* + 1. FEDERAL CIRCUIT COURT OF AUSTRALIA

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| MITCHELL & MITCHELL | [2014] FCCA 2526 |

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| * Catchwords:
* FAMILY LAW – Parenting – unacceptable risk – protection of children from harm – concession of abuse by parent – psychological and emotional abuse of children – failure to comply with interim and interlocutory orders – open expression of hatred by parent – enlisting children as “*co-conspirators*” in campaign of hate – credit findings – failure to call witness and *Jones & Dunkel* inference – waiver of legal professional privilege.
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| Legislation:*Family Law Act 1975*, ss.4, 4AB, 13C, 60B, 60CA, 60CC, 60CC(3)(f), 61DA, 65DAA, 65DAA (5), 65DAC*Evidence Act 1995* (Cth), s.131 |

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| * 1. *Jones & Dunkel* (1959) 101 CLR 298
	2. *Makita & Sprowles* (2001) 52 NSWLR 705
	3. *Brandi v Mingot* (1976) 12 ALR 551
	4. *Manly Council v Byrne and Anor* [2004] NSWCA 123
	5. *Browne & Dunn* (1893) 6 R 67 (HL)
	6. *Harrison & Woollard* (1995) FLC 92-598
	7. *Mazorski & Albright* [2007] FamCA 520
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| Applicant: | MS MITCHELL |

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| Respondent: | MR MITCHELL |

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| File Number: | AYC 255 of 2013 |

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| Judgment of: | Judge Harman |

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| Hearing dates: | 24, 25, 26 September and 8 October 2014 |

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| Date of Last Submission: | 8 October 2014 |

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| Delivered at: | Albury |

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| Delivered on: | 14 November 2014 |

### REPRESENTATION

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| Counsel for the Applicant: | Ms Dart  |

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| Solicitors for the Applicant: | Rama Myers Family Lawyers  |

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| The Respondent appeared in person  |

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| Solicitor Advocate for the Independent Children's Lawyer: | Ms Wearne of Legal Aid NSW Sydney Central |

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| Solicitors for the Independent Children's Lawyer: | Legal Aid NSW Wagga Wagga Family Law |

### ORDERS

* + 1. Discharge all prior parenting orders with respect to the children of the relationship:

[X] born [omitted] 2005;

[Y] born [omitted] 2007; and

[Z] born [omitted] 2010.

* + 1. The children’s mother [Ms Mitchell] shall have sole parental responsibility the [X], [Y] and [Z].
		2. [X], [Y] and [Z] shall live with their mother.
		3. The children’s father Mr Mitchell shall spend time with [X], [Y] and [Z]:

From 11am Saturday until 5pm Sunday each alternate weekend (and provided that in the event that Christmas Day/Boxing Day falls on a weekend then time pursuant to this order shall be suspended and the following order shall instead apply);

From 5pm Christmas Day until 5pm Boxing Day in each year.

* + 1. For the purpose of the father’s time with [X], [Y] and [Z], the father shall be responsible for arranging for his mother Mrs M or such other person as may be agreed in writing between the parents, to collect the children from the mother and the father shall be responsible for ensuring the return of the children to their mother by the same person.
		2. Pursuant to section 68B of the *Family Law Act 1975* the father shall be and is hereby restrained and injuncted from attending at, approaching or being upon the premises of the school, preschool or day care centre attended by the children or any of them, save for the purpose of attending events to which parents are invited and encouraged to attend and to participate in such events and the father shall, if intending to attend any such event, shall ensure that he has notified the mother in writing not less than 72 hours prior to attendance.
		3. In the event that the father commences future proceedings to spend time with the children, and unless the parties otherwise agree or the Court orders otherwise, such application is to be made not less than eighteen months from the date of these Orders and be supported by:

A comprehensive psychiatric assessment undertaken by a forensic psychiatrist who has read the Family Report and Reasons for Judgment;

A report from a treating psychologist, from a psychologist other than Mr T, evidencing the father’s regular and ongoing engagement in therapy to address:

his adjustment to the separation from the mother and the father’s antipathy towards her;

his capacity to appropriately manage his emotional responses;

his anger issues;

his insight into the emotional and psychological harm of his conduct upon the children;

his capacity to provide a psychologically and emotionally safe environment for the children if they are to spend time with him.

Evidence that the father has successfully attended and completed:

1. An anger management course;
2. The following programs through Upper Murray Family Care:

Parenting Orders Program;

Kids in Conflict;

Building new Bridges.

* + 1. The parties shall have leave to provide to any psychiatrist or psychologist attended in relation to either of them, or engaged to provide psychological support for the children, with a copy of the Family Report and the Reasons for Judgment.
		2. Each parent shall forthwith do all things, sign all documents and give all consents and authorities necessary to ensure both parents’ contact details are recorded with any school, preschool or day care centre attended by the children or any of them as parents and provided that the mother shall ensure that a copy of these orders are provided to such school, preschool or day care centre and their attention specifically drawn to the restraints and injunctions above.
		3. Each parent shall advise the other immediately of any significant illness or hospitalisation relating to the children or any of them, such notice to be given contemporaneous with the event and to include sufficient information and authority to enable both parents to be fully consulted and advised about any treatment decisions and to visit them if hospitalised.
		4. Pursuant to S.65DA(2) and S.62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders.
		5. All outstanding Applications and Responses are withdrawn and dismissed and all issues are removed from the list of matters awaiting hearing.
		6. Upon the expiration of the Appeal period and in the event that no appeal is lodged that all exhibits then be returned to the party who tendered same and that all material produced on subpoena be returned to the person or organisation who produced same or securely destroyed.

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

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| FEDERAL CIRCUIT COURTOF AUSTRALIAAT Albury |

* + 1. AYC 255 of 2013

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| MS MITCHELL |

Applicant

And

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| MR MITCHELL |

Respondent

* + 1. REASONS FOR JUDGMENT
1. These are proceedings involving competing parenting applications regarding the future care, welfare and development of three children, namely:

[X] born [omitted] 2005 (aged 9 years);

[Y] born [omitted] 2007 (aged 7 years); and

[Z] born [omitted] 2010 (aged 4 years).

1. The parties to the proceedings are the children’s parents, namely, the children’s mother Ms Mitchell, who is the Applicant in the proceedings, and the children’s father Mr Mitchell who is the Respondent.
2. The children’s interests in these proceedings are represented by an Independent Children’s Lawyer.

### Allegations of abuse

1. Those of my generation would recall during the 1970’s being shepherded on mass into their school hall or similar space to watch a film which I recall was titled (or at least depicted) “*The Man in the White Holden*”. It was a film warning of “*stranger danger*”.
2. I do not suggest that stranger danger is any less relevant today than previously. Indeed, tragic circumstances such as those of young Daniel Morcombe remind us all too starkly and painfully of the dangers and perils awaiting children and corrupting their innocence or worse. Conversely, cases such as that of young Luke Batty remind us of dangers closer to home and from within the family.
3. In the time that *“The Man in the White Holden”* was watched there was no discussion of the dangers to children lurking within their own families and households. Those dangers were not unknown. We have known for some significant time, for example, that sexual abuse of children is often perpetrated by people known to the child and including within the child’s family structure. It is the examples that involve heinous and unprovoked attacks upon the innocent by strangers, however, which attract the most media attention even in this day and age (perhaps rightly so).
4. In that past age, roughly corresponding with the commencement of the Family Law Act, there was a very different attitude towards that which occurred within the family. Thus no messages were delivered in the school hall regarding the dangers that potentially awaited children upon returning to and within their own homes.
5. It would be tempting to mythologise a romantic nostalgia for that time as being one in which children were safe and allowed to be innocent, safe as long as they were home “*before the street lights came on*”.
6. The innocence of childhood is a western concept which has its roots in the 19th century and which arose from a period involving a total lack of childhood innocence and children’s exposure to innocence destroying behaviours from an early age. At the time of the Industrial Revolution and in Victorian times, which spawned such ideals, there were dangers to children on every front through childhood labour (and unsafe work at that), rampant illness and disease (largely the after effects of inequality and poverty) and armed conflict.
7. Such lack of innocence is reflected in the popular fairy tales of the Brothers Grimm or, in more recent times, the crushing, soul destroying lack of innocence faced by children in unequal, disadvantaged and segregated societies throughout the world.
8. The concept of childhood innocence has always been founded in privilege. Those below or of the working classes, poorly educated and departing such education as was available to them at an early age to work in shops, factories and mines and assist in the support of the family, did not ever have the benefit or privilege of such “*innocence*”. To demonstrate the fallacy of the concept one need only look to children in war zones, those subject to and living with extreme poverty, preventable illnesses and diseases and the like. For them there is, even today, little “*innocence*”. Such children are exposed to the ways of the world and the impact upon them and their families of those ways at and from an early age.
9. One need not dwell upon these issues in a philosophical sense. Such considerations and dialogues are a matter for different fora and different times.
10. I have raised the above matters purely as one is caused to reflect, in dealing with cases such as this, upon the fallacy of focusing solely upon the danger to children from strangers and forces external to the family. In this case, as in so many which come before the court, the danger to children has been from their own parents and within their own family.
11. That is not to suggest that there has, over time, been a change in the fronts upon which children’s innocence is attacked. There is no reason to doubt that children were damaged and exposed to injurious behaviours by their parents prior to the commencement of the Family Law Act in 1975.
12. At that time, separation and divorce was difficult both legally and socially and thus rarely occurred (for a myriad of complex reasons which need not be unbundled for the purpose of this determination). It was also a time when interference in the “*private affairs*” of the family was not countenanced, contemplated or considered necessary.
13. It was within this culture of the family as the private domain, indeed a culture of *“domestic secrecy”* and collective *“turning a blind eye”*, that such abuses of children, as are presently being explored by the Royal Commission into institutional abuse, could flourish and remain largely unchecked.
14. This turning a blind eye towards the private affairs of the family and the institutional and political belief that events that occurred within the privacy of one’s own home should not be the subject of public scrutiny or discussion, allowed abuses such as harsh and excessive corporal punishment to be practised by parents and institutions in *locus parentis* (such as schools). It was an environment in which parents, even those unhappy and trapped within loveless or abusive relationships, stayed together (for a variety of complex reasons but including, sadly, financial imperatives) *“for the sake of the children”*.
15. I do not intend to suggest that one can causally connect the “*divorce revolution*” that followed the passage of the Family Law Act as responsible for the risks and dangers that children now face at the hands of their own parents. I do not intend that criticism to be made at all. I am simply conscious that as a consequence of changing societal and political attitudes as well as the incidence of separation and divorce (indeed the incidence of children born into relationships wherein their parents have never married or never lived together), that such circumstances now come before the court as *“disputes”*, whereas previously they did not. Thus the public scrutiny that arises through litigation was simply not present in 1976 when the Family Law Act commenced and when I sat with other bemused and somewhat terrified students learning of the dangers of *“The Man in the White Holden”*.
16. In this case what is clear is that the three children of these parents have been abused. They have been abused by their father.
17. I use the term *“abuse”* in both its legally defined context (see section 4 of the *Family Law Act 1975*) and in its broader, lay context.
18. In these proceedings Mr Mitchell has conceded, frankly and candidly, that his behaviours towards these children have been abusive and have damaged them. I have taken Mr Mitchell’s admissions of *“abuse”* within the lay context. He is unrepresented and is not necessarily in a position to make an informed concession as to “*abuse*” within the section 4 definition. However, I am satisfied that abuse has occurred within both the lay and legal definitions.
19. That these children have been abused has nothing to do with lack of vigilance by government agencies, schools, child welfare officers or the court. The children have been abused by their father whilst in his care and within his home and through his behaviour and actions, so much is conceded.
20. That these children have been abused and harmed by their father does not, in any way, suggest that he does not love them nor that they do not love him. The coexistence of the children’s love and affection for their father (and their father’s love for them) and the injury which the children have assuredly sustained as a consequence of their father’s behaviour cannot be described as other than a catastrophic conundrum.
21. There is no allegation that the father has physically or sexually abused these children. However, that does not ameliorate against the reality that they have been abused by their father as he has conceded.
22. To give a context to that which is conceded by Mr Mitchell as abuse, one must look to the definitions of family violence and abuse contained within sections 4AB and 4 of the *Family Law Act 1975*, namely:

abuse, in relation to a child, means:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child

Definition of family violence etc.

(1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member ), or causes the family member to be fearful.

(2) Examples of behaviour that may constitute family violence include (but are not limited to): the

(a) an assault; or

(b) a sexual assault or other sexually abusive behaviour; or

(c) stalking; or

(d) repeated derogatory taunts; or

(e) intentionally damaging or destroying property; or

(f) intentionally causing death or injury to an animal; or

(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or

(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or

(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(3) For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family

1. In these proceedings the evidence of “*abuse*” by Mr Mitchell arises from one or other or both of the children’s exposure to family violence or neglect.
2. Neglect does not have a definition within the Family Law Act. Accordingly, one is left to turn to a common English usage definition.
3. The Macquarie Dictionary defines neglect as *“to pay no attention to; disregard; to fail to care for or treat properly; to fail to (do something) through carelessness”.* I am satisfied that I need not traverse alternate dictionary definitions and that this will suffice.
4. As regards the children’s physical care (whether attended to by Mr Mitchell and/or his mother from whom the children receive significant support) there is little, if any, criticism raised in the evidence. However, the physical care of children is far from the only basis of relevance. So much is signalled by provisions of the Act, such as section 60CC(3)(f) requiring an assessment of the capacity of each parent to meet the children’s *“emotional and intellectual needs”.*
5. Mr Mitchell’s evidence, which I will deal with in more detail shortly, makes clear, including by concession, that the children have been exposed to significant behaviours by their father which have neglected their emotional and intellectual needs. This has included the children’s right to a relationship with their mother, conceded by Mr Mitchell to be a caring and loving relationship, as well as the exposure of the children to significant anger (as Mr Mitchell concedes *“rage”*), repeated derogatory comments regarding their mother and the mother’s partner, and a discussion with the children or in the children’s presence of adult issues, the discussion of which (for example, the mother’s sexuality) with children of these ages is entirely unnecessary and inappropriate.
6. I am satisfied that Mr Mitchell has engaged in neglect of the children’s emotional needs. That neglect is serious both as to the facts and circumstances which constitute the neglect and the period of time over which the neglect of their emotional needs has occurred.
7. I am also satisfied that the children have been exposed to family violence which exposure has occasioned and continues to present a risk of serious psychological harm. There is a common substratum of fact between the allegations and findings of family violence (and the children’s exposure thereto) and a consideration of neglect. That evidence shall be canvassed in more detail shortly.
8. I have commenced with a consideration of the context of the allegations of, indeed, admissions of abuse as it assumes some fundamental significance to the determination of the matter and gives some appreciation and understanding to the position advanced by each of the parties and the Independent Children’s Lawyer. That is not to suggest that the determination of risk and the finding of abuse that will be further elucidated shortly are conflated with a determination of the children’s best interests at large. It is not. It does however, as is submitted by the Independent Children’s Lawyer, assume great significance in that the children require protection from further exposure to that abuse, which protection is fundamentally and inextricably linked and connected with the children’s best interests, but not solely defining or determinative of those interests.

## Material considered

1. In dealing with the proceedings I have read and considered each of the documents identified by the parties together with the various exhibits which have been tendered into evidence.
2. In the case of Ms Mitchell I have read and considered each of the documents as filed being:

Initiating Application filed 19 July 2013;

Form 4 Notice of Child Abuse, Family Violence or Risk of Family Violence filed 19 September 2014;

Affidavit of Ms Mitchell affirmed 11 July 2014 and filed 14 July 2014;

Affidavit of Ms S affirmed 10 July 2014 and filed 11 July 2014;

Affidavit of Ms Mitchell affirmed 6 October 2014 and filed the same day; and

Affidavit of Ms S affirmed 7 October 2014 and filed the same day.

1. In the case of Mr Mitchell I have read and considered each of the documents filed by him in these proceedings and comprising:

Response filed 6 September 2013;

Affidavit of Mr Mitchell sworn 6 September 2013 and filed the same day;

Affidavit of Mr Mitchell sworn or affirmed 17 November 2013 and filed 18 November 2013;

Affidavit of Mr Mitchell sworn or affirmed 9 May 2014 and filed the same day;

Affidavit of Mr Mitchell sworn or affirmed 14 August 2014 and filed the same day;

Affidavit of Mr Mitchell sworn or affirmed 15 September 2014 and filed the same day;

Affidavit of Mrs M sworn or affirmed 14 November 2013 and filed the same day;

1. An affidavit had been filed in these proceedings by a Ms H. Ms H is the *“partner”* of Mr Mitchell. Ms H’s affidavit was not relied upon by Mr Mitchell and thus has not been read or considered.
2. Ms H was present for significant portions of the hearing and was thus clearly available to be called and give evidence. On that basis I am invited to and will draw a *Jones & Dunkel* inference with respect to any evidence relating to the relationship between Mr Mitchell and
Ms H, and will disregard any suggested corroboration Ms H could give to the evidence of Mr Mitchell. I propose to draw the inference that is available as a consequence of his failure to call her, namely, that her evidence would not, if called, have been of assistance to him.
3. In addition to the evidence of the parties, I have also had the benefit of a significant number of exhibits in the proceedings comprising:

Exhibit A1 clinical neuropsychologist reports with respect to the mother;

Exhibit A2 a transcript of evidence from an interim hearing in these proceedings conducted by Judge Henderson 25 September 2013;

Exhibit A3 correspondence from the mother’s attorneys to the father’s attorneys dated 9 August 2013;

Exhibit A4 a surgery consultation of the father recorded by Dr M dated 28 April 2011;

Exhibit A5 material from [school omitted] dated 9 September 2013;

Exhibit A6 correspondence from the mother’s attorneys to the father’s then attorneys;

Exhibit A7 a Statutory Declaration of Ms Mitchell 27 November 2012;

Exhibit A8 a transcript of various text messages between the parents;

Exhibit A9 notes from the Hume Riverina Community Legal Service with respect to the father’s attendance upon that service;

Exhibit A10 records with respect to the father’s attendance upon Dr T 26 February 2013;

Exhibit A11 a printout of material from the father’s Facebook page;

Exhibit A12 an email forwarded by the father to the mother 6 May 2013;

Exhibit A13 an Amended Minute of Proposed Order sought by the mother;

Exhibit A14 entries from a communication book maintained between the mother and paternal grandmother up to and including August 2014;

Exhibit A15 various notes from the children’s school;

Exhibit ICL1 occupational therapy reports with respect to the mother;

Exhibit ICL2 a report from a child psychologist Ms B;

Exhibit ICL3 certain records with respect to school attendance and school records generally for the child [X];

Exhibit ICL4 various records from Mr Mitchell’s treating medical practitioner;

Exhibit ICL5 a record of absences and other notes with respect to [Z]’s preschool attendance up to and including May 2013;

Exhibit ICL6 various letters forwarded by the Independent Children’s Lawyer to the father requesting urinalysis (in accordance with an order made by the Court requiring that the father undergo urinalysis or drug testing of some form);

Exhibit ICL7 notes from a treating psychologist for the father Mr T;

Exhibit X a Family Report prepared by Family Consultant Ms D.

