whether or not the Court applies the presumption of equal shared parental responsibility, the Court must still consider, in determining what is in the best interests of the child, the arrangements that will promote the child’s best interests (*Goode & Goode[[42]](#footnote-43)* at [47]).
8. Whilst s.61DA(3) provides that when making an interim order, the presumption of equal shared parental responsibility applies, unless the Court considers that it would not be appropriate in the circumstances, this appears to be a clear case to find that it would not only not be appropriate, but not in the child’s best interests (s.61DA(4)). The parties cannot communicate, and the Father’s evidence, none of which the Mother has refuted, shows that his attempts at proposing arrangements for the child are angrily rebuffed by the Mother.
9. It must follow that one or other parent should, until further order, have sole parental responsibility for [X].
10. When considering what arrangements are most likely to promote the child’s best interests, there appear to be four different options:
11. The first option is, as the mother sought in her Response filed on 15th May 2013 and in her earlier Response filed on 31st July 2012:
12. Reduce father’s fortnightly access so he picks her up at 5pm on Saturdays if he is not going to support her activities and homework commitments.
13. The second option is to maintain the *status quo,* as the Mother submitted at the hearing, by allowing [X] to continue to live primarily with her and maintain a relationship with her father.
14. The third option would be to provide that the child would spend equal time with each parent on a week-about basis, as the father sought as a final order in his Amended Application filed on 21st February 2013. The Father no longer seeks that arrangement.
15. The fourth option is to provide that until further order the child is to live primarily with the Father and spend alternate weekends with the Mother, the reverse of the current arrangement.
16. The first option, reducing the child’s time with the Father, does not appear to be in the child’s best interests at all. It is contrary to what the evidence suggests that the child wants. Whilst the Father provides evidence in his affidavits that [X] says she wants to spend more time with him, it is persuasive that the Family Consultant reported in her memorandum written after the Child Inclusive Conference on 6th May that [X] wants to spend more time with her father, not less. The Mother claims that the child has been manipulated or coached by her father, but there is no evidence to corroborate that claim. Disturbingly, the Mother is convinced that the child’s expression of a wish to spend more time with her father indicates a need for her to see a child psychologist and she has made an appointment for Thursday 20th June.
17. The Mother appears to accept, in fact, that [X] enjoys spending time with her father. Why, then, would it be in the child’s best interests to reduce her time with her father? Why, as the Mother has previously sought, should [X] only be able to telephone her father once a fortnight? The child is twelve years of age. It is difficult to see why she should not be able to ring her father on the telephone every evening if she wants to.
18. The option of reducing the child’s time with the Father is not in [X]’s best interests and should be rejected.
19. The Mother has submitted that the Court should follow the second option, of continuing with the current arrangement where by [X] lives with her and spends alternate weekends and half the school holidays with him. The arrangement apparently is that the child is only allowed to speak to her father on the telephone every alternate Thursday.
20. This option, too, should be rejected. It has been tried and the evidence strongly suggests that it does not work. It does not appear to be in [X]’s best interests.
21. The reasons why this arrangement no longer works are:
    1. The Mother exhibits a constant and unrelenting hostility towards the Father, so that the child is seriously hindered in developing her relationship with him;
    2. The Mother’s attitude to the Father appears to be an attempt to deny to the child the benefit of having a meaningful relationship with her father;
    3. The Father’s attitude does not appear to be intended to deny to the child the benefit of having a meaningful relationship with her mother;
    4. Whilst [X] appears to be constrained in discussing with her mother details of things that have occurred whilst she has been spending time with her father, the reverse does not seem to apply, as it is apparent from the Father’s affidavits that [X] is able to speak freely about things that happen when she is living with her mother;
    5. The Mother appears to be unable to separate [X]’s needs from her own antagonism towards [X]’s father, so that the Mother appears to prefer that the child is at home alone on weekdays during the school holidays or between the time she arrives home from school and when her mother arrives home from work rather than being able to spend time or communicate with her father or stepmother;
    6. The Mother’s constant anger directed at the Father would be difficult for the child to live with on a regular basis;
    7. The child has been required to go along with the fiction created by the Mother in providing an incorrect address to [N] School so that she was able to enrol on the pretext of living within the school’s catchment area;
    8. The child is said to have positive relationship with Ms C, who does not work outside the home and would be able to supervise the child and keep her company after school or on days during the school holidays even when the Father is not home; and
    9. [X] clearly wants to spend more time with her father.
22. [X]’s wishes must be given some weight. She is twelve years old and apparently of a normal level of maturity for her age. She clearly spoke clearly and frankly to the Family Consultant at the Child Inclusive Child Dispute Conference on 6th May.
23. For all of those reasons, I am satisfied that, on an interim basis, the current arrangement no longer works to promote [X]’s best interests.
