

FAMILY COURT OF AUSTRALIA

THORNTON & THORNTON

[2015] FamCA 92

FAMILY LAW – CHILDREN – Where the mother alleges that the father had engaged in sexual misconduct against their two female children – Where the mother’s belief pertaining to the alleged abuse is driven by various statements made by the children – Where the children are medically examined – Where the children make inconsistent statements to police, family members and other carers – Where the statements made by the children are not unequivocally consistent with abuse occurring – Where children make conflicting statements as to their desire to see their father – Where the mother is the primary carer of the children – Where the evidence is insufficient to establish the risk as unacceptable.

FAMILY LAW – EVIDENCE – EXPERT EVIDENCE – Where the mother alleges that the father had engaged in sexual misconduct against their two female children – Where relevant rules of evidence are excluded pursuant to s 69ZT of the Act – Where expertise need not be established as a result – Where the trial judge holds that the appropriate qualifications, training or experience of an expert is a significant factor in the attribution of weight.

Evidence Act 1977 (Qld)

Evidence Act 1995 (Cth)

Family Law Act 1975 (Cth)

Brandon v Hanley [2014] VSC 103

Briginshaw v Briginshaw (1938) 60 CLR 336

Carpenter & Carpenter (2014) FamCAFC 100

Carpenter & Carpenter (2012) FamCA 1005

CDJ & VAJ (1998) 197 CLR 172

DeVries v Australian National Railways Commission (1993) 177 CLR 472

Donaghey & Donaghey (2011) 45 Fam LR 183

Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor [2013] EWHC (Comm) 3560

Goode & Goode (2006) FLC 93-286

Hardie & Capris [2010] FamCA 1046

K v B (1994) FLC 92-478

Lane v R [2013] NSWCCA 317

Mother and Father [2006] FCWA 89

M v M (1988) 166 CLR 69

Napier v Hepburn (2006) 36 FamLR 395

Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd’s Rep 403

Partington v Cade (No 2) (2009) FLC 93-422

Potter v Potter (2007) FLC 93-326

Qantas Airways v Gama (2008) 167 FCR 537
Re W (Sex Abuse: Standard of Proof) (2004) FLC 93-192
U v U (2002) 211 CLR 238 at 159 per Kirby J
Withyman v New South Wales [2013] NSWCA 10

APPLICANT: Ms Thornton

RESPONDENT: Mr Thornton

INDEPENDENT CHILDREN’S LAWYER: Nicola Davies

FILE NUMBER: BRC 8946 of 2012

DATE DELIVERED: 23 February 2015

PLACE DELIVERED: Brisbane

PLACE HEARD: Brisbane

JUDGMENT OF: Murphy J

HEARING DATE: 19-22 May 2014,
11-12 August 2014

REPRESENTATION

COUNSEL FOR THE APPLICANT: Mr North SC with Mr Bunning

SOLICITOR FOR THE APPLICANT: Wiltshire Family Law

COUNSEL FOR THE RESPONDENT: Mr Jordan

SOLICITOR FOR THE RESPONDENT: Simonidis Steel Lawyers

COUNSEL FOR THE INDEPENDENT CHILDREN’S LAWYER: Mr Andrew

SOLICITOR FOR THE INDEPENDENT CHILDREN’S LAWYER: Legal Aid Qld

ORDERS

IT IS ORDERED THAT

1. All previous parenting orders are hereby discharged.

Parental Responsibility

2. IT IS DECLARED THAT the presumption of equal shared parental responsibility is rebutted in the best interests of the children G (born ... 2005) and V (born ... 2009).
3. The mother MS THORNTON shall have sole parental responsibility in respect of all major long term issues (as that expression is defined in the *Family Law Act 1975* (Cth) (as amended)) in respect of the children save that the mother shall, prior to making the sole ultimate decision about any such issue:
 - a. Advise the father, MR THORNTON in writing of the decision intended to be made;
 - b. Seek the father's written response in relation thereto;
 - c. Consider, by reference to the best interests of the children, any