1. Prior to hearing I had received a case outline document from counsel for the mother and the Independent Children’s Lawyer and those documents have also been considered.
2. At the conclusion of evidence oral submissions were made by each party and by the Independent Children’s Lawyer. Those submissions have also been taken into account.

## The proposals of the parties

1. The orders that are sought by the parties in their respective application or response bear little resemblance to that which is, in fact, sought by them at the conclusion of the trial.
2. By her Initiating Application the mother sought orders for equal shared parental responsibility, for the children to live with her and for the children to spend alternate weekend time with the father, from after school Wednesday until before school the following Monday, together with periods during school holidays and other special events. Thus the mother had initially proposed orders for shared time.
3. At the outset of the trial it was made clear by the mother’s counsel, in opening the mother’s case, that the mother would urge the Court to make orders which would have the effect of suspending all time and communication between the children and their father for a period of six months or so before time would then resume on a supervised basis.
4. By the close of trial the mother’s position had further varied and such that relief was then sought in accordance with the Minute of Order exhibit A13 and being:

An immediate suspension of the father’s time with the children;

An order for sole parental responsibility in the mother’s favour;

A variety of injunctions and restraints pursuant to section 68B of the *Family Law Act 1975*;

A requirement for the father to undergo psychiatric assessment and engage with ongoing psychological treatment prior to filing any fresh application to pursue orders for time with the children.

1. The father’s position is somewhat less clear.
2. By his Response filed 18 November 2013, Mr Mitchell sought that the parents have equal shared parental responsibility and that the parties spend equal time with the children (on a week about basis).
3. In closing submissions Mr Mitchell appeared to maintain his position, consistent with his Response, for an equal time arrangement. However, the submissions put by Mr Mitchell could also be interpreted as suggesting a plea for alternate relief such that in the event that the court were not satisfied that an equal time arrangement should apply, that a shared care arrangement should apply, representing a continuation of orders made by Judge Henderson 25 September 2013 (which would, on the basis of the continuation of those orders, see the children spending from after school Wednesday until before school Monday each alternate weekend with their father and the balance of their time with their mother). Mr Mitchell urged the court to make an order for equal shared parental responsibility.

## History of proceedings

1. The case outline document filed by the Independent Children’s Lawyer contains a substantial and largely neutralised and non-contentious chronology of events. Accordingly I adopt and incorporate that chronology herein.

|  |  |
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| *Date* | *Event*  |
| *[omitted] 1974* | *Father born* |
| *[omitted] 1978* | *Mother’s partner Ms S born* |
| *[omitted] 1979* | *Mother born* |
| *2001* | *Mother alleges she and father began living together.* *Father says they began living together in 1999.* |
| *[omitted] 2004* | *Parties were married.*  |
| *[omitted] 2005* | *[X] born (currently aged 9)* |
| *[omitted] 2007* | *[Y] born (currently aged 7)* |
| *September 2007 onwards* | *Mother develops acquired brain injury as a result of staph infection. Father stopped work to care for mother and the children.*  |
| *January 2008* | *Mother returns to work minimal hours.*  |
| *March 2008* | *Father returns to full time work.*  |
| *[omitted] 2010* | *[Z] born (currently aged 4)* |
| *17/08/2012* | *Parties separated. Mother moved out of shared rental accommodation, Mr Mitchell remained living there. Mother moved to 3 bedroom townhouse in [omitted].* |
| *27/08/2012* | *Mother collected children from school and childcare, parties agreed that father would deliver their suitcases to her home that afternoon. Father subsequently came to her house, collected children, only allowed mother supervised visits.*  |
| *7/09/2012* | *Section 60I Certificate issued.*  |
| *Mid September 2012* | *Father allows mother to spend time with children on a regular basis. Agreed that mother would pick up children from school/childcare each weekday and spend time with them until 6.00pm each weekday and then time with mother each alternate weekend from after school Friday until 6.00pm Sunday.* *Mother said she would like kids overnight, father said no because his parenting payment would be cut. Said that if she saw them outside those times she won’t see them at all.*  |
| *October 2012* | *Father contacts mother and tells her he has contacted lawyer for defence in her personal injury matter to have him appear as witness against her.*  |
| *20 October 2012* | *Mother introduces her partner [Ms S] to the children as her friend. Children now aware that [Ms S] is her partner.*  |
| *13 November 2012* | *Participated in Legal Aid Conference.* *Mother claims she and father reach interim agreement that children will live with father and spend time with mother each Wednesday overnight and each alternate weekend from Friday afternoon to Monday morning.*  |
| *November 2012* | *Mother alleges father unilaterally changed arrangements: she was told to pick kids up at his house rather than his mothers; he enrolled kids in a new school without her permission.* *Father claims he doesn’t think he was bound by heads of agreement because the mother unilaterally altered the agreement previously.*  |
| *Late November 2012* | *Police lodged AVO against father for the mother’s protection.*  |
| *Late 2012/early 2013* | *Parties agreed to change arrangements for children. They agreed that the mother would spend time with the children each alternate week from Wednesday afternoon to before school Monday.*  |
| *17/12/2012* | *Interim AVO made against father. After this parties agreed mother would spend time with kids from Wednesday afternoon until Monday morning.*  |
| *25/02/2013* | *Father claims [Ms S] put [X] in a cold shower with his pj’s [pyjamas] on and he had no other pj’s [pyjamas] to wear so he went to bed in his undies and he was really cold. Father alleges [X] told him this and that it occurred because he wouldn’t do as [Ms S] told him to.* *Mother says this happened in December 2012, that [X] became irrational and angry, couldn’t calm him down and he was so angry he kicked a hole in the wall. They put [X] in shower and he calmed down. She then snuggled [X] in bed. Said that she acknowledges situation could have been handled better. No such incident has occurred since.*  |
| *June 2013* | *Parties had ongoing issues as father refused mother time with kids.*  |
| *1 July 2013* | *Mother alleges father refused to allow her to spend any time with the children. Mr Mitchell did not respond to her attempts to contact the children.* *Father says he turned off his phone so he wouldn’t have to be harassed by the mother.*  |
| *10/07/2013* | *Father takes children to Dr E and says that [X] and [Y] told Dr about abuse. Dr reported this to DOCS.*  |
| *July 2013* | *Father claims he stopped mother from having all three kids for more than every second weekend and the occasional day time visit on the basis of his concerns due to her declining mental health. Wants her to have supervised visits only. Mother did not see the children for three weeks.*  |
| *19 July 2013* | *Mother files initiating application in FCC [Federal Circuit Court] requesting orders on interim basis for the following** *ESPR [equal shared parental responsibility] between parties.*
* *That the children live with the father.*
* *Spend time with the mother during school term in each alternate week from after school.*
* *Wednesday until before school on Monday.*
* *Half school holiday periods.*
* *All other times as agreed.*

*On a final basis she sought the following:** *ESPR [equal shared parental responsibility] between parties.*
* *Children to live with the mother.*
* *Children to spend time with the father each alternate week from after school Wednesday until before school on Monday.*
* *Half school holiday periods.*
* *All other times as agreed.*
 |
| *22/07/2013* | *Mother says she attended the children’s school. Hasn’t seen children in three weeks.*  |
| *5/08/2013* | *Orders that provided inter alia:** *Parties to attend CDC [child dispute conference].*
* *Matter for interim hearing 25/9/2013*
* *ICL [Independent Children’s Lawyer] to be appointed.*
 |
| *9/08/2013* | *Following first return date, mother’s solicitor sent proposal to the father to organise supervised time with children and communication via phone. She didn’t admit need for this but wanted to see kids. He refused to agree as the supervisors proposed were not independent. His solicitor proposed a fee for service basis to avoid waiting list at contact centre. Mother could not contact children via father’s mobile number and he had not provided her with a new one. Mr Mitchell’s solicitor did not provide a response to correspondence.* *Issues with regard to father completing intake process at contact centre.* *Mother not able to communicate with children via phone from 5 August 2013 until September 2013.* *Father says he suggested getting a phone for the children.*  |
| *21/8/2013* | *NOAS [notice of address for service] for Nicole Dwyer ICL [Independent Children’s Lawyer] filed.*  |
| *6/9/2013* | *Father files response seeking:** *Parties have ESPR [equal shared parental responsibility] for children.*
* *Children live with father and spend time with mother on supervised basis pending assessment of her cognitive function due to brain injury.*
* *Sought various property Orders as well.*
 |
| *25/09/2013* | *FCC [Federal Circuit Court] Orders providing for, inter alia:** *The parents have ESPR [equal shared parental responsibility] for the children.*
* *That the children live with the mother.*
* *The children spend time with the father as follows:*
	+ *Each alternate week from after school on Wednesday until before school on Monday.*
	+ *One half of school holiday periods.*
	+ *One half of Christmas school holiday period.*
* *Various other orders regarding time for father to spend with children.*
* *Non-denigration order.*
* *Changeover arrangements.*
* *Father to attend personal counselling, with counsellor nominated by ICL [Independent Children’s Lawyer].*
* *Father to undergo drug testing.*
* *Communication orders about medical issues.*
 |
| *September 2013* | *Father has not paid the mother child support since the children came into her care.*  |
| *3/10/2013* | *Father gets report from Dr C saying he is not suicidal.* |
| *5/10/2013* | *Mr Mitchell did not call to speak with children as provided for in the orders. He has not called the children since this time.*  |
| *8/10/2013* | *Father did not attend CDC [child dispute conference].**Mother did attend CDC [child dispute conference].* |
| *10/10/2013* | *Mother phoned the mobile to speak with the children on four separate occasions between 6:30 – 7.00pm. None of the calls were answered and she believes the phone was switched off.*  |
| *14/10/2013* | *Father fails to comply with changeover Orders.*  |
| *18/10/2013* | *Mother filed application in a case seeking interim orders that:** *The Orders 4-9 made by FCC on 25/9/2013 be discharged.*
* *Sole PR [parental responsibility].*
* *That the father spend time with the children supervised at the contact centre for two hours per fortnight and other times as can be facilitated by the Centre.*
* *That the father pay the wife’s costs of an incidental to this application.*
 |
| *22/10/2013* | *Loretta Terrill files Notice of Withdrawal as Lawyer for the father.*  |
| *18/11/2013* | *Father files a response seeking the following:** *That the parties have ESPR [equal shared parental responsibility] for the children.*
* *That the children live with both parties for equal time in week about arrangement.*
* *Children spend time with mother for one half of school holidays.*
* *All other terms as per initiating application filed on 19/7/2013 by the mother from and including sub point 3.*
* *As per final orders.*
 |
| *18/11/2013* | *Mother’s solicitor received email from Mr Mitchell in a response to a letter they had sent him. Email said “ No worries, let Ms Mitchell know that [name omitted] who we had the 3 way orgy with has tested positive to aids - she may want to get tested…”Mother claims that the statement father made was false and that it was said to belittle or embarrass her.*  |
| *20/11/2013* | *ICL [Independent Children’s Lawyer] requests father to undertake drug testing. To date no results have been received.* |
| *26/11/2014* | *FCC [Federal Circuit Court] Orders:** *That the parties attend upon a family consultant for preparation of a family report.*
* *The parties send copies of all of their court documents to the report writer.*
 |
| *4/12/2013* | *Mother’s solicitor sent letter to father. He responded “piss off”.* |
| *19/12/2013* | *ICL [Independent Children’s Lawyer] requests father to undertake drug testing. To date no results have been received.* |
| *January 2014* | *Mother says [X] said “I tell Dad I don’t like it at your house but I do. I like it the same but I can’t tell dad that or he will get mad. Sometimes I miss you but I can’t say anything. I have to go to my room, or cry in my bed.*  |
| *Late January/Early Feb* | *Mr Mitchell left mother several nasty telephone messages over several days. Transcript of those messages attached to affidavit.*  |
| *February 2014* | *[Ms S] says she picked up [X] and [Y] from school and [Y] said to her “Dad says I have to tell the court lady that I want fifty fifty time”. [X] immediately said “shut up [Y], don’t talk about it. You are gonna get dad in trouble”. [Y] then said “I can tell them things if I want to. You tell dad things about them so why can’t I tell mum things if I want to”. [X] replied “I do not [Y] you are the one that says mean things about mum and [Ms S] not me”.* |
| *Between Feb and April 2014* | *Mother says that the children would argue and dob on each other, telling [Ms S] and her what the others had said about them while they were with their father.*  |
| *April 2014* | *Mother says that on 3 occasions during April the children said “dad told us to catch the bus to his house from school”.**Father responds with “no law in this world that makes someone be nice to their ex-wife”.* |
| *11/04/2014* | *ICL [Independent Children’s Lawyer] requests father to undertake drug testing. To date no results have been received.* |
| *16/04/2014 (report prepared) Released on 5/5/2014.* | *Family Report – completed by Ms D 16 April 2014.**Recommendations in regards to interim arrangements:*1. *That the family report be released to the parties at the next court date.*
2. *That the children’s current living arrangements be suspended*
3. *That children live with the mother*
4. *That children’s time with the father be supervised by contact centre.*
5. *That father undergo sustained course of psychological counselling.*
6. *That [X] and [Y] continue to attend psychological counselling.*
7. *That the father not be permitted to attend the children’s school.*
8. *That arrangements be made for the children to have telephone communication with PGM [paternal grandmother] and paternal aunt in relation to [Y].*
9. *That if feasible, that arrangements be made for the children to STW [spend time with] PGM [paternal grandmother] separate from the father.*
10. *That the mother and father complete the parenting Orders Program and the children the Jigsaw program.*
11. *That the father undergo clinical psychological assessment and follow any recommended treatment program and/or that an expert family report including a psychological assessment of the father be completed prior to final hearing.*
 |
| *5/05/2014* | *FCC [Federal Circuit Court] Orders providing for the following:** *That the family report be released to the parties.*
* *That the applicant shall by close of business on 8/5/2014 file and serve an application in a case and affidavit material in support of such interim relief that is sought.*
* *That the matter be listed for further mention and directions and possible interim hearing on 12/5/2014.*
* *Noted that during the adjourned period the father undertakes not to attend the children’s school or day care.*
 |
| *5/05/2014* | *Children told mother that Mr Mitchell would be at school that afternoon to pick them up and they could choose who they went with. This was a day when mother was due to collect children.*  |
| *8/05/2014* | *Mother files Application in a Case seeking the following:** *That orders 4-7 inclusive of the Orders made by FCC [Federal Circuit Court] on 25/9/2014 be suspended.*
* *That pending further order the children STW [spend time with] father at supervised contact centre for 2 hours per fortnight and at such times and on such days as may be accommodated by the Centre.*
* *Arrangements for facilitating the above time arrangements.*
* *That the father undergo sustained psychological counselling.*
* *That leave be granted to ICL [Independent Children’s Lawyer] to provide copy of the FR [family report] to the father’s counsellor.*
* *That the father be injuncted and restrained from attending at the children’s school or day care.*
* *That the parties and Ms S go to the Upper Murray Family Care for intake for completing of the POP’s [parenting orders] program. They will do what is required to participate and complete such program.*
* *That the father be restrained from distributing or dissemination any of the material produced, prepared or filed in these proceedings, save for to his legal advisor for the purposes of obtaining family law advice.*
 |
| *8/05/2014* | *Mother says that Mr Mitchell left a voice message on her mobile threatening that he would contact the defence in her personal injury claim.*  |
| *May 2014* | *Mother was putting [X] into bed and he talked about 50-50 time with the father.* *Incident at McDonalds with [Y]. Father raises voice at [Ms S], [Y] was scared.*  |
| *9/05/2014* | *Father files Response to an Application in a Case seeking:** *ESPR [equal shared parental responsibility] and week about arrangement.*
 |
| *9/05/2014* | *Father provides undertaking that he will not discuss mother in any way with his children.*  |
| *12/05/2014* | *FCC [Federal Circuit Court ]Orders, inter alia:* * *Pending further Order, each party is restrained from discussing with the children any aspect of the family report, any issue relating to the other parent or matters that occur within the other parent’s household or any issue or allegation raised by anyone in these proceedings. (pursuant to 68B Family Law Act).*
* *Father top [sic] provide ICL [Independent Children’s Lawyer] with details for counsellor, psychologist that he is attending together with an authority for ICL [Independent Children’s Lawyer] to speak with that person.*
* *Father to attend appointments with that person not less than fortnightly and pending further Order.*
* *Parties to go to Upper Murray Family Care enrol and complete POP’s [parenting order] program.*
* *Matter listed for final hearing 24-26 September 2014.*
 |
| *15/05/2014* | *Children began attending counselling with Dr B.*  |
| *10/06/2014* | *Mother putting [Y] to bed, [Y] starts talking about 50-50 time.*  |
| *5/07/2014* | *Mother called the children to speak with them, [Y] answered the phone and was laughing. The mother asked her what was so funny and she said “when you ring it comes up on dad’s phone as ‘[first name omitted] the mole’.* |
| *10/07/2014* | *[Ms S] talks about [Y] stealing and lying.*  |
|  | *Following Orders being made the children have continued to talk about having 50-50 time with the father, that the mother wants the kids to herself, that [X] doesn’t have to do homework at the father’s house until it’s 50/50.**Father denies he is putting any pressure on the children about the 50-50 arrangement.*  |
| *31/07/2014* | *ICL [Independent Children’s Lawyer] requests father to undertake drug testing. To date no results have been received.* |
| *29/08/2014* | *ICL [Independent Children’s Lawyer] requests father to undertake drug testing. To date no results have been received.* |