24. The third and fourth options both involve [X] spending more time with her father, which is in accordance with her wishes and would give her the benefit of developing and maintaining a meaningful relationship with her father.
25. The third option involves an equal-time arrangement on a week-about basis. It is no longer sought by the Father and not supported by the Independent Children’s Lawyer. The Mother does not support it. That does not mean it should not be considered. Subject to procedural fairness, the Court could make orders to bring about such an arrangement, even though it was an arrangement that neither party had advanced, if the Court were of the view that it was in the child’s best interests (*Goode & Goode* at [47]).
26. Whilst I have considered such an option, it appears to me to be unworkable because it would require the parents to cooperate, which does not appear to be possible at the present time.
27. By a process of elimination, that leaves the fourth option, providing that [X] should live primarily with her father and spend weekends and school holidays with her mother. In my view, this arrangement would give [X] some peace, in that she would spend more time in her father’s household, where there does not appear to be a constant display of hostility towards the other parent. She would spend more time with her father and with Ms C, and she would be able to spend more time with Ms C’s parents.
28. Such an arrangement would appear to mean that [X] would spend less time at home alone, as she would no longer come home from school to an empty house, as appears to be the case at the moment.
29. Clearly, the effect of this change of circumstances on [X] would be quite significant (see s.60CC(3)(d)). She would be separated for a longer period of time from her mother, but she told the Family Consultant that she believed that she would get used to that. One big change would be that she would change schools, as her father proposes to enrol [X] at [K]. Clearly, he would have to pay for this.
30. [X] appears to be of the view that she would be happy at [K], although she has been happy at [N]. The problem with [N] is that the child has been obliged to “live a lie” and has needed to remember not to give the wrong address. The Mother has made light of this, but it appears clear that this deception would have come out eventually.
31. Where parents disagree about which school their child should attend, the Court must consider the best interests of the child. There is no presumption in favour of the parent with whom the child lives, but that is not to say that the reality of the child residing predominantly with one parent has no relevance (see *Re G: Children’s Schooling[[43]](#footnote-44)*).
32. If [X] is to change schools, [K] would appear to be a good school for her to attend. She must continue to attend [N] School until the end of the school term, and then she can commence at [K] at the commencement of Term 3, if the Father can arrange her enrolment. He must pay the necessary tuition and other fees, and he must pay for her to be outfitted with the necessary school uniforms.
33. One other concern is the Mother’s view that the child’s expressed wish to spend more time with her father is in some way product of her being coached or manipulated by her father. The Mother’s solution is for the child to be seen by a child psychologist. It appears to be strange, to say the least, to suggest that the child needs to be treated by a child psychologist because she wants to spend more time with her father.
34. This proposal does not appear to be necessary or in the child’s best interests. If anything, it may be conducive of psychological harm. The Court is only too aware of the danger of “systems abuse” of children. The Family Consultant recommended that [X] should not be put into a position where her views about where she lives would be canvassed any further.
35. I propose to order that the child should not be taken to a psychologist without the consent of the Independent Children’s Lawyer or the leave of the Court.
36. The Father’s proposed order 12 requiring each parent to ensure that the child completes her homework has not been included. In my view, it involves an undesirable micro-managing of the parties in the performance of their role as parents (*Scott & Kent[[44]](#footnote-45)*at [93]-[95]; also *Nash & Reis[[45]](#footnote-46)*at [52]; *VR & RR[[46]](#footnote-47)* at [29]-[30]. It also appears to be unenforceable.
37. The Father’s proposed Order 18 would require the Mother to give the Father not less than three weeks’ notice of her inability to spend time with [X]. This appears to be an unreasonably long time as there may be circumstances where the mother finds herself unable to spend time with the child because of some commitment at less than three weeks’ notice. The Mother works on contract and there may be circumstances that arise where she does not have three weeks’ notice. In addition, in the case of an emergency, such as illness or injury, the Mother may have to advise the Father at much shorter notice.
38. The Independent Children’s Lawyer has proposed an order in her Minute requiring the parties to prevent other parties from making critical, disparaging or derogatory remarks about the other party or nay member of the other party’s household. This appears to be a difficult order to enforce.
39. Leaving those matters of detail aside, I am of the view that this child’s best interests would be served by removing her from the primary care of her mother at this stage and requiring her to live primarily with her father. It follows that she will change schools.
40. What needs to be considered at a final hearing is what arrangement will eventually be in this child’s best interests, as it seems clear that the present arrangement does not promote her best interests.
41. The change from one parent’s household to the other will be a major change for the child, and it will perhaps take a little while for her to get used to. However, it would appear that she will be able to adjust to the change.
42. The change of living arrangements will no doubt be distressing to the Mother. In my view it needs to happen quickly, so that [X] does not spend a lengthy period of time at home with her mother before the change takes place. The school holidays are approaching, and [X] can then spend some school holiday time with her mother, so that they can adjust to the new arrangement.