1. The proceedings were commenced, as would be apparent from the above, by an Initiating Application filed 19 July 2013.
2. The final hearing of the proceedings concluded 8 October 2014.
3. Whilst it is regrettable that a period of some 15 months has passed from the commencement of the proceedings to the conclusion of the proceedings this is, in reality, an expedited disposal of the matter. The proceedings have, at all times, been dealt with on a regional circuit of the Court.
4. The pressures of work within this circuit, comprising a case load equivalent to a full-time judicial officer’s caseload, are such that delays of this nature are inevitable. Indeed, the expedition of the matter, following the release of the Family Report and the filing of an Application in a Case by the mother (seeking a suspension of then extant interim parenting orders), has seen the matter reach a conclusion in a timeframe that, in light of the available resources, is little short of extraordinary. It has, however, been at the cost of other litigants in other matters before the Court. That is not, in any fashion, to begrudge these parties of such resources. The issues raised in these proceedings, as would be apparent from the findings of abuse made above and to which I will return in due course, compels the determination of the proceedings with such resources and such expedition as can be made available.
5. Prior to commencing proceedings the parties had attended Family Dispute Resolution. As the evidence demonstrated, the parties would, appear to have reached a resolution of issues between them at Family Dispute Resolution. A parenting plan was prepared and signed by the parties and that parenting plan is before the Court in evidence. The parenting plan provided for a shared care arrangement between the parties.
6. Within a short period (days if not weeks) Mr Mitchell had resolved to or circumstances had arisen which caused Mr Mitchell to resile from the agreement which had been reached. The children were then withheld by Mr Mitchell from their mother (both as to spending time or communicating with her in any meaningful way), for a period of approximately three months. During this period and as a consequence of those events Ms Mitchell commenced these proceedings.
7. The matter first came before the Court on 5 August 2013. On that date the parties were directed to attend a Child Dispute Conference with a Family Consultant in Albury, directions were made for the filing of material, an Independent Children’s Lawyer was appointed, and a date for interim hearing fixed by video-link between the Albury and Parramatta Registries. Thus each and every resource available to litigants and to assist in the conduct of litigation was made available.
8. On 25 September 2013 an interim hearing was conducted. Orders were made which provided for the parents to have equal shared parental responsibility for their children, for the children to live with their mother and to spend time with their father each alternate weekend from Wednesday afternoon until the commencement of school the following Monday, together with periods during school holidays. Those orders were, substantially, in accordance with the mother’s application and clearly supported by the evidence then available and to which I will turn in due course.
9. The orders made 25 September 2013 signalled the communication difficulties and other issues of concern which were then apparent. Thus orders were made which:

Provided for changeovers to occur at the children’s school or, if the school were not available, through a children’s contact service, and, if that service were not available, at the [A] Police Station;

Restrained both parties from denigrating the other or members of the other’s household as well as restraining each party from discussing the proceedings with, in the presence of, or within the hearing of the children;

Required that the father attend personal counselling with a counsellor nominated by the Independent Children’s Lawyer;

Required that the father submit to random supervised blood tests with respect to allegations of chronic marijuana use; and

Restrained the mother from allowing her partner to physically discipline the children or any of them.

1. The proceedings were otherwise adjourned for further mention and possible interim hearing to 26 November 2013.
2. On 26 November 2013 neither party nor the Independent Children’s Lawyer sought to raise or press any application for further interim relief. Orders were made to advance the matter towards trial including an order for the preparation of a Family Report.
3. The Family Report was prepared within the timeframe requested and was produced 16 April 2014. The report recommended that as a consequence of matters of concern which had arisen during report interviews that:

The report be released to the parties and their legal representatives upon the next listing of the proceedings rather than being administratively released by orders made in Chambers (as would usually occur); and

All arrangements for time and communication between the children and their father be suspended forthwith.

1. Immediately following the release of the Family Report to the parties 5 May 2014 an application was made by Ms Mitchell, as recommended by the Family Consultant, to immediately suspend all time between the children and their father.
2. On the basis of the mother’s oral application made 5 May 2014 the proceedings were adjourned for a short period (to 12 May 2014) and directions made for both parties to file material. That was attended to by the mother 8 May 2014. During the brief adjourned period
Mr Mitchell undertook to not attend at or upon the children’s school or day care centres.
3. On 12 May 2014 all extant applications were consolidated and listed for hearing to commence 24 September 2014 and to continue until completed. Orders were also made to facilitate the provision of information by the parties to the Independent Children’s Lawyer as well as orders:

For the personal protection of the children. This comprised an order pursuant to section 68B of the Act restraining each party from discussing with the children or any of them anything contained within the Family Report, any issue relating to the other parent or matters that occur within the other parent’s household or any issue or allegation raised in the proceedings;

Pursuant to section 13C of the Act requiring that the parties forthwith attend upon Upper Murray Family Care to enrol in and attend (subject to assessment of suitability) the Parenting Orders Program; and

For preparation for trial including the filing of affidavit material.

1. The matter proceeded to trial 24-26 September 2014 inclusive. The matter was not concluded within that time and was, accordingly, adjourned for a fourth day of hearing, by video-link between Albury and Parramatta Registries, 8 October 2014.
2. At the conclusion of the hearing 8 October 2014, the mother sought, by her counsel, to press for an immediate suspension of existing parenting orders at least to the extent that they provided for time to occur between the children and their father. On the basis that an interim application remained live before the Court (the mother’s Application in a Case filed 8 May 2014) and having regard to the evidence which had been presented over the four days of trial, orders were made as follows:

Reserved judgment to be delivered at a time and by means to be advised;

Pending further order, suspend all extant parenting orders;

Pending further order the three children shall live with their mother;

The Court requests that the Independent Children’s Lawyer explain both the above orders and the process to now be followed to bring the proceedings to a conclusion including, in terms the children will likely understand, the reservation of final judgment.

1. An undertaking was given to the parties to deliver judgment as soon as practicable and if at all possible on or before 14 November 2014 and such that the suspension of the order providing for the children’s time with their father would operate for a limited period and for no more than four weeks.
2. Notwithstanding the clear explanation to the parties and particularly
Mr Mitchell that the purpose and intent of the above orders was to cease time between Mr Mitchell and the children until judgment was delivered Mr Mitchell took it upon himself to then engage in a practice of collecting the two elder children from school of a Friday and for the day (at a time when State law imposes the obligation that children attend school).
3. A further Application in a Case was then filed by Ms Mitchell seeking a restraint upon Mr Mitchell’s removal of the children from school. That application was dealt with on short notice and on an undefended basis and such orders made, (together with a costs order with respect to the Application in a Case).

# A consideration of the evidence

1. Each of the deponents were required for cross-examination. A consideration of the evidence will thus take into account the sworn evidence of the parties as filed, together with their evidence during cross-examination.
2. In the case of Mr Mitchell his treating psychologist was required and made available for cross-examination, namely, Mr T. Mr T had not sworn an affidavit in the proceedings. A report had been prepared by him which was annexed to the last of the various affidavits filed by
Mr Mitchell.
3. From the outset I make clear that all of the evidence (whether that contained within the affidavits, cross-examination or the various exhibits) has been taken into account by me. To the extent that the evidence is not recited in its totality and is touched upon in part and for illustrative purposes, I do not wish there to be any suggestion that the portions of the evidence specifically referred to within these Reasons is all that has been taken into account and that the other portions of the evidence have been overlooked or disregarded. They have not.
4. Whenever I have referred to the evidence of the parties given during cross-examination, I have endeavoured to quote the answer given as I have recorded it. I do not have the benefit of the transcript of each of the four days of hearing and have relied upon my notes. Accordingly, a quote of answers given by parties is intended to be as I have recorded the answer rather than a suggestion that it is drawn from a transcript. I am satisfied, however, that the answers that I have recorded are an accurate reflection of the evidence each party has given.
5. Ms Mitchell, as the Applicant, was cross-examined first. Ms Mitchell also, on day four of the hearing, briefly reopened her case and was available for cross-examination as regards further affidavits filed by her and her partner Ms S deposing to matters suggested to have occurred in the period between the matter going over part-heard and returning for conclusion.
6. As Mr Mitchell was self-represented throughout the proceedings I called upon the Independent Children’s Lawyer to commence cross-examination of Ms Mitchell. Mr Mitchell then also briefly cross-examined Ms Mitchell.
7. At the conclusion of Ms Mitchell’s evidence she was not significantly challenged on any aspect of her testimony and I accept her as a witness of truth.
8. A particular area of cross-examination of the mother (and her partner Ms S) was communication between Ms Mitchell and Mr Mitchell (and his mother), following release of the Family Report in early May 2014, in an attempt to seek a resolution of the matter. Whilst those discussions would, on their face, have fallen squarely within section 131 of the *Evidence Act 1995* (Cth), and thus excluded, no objection was raised. In submissions regarding the issue however, it was made clear that the purpose of cross-examination upon the topic was not to interfere with the confidentiality of settlement negotiations but to seek to place them within a context, and thus address any submission as might arise regarding the contents of those settlement negotiations being inconsistent with the mother’s position in the case generally (which might found an exemption to confidentiality of settlement negotiations).
9. What was clear from cross-examination regarding such late attempts at resolution (and which involved both Ms Mitchell and Ms S proposing a shared care arrangement in contradistinction to the case argued a trial) was:

Those entreaties represented the only real or effective communication between the parties, directly or indirectly, since separation; and

The desire of Ms Mitchell and, for that matter, Ms S to balance the two evils of the children’s ongoing exposure to Mr Mitchell’s *“rage”* and the children’s exposure to ongoing litigation between their parents (and the disadvantage, emotionally and financially, that this would represent for all).

1. I accept Ms Mitchell’s evidence that she did not, at any time and including by the settlement proposals and entreaties for resolution advanced by her, resile from her belief that the children had been and would continue to be exposed to Mr Mitchell’s *“rage”* and psychologically harmed thereby.
2. Mr Mitchell’s cross-examination of the mother touched upon some issues of significance even though his cross-examination was brief. In particular a telling portion of the cross-examination was to the following effect:

Question: You agree the children love me?

Answer: Yes.

Question: You agree the children love their grandmother?

Answer: Yes.

Question: The children love my family?

Answer: Yes.

Question: Do you think decreasing the children’s time with me is in their best interests?

Answer: Yes.

Question: Do you believe reducing the children’s time with their extended family is in their best interests?

Answer: No.

Question: Do you think the children will be happy having supervised time with me?

Answer: No.

Question: Do you like making the children unhappy?

Answer: No.

1. What I clearly take from this passage of cross-examination is the catastrophic conundrum faced by Ms Mitchell (indeed faced by the Court) in balancing the children’s competing love for their father and desire to maintain a relationship with him, against their protection from the serious disadvantage and injury they have already suffered as a consequence of that relationship and might and in all probability will continue to suffer in the future, absent any significant change in the insight and behaviour of Mr Mitchell.
2. The cross-examination of Ms S was focused upon similar issues to those put to Ms Mitchell. Again, to the extent that Ms S had involved herself in seeking to negotiate a resolution of the matter following release of the Family Report, this does not cause me any concern as to the genuineness or veracity of the concerns held by Ms Mitchell and Ms S, and underscoring the position which Ms Mitchell urges upon the Court, being the suspension of the children’s time with their father on at least an interim basis and, on a long-term basis, stringent terms and conditions attaching to any relationship with and communication between the children and their father.
3. Ms S was also cross-examined regarding an event prior to the commencement of the proceedings and which was referred to throughout the proceedings as *“the shower incident”.*
4. There is no dispute, it is conceded frankly and clearly by both Ms S and Ms Mitchell, that on one occasion the eldest child [X] was placed by Ms S into a shower, whilst fully clothed, and the water turned on drenching the child. The only area of controversy is whether the water under which [X] stood was hot, cold or warm.
5. Mr Mitchell in his evidence and in his cross-examination of Ms Mitchell and Ms S, suggested that this event represented a significant incident of *“child abuse”*. During Mr Mitchell’s cross-examination and after he had conceded his behaviour towards the children (particularly their exposure to his *“rage”*) was abusive, he was asked to reflect upon which of the *“shower incident,”* or the ongoing pattern of the children’s exposure to anger and denigration was more injurious to the children. He quickly asserted that the *“shower incident”* was the more concerning and damaging.
6. When cross-examined with respect to the *“shower incident”* Ms S responded:

He [[X]] had been going off for 20 minutes. The other children were crying and screaming. He was crying and screaming and lashing out. I did what my mum did to me when I had tantrums albeit I was four not [X]’s age. I put him under the shower. He calmed down. Since, I have used strategies, as has [Ms Mitchell] to get him not to act like that and he hasn’t.

1. Both Mr Mitchell and his mother were clear during their cross-examination, that they each viewed this incident as child abuse and as a sufficient and appropriate basis for the three month cessation of all time and communication between the children and their mother immediately preceding the commencement of proceedings. Indeed
Mrs M Senior had suggested that during that period of being withheld from their mother that the children had not asked after their mother and had seemed perfectly happy and content without spending time with or communicating with her. That evidence I do not accept.
2. At the conclusion of Ms S’s evidence she was, like Ms Mitchell, unshaken as to the evidence that she had given and I accept her evidence. I accept Ms S as a witness of truth.
3. When each of Ms Mitchell and Ms S were recalled and Ms Mitchell’s case reopened 8 October 2014, their evidence was limited to comments made to them by one or more of the children since the matter had gone over part-heard. Ms Mitchell suggested that [Y] had related to her various clear and direct conversations between she and Mr Mitchell regarding the part-heard hearing and, in particular, matters raised by the Independent Children’s Lawyer. [Y] is suggested to have concluded by saying *“Daddy said we deserve to know the truth so he told me about everything from court…”.*
4. Ms S’s evidence was directed towards comments made by [Y] to her.
5. Ms Mitchell was not cross-examined by Mr Mitchell regarding the suggested content of the comments made by [Y]. The sole issue canvassed with Ms Mitchell was whether Ms Mitchell had, in her trial affidavit [paragraph 150] referred to [Y] as being a *“compulsive liar”.* Ms Mitchell conceded that the statement had been made by her in her affidavit but denied that she believed that [Y], or any of the children, fell within that description.
6. The above question had arisen within the context of Mr Mitchell’s evidence, particularly during his cross-examination, that he believed all three children to be *“compulsive liars”.* This was asserted by
Mr Mitchell as one of the bases upon which he should not be regarded as having acted inappropriately in, for instance, having terminated the children’s time and communication with their mother for the period of three months predating the commencement of these proceedings.
Mr Mitchell asserted that the children had made certain statements to him which he had relied upon as truthful and which, other than the *“shower incident”* he now doubted.
7. There is real issue as to whether the children have ever made statements to Mr Mitchell which would or would have been a reasonable basis for him to have acted in the manner that he has. To that end it is submitted in Ms Mitchell’s case that Mr Mitchell has simply sought to apportion blame to others, such as the children and former attorneys, for his actions so as to seek to avoid attribution of culpability for those behaviours and that in doing so he has been untruthful or disingenuous. I will deal with those issues in considering Mr Mitchell’s evidence to which I now turn.
8. Mr Mitchell was cross-examined at some length. It was to be expected that Mr Mitchell might be more thoroughly and completely cross-examined by Ms Mitchell’s counsel than the somewhat frugal cross-examination undertaken by Mr Mitchell of the mother.
9. Mr Mitchell’s evidence during cross-examination was given in a hostile, sarcastic and, at times, flippant manner. For example, on one occasion when Mr Mitchell was asked to turn his mind back to certain events during 2013, he gestured with his arms and made certain noises. When asked what he was doing he responded, somewhat gleefully, *“I’m doing the Scooby Doo flashback. You know from the cartoon Scooby Doo. You’re asking me to go back and remember so that’s what I’m doing”.*
10. Surprisingly, Mr Mitchell was able to maintain such an attitude, described by me to him whilst he was in the process of being cross-examined as *“dripping with sarcasm”* throughout his time in the witness box and notwithstanding the clear warning to him that such an attitude did him little credit and potentially damaged both his credibility and his case. Whilst he acknowledged that this was so, he seemed powerless to change the manner in which he addressed questions put during cross-examination which he was quick and ready to describe as “*bothersome*” and “*tiresome*”.
11. On several occasions Mr Mitchell was clear in indicating his contempt for the proceedings, counsel for Ms Mitchell and the Independent Children’s Lawyer, and the process generally which he saw as a completely unnecessary intrusion into his privacy and that of his family.
12. The cross-examination of Mr Mitchell particularly focused upon his general attitude to parenting, the children’s mother and his means of dealing with and responding to criticism or confrontation of him by any person. Any such suggestion put to Mr Mitchell was met with his assertion that he spoke his mind clearly and whilst this upset or confronted some people that he would continue to do so.
13. In dealing with the myriad of derogatory and offensive comments that Mr Mitchell was suggested to have made to, or about Ms Mitchell and Ms S, whether to them directly, to the children or to others,
Mr Mitchell largely, but not universally, accepted that which he had said or done. However, there were significant difficulties in accepting his evidence, both as to his denial of certain actions and comments which were clearly corroborated through independent records, and as to his suggested reliance upon external influences such as legal advice.
14. Generally as regards criticisms put to Mr Mitchell that he had exposed the children (and on one occasion, on the day the parents separated, a classroom full of children, when he had attended at [X]’s school and announced loudly in [X]’s classroom to [X]’s teacher and the assembled class of children that Ms Mitchell was a lesbian and had left him) to negative and derogatory comments as well as his anger and, in Mr Mitchell’s terms, his *“rage”,* Mr Mitchell responded in a disingenuous fashion, examples of which include:

“I was not in a good headspace. I did lots of things that were not good. In fact I did things that were bad.”

 “I was far too upset and angry to listen to anyone or do anything rational.”

 “The children are around too many frowning people. They just want to make people happy. I’ll say anything to make anyone happy. You can’t believe a word any of them say.”

 “I was acting on advice of my lawyers and ignoring the interests of my children. The children’s best interests is a concept a bit foreign in this court room right now.”

 “Yeah, things I said had an impact on the kids. A bad impact. Certainly not good.”

 “They [the children] don’t need to know what between their parents. It does them no good. Sure that’s happened. But I’ve changed.”

 “Yes I’ve done some very bad things and said bad things to the children. I was angry with the world. My behaviour was disgusting.”

 “I did a lot of bad things regarding the children’s care. I said a lot of bad things to the children. Not a continuing or underlying problem though. I don’t know why everyone is making such a big deal.”

 “The children have been exposed to my anger a lot over a long time. I’ve been angry for a long time. I was angry all the time. I was a very angry man. Basically the whole time I was married I was angry.”

1. When it was put to Mr Mitchell that the Court might have some difficulty in accepting that he had, indeed, experienced the “*epiphany”* he described and had realised, at some unspecified time following release of the Family Report, that to make such comments to, or in the presence of his children and to involve them in the dispute was contrary to their best interests and thus the Court might impose some stipulations upon his time with the children, Mr Mitchell responded with words to the effect:

“If there are stipulations for me to see the children than I’ll do whatever the court says. I’ll do everything within my power to see my children. Do whatever the court requires. I’m worn down and broken. You’ve won”.

1. I take little if any comfort from the above statement by Mr Mitchell. It does not demonstrate any insight on the part of Mr Mitchell as to the impact of his past behaviours.
2. To the extent that Mr Mitchell has sought to acknowledge that he has done *“bad things”* to his children, his answers have been flat, emotionless and generally given with an arrogance and sarcasm which would suggest the contrary to that which he asks the Court to accept he concedes and understands. An example of this also arises from cross-examination of Mr Mitchell regarding his attitude towards Ms Mitchell. It was put to Mr Mitchell that he did not like Ms Mitchell to which he smiled and responded in words to the effect:

“I like her, she is nice. She’s lovely. I personally was her carer. I did everything I could for her in the last two years. I don’t dislike her. I only don’t like her when she’s trying to take the children away”

1. It was then immediately suggested to Mr Mitchell that his answer was somewhat at odds with the views he expressed of Ms Mitchell only some weeks earlier when preparing his affidavit sworn or affirmed 14 August 2014 and wherein he had said, at paragraph 9:

I certainly do not like Ms Mitchell as she has been a lying and manipulative person of the lowest character - but there is no law against not liking your ex wife... As to being nasty to her lawyers there is certainly no law or ramifications to the children in my correspondence to her lawyer. Ms Mitchell’s lawyers in my opinion, are of low moral values and they were stating the obvious. I considered this antagonistic harassment.

1. In paragraph 14 of the same affidavit Mr Mitchell continued in the same vein:

There is no law in this world that makes someone be nice to their ex wife, Ms Mitchell is deluded as to how I should be dealing with her and wasting courts [sic] time with pointless legal action including AVO’s [Ms Mitchell obtained an apprehended domestic violence order, on a police complaint, after Mr Mitchell, as he conceded during cross-examination, kicked her when she was attending to collect the children]. I no longer smoke marijuana and haven’t since separation, I am offended that a lawyer and court can try to impose themselves on an individual to partake in drug testing with some old women [sic] watching me piss in a jar or take my blood – but I have made an appointment to do so and will supply the results which will be negative to the ICL as directed when they are available.

1. Mr Mitchell’s evidence in his affidavit 14 August 2014 concludes with the submission:

I have done nothing wrong and I’m agonising over the thought of losing more time with my kids. Life is very short and these kids should have a chance to enjoy their childhoods and equal time with both parents. Being dragged unnecessarily and repeatedly through court puts everybody involved under tremendous stress and anguish. I wish Ms Mitchell would stop and think for a minute as to how she is devastating the lifes [sic] of her kids and of their family.

1. During his cross-examination and, indeed, during his closing submissions, Mr Mitchell was prepared to concede:

 I wasn’t a very good dad. I’ve done a lot of things that were not in their best interests. Have I harmed them? I agree. I let my anger cloud all of my thinking and I acted like a real dork. I was in a state of rage and the children saw it.

1. When challenged as to why he had withheld the children from
Ms Mitchell for a period of three months, notwithstanding that he had immediately prior thereto executed a parenting plan to implement a shared care arrangement and had, at interim hearing before Judge Henderson sought that the children’s time with the mother be supervised, Mr Mitchell repeatedly asserted that he had been doing nothing more than listening to the children’s complaints (they being described by the father as compulsive liars) and he now realising that he should not have done so and that he had been ill advised and “*instructed*” by his lawyers to do so notwithstanding his genuine belief and desire that a shared care arrangement should apply.
2. Mr Mitchell was warned on several occasions that the evidence that he was giving, as regards the advice provided to him by his lawyers and upon which he purportedly relied, was a waiver of his right to legal professional privilege. Mr Mitchell made clear that he had no difficulty with that evidence being before the Court and that evidence from the lawyers would corroborate his position. Indeed, he went so far as to indicate that each of the lawyers he had spoken to (being three separate lawyers from three separate firms or organisations) had “*instructed him*” to withhold time or to seek orders for limited time from the Court.
3. A subpoena was issued at short notice to the Hume Riverina Community Legal Service being the first legal service consulted by
Mr Mitchell. Their file was produced; Mr Mitchell was cross-examined with respect to portions of it and those portions upon which
Mr Mitchell was cross-examined were tendered.
4. What is clear from the material produced by the Hume Riverina Community Legal Service was that the situation as regards advice provided to Mr Mitchell was contrary to that which he suggested. Both the notes and subsequent correspondence confirming advice (very much following best practice) made clear that Mr Mitchell had sought validation of his view that the children’s time with their mother should be withheld and that he had been advised clearly of the:

Available services to assist in resolution, such as family dispute resolution;

Obligations of the Family Law Act to consider *“… the basic responsibilities of both parents… To establish a way of working together to the benefit of the children”;* and

Impact upon children of conflict and derogatory comments about or enmeshment in discussions regarding their parents and matters such as their parent’s separation and/or sexuality.

1. One further aspect of Mr Mitchell’s cross-examination which I am satisfied involved his giving evidence that was untruthful or at least disingenuous arose regarding comments made by him upon his Facebook page and in messages between he and Ms Mitchell.
2. Mr Mitchell indicated that his communication with Ms Mitchell was civil and whilst he had expressed some anger towards Ms Mitchell at an early point in their separation, he and Ms Mitchell had otherwise been able to communicate civilly and effectively. Specifically,
Mr Mitchell denied that he had ever sent any insulting or abusive text or voice messages to Ms Mitchell.
3. A number of voice messages left by Mr Mitchell for Ms Mitchell were played to him during his cross-examination. Within the messages left by Mr Mitchell, including in quite recent times and certainly during 2014, Mr Mitchell’s language, raised voice and sarcasm demonstrated clearly a negative attitude towards Ms Mitchell and his inability to be civil towards or in dealing with Ms Mitchell.
4. The above was further demonstrated by a number of text message communications between the parties, albeit dating from November 2012. Those messages (exhibit A8) commence with the statement by Ms Mitchell *“That is an inappropriate way to communicate with me. Keep to the point and refrain from abuse”.* Mr Mitchell then responds:

That is the point I’m not happy with what my kids are being exposed to your way of life disgusts me to use your words! You disgust me! You make me dry reach [sic] you have no idea about appropriate… you are laughable! The only non funny [sic] bit is that you are still around my kids

1. The evidence is littered with similar comments and reactions by
Mr Mitchell to and about Ms Mitchell, from the date of separation and until recent times.
2. When Mr Mitchell was confronted regarding his expression upon his Facebook page of his dislike of *“fags”* (there being no issue that Ms Mitchell lives in a lesbian relationship), Mr Mitchell was at pains to assert that his Facebook page suggested an entirely appropriate dislike of smoking. The context of the comments make clear that this was not that intended by Mr Mitchell in the comments made on his Facebook page and I reject his evidence. Indeed, the comments made by
Mr Mitchell upon his Facebook page make clear that he has no difficulty in sharing his dislike of Ms Mitchell and her sexuality, with the children and the world at large.
3. I do not propose to canvass the balance of Mr Mitchell’s evidence in detail. As indicated earlier I have read and considered all of the material before the Court and have taken into account the evidence of the parties given during their cross-examination.
4. At the conclusion of Mr Mitchell’s cross-examination I did not accept him as a witness of truth. Specifically I did not accept his evidence that:

He had been embracive of shared care and the importance to the children of a relationship with their mother at all times and, to the extent that anything to the contrary had been expressed, including to the Court or the Family Consultant, that this had been on the basis of “*instruction”* to him by lawyers;

His attitude towards Ms Mitchell has changed and that he no longer held negative views of her nor expressed them;

He had not discussed with the children during the part-heard adjournment of the proceedings or otherwise, the proceedings or his desire for an equal shared care arrangement;

He appreciated and understood the impact of his behaviour and especially his expression of anger, bitterness and dislike of and towards the children’s mother upon the children; and

He and Ms Mitchell were able to communicate openly and civilly with each other and resolve difficulties between them and that Mr Mitchell was ready, willing and able to speak calmly and civilly with Ms Mitchell.

1. Mr Mitchell’s mother was also required for cross-examination. Mrs M conceded that, at times, she had had to intervene to *“calm down”*Mr Mitchell when he was expressing anger or rage in the children’s presence. Mrs M conceded that she had intervened on occasions but added *“when he’d receive texts from Ms Mitchell, he would react in a non-guarded way”.*
2. When it was put to Mrs M that [X] had suggested to both his counsellor and the Family Consultant that his father had reacted angrily and demonstrated significant anger which had made him fearful and that his father continued to do so even after Mrs M’s interventions
Mrs M responded:

I can’t say it’s never happened. He usually runs at me and then walks away. I spend a lot of time with him. He does act out what he is thinking. He’s always been very outspoken. He’s the same person who he’s always been. It’s not him that has changed [being a reference to the suggested “change” of Ms Mitchell in leaving the marriage and coming out as regards her sexuality].

1. I accept Mrs M has filled a number of important roles for these children since the separation of their parents (indeed she has had a significant role to play with the children since their respective births and particularly during a period when Ms Mitchell was significantly ill and hospitalised (prior to separation) as a consequence of injuries sustained by her in hospital – and the subject of litigation in another forum).
2. In more recent times Mrs M has had a significant role to play in:

Preparing the children for school each morning when they are in the care of Mr Mitchell and ensuring that they get to school (Mr Mitchell leaving for work early in the morning and that role devolving to Mrs M);

Attending to changeovers (and collecting the children from school on weekdays that they are in Mr Mitchell’s care) on behalf of Mr Mitchell. This has had the significant benefit that the children have not been directly exposed to their parent’s “*toxic*” communication with each other at changeovers, as they have been exposed in the past (including, I accept, the children being present and witnessing both verbal and physical violence by their father towards their mother in their presence);

Engaging with Ms Mitchell and being the conduit by which communication has occurred with respect to the children. Ms Mitchell and Mrs M have begun a practise of using a communication book between them and by which they pass information relating to the children and so that Mrs M might assist her son in receiving that information although, based upon Mr Mitchell’s evidence, not completely; and

Spending time with the children as arranged between she and Ms Mitchell.

1. There are some concerns, however, that Mrs M is, understandably, partisan to her son’s cause. She is able to recognise and understand the inappropriateness of a number of Mr Mitchell’s behaviours (such as, to this date in all probability, having the children’s mother saved on his mobile phone as *“[Ms Mitchell] the mole”* and his inability to self-regulate and restrain his expression of anger). However, Mrs M would appear reluctant to acknowledge the impact of Mr Mitchell’s past behaviours upon the children or the impact of his present and ongoing behaviours upon the children. For example, Mrs M gave evidence that:

During the period of three months that the children were withheld from their mother, *“they didn’t really talk about her* [the mother]. *They didn’t ask to ring her. They seemed perfectly happy”*;

With respect to the saving of the mother’s name upon
Mr Mitchell’s phone as *“the mole”,* Mrs M acknowledged that the children were aware of this and that [Y] had seen it on her father’s phone and she then opined *“she* [[Y]] *found it funny and wasn’t distressed”.*

1. In discussing Mr Mitchell’s inability to self-regulate and control and restrain his rage she described, *“He flies off. He says whatever is in his head. It’s just how he’s always been. He apologises later if he said anything wrong”.* This would not, however, sit comfortably with acknowledging the inappropriateness of such behaviours nor the ability to effectively prevent such situations arising and diffusing them when they do arise. The difficulty being that once Mr Mitchell has *“said whatever is in his head”* the children have been exposed to their father’s *“rage”* and are harmed by it (as was conceded by both
Mr Mitchell and Mrs M as a consequence of that behaviour).
2. By and large I accept the evidence of Mrs M as truthful, although I retain a concern that Mrs M’s evidence was, at times, less than candid and was deliberately so in the full awareness of the impact of
Mr Mitchell’s past behaviours upon his children and his case.

## The father’s psychologist Mr T

1. Mr T had provided a report with respect to the father and which report was annexed to one of Mr Mitchell’s affidavits. Within that report Mr T made clear that Mr Mitchell had attended four appointments in total, commencing in March 2014. No future appointments are identified.
2. Mr Mitchell is described within the report as:

When talking about his ex-wife in the first session Mr Mitchell became very black and white in his thinking and sarcastic. It is the opinion of the writer that Mr Mitchell was very hurt and confused by his ex-wife’s decisions and this manifested in frustration, anger, and an outpouring of emotion. It is also the opinion of the writer that there was no malice in Mr Mitchell’s intentions but again a confused expression of hurt and insecurity.

1. In cross-examination counsel for the mother put to Mr T that an example of such outpouring, in the presence of the children, was to describe the mother as *“a disgusting Leso”.* Mr T responded with words to the effect *“that’s labelling. I don’t catastrophise. At times he lets his emotions get the better of his mouth”.*
2. Similarly, it was put to Mr T that the father’s *“outpouring of emotions”* manifested itself in his referring to the mother, to and in the presence of the children, as a *“homo, slut, retard, disgusting bit of shit and brain injured lesbian”*. Mr T conceded that the children had, in all probability, been exposed to such language and comments with respect to their mother, whether referred to as labelling or otherwise, and it would be injurious to the children.
3. Mr T otherwise conceded from that which was put to him in the witness box and that which had been related to him by Mr Mitchell that *“there is evidence that at times he* [the father] *is not able to regulate his emotions”.* Mr T did go on to express the view that certainly in the third and fourth (penultimate and last) sessions between he and Mr Mitchell, that he believed that Mr Mitchell had begun to “*take some ownership for these past behaviours*”, to develop insight into the inappropriateness of such behaviours and was beginning to demonstrate capacity for change.
4. Mr T then described, when questioned as to Mr Mitchell’s propensity to communicate in a flippant and sarcastic manner, that in his view
Mr Mitchell *“when threatened goes into fight mode. It’s an inability to shut his mouth. It is perceived as problematic but it is how he expresses himself”*. It was also conceded that Mr Mitchell was *“incredibly angry towards his ex-partner”.*
5. Similarly, in response to questions from the Independent Children’s Lawyer, Mr T conceded that the behaviours demonstrated by
Mr Mitchell and as related throughout the evidence, would have been instances of Mr Mitchell’s inability to restrain himself from speaking his mind and that the children’s exposure to such comments would have been hurtful and/or harmful to them.
6. In submissions by both the Independent Children’s Lawyer and counsel for Ms Mitchell, I am asked to dismiss Mr T’s evidence. I am not prepared to do so entirely. There are portions of Mr T’s evidence which are, frankly, refreshing such as his acknowledgement that parents, in most separated families, are likely to discuss their separation and issues relating to the resolution of disputes with their children. Indeed, there are many circumstances where this would be entirely appropriate and to fail to do so may be injurious and confusing to the children.
7. Similarly, Mr T’s reference to various propositions put to him as being a *“catastrophisation”* of circumstances would appear apt. This, for example, is so as regards suggestions that the children might be aware of the proposals of their parents for their future care which awareness would, in many circumstances, be entirely appropriate and healthy.
8. The concern I have with aspects of Mr T’s evidence, however, arise from the brevity of the therapeutic intervention and concerns as to whether the intervention has been therapeutic or has achieved or could sustain any lasting change in the behaviour and behaviour modulation of Mr Mitchell. I am not satisfied that it would, or could have, or has.
9. Mr T was frank in conceding the behaviours of the type described to him during his cross-examination (vile and repeated denigration of
Ms Mitchell and her partner) would be and were damaging to these children and that to have exposed the children to his extreme dislike for Ms Mitchell and Ms S and his *“rage”* was *“contrary to their well-being”.* Indeed, Mr Mitchell’s evidence persuades me it has.
10. I accept the above aspects of Mr T’s evidence without reservation. However, from the totality of Mr T’s evidence I have some concern that Mr Mitchell has:

Been less than frank, candid or complete in that which he has disclosed to Mr T;

Failed to make clear or establish any therapeutic goals to be achieved from his counselling with Mr T;

Attended appointments with Mr T largely for the purpose of “*ticking a box*” of attending counselling. It is to be remembered that Mr Mitchell had been ordered to attend counselling as arranged by the Independent Children’s Lawyer. Mr Mitchell conceded that he had ignored all such correspondence that he had received from the Independent Children’s Lawyer and ultimately sourced his own counsellor. Mr Mitchell was unable to give any clear indication of why he had attended to arrange this counselling and it would appear to have been arranged by Mr Mitchell for opportunistic and superficial reasons; and

Failed to obtain any therapeutic or long-lasting benefit from his limited sessions with Mr T. Mr Mitchell has arranged no future appointments and was clear in his evidence that he did not see any need for any ongoing intervention or assistance. A large purpose for the attendances would appear to be a desire on the part of Mr Mitchell to establish, through the counsellor, that he is not suicidal (as a general practitioner had opined of Mr Mitchell in notes comprising one of the exhibits), did not need any assistance in modification or regulation of his behaviour and was otherwise (a portion of Mr T’s evidence which I disregarded as it falls within the category of “*championing*”) a “*capable and caring father*” and that this should be manifested as an equal care arrangement (being well beyond the expertise or qualification of Mr T who has had limited meetings with
Mr Mitchell and none with Ms Mitchell or the children).