43. In my view [X] should commence to live with her father with effect from today.
44. The Mother has not demonstrated that there is a ground to make an order for security for costs. I am not satisfied that she is unable to afford legal advice. That application will be dismissed.

I certify that the preceding one hundred and thirty-two (132) paragraphs are a true copy of the reasons for judgment of Judge Scarlett

Associate:

Date: 18 June 2013

1. Family Report 11 July 2007 in Family Court proceedings SYF 4179 of 2002 at paragraph [3] [↑](#footnote-ref-2)
2. [2010] FMCAfam 1084 [↑](#footnote-ref-3)
3. [2010] FMCAfam 1084 at [3] [↑](#footnote-ref-4)
4. *Ibid* at [19] [↑](#footnote-ref-5)
5. If there was such an application made in 2011, it does not appear to have been made in this Court. [↑](#footnote-ref-6)
6. Affidavit of Ms Phu 29.7.2012 at paragraph [1] [↑](#footnote-ref-7)
7. Family Consultant Memorandum to Court 29 September 2012 [↑](#footnote-ref-8)
8. *Chan & Phu* [2012] FMCAfam 1300 [↑](#footnote-ref-9)
9. [2012] FMCAfam 1300 at [44] [↑](#footnote-ref-10)
10. Family Consultant Memorandum to Court 10 May 2013. [↑](#footnote-ref-11)
11. Presumable “school **holiday** period” [↑](#footnote-ref-12)
12. *sic* [↑](#footnote-ref-13)
13. Applicant’s Case Outline – Interim Hearing page 3 [↑](#footnote-ref-14)
14. *Ibid* [↑](#footnote-ref-15)
15. Affidavit of Mr Chan 5.6.2012 at paragraph [14] [↑](#footnote-ref-16)
16. *Ibid* at [19] [↑](#footnote-ref-17)
17. Ms C is Ms C, the father’s wife [↑](#footnote-ref-18)
18. Affidavit of Mr Chan 5.6.2012 at [21] [↑](#footnote-ref-19)
19. *Ibid* at [23]-[24] [↑](#footnote-ref-20)
20. Affidavit of Mr Chan 21.2.2013 at paragraph [9] [↑](#footnote-ref-21)
21. *Ibid* Attachment 3 [↑](#footnote-ref-22)
22. *Ibid,* Attachment 4 [↑](#footnote-ref-23)
23. *Ibid* [↑](#footnote-ref-24)
24. Affidavit of Mr Chan 212.2013 Attachment 5 [↑](#footnote-ref-25)
25. *Ibid* [↑](#footnote-ref-26)
26. Affidavit of Mr Chan 30.5.2013 at paragraph [9(f)] [↑](#footnote-ref-27)
27. Affidavit of Mr Chan 30.5.2013 at [10(e)] [↑](#footnote-ref-28)
28. *Ibid* at [10(f)] [↑](#footnote-ref-29)
29. Here the mother appears to be referring to the Child Inclusive Child Dispute Conference [↑](#footnote-ref-30)
30. Affidavit of Ms Phu 15.5.2013 at [1] and [3] [↑](#footnote-ref-31)
31. Affidavit of Ms Phu 15.5.2013 at [7(c)] [↑](#footnote-ref-32)
32. *Ibid* Order3 paragraphs [1]-[2] [↑](#footnote-ref-33)
33. *Ibid* Order 5 paragraph [1] [↑](#footnote-ref-34)
34. Affidavit of Ms Phu 3.6.2013 at [3]-[4] [↑](#footnote-ref-35)
35. *Ibid* at [7]-[10] [↑](#footnote-ref-36)
36. Affidavit of Ms Phu 7.6.2013 at [9] [↑](#footnote-ref-37)
37. *Ibid* at [26]-[27] [↑](#footnote-ref-38)
38. Family Consultant Memorandum to Court 10 May 2013. [↑](#footnote-ref-39)
39. *Ibid* [↑](#footnote-ref-40)
40. [2006] FamCA 1346; (2006) 36 Fam LR 422; FLC 93-286 [↑](#footnote-ref-41)
41. Affidavit of Mr Chan 21.2.2013 Attachment 5 [↑](#footnote-ref-42)
42. *supra* [↑](#footnote-ref-43)
43. [2000] FamCA 462; (2000) 26 Fam LR 143; FLC 93-025 [↑](#footnote-ref-44)
44. [2013] FCCA 127 [↑](#footnote-ref-45)
45. [2013] FMCAfam 11 [↑](#footnote-ref-46)
46. [2002] FamCA 320; (2002) 29 Fam LR 39; FLC 93-099 [↑](#footnote-ref-47)