## The children’s counsellor

1. During the course of these proceedings the children were referred by their general practitioner for assessment and treatment by a psychologist. The children were referred to such assessment and treatment on the basis of a Medicare funded mental health care plan (to allow bulk billing) but on the basis of concerns as to the children’s behaviour and emotional health. This sadly related to the two eldest of the three children.
2. As a consequence of this referral the children have attended a number of appointments with a clinical and forensic child psychologist Ms B.
3. Ms B had prepared a report, at the request of the Independent Children’s Lawyer, dated 20 September 2014 (exhibit ICL2). Ms B attended for cross-examination.
4. Ms B had met with [X] and [Y] but not with [Z]. Issues with respect to [Z]’s present emotional or psychological health were addressed, instead, through records produced from [Z]’s preschool. These records suggest, for example, that [Z] is:

…Quiet [sic] sensitive to noise, he is often observed sitting down in a squatting position covering his ears.

Appears to like solitary time often.

[Z] does not use a lot of verbal communication at childcare although he has been observed talking quite a lot when Mum or Dad collects him.

1. The matters contained within those notes consistently relate similar observations of [Z], and those observations were, in due course, put to the Family Consultant who completed the Family Report, more so than Ms B.
2. Ms B’s report described of [X] (page 2):

[X] presented as an emotionally withdrawn child who was experiencing anxiety as a direct result of the dispute between his parents regarding contact and care arrangements.… Despite his anxious and withdrawn persona he was well able to express himself to the examiner without any difficulty as his sessions progressed. He also seemed to be somewhat influenced by his younger sister [Y].

1. When [X] was asked to draw a picture of his family the following is reported (page 2):

According to [X], he was unable to decide which family to draw: his mother’s or his father’s which clearly showed his perceptions of not only ‘two families’ but also a degree of confusion around the notion of where he ‘belonged’ or where he thought he ‘should belong’. He displayed high awareness of the conflict which existed between his mother and father. He described his mother to be neutral within the conflict and saw s his father as ‘being mean to Mum’. He considered it to be unfair that his father did not have ‘50-50’ care and felt compelled to have his mother understand this fact. He also qualified that his father was the one who wanted the 50-50 care however claimed that his father was ‘no longer mean’ to Mum and that ‘dad used to be mean to Mum’ even though he is not any more. He also commented that he thought his mum ‘expects him still to be mean’ even although the described ‘mean’ behaviour was not occurring in the present time. The source of his perceptions about ‘mean behaviour’ and how he concluded this remained unclear.

1. Overall Ms B reported of [X]:

He was assessed to be suffering from anxiety as a direct result of the conflict between his parents regarding care arrangements however claimed that it was his father who had declared the current arrangement to be ‘unfair’ and not mum.

1. With respect to treatment Ms B concluded:

Following his sessions he expressed diminished need to attend and seemed to display anxiety levels which had decreased from severe to mild. He persisted to believe however that the care arrangements were the problem of him and his sister and that dad should have ‘50-50’ care because it was ‘unfair’.

1. With respect to [Y], Ms B’s report commences:

[Y] presented as a very restless girl who had been engaged in lying, stealing and aggressive behaviour. Her behaviours seemed directly related to the matrimonial issues due to the fact that she considered that her mother was preventing her father from granting 50-50 care. She also saw this dilemma as being her problem because her father had allegedly discussed this with her. She also disclosed that her father had stated to her that she was not allowed to discuss the matter with anybody. This generated feelings of confusion and tension which in my view gave rise to aggressive behaviour. The lying and stealing seems to had [sic] been a rebellious response to her mother for not granting her father 50-50 care she perceived that he should have.

1. With respect to the treatment provided to [Y], Ms B opined:

She continued to claim that her father ‘used to be mean to her mother’ however this was not happening in the present time. She claimed that she felt sorry for her father because he did not have 50-50 care and that he was somehow victimised by her mother even although [sic] she did not use those words… This seemed like a heavy weight upon young shoulders.

1. Ms B concluded:

 It appears that both children have been influenced by their father’s care preferences, and as a consequence of this feel they have a role to play in order to have those needs met. This appears to have induced significant levels of agitation and anxiety within both of them, which remains evident after treatment…

Both children openly expressed the knowledge that the father had been ‘mean’ to their mother however this was not happening in the present time.

1. Finally Ms B concludes:

The children’s perceptions of their parents’ interactions are negative which is directed from their father to their mother from the recent past, which is a dynamic which they do not perceive to have been reciprocated by their mother to their father.

Both children seemed very aware that the parental dispute concerns the difference of only two days care from either parent.… It would appear that more emotional influence has been sourced from the father than by their mother according to [X] and [Y] in their disclosures.

1. In her cross-examination Ms B expressed the view that a continuation of such *“emotional pressures”* upon the children *“can induce mental health concerns such as anxiety, putting others ahead of self”* and that both children were demonstrating *“some anxiety and emotional withdrawal”.*
2. As regards the “*views”* reported of both children regarding equal time (and I have used the term “*views*” in light of Mr Mitchell’s assertion that Ms B’s report corroborates his evidence that the children genuinely wish and desire an equal time arrangement) Ms B was clear:

*“At their ages, nine and seven, they don’t have the emotional maturity to sort out what they’d like and what the parent wants”*; and

Both children expressed directly to her what they believed and perceived their father wanted and described their expression of “*views”* in the context of *“they advocated for it and seemed compelled to have it based on the communications they had had with their father”.*

1. In due course and as part of dealing with the legislative pathway I will address the children’s views. Suffice to say at this point that little, if any, weight could be placed upon that which is opined by Mr Mitchell as the children’s “*view*” or support for equal time. They have neither expressed a desire for an equal time arrangement (as opposed to expressing their father’s desire for it and their desire for it to be achieved for his benefit) nor formulated and expressed, in the evidence available, a genuine view articulated and expressed by them.
2. When Ms B was asked for her opinion as to whether the children had considered or understood the consequences of spending more time with their father, being that they would spend less time with their mother
Ms B responded *“I’m not sure they’d given it any thought. They’re very focused on unfairness to their father. They understood the unfairness based on discussions with their father”.*
3. The final matter touched upon by Ms B during her cross-examination related to her view of whether the children, as Mr Mitchell had asserted, were *“compulsive liars”.* Ms B rejected this descriptor and described that to the extent that the children and, in particular [Y], were engaging in untruthful statements or lies that this most likely arose as consequence of confusion regarding the care arrangements, exposure to conflict between their parents and their relative immaturity in seeking to find a means of dealing with, expressing and extracting themselves from this conflict.
4. Similarly, Ms B, when questioned as to the impact upon the children on a long-term basis, of repeated exposure to negative and derogatory comments regarding one parent, particularly when those comments were made by the other parent, expressed the view that:

It is less than desirable. Both parents need to be aware of the implications for the future mental health. It could be called abusive. The mental health implications are very serious with chronic and severe consequences for these children. I would have serious concerns for their mental health especially in their teen years if it continued.

1. It is to be noted, as was conceded by Ms B in response to questions from Mr Mitchell, that the children had reported to her that the father’s *“mean comments”* had recently ceased. However, I am concerned that the potential for their renewal, if they have in fact ceased, is large.

## The Family Report

1. The final evidence to be considered is the Family Report of the Family Consultant, Ms D.
2. Ms D had the opportunity of meeting both parents and the three children. Ms D was cross-examined with respect to her report and, at the conclusion of that cross-examination, her evidence remained unshaken and, indeed, strengthened.
3. The history given to the Family Consultant by Ms Mitchell was entirely consistent with her evidence. Thus, to the extent that
Ms Mitchell’s assertions are relied upon by Ms D, I accept that they are established in evidence (see for example *Makita & Sprowles* (2001) 52 NSWLR 705).
4. As regards interviews with Mr Mitchell, Ms D has noted (paragraph 22)

Mr Mitchell said that he does not appreciate being told by the Court that he needs to attend appointments with a psychologist.… He does not feel he should be required to “jump through hoops”… He said he does not want Ms Mitchell telling him “what to do” and that he will not do anything that she “or her lawyer” tell him.

1. At paragraph 25 of the report Mr Mitchell, who did not challenge the accuracy of anything contained within the report and particularly not those portions suggested to report his comments, is suggested to have said:

…he limited, and later stopped the children from spending time with Ms Mitchell because he genuinely did not feel that Ms Mitchell could cope with having the children for lengthy periods on her own.

1. The above assertion, which I accept is accurately reported by Ms D, is entirely at odds with Mr Mitchell’s evidence that he had, at all times, genuinely desired a cooperative, equal time arrangement between he and Ms Mitchell but had acted on the “*instructions*” of his lawyers to propose far more limited or no time.
2. Of the children Mr Mitchell is reported as follows (paragraph 28):

Mr Mitchell said that [X] and [Y] are aware that there are Court proceedings but he has not informed them of such directly [this is entirely at odds with that stated by the children to Ms D and to Ms B]. He said that [Y] is a child who likes to be involved in everything and likes to hear about adult issues and she may be listening into adult conversations. He said [Y] seems to think that he wants to hear negative stories about her mother and Ms S but he said that is not the case.

1. In interviews [X] is reported by Ms D in the following terms (paragraph 37):

When asked about his parents’ relationship [X] said “Dad hates her (Ms Mitchell)”. He said he knows this because Mr Mitchell has told him so. [X] said that Mr Mitchell often says “mean stuff about Mum and about [Ms S] (Ms S)”. When asked, [X] indicated that that occurs currently [the report interviews having taken place 5 March 2014].

1. At paragraph 38 [X] is reported as follows:

[X] said about [Y] “she tries to help dad to feel better” and “she just says forget the stupid cow”. When repeated back and asked to clarify [X] said that [Y] is referring to Ms Mitchell as “the stupid cow”. [X] said [Y] says “other really mean stuff that I don’t like” about Ms Mitchell. [X] said “I don’t think she ([Y]) likes saying it” (mean stuff about Ms Mitchell) “but she just says it to get Dad to be happy again”.

1. Of concern at paragraph 39 of the report it notes:

[X] said that Mr Mitchell had also told him “to do mean things” to Ms Mitchell and Ms S. When asked to clarify, he said “like punch [Ms S] in the face” and “tell her the “fuck” word”. He said, “I don’t want to do that”. He mentioned another occasion when Mr Mitchell had told him to “to kick her (Ms Mitchell)” and “other really mean stuff”.

1. In contradistinction [X] was clear to Ms D that his mother does not engage in such behaviours nor sought to enlist him or any of the children in aid of her cause.
2. In interviews with [Y] (then aged 7 years) Ms D notes (paragraph 43):

When asked if she recalled the circumstances surrounding her parents’ separation, [Y] said “I remember I was crying and wanted to go with her” (Ms Mitchell). She said “I was living with Dad and it was a long time” before she spent time with Ms Mitchell.

1. The above would appear to cast some doubt upon the assertion of
Mr Mitchell and Mrs M that during the period when the children’s relationship with their mother was terminated and withheld that the children were *“perfectly happy”* and *“doing fine”.*
2. At paragraph 44 of the report Ms D records:

[Y] said about Mr Mitchell “he tells me funny stories about Mum and [Ms S] and he says mean things about them”. When asked when that last occurred, she said “last week when I was with him”. She said that when this occurs “I feel sad”. She repeated that she does not say anything about it because she does not want Mr Mitchell to get into trouble.

1. Similarly, [Y] confirmed that her mother did not engage in similar behaviours, regarding negative and derogatory comments, as her father.
2. As at the date of the report interviews 5 March 2014, [Y] confirmed that her father *“gets angry”.* With respect to her views (in paragraph 47) Ms D records:

[Y] said that she feels close to her mother and father and wants to spend time with them both, “but I don’t want him (Mr Mitchell) to say mean things about Mum”. She said that she feels close to [Ms S] (Ms S) “about the same as Mum and Dad”. [Y] said that Mr Mitchell had told her to inform the Family Consultant in interview that she wants to see her parents the same amount of time.

1. [Z] was not formally interviewed but all three children were observed with their parents. Nothing of great concern is raised as regards observations.
2. The evaluation portion of Ms D’s report commences with the statement (paragraph 49):

This is a serious and concerning matter.… That these very young children have been exposed to Mr Mitchell’s strong negative emotional responses to his post separation situation for such a considerable period of the young lives is highly concerning.

1. At paragraph 50 of the report Ms D opines:

It is apparent that Mr Mitchell is unable or unwilling to protect the children from ongoing exposure to his strong negative views of Ms Mitchell and her partner, Ms S. In addition, from the children’s accounts when they are spending time with them [sic] he purposefully and actively directs them to speak rudely and disrespectfully to their mother and, on occasion, to physically hit out at her and her partner. Concerningly, [Y] feels she needs to denigrate Ms Mitchell to Mr Mitchell to help him to feel happy. That this is occurring is concerning on a number of levels which includes boundary and role reversal issues (in that the child feels the need to comfort the parent). [Y] may also feel that to keep herself emotionally safe when in Mr Mitchell’s care she needs to appear to align with him against her mother. That [X] is required to witness [Y] denigrating his mother to his father increase the detrimental impacts on him. [X] and [Y] are very conscious of their father’s expressed anger and are fearful of it being directed towards them.

1. Ms D then relates the children’s behaviours and presentation to their exposure to the behaviours reported by the children and, in cross-examination, conceded by Mr Mitchell. Ms D opines (paragraph 52):

… they [the children] have suffered emotional harm and… there is a high likelihood that they are at risk of suffering ongoing emotional harm when spending time with Mr Mitchell. To protect the children from further harm it is the Family Consultant’s opinion that the current time arrangements with Mr Mitchell be immediately suspended.

1. In addressing the difficulty of balancing the children’s need for protection from emotional harm as a consequence of Mr Mitchell’s uncontrolled and unregulated emotional response and their relationship with him the Family Consultant, Ms D opines:

The children’s relationship with Mr Mitchell and significant extended paternal family members, particularly Mrs M, also need to be considered. These relationships need to be supported and protected but not in the Family Consultant’s view prioritised above the children’s emotional safety and security needs.

1. A final recommendation was not advanced by Ms D on the basis that the immediate concerns as to the children’s exposure to emotional harm required address together with the gathering of further evidence, particularly, a clinical psychological assessment by Mr Mitchell.
2. During her cross-examination Ms D highlighted the negative consequences for these children of repeated and ongoing attacks, verbal or otherwise, upon a significant caregiver, in this case Ms Mitchell. The potential for such denigration to impact upon the children’s sense of self, self-esteem and self-confidence and future emotional well-being was, again, highlighted.
3. Ms D was clear in expressing her view that the children’s exposure to such emotional harm to date had already impacted negatively on all three children and particularly, [Y] who was particularly enmeshed with Mr Mitchell and to some extent responsible for his emotional support. Ms D expressed her view that this had impacted [Y]’s resilience.
4. The children’s warmth and affection for their father and, indeed, their compliance with his demands of them (such as [X] being rude to his mother and Ms S and [Y] making negative comments about her mother) was opined as entirely consistent with the children being fearful of displeasing their father. Accordingly, Ms D was also of the view that little if any weight could be attached to anything expressed by the children regarding a shared care arrangement particularly as Ms D was of the view that any view as expressed by the children was a reflection of their father’s wish and desire and the children’s compliant repetition of same.
5. Ms D was very pessimistic as to the father’s capacity to change or to contain himself whilst with the children. From my observation of
Mr Mitchell in the witness box I share that pessimism. On that basis Ms D expressed the view, as regards future arrangements, that:

If there is no containment of his emotions then it is hard to make any recommendation. Maybe overnight one night or one day for the day would work. It would need to ensure that Mr Mitchell was not a predominant caregiver and had less capacity to have control over the children.

1. Mr Mitchell put to Ms D that the children desired more time with him and, in fact, desired an equal time arrangement. Ms D expressed the view clearly *“I think they love you. I’m not confident they want more time with you”.*
2. Finally, Mr Mitchell put to Ms D a question to the effect *“the child abuse I’ve done in the past I admit it was verbal”.* Ms D responded emphatically *“it was verbal and emotional”.*
3. I accept Ms D’s evidence.
4. Ms D has, appropriately, not advanced recommendations for the children’s final care arrangements. It would have been entirely unsafe for her to do so within the context of the evidence as it stood at the time of her interviews. Her suggestions regarding the urgent and interim intervention have been highly influential and of assistance and have moved the matter to as expeditious a conclusion as was possible.

# Submissions

1. The Independent Children’s Lawyer submits that the presumption of equal shared parental responsibility cannot apply as the father has conceded both family violence and abuse. The Independent Children’s Lawyer accurately and appropriately described this as *“a campaign of angry and bitter behaviour, appalling and unrelenting abuse. What is appalling is that his behaviour has used the children as a vehicle for his anger”.*
2. In furtherance of the above the Independent Children’s Lawyer submitted that the father’s behaviour would obviate against any possibility of future parental alliance and would clearly support the children’s best interests being identified and met through their living with Ms Mitchell and Ms S and, further, would obviate against any order other than for Ms Mitchell to have sole parental responsibility for the children.
3. With respect to Mr Mitchell’s position that an equal shared care (or shared care) arrangement should apply, the Independent Children’s Lawyer identified the relevant practical impediments to same as:

The complete absence of communication or effective communication between the parents;

Such communication as has occurred of recent times has occurred between the mother and paternal grandmother and without the father being a party to such communication;

The father’s proposal contemplates a continuation of no communication or no constructive or effective communication;

The father is clear in expressing his hatred and disrespect of the mother;

[X] and [Y] both understand clearly that their father hates their mother;

The father was clear that he does not wish or desire any ongoing interaction or communication with the mother and had suggested in his evidence that if he was aware of a school function that Ms Mitchell was intending to attend that he would not attend;

Given the father’s attitude towards the mother it was impractical and undesirable for an equal or substantial and significant time arrangement to operate particularly as the children would be exposed to ongoing conflict which has already been seriously deleterious and disadvantageous to them; and

The father’s hortatory behaviour was, by and of itself, injurious to the children’s emotional and psychological health and functioning.

1. The above factors were also clearly identified as connecting with the opinions expressed by both Ms B and Ms D in concluding that the children’s present emotionally disturbed and anxious behaviours are inextricably linked to the harm they have suffered through the father’s *“rage”* and *“hatred”* as expressed by him consistently since separation. This has led to the point where both children are acting out with behaviours which will continue to disadvantage them and potentially signal a risk of future psychological/psychiatric harm as they enter their adolescence.
2. It was submitted that whilst [Z] is not presently expressed by either
Ms B or Ms D to be acting out behaviours reflective of emotional abuse that this must be seen within the context that:

[Z] was not observed or interviewed by either; and

[Z]’s behaviours as described in his childcare notes would suggest some reaction to anger and hostility and with the real potential, as and if those behaviours continue, that they will further impact upon him.

1. The Independent Children’s Lawyer submitted that there were serious concerns regarding the enmeshed emotional dynamic within the father’s home and that at the heart of the emotional harm already suffered by the children (and the risk of which is real) is the father’s incapacity to separate his thoughts and feelings from those of the children. This was particularly demonstrated by the father’s propensity to blame his reactions upon the actions of others (i.e. he reacts to Ms Mitchell rather than being responsible for his own emotions) blames his legal advisers for his past actions, (which is clearly contradicted by the material tendered) and the father’s propensity to “*justify*” his behaviour on each occasion as suggested by or reliant upon advice of others. All of these behaviours are suggested to demonstrate a significant lack of insight on the father’s part and thus the inability of the Court to be satisfied that the risk of further harm to the children as a consequence of the continuation of such behaviours is other than real.
2. The Independent Children’s Lawyer highlighted, and I accept, the evidence points towards the long-term implications for the children if emotional abuse of the type which they have suffered to date continues, including:

Having no or ill-defined boundaries in relationships;

The reversal of the emotional role between parent and child;

The impact upon the children’s self-esteem and self-confidence;

The children demonstrating symptoms of anxiety; and

[Y] acting out aggressively and through acts of dishonesty.

1. As regards the children’s suggested *“views”* in support of shared care, the Independent Children’s Lawyer highlighted the evidence of Ms B and that reported by Ms D at paragraph 47 of the Family Report as supportive of the proposition that (in the terms of Ms B’s evidence), *“at no time do they own these wishes as their own. They push their father’s barrow”.*
2. The Independent Children’s Lawyer acknowledged and accepted the children’s love for their father and desire to continue pursuing a relationship with him. However, it was identified clearly that this must be set against and balanced with the children’s desire to continue their meaningful relationship with their mother (and Ms S) and their need to be protected from the father’s emotionally abusive behaviours.
3. The real conundrum, indeed the catastrophic conundrum, which has been created through the father’s behaviour and by no other circumstance, is the reality that these children crave a relationship with their father and would be emotionally harmed if that relationship were terminated completely. The children would perceive that circumstance as catastrophic and on the basis of that perception it would be, at least potentially, as catastrophic as a continuation of the children’s present circumstances and their exposure to the father’s uncontrolled and unregulated rage and hatred of the mother (and Ms S).
4. As regards Mr Mitchell’s assertion that his behaviours have now changed entirely and he has seen the “*error of his ways*”, the Independent Children’s Lawyer pointed to those aspects of the evidence which would sit uncomfortably with, if not contradict that proposition, including:

The father’s anger towards his lawyers, the mother, the Independent Children’s Lawyer and the Court when care arrangements for the children were reversed by interim orders 25 September 2013. The father, when questioned as to the basis which he perceived that change was founded upon, was unable to provide any self-reflective response;

The father’s refusal to engage with any of the orders made by Judge Henderson including with respect to family counselling or therapy as arranged by the Independent Children’s Lawyer or drug testing;

The father’s failure to respond to the criticisms of him raised by the Family Report (what was appropriately described by the Independent Children’s Lawyer as a *“shocking document for any parent to read suggesting, as it did, the immediate suspension of the time”*); and

The father having failed to search out any long-lasting or effective therapeutic intervention to assist him with his problematic and concerning behaviours, particularly his inability to self-regulate his emotional responses and acting out. Indeed the father only engaging with services which supported his position that he was *“misunderstood”* and had a *“quirky sense of humour”.*

1. It was submitted that the father’s *“anger”* still effected his behaviour with the children 12 months after separation and, on all of the evidence, in every aspect of his life. While some change may have occurred (certainly the children report to Ms B that since March 2014 there has been a diminution in the father’s behaviours), the father’s behaviour in exposing the children to his verbal abuse, rage and hatred was, in the words of Mr T *“careless and reckless”.*
2. Ultimately, the Independent Children’s Lawyer submitted, and I accept, that the father’s behaviour had not ceased but it had simply been *“reframed”* so as to engage or enmesh the children, *“carrying the flag for the father’s position”* of equal time. This is consistent with the manner in which the children are reported by both Ms B and Ms D to have discussed their “*views*”. I accept, as is submitted by the Independent Children’s Lawyer, that this reflects an inability by the father to separate his views, needs and interests from those of the children.
3. As a consequence the Independent Children’s Lawyer submits that arrangements should be made for the children to spend time with their father each alternate weekend, from such time on Saturday as the father completes his regular Saturday morning [sport omitted] commitment until Sunday evening. This would allow the children, as Justice Baker had been one to describe, to experience their father “*warts and all*” whilst balancing against the stress and distress that would be caused to the children through a complete termination of their relationship with their father. Further, it is submitted by the Independent Children’s Lawyer that this would allow the children to continue a relationship with their father which would not overburden them and which would obviate against their father being mythologised as the victim of the mother and/or the Court if he were absent from their lives.
4. The Independent Children’s Lawyer does not support, indeed it would be inconsistent with a body of High Court and Full Court authority, ongoing and perpetual supervision of time, this being too stressful for the children, not practical on a long-term basis and thus not sustainable.
5. The Independent Children’s Lawyer’s position is submitted, consistent with Ms D’s evidence, as providing for *“short chunks of time to maintain a connection with their father, whilst allowing a stable base for the children with their mother who would be able to settle them, debrief with them between visits and allow the children’s behaviours to be normalised”*.
6. The mother’s position was not dissimilar although going somewhat further in seeking to immediately suspend and to continue the suspension of time between the children and the father until certain therapeutic steps were taken by him and a further judicial assessment undertaken of the “*safety*” of the father’s reintroduction to the children.
7. The mother’s position was, I accept, aptly described as *“she just wants the abuse of her children to stop”.*
8. The mother’s counsel described the father’s behaviour as *“a campaign against the mother, a campaign of emotional and psychological abuse of the children wherein the children are being recruited as co-conspirators of the father”.*
9. The mother’s submissions eruditely summarised and connected the father’s past behaviours and his decrying of responsibility for them (blaming them upon others such as the children and his past legal representatives) as supporting the proposition that the Court would have no confidence in the father’s capacity to change. There is some particular merit to this submission, noting that, until recently, the father has steadfastly maintained that the children would be at risk in spending time with the mother and particularly following the *“shower incident”.*
10. The mother’s counsel highlighted a number of areas of the father’s evidence wherein it was submitted that the father could not be believed. I accept that this is so with respect to each, including:

The father’s suggestion that the mother had *“abandoned”* the children and *“abandoned the children to his care”* at separation;

That the father had withheld the children from the mother on the advice of his lawyers;

That the mother now or at any time in the past posed a risk to the children (and lest it be unclear I do not accept that any such risk has been established at any time including but not limited to the *“shower incident”*);

That the father’s Facebook postings and other comments did not reflect a homophobic attitude by him at least as regards the mother. The father’s propensity to use offensive comments and insults with respect to the mother connected with her sexuality has been clearly demonstrated; and

That the father’s behaviour had changed and significantly changed. The father was unable to identify any particular event, incident, reflection or time at which his suggested “*epiphany*”, of recognising and realising the harm he was doing to the children and thus consciously determining to cease those behaviours, had occurred. The father was unable, other than in broad, flippant and sarcastic terms, to identify which of his behaviours had harmed the children or how those behaviours had harmed the children.

1. One aspect of the evidence particularly touched upon by submissions in the mother’s case was the failure by the father to call evidence from his new partner (notwithstanding that she was present for a large part of the hearing and sitting in the courtroom). The *Jones & Dunkel* inference that would be drawn against the father in the absence of such evidence was explained to him clearly at the commencement of the trial and at various points during the trial.
2. The father conceded in his evidence that he and his partner had separated on a number of occasions. Mrs M corroborated this although limiting the separations to *“just overnight”.* Thus the relationship between the father and his current partner would appear to also be somewhat tempestuous.
3. Mr Mitchell asserted that the children enjoyed a close and warm relationship with his partner and her two children. However, nothing is known of those relationships and nor was the father’s partner involved in Family Report interviews (although the relationship appears to have been on foot, albeit in its early days, at the time of those interviews).
4. As Gibbs ACJ, Stephen, Mason and Aitken JJ opined in the High Court’s decision of *Brandi v Mingot* (1976) 12 ALR 551(at pages 559-560) and as quoted with approval by Campbell J in *Manly Council v Byrne and Anor* [2004] NSWCA 123 at 51:

... if a witness is not called two different types of result might follow. The first is that the tribunal of fact might infer that the evidence of the absent witness, if called, would not have assisted the party who failed to call that witness. The second is that the tribunal of fact might draw with greater confidence any inference unfavourable to the party who failed to call the witness, if that witness seems to be in a position to cast light on whether that inference should properly be drawn.

1. I am satisfied that each of those inferences should be drawn, namely:

That the evidence of Ms H would not have supported and may have contradicted the evidence of Mr Mitchell particularly as regards his suggested recent changes of behaviour; and

That the relationship between Mr Mitchell and his partner is anything but stable and thus anything of great benefit or assistance to these children either as regards the father’s partner or her children.

1. Ultimately, it was submitted by the mother that her position of advocating for no time between the children and their father was a reluctant conclusion based upon:

The father’s inability to comply with any past order of the Court and thus pessimism that he would comply in the future (this was to a large extent consistent with his behaviour following the reservation of judgment);

The father having failed to demonstrate any shift in the intensity of his attitudes towards the mother at any time since separation and thus the Court, upon accepting, as the father concedes, that the children are being harmed and abused by their father, that there would remain an unacceptable risk of this into the future; and

The father had not demonstrated any insight into his behaviours upon the children other than his bland and sarcastic concession that his behaviour had been *“bad”* and his failure to take any action to address or produce lasting change in his behaviour (let alone the absence of insight as to the need for that change).

1. The final issue touched upon by counsel for the mother was the application for an interim and immediate suspension of time. It was submitted that this would be justified based not only upon the totality of evidence, but, particularly those portions of the evidence arising from the father’s suggested discussion with the children (which it is to be noted the father did not dispute in his cross-examination and thus, by reference to *Browne & Dunn* (1893) 6 R 67 (HL) I accept as having occurred) and thus the propensity of the children to be emotionally harmed through their enmeshment with the father and further discussion with him during the adjourned period, prior to delivery of judgment.
2. The father submitted that a shared care arrangement, equal or as a continuation of the presently ordered arrangement, would best meet the children’s needs.
3. The father agreed and conceded that his behaviour had harmed the children, that he had not been a *“good dad”* and that he had acted in a manner that was contrary to the children’s best interests. Those aspects of the father’s submissions are set out above.
4. The father submitted that the parents were capable of communicating and resolving issues. However, the only material put in support of this proposition were the limited entreaties from Ms Mitchell and Ms S following release of the Family Report and within the context described above.
5. The father then urged upon the Court orders for equal shared parental responsibility and shared care and as:

He had conceded that he *“had not done the best job”*;

Whilst he had *“let rage cloud my* [his] *judgement”* had sought counselling and was now “*a different person*” (which proposition I do not accept); and

*“The only thing that upsets me* [the father] *now is the prospect of not seeing my kids”.*

1. Mr Mitchell’s submissions were brief and did not specifically connect with any significant portion of the evidence. Mr Mitchell did, however, urge that I should accept his evidence as truthful and frank. Regrettably, as would be clear from the above discussion of evidence, I reject that submission.

# Legislative pathway

1. As section 60CA of the Act reminds, the Court must in all that is done in parenting proceedings, treat as paramount the best interests of the children the subject of the determination.
2. The Court must then turn to section 60B which sets out the objects and principles. Whilst the objects and principles do not form part of the substantive law to be applied to the facts and circumstances of any case they assist the Court by informing the manner in which those provisions should be applied and interpreted and creating, as it were, philosophical considerations which the Court must keep in mind and to be achieved where possible and save where it is demonstrated to be contrary to the children’s best interests.
3. The objects and principles provide as follows:
4. *Objects of Part and principles underlying it*
	* + 1. *The objects of this Part are to ensure that the best*[*interests*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#interests)*of*[*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*are met by:*
				1. *ensuring that*[*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*have the benefit of both of their*[*parents*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent)*having a meaningful involvement in their lives, to the maximum extent consistent with the best*[*interests*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#interests)*of the*[*child*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*; and*
				2. *protecting*[*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*from physical or psychological harm from being subjected to, or*[*exposed*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#exposed)*to,*[*abuse*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#abuse)*, neglect or*[*family violence*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#family_violence)*; and*
				3. *ensuring that*[*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*receive adequate and proper*[*parenting*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent)*to help them achieve their full potential; and*
				4. *ensuring that*[*parents*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent)*fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their*[*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*.*
			2. *The principles underlying these objects are that (except when it is or would be contrary to a*[*child*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*'s best*[*interests*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#interests)*):*
				1. [*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*have the right to know and be cared for by both their*[*parents*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent)*, regardless of whether their*[*parents*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent)*are married, separated, have never married or have never lived together; and*
				2. [*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*have a right to spend time on a regular basis with, and communicate on a regular basis with, both their*[*parents*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent)*and other people significant to their care, welfare and development (such as grandparents and other*[*relatives*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#relative)*); and*
				3. [*parents*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent)*jointly share duties and responsibilities concerning the care, welfare and development of their*[*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*; and*
				4. [*parents*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent)*should agree about the future*[*parenting*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#parent)*of their*[*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*; and*
				5. [*children*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).*
			3. *For the purposes of subparagraph (2)(e), an*[*Aboriginal child*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#aboriginal_child)*'s or Torres Strait Islander*[*child*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*'s right to enjoy his or her*[*Aboriginal or Torres Strait Islander culture*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#aboriginal_or_torres_strait_islander_culture)*includes the right:*
				1. *to maintain a connection with that culture; and*
				2. *to have the support, opportunity and encouragement necessary:*

*to explore the full extent of that culture, consistent with the*[*child*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*'s age and developmental level and the*[*child*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*'s views; and*

*to develop a positive appreciation of that culture.*

* + - 1. *An additional object of this Part is to give effect to the Convention on the Rights of the*[*Child*](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s4.html#child)*done at New York on 20 November 1989.*
1. The objects and principles would support the relief proposed by the Independent Children’s Lawyer and the mother.
2. There is some real force to the submissions put on the mother’s behalf that time spent by the children with their father, whilst soever he remains insightless as to the impact of his behaviour upon the children and unable to appropriately self-regulate his emotional responses to and in the presence of the children (leaving aside his propensity to enlist the children and in particular [Y] in the dispute, to conflate his interests with those of the children and to involve the children [X] and [Y], as he concedes to Ms D, in adult issues), would have the potential to limit the mother’s relationship and involvement with the children.
3. To the extent that a limitation upon Mr Mitchell’s time with the children would thus limit his involvement with them, I am concerned, again that in the absence of demonstrated and sustainable change in both the father’s insight and behaviour that this may well be protective of the children and that limited involvement would be the *“maximum extent”* of involvement consistent with the children’s best interests, balancing their desire for a relationship with their father against the need for protection from harm as a consequence of his behaviour.
4. In this case the need to protect the children from psychological harm is real. The father concedes that he has engaged in abuse of the children. I accept that abuse has occurred on both a lay understanding of that term and within the section 4 definition contained in the Act.
5. It is extraordinary that a parent who concedes that they have been abusive to their child is unable to accept or demonstrate any level of understanding as to why the Court might have some qualms in then ordering an equal, shared time arrangement or might be reluctant to make an order for equal shared parental responsibility.
6. There is no suggestion in this case that the father has engaged in physical or sexual abuse of the children or any of them. Following the *“shower incident”* which Mr Mitchell considered to be emotional, if not physical abuse of [X], Mr Mitchell, as he conceded to Ms D, did not hesitate in withholding the children from Ms Mitchell for what he perceived, erroneously, to be their protection.
7. It is difficult, when Mr Mitchell has readily conceded (albeit I accept sarcastically and flippantly) that he has abused the children, to comprehend how he could feel that the Court would readily and willingly order a shared care arrangement between the parents.
8. No such finding is urged upon the Court with respect to Ms Mitchell’s behaviour. In short she has not been abusive of the children. It is
Mr Mitchell who has abused the children. Thus the need to protect the children from the possibility of future psychological harm through abuse, neglect or family violence arises with respect to Mr Mitchell alone.
9. The factor of protection alone obviates against the relief that is proposed by Mr Mitchell and as will be considered by reference to section 60CC of the Act.
10. The Court is required to ensure that children will, as a consequence of any order made by the Court, receive “*adequate and proper parenting”*. I am not satisfied that the children have received adequate and proper parenting from Mr Mitchell since separation. He has acted abusively, without insight and even within the context of his concession of his abusive behaviour towards the children, he does not demonstrate any comprehension of the scale or scope of the immediate and long-term harm that he has exposed or potentially exposed these children to, children whom he professes to love.
11. Connected with the above it is difficult to see, in light of Mr Mitchell’s past refusal to comply with any order made by the Court which does not meet his pleasure and the open contempt that he has demonstrated and expressed towards the Court’s orders as well as Ms Mitchell, how the Court could have any confidence that Mr Mitchell would meet his responsibilities as a parent.
12. Mr Mitchell has not demonstrated any capacity for change of his behaviour in a lasting or sustained fashion. Indeed, the difficulties with his self-regulation would appear to date, on his mother’s evidence, from the time of his childhood and from as early as three or four years of age. In those circumstances I have no confidence Mr Mitchell would, in the foreseeable future, change his attitude or behaviour and absent such change that he could possibly meet his responsibilities as a parent, identifying his children’s needs and best interests as separate and distinct from his own and subjugating his own needs and interests to theirs.
13. The children’s right to know and be cared for by both of their parents and to spend time on a regular basis with both of their parents is more problematic.
14. To the extent that the principles might be suggested to create *“rights”* for children they are not absolute or unfettered rights. They are subject to the Court being satisfied that it is in their best interests that it be so. To that end, I must be satisfied that any arrangement for the children’s time and communication with their father will not expose them to unacceptable risk, physical or emotional, nor be contrary to their right to protection.
15. As regards the rights of these children to have their parents agree about future parenting and have both parents involved in making such decisions, I cannot see any means by which this could be practically achieved.
16. The hatred and loathing that Mr Mitchell demonstrates towards this mother and her partner is complete and unremitting.
17. The childish and sarcastic manner in which Mr Mitchell has sought to assure the Court that he thinks Ms Mitchell is *“lovely”* (a term similarly adopted by him in his hateful and sarcastic voice messages), gives me no basis or comfort that it would be possible for joint or consensual decision-making to occur in the future, nor that it would be an appropriate burden to impose upon Ms Mitchell to seek to engage in joint decision making with Mr Mitchell as she would be required to do so pursuant to section 65DAC of the Act.
18. I must turn to section 61DA of the Act and determine whether the presumption of equal shared parental responsibility applies and, if it does apply, determine whether it is rebutted.
19. The presumption of equal shared parental responsibility does not apply if the Court is satisfied on reasonable grounds that a parent has engaged in family violence or abuse of a child. As set out at the commencement of these Reasons and based, at least in part (and otherwise supported by the evidence in its totality) upon the concession of Mr Mitchell, I am satisfied that Mr Mitchell has engaged in both family violence and abuse. Thus the presumption could not apply.
20. Lest I am wrong with respect to the above I am satisfied that the presumption would, in any event, be rebutted. As noted above it would be entirely impractical and an inappropriate onus and burdensome obligation to impose upon Ms Mitchell to expect her to engage with
Mr Mitchell (leaving aside for one moment the absence of any evidence that it has occurred at any time since separation) and to then seek to genuinely engage with Mr Mitchell in reaching joint and consensual decisions with respect to major issues. That would simply expose Ms Mitchell to such a course of conduct as to undermine her functioning, parenting capacity and, ultimately, relationship with the children and expose the children to a further unacceptable risk of exposure to family violence through, if nothing else, a repetition of
Mr Mitchell’s expression of views to and about Ms Mitchell.
21. In due course an order for sole parental responsibility will be made in favour of Ms Mitchell.
22. As the section 61DA presumption does not apply I am not mandated, pursuant to section 65DAA of the Act, to consider equal or substantial and significant time before considering any other time arrangement. I propose, however, to consider all time arrangements at large and by turning to and addressing the various factors set out within section 60CC and incorporating therein section 65DAA (5) of the Act.

## Primary considerations

1. I must commence with the primary considerations which provide:

Primary considerations

 (2) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and

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

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

 (2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

1. The need to protect children is prioritised above all else and, in particular, the potential benefit to a child of a meaningful relationship with both parents by reference to subsection (2A).
2. I have already made a finding that Mr Mitchell has exposed the children to family violence and neglect and, as a consequence, the children have experienced psychological harm (including psychological harm of a serious nature such as to constitute a finding of abuse as made above).
3. It is curious, in light of the above findings, based in part upon concessions made by Mr Mitchell, that Mr Mitchell’s affidavit 14 August 2014 protests *“I have done nothing wrong”.* Mr Mitchell has exposed his children to a course of behaviour which has psychologically harmed these children and all three of them.
4. In his evidence and as repeated in his submissions Mr Mitchell concedes that he has exposed the children to his *“rage”* and his negative comments and hatred of their mother.
5. I accept the evidence of Ms B and Ms D that the children’s exposure to those behaviours:

Has been injurious to them;

Is likely to occur in the future as Mr Mitchell has demonstrated no genuine insight into his behaviours and the impact of those behaviours upon these children; and

Will expose these children to long term harm and disadvantage if the behaviours, as I am satisfied is likely to be so, continue.

1. Mr Mitchell has also protested by his Affidavit 14 August 2014 that *“these kids should have a chance to enjoy their childhoods”.* That assertion, of course, is made by Mr Mitchell in the context of agitating for an equal time arrangement. However, I take the assertion without the caveat offered by Mr Mitchell.
2. I have commenced these Reasons with some reference to the concept of *“childhood innocence”.* With respect to these children no one has done a greater disservice to their innocence, to their enjoyment of childhood, more so than their own father.
3. How Mr Mitchell considered it necessary or appropriate, leaving aside the grief he suggests he was suffering immediately following separation, to attend at [X]’s school and to present himself to [X]’s classroom and therein to announce to all present (all but the teacher and Mr Mitchell being children) that his wife had left him to pursue a lesbian relationship simply beggars belief.
4. What is more concerning is the inability of Mr Mitchell to recognise and understand the inappropriateness of that behaviour at the time of hearing and notwithstanding his suggested “*change*” and development of insight. The fact that he cannot make that concession causes me to reject his evidence that such a change or development of insight has occurred or is likely to occur in the foreseeable future.
5. Similar incidents of Mr Mitchell’s insightless and injurious (to the children) behaviour permeate the evidence.
6. I am satisfied that there is a real and serious need to protect these children from psychological harm through exposure to Mr Mitchell’s unremitting, insightless and damaging behaviours. That must, as the primary considerations require, outweigh the consideration of the benefit to these children of having a meaningful relationship with both parents.
7. In his closing submissions and whilst conceding his past behaviour,
Mr Mitchell urged the Court to *“not punish the children”* for those behaviours. I make clear that I have no intention of punishing these children for anything. It is clear, particularly from the evidence of
Ms B and Ms D, that these children feel overburdened and responsible for their father’s emotional well-being and carry the weight of his behaviours and the consequences thereof.
8. These children will not be punished by a reduction in the time that they spend with their father but rather protected. The *“catastrophe”* that this may be perceived to be by these children is a catastrophe entirely created by Mr Mitchell.
9. The need to protect these children from harm as a consequence of an unacceptable risk of exposure to behaviours by Mr Mitchell of similar nature and impact of those with which the evidence is riddled is also intimately connected with the benefit or potential benefit to these children of a meaningful relationship with both parents.
10. Whilst the children have a deep love and affection for their abusive father this could not be satisfactorily described as a meaningful relationship. The children’s enmeshment in conflict, active enlistment therein by their father, and the subjugation of these children’s self-expression and free will to the adoption and carrying and championing of their father’s needs and perceptions, is such as to counter against any finding that their relationship with him is meaningful.
11. The nature of the father’s behaviour with these children and the father’s lack of insight into how his behaviour impacts upon his children or his relationship with them gives me no confidence that the father has insight into those aspects of his behaviour which require change and of the long-term impact upon these children of a failure by him to change.
12. I accept that there has been some change in the father’s behaviour within the last few months and as the children have perceived and reported to Ms B. However, I accept the submission of the Independent Children’s Lawyer that this change is best reflective of the father’s behaviour being refocused upon instilling within these children an innate sense of the father’s victimisation by the mother and the Court (and all involved therewith) and such that the children’s anxiety is now reflected in their anxiety towards those arrangements rather than the father’s active expression of hatred and loathing of the mother. The father’s evidence makes clear that his attitude towards the mother is unchanged, unlikely to change and, consequently, unlikely to be permanently withheld from these children.
13. For Mr Mitchell to submit that the children have a “*right to their childhood”* when the only person who has engaged in any behaviour which has, in any fashion, impacted upon their right to such childhood innocence is him, demonstrates profound hypocrisy on his part, but for the purpose of this determination and more importantly, a profound lack of insight on his part.
14. I accept that there remains a significant risk that the children will be exposed to the father’s unremitting attitudes, hostility, inability to self-regulate or refrain from inappropriate outbursts and discussions with these children. Further, I accept from the totality of the evidence including that specifically discussed above, suggests that even the modulating presence of Mrs M is insufficient to ensure that this does not occur or will not occur in the future.
15. Mr Mitchell has created the circumstances wherein the Court must, if not now then in the foreseeable future, choose between which parental relationship these children can safely maintain. As clearly the children’s relationship with Mr Mitchell, on his own concession, is permeated by past harm, disadvantage and subject to future risk, any failure on the part of Mr Mitchell to modify his behaviours may irresistibly support the relief which Ms Mitchell urges namely, the cessation of the relationship between the children and their father.
16. There have been periods since separation when clearly it has been impossible for the children to maintain a relationship with both parents either physically, practically or emotionally. It should be noted that notwithstanding the children’s exposure to the father’s behaviours, as unrestrained expressions of rage and hatred and repeated and ongoing denigration of Ms Mitchell and Ms S, these children’s relationship with their mother remained strong. That must, in my mind, speak to the strength of that relationship and the strength of the relationship prior to the separation of these parties.
17. When faced with a relationship of strength between the children and their mother, a relationship which is not impacted by self-destructive and damaging behaviours and when this is balanced with the children’s troubled relationship with their father (wherein they express love and a desire for a relationship with a parent who concedes his abuse of them) the choice, while damaging to the children on acceptance of either proposal, overwhelmingly supports the relief proposed by the Independent Children’s Lawyer, if not that proposed by the mother.

## Children’s views

1. I have difficulty accepting the submissions of Mr Mitchell that these children, particularly [X] and [Y], have a strong view supportive of the shared care arrangement.
2. The evidence which I accept with respect to the children’s views is that contained within the evidence of Ms B and Ms D. That evidence is entirely consistent with the evidence of the mother and Ms S, particularly, as regards the extent to which the children’s father has actively engaged in discussion with the children and influenced any view they have expressed.
3. The evidence of Ms B, to do it credit, does not advance any wish suggested to be expressed by the children. Ms B records that the children express views regarding a *“50-50 care”* arrangement and within the context of their father’s perception of and desire for that arrangement. At no point in that contained within Ms B’s report is it suggested that the children have advocated for such an arrangement nor that it is something they crave or desire. They have most assuredly advocated for that outcome and within the context therein described as being their father’s view that it would be unfair that any other arrangement apply.
4. What is clear is that Ms B concludes that *“it appears that both children have been influenced by their father’s care preferences, and as a consequence of this feel that they have a role to play in order to have those needs met”.*
5. These are children aged nine and seven years. Such a burden upon the shoulders of children of that age does not achieve the very purpose which Mr Mitchell advocates on behalf of these children, being to permit them to enjoy their childhood. Indeed, that level of pressure and enmeshment is abusive by and of itself (whether within the lay or section 4 definition I need not determine and I make clear that I adopt that term consistent with the evidence of Ms B).
6. Similarly, Ms D in her Family Report refers to the children’s perceptions of the fairness of future care arrangements. Both [X] and [Y] are quite clear in their concern to protect their father and, similarly, some level of fear regarding their father’s reaction in the event that they express views contrary to his own (see for example paragraphs 41 and 44 of Ms D’s report).
7. Of [X] Ms D reports (paragraph 42):

When asked about his living arrangement preferences, [X] said that he did not know.

1. With respect to [Y], Ms D reports:

[Y] said that she feels close to her mother and father and wants to spend time with them both, “but I don’t want him (Mr Mitchell) to say mean things about Mum”… [Y] said that Mr Mitchell had told her to inform the Family Consultant in interview that she wants to see her parents the same amount of time.

1. I accept the evidence of Ms B and Ms D that the views expressed by the children, to the express extent that they can appropriately be described as an expression by the children of “***their***” (emphasis added) view, cannot be afforded any real weight.
2. The children have clearly been the subject of discussion with their father and the children’s desire to not create trouble for their father is made clear in Ms D’s report. The desire of both [X] and [Y] to advocate the arrangement their father desires is made clear in the report of Ms B.
3. By reference to authorities such as *Re R Children’s Wishes* [2000] FamCA 43 and *Harrison & Woollard* (1995) FLC 92-598, I am satisfied that the children’s views are not reflective of their genuine feelings, not views formulated or articulated by or for themselves and represent nothing more than the children’s anxious and deliberate advocacy for a position they are fully aware their father desires and in a context wherein his anger, whether towards them or otherwise, to which they will be exposed, will be significant and unremitting.

## The nature of the children’s relationship with each parent and other significant people

1. I am satisfied that the children enjoy an excellent and meaningful relationship with their mother and with Ms S (the mother’s partner).
2. I am satisfied the children hold real love and affection for their paternal grandmother Mrs M and feel a greater degree of safety in her care or when she is present than when they are in the care of their father. She is an important person to them and in their lives and has been since an early age.
3. It is a credit to Ms Mitchell that she has been able to maintain communication and a cordial relationship with Mrs M (notwithstanding that Mrs M is somewhat forgiving and shielding of her son from criticisms which are entirely warranted and would appear, from her evidence during cross-examination, to share, although not to the same depth or intensity, some of the negative views of Ms Mitchell expressed by Mr Mitchell).
4. The children’s relationship with their father is touched upon above. I am satisfied that the children’s relationship with their father is, in a loose and broad sense, “*meaningful*”. However, within the context of the discussion within *Mazorski & Albright* [2007] FamCA 520 and in any significant fashion I am concerned that the children’s relationship with their father could not be described as:

Meaningful. Fear and sense of duty are circumjacent to the children’s relationship with their father and particularly [Y]’s relationship with her father. As a consequence, these children and [Y] in particular have, to a large extent, assumed the role of supporter or *“parent”* to Mr Mitchell, rather than the relationship which can and should exist wherein Mr Mitchell identifies and meets the needs of the children separate from his own; and

Close or meaningful or as emotionally healthy as the relationship that the children enjoy with their mother. Ms Mitchell is able to differentiate her needs and interests from those of the children. She has shielded the children from conflict, has been supportive of them in dealing with their own reactions to their father’s behaviours and has acted protectively towards them including in these proceedings.

1. To the extent that it is asserted that these children enjoy a relationship of importance with the children of Ms H I do not, for the reasons described above and including through application of *Jones & Dunkel*, accept that they are relationships of importance or meaning.

## The extent to which each parent has taken the opportunity to participate in decision-making, spending time and communicating with the children

1. Ms Mitchell has availed herself of all opportunities to participate in decision-making, spend time and communicate with these children, and has done so at all times since separation and irrespective of the barriers and impediments put in her way principally by Mr Mitchell.
2. To the extent that Mr Mitchell submits that the mother *“abandoned”* the children at separation I reject that submission. I prefer and accept the evidence of Ms Mitchell that she had indicated clearly to Mr Mitchell, prior to separation, that she would obtain accommodation for herself (having none to go to at the time of separation) and would then seek to have the children live in an equal care arrangement between the parents. Within five days of separation Ms Mitchell had procured accommodation and sought to initiate that arrangement.
3. Mr Mitchell has placed barriers in Ms Mitchell’s path at each available point, including, through his actions immediately following separation (as demonstrated through the notes from the Hume Riverina Community Legal Service), in terminating all time for a period of three months and notwithstanding the parties had recently attended Family Dispute Resolution and had entered into a parenting plan, and through seeking to influence the children’s views both towards the mother (and her partner Ms S) and towards future care arrangements.
4. To the extent that Mr Mitchell asserts that he was acting protectively in withholding the children for a period of three months (which action prompted Ms Mitchell to appropriately commence these proceedings), such allegation does not bear close scrutiny. The major incident upon which Mr Mitchell relied in asserting risk to the children, being the *“shower incident”*, occurred some months prior to his actions in withholding the children and prior to Family Dispute Resolution. Whether Mr Mitchell was motivated, as Ms Mitchell alleges, by financial considerations or simply his hatred of Ms Mitchell is unclear. However, I cannot accept that he acted upon any motivation connected with the children’s best interests or a consideration thereof.
5. Mr Mitchell has, since separation, continued to absent himself from the children’s care each weekend that they have been in his care for the purpose of pursuing his hobbies and interests [omitted] and does so willingly. That is not to suggest that a parent cannot indulge their own interests and that it is not, in fact, beneficial to children to have a parent who is relaxed, self-satisfied and better able to engage in their care as a consequence. However, it is consistent with the balance of
Mr Mitchell’s actions as regards failing to prioritise the children’s needs as separate from and in priority to his own. When the two are identical he is able to take action and when they are not he declines.
6. Mr Mitchell is dependent upon his mother to ensure that the children can be taken to and from school during the periods that they have been in his care in the past. Mrs M prepares the children for school each morning and ensures their attendance thereat and their collection therefrom. That is not to suggest that a working parent cannot and should not continue in employment and make appropriate arrangements, in this case with a family member with whom the children are close and familiar. However, I am satisfied that in the case of Mr Mitchell, it is reflective of the priorities in his life, the care of the children being less important to him than meeting his needs and ensuring that the children are not in the care of Ms Mitchell.
7. Prior to the June 2012 amendments to the *Family Law Act* this consideration was contained within section 60CC(4) and which also provided for a consideration of the extent to which each parent had interfered in the capacity of the other to be involved in decision-making, spending time and communicating with children. On the evidence, that is a significant criticism of Mr Mitchell and one which cannot be made of Ms Mitchell.
8. To the extent that Ms Mitchell, at the conclusion of the evidence in this trial, seeks to severely limit (if not terminate) the children’s time with their father her action is motivated, I am satisfied having heard and considered the same evidence, by a protective desire.
9. Also prior to the June 2012 amendments the Court was authorised by subsection (c) as then drafted, to have regard to the capacity of each parent to promote and encourage the relationship between the children and the other parent. Whilst that provision was often erroneously described as the *“friendly parent”* provision it was nothing of the sort. Such a consideration remains relevant however.
10. Clearly the attitude that has been demonstrated by Mr Mitchell towards recognising, encouraging and promoting the children’s relationship with their mother is the subject of significant criticism. I am satisfied, from a consideration of the totality of evidence, that Mr Mitchell has demonstrated an inability and incapacity to recognise the children’s needs as separate from his own and has, by and large, conflated the children’s needs with his own. That has, as the expert evidence has spoken to, a real potential to psychologically if not psychiatrically damage these children as they age and mature.
11. Ms Mitchell has demonstrated an appropriate and responsible attitude towards the children’s relationship with their father both at separation, throughout the currency of these proceedings and in her present application to the Court.

## The extent to which each parent has financially supported the children

1. Each party has given evidence regarding the suggested financial motivation of the other in pursuing the position they advance. I am not satisfied that I can nor need make any finding with respect to that evidence. Suffice to note that the financial contribution made by each is significant at this time as each has had substantial and significant care of the children and thus meets the needs of the children whilst the children are in their care.
2. The level of child support that is provided for the children is not significant. The parties have clearly been engaged in obtaining an administrative assessment of child support and, following the issue of an assessment, Mr Mitchell has pursued, as is his right, an application for change of assessment. That application would appear to have been determined 3 September 2014 (a few weeks prior to the commencement of this hearing) and accordingly arrangements for future financial support, in accordance with the child support legislation, are set. I do not propose to consider the issue further.

## Likely effect of change including separation from either parent or other person

1. Ms Mitchell urges that the children’s relationship with their father should be terminated or severely restricted. As regards restriction the Independent Children’s Lawyer supports that position.
2. Significantly reduced time between the children and their father would be a significant change for them. However, change can be positive or negative and in most cases, including this, comes with both positive and negative consequences.
3. As I have described to the parties, Mr Mitchell has created an unacceptable catastrophe for these children. To continue their time arrangements with their father, on a shared care basis, however that might be structured, has the potential to be significantly injurious to them. A continuation of the father’s behaviours, and I do not accept his evidence that he has developed and acted upon insight into the effect of his behaviours and thus the need to restrain himself from them, has real and significant potential to cause lifelong psychological or psychiatric harm to these children. I do not accept that Mr Mitchell is capable of accepting, appreciating or understanding that proposition as he remains, in his own words, *“blinded by his anger”* as well as his underlying inability to accept that he may be wrong about anything.
4. The consequence for these children of terminating or severely restricting their relationship with their father is, simplistically, beneficial and, at least as regards restriction, verging upon irresistible. These children have already been psychologically harmed in the 18 months since their parents’ separation and as a consequence of nothing more than their father’s anger and hatred of their mother and Ms S together with his inability to restrain himself from expressing those emotions in a manner which is inappropriate for and inconsistent with proper parenting.
5. Notwithstanding the above there are also negative consequences for these children of terminating or reducing their time with their father. To the extent that they are already significantly enmeshed in their father’s position and advocating for it, would have the potential to generate anger in them towards their mother and thus damage their relationship with her. There would always be the potential that a reduction in time would damage the children’s relationship with their father. However, in the circumstances wherein that relationship is largely unhealthy for these children, without significant change in the father’s insight and behaviours, that is the lesser of the two concerns.
6. I accept the submission of the Independent Children’s Lawyer that a complete termination of the children’s relationship with their father at this point may be counter-productive at least in the short term. The burden which these children feel, the responsibility for not only agitating for but obtaining the arrangement which Mr Mitchell seeks, is so significant that these children would feel an overwhelming sense of guilt and responsibility if it were not achieved and their father would thus be hurt and disappointed.
7. There would also be the potential that the father, if cut from the children’s lives at this point, might become “*mythologised*” to these children as a “*wronged martyr*”. The potential for the children to focus their sense of wrongdoing upon their mother and thus impact on their relationship with her, their only healthy parental relationship, is again, real and significant.
8. In light of the conundrum created by these choices, I am satisfied that a significant change is not only warranted but required and desirable if not necessary to meet the children’s needs and best interests. To that end I accept the submission of the Independent Children’s Lawyer that a regime of limited, fortnightly time, so that the children maintain a connection with their father, is preferable to no time at all.
9. I do not consider it valid to differentiate between different categories of “*abuse*”. It is difficult to comprehend the circumstances in which the Court would countenance an ongoing relationship between a child and a parent when that parent had physically or sexually abused the child. It may be possible that evidence might support the need to continue such a relationship on some limited basis and with appropriate safeguards. However, I need not formulate, hypothetical as it would be in this case, the type of circumstances which might warrant such an approach.
10. In this case and as I have deliberately highlighted at the outset of these Reasons, this father concedes that he has engaged in behaviour that has been abusive of his children and which, whether accepted by
Mr Mitchell or not, I accept has caused serious emotional and psychological harm to these children and, at the very least, for [X] and [Y]. In those circumstances, I accept that I must act protectively and, as the legislation compels, prioritise the children’s need for protection above all else.
11. There is some risk in continuing even limited time between these children and their father. Those risks are real. There is the risk that the father will not comply with orders. He has demonstrated during the currency of these proceedings that he does so only when he considers it necessary and desirable and then at a time and by means of his choosing and not otherwise. Those matters are highlighted not to suggest reaction to the father’s contumelious disregard of the Court but as reflective of Mr Mitchell’s lack of insight into the need for change in his attitude and behaviour, let alone his ability to be an instrument of affecting such change.
12. There is the risk that these children, when spending time with their father, will be subjected to an ongoing campaign by him to enlist the children as co-conspirators (to adopt the submission of counsel for the mother which is, having regard to the evidence in this case, entirely appropriate). If that were to continue and the evidence, in any future application supported such a finding then the mother’s primary position of no time would begin to assume such importance as to warrant serious reconsideration and such as to render that proposal and the children’s best interests conterminous.
13. Finally, there is the risk that even if the father is able to restrain himself from engaging in the abusive and injurious behaviours which he has engaged in and demonstrated in the past, that difficulty would still arise for these children, through their continuing relationship with their father in feeling such empathy and identification with his position, his sense of hurt and unfairness, that it would undermine, to their disadvantage, their relationship with their mother.
14. I am satisfied, having regard to the totality of evidence that whilst this potential is real that it would be equally real and valid, as a risk to the children’s welfare, if their relationship with their father were terminated at this time.

## Practical difficulty and expense

1. I incorporate herein the provisions of section 65DAA(5) as follows:

Reasonable practicality

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

 (a) how far apart the parents live from each other; and

(b) the parents’ current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and

 (c) the parents’ current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

 (d) the impact that an arrangement of that kind would have on the child; and

 (e) such other matters as the court considers relevant.

1. These parents do not live any significant distance apart. They live remarkably close to each other on a geographical basis.
2. The consideration of reasonable practicality does not, however, start and finish with a consideration of logistical factors. That which is contained within section 65DAA(5) largely codifies the aspects of a parenting relationship which one might expect to exist if any arrangement for shared care (whether equal or substantial and significant time) is to operate successfully and in serving the best interests of a child.
3. These parents have little capacity to implement an arrangement for equal or substantial and significant time. Such an arrangement requires an ability to cooperatively parent, communicate and resolve difficulties and to develop and maintain some degree of “*parental alliance*”. Clearly that is not present in this case.
4. Similarly, these parents have no present capacity to communicate and resolve difficulties with each other. The only communication which presently exists, on any level, and it is far from a meaningful level, is the communication which occurs between the mother and Mrs M through the use of the communication book.
5. I am not satisfied that an order made by me pursuant to section 13C of the Act, directing that these parties attend and participate at any further family counselling service will achieve any benefit to these children through improvement of communication. I have previously made orders requiring that the parties enrol in, attend and complete the Parenting Orders Program (subject to assessment of suitability). That is one of the orders that Mr Mitchell has failed to see benefit in and has thus taken no active step to address. In any event, and now having had the benefit of hearing all of the evidence and, importantly, having observed Mr Mitchell in the witness box, I am not satisfied that it would produce any meaningful or lasting benefit.
6. I have the greatest of respect for those who work within family counselling and family dispute resolution. However, they cannot achieve miracles. They can assist parties who recognise and embrace the need to change and to become an instrument of such change in their lives and that of the children. I am not satisfied that Mr Mitchell identifies any need to change his behaviour and thus it is unlikely that he would benefit, as I accept he has failed to benefit from counselling with Mr T, from those services. Accordingly, those services would be better used by parties to whom they can bring benefit.
7. As regards the impact of future arrangements upon these children I am satisfied that is addressed above by reference to subsection (d).

## Capacity of each parent to meet the children’s emotional and intellectual needs

1. There is no criticism raised by Mr Mitchell as to the capacity of
Ms Mitchell (or for that matter Ms S) to meet the emotional and intellectual needs of these children.
2. There is significant issue raised as to the capacity of Mr Mitchell to identify and meet the emotional and intellectual needs of these children. On the basis that I have accepted and have found that Mr Mitchell has, as he has conceded, been emotionally abusive of these children it is impossible to find that Mr Mitchell has an equal capacity to that of
Ms Mitchell to meet the children’s emotional needs, if at all.
3. I accept the criticisms of Mr Mitchell, as raised by Ms Mitchell and as is spoken to and substantially shared by Ms B and Ms D, that
Mr Mitchell has, at different times and to different degrees, conflated his emotional needs and interests with those of these children and in so doing has subjugated and suppressed the children’s sense of identity and has failed to meet their emotional needs at all. This has included through the exposure of these children to expressions of hatred for the children’s mother (and Ms S), discussion of adult issues which it has been entirely inappropriate to share with children of 7 and 9 years of age and through the children’s exposure to family violence.
4. More recently but no less insidiously this has involved Mr Mitchell generating within these children, particularly [X] and [Y], a sense of responsibility to “*do his bidding*” and obtain the arrangement which he desires, that which he considers “*fair*”. In doing so, Mr Mitchell has, at the very least, been blind to the children’s emotional needs and the impact of his behaviours upon them and has, at worst, completely suppressed and disregarded there emotional needs in preference to his own.
5. Clearly this factor favours Ms Mitchell’s case.

## Maturity, sex, lifestyle and background of the children and each parent

1. At various points in these proceedings Mr Mitchell has referred to
Ms Mitchell’s *“brave choices”* and *“lifestyle”* choices. In making those comments Mr Mitchell has been referring to Ms Mitchell’s sexuality as a gay woman. Mrs M has similarly referred to
Ms Mitchell’s sexuality as *“her choice”.*
2. Mr Mitchell has not sought to press this issue with any force in his closing submissions. However, lest it be suggested that his position has been overlooked I make clear that Ms Mitchell’s sexuality is not a choice. Nor is it lifestyle. It is a genuine, authentic expression by her of herself.
3. Mr Mitchell is clearly aggrieved and unable to come to terms with
Ms Mitchell’s authentic self. However, that is his shortcoming, perhaps even his “*choice*”, rather than anything within the control or influence of Ms Mitchell. If Mr Mitchell chooses to continue to hold such a view, to support or protect his sense of self or for any other reason, then that is a matter for him. However, it is a simple reality for Ms Mitchell that she is gay and for her to live her life authentically and genuinely is a benefit to these children in demonstrating herself and her humanity.
4. These children are young. [X] is 9, [Y] is 7 and, [Z] is 4. They cannot attend to their own needs and should not be called upon to do so. That extends to and includes their emotional needs.
5. These children should be allowed and permitted, as Mr Mitchell has submitted and protested, to enjoy their childhood. They cannot do so whilst their self, their emotional needs and their role in a parent-child relationship as children is ignored.
6. It is the role of parents to parent. It is not the role of children to be an emotional support, a crutch if you will, to their parents. Children should certainly do as their parents tell them but within the bounds of appropriate and lawful direction and enforcement of a parent’s will or chastisement.
7. The directions given by Mr Mitchell to these children, such as the directions to [X] to tell his mother and Ms S to *“fuck off”* or to physically strike them is inappropriate and abusive. For [Y] to be so enmeshed and taken in by her father as an accomplice in his emotional trauma following separation from their mother, is again inappropriate and abusive.
8. The involvement of these children, at the time of separation of the parents then aged eight and six years of age, in a discussion of their mother’s sexuality (or any parents sexuality and whether heterosexual or gay) is entirely inappropriate and abusive.
9. Such criticisms are not raised or levelled with respect to Ms Mitchell. They are raised with real force and weight as regards Mr Mitchell.
10. This factor supports Ms Mitchell’s case and that advanced by the Independent Children’s Lawyer

## Aboriginality and Torres Strait Islander descent

1. Neither parent identifies as a person of Aboriginal or Torres Strait Islander descent. The children are not identified as persons of Aboriginal or Torres Strait Islander descent.

## The attitude demonstrated by each parent towards their responsibilities as parents

1. I am satisfied that the above discussion of the evidence abundantly addresses this consideration.
2. There is no criticism raised of Ms Mitchell’s attitude towards her responsibilities as a parent including her responsibilities financially, practically and emotionally.
3. There are significant criticisms raised as regards Mr Mitchell’s attitude towards his responsibilities as a parent and those criticisms have been substantiated by the evidence led in these proceedings including by concessions made by Mr Mitchell as to both his past actions and the inappropriateness of his attitude (confined, as regards Mr Mitchell’s concessions, to past attitude). Beyond the concession made by
Mr Mitchell I am satisfied that criticism of his present and demonstrated attitude is also warranted.

## Family violence

1. Ms Mitchell alleges family violence perpetrated by Mr Mitchell towards her and in the presence, hearing and perception of the children.
2. Considerations of family violence are fundamental to all that is done by the Court in parenting proceedings. The obligation to consider family violence arises prior to the commencement of proceedings forming, as it does, a basis for exemption from attendance at Family Dispute Resolution prior to filing. To the credit of these parties they have pursued Family Dispute Resolution and have taken advice (as section 60J requires) as to the means by which Family Dispute Resolution might proceed even with the presence of family violence concerns.
3. The consideration of family violence and its importance is discussed at length in the *Best Practice Principles version 3.1* and the discussion therein of the various legislative provisions and binding authorities.
4. Having considered the totality of evidence I am satisfied that the risk of future family violence and the children’s exposure thereto will be minimised through relief of the nature proposed by Ms Mitchell and supported by the Independent Children’s Lawyer.
5. These children have been exposed to family violence. On the basis of the section 4AB definition Ms Mitchell has established coercive and controlling family violence through physical violence towards her, repeated derogatory taunts and denigration, restrictions upon relationships with family members (indeed restrictions upon the children’s relationship with their mother) and the active steps taken by Mr Mitchell to enlist these children as his allies or co-conspirators in furthering his interests and meeting his needs. That finding and the evidence supporting that finding weigh in favour of the relief proposed by Ms Mitchell and the Independent Children’s Lawyer.

## Family violence orders

1. A family violence order has been made in the past and has been made for the protection of Ms Mitchell and imposing prohibitions upon
Mr Mitchell. It would not appear to be presently in force. The facts and circumstances relating to the making of the order have been the subject of evidence given directly by the parties in these proceedings and thus taken into account above.

## Making the order that would least likely lead to the institution of future proceedings

1. Satisfactorily addressing this factor is problematic.
2. I am conscious that any order which provides for time between the children and Mr Mitchell has the potential, in light of the risks apprehended with respect to such an arrangement and discussed above, to lead to future proceedings. However, that risk is outweighed by the risks to the children of pre-emptively terminating their relationship with their father and for the reasons submitted by the Independent Children’s Lawyer and canvassed above.
3. I am satisfied that the best balance which can be achieved in minimising the risk of future proceedings is to make orders that are clear and certain, which allow an ongoing involvement between these children and their father but on a relatively minimal basis.
4. In light of the above I am satisfied that orders as follows are appropriate.
5. I certify that the preceding three hundred and forty-nine (349) paragraphs are a true copy of the reasons for judgment of Judge Harman

Associate:

Date: 14 November 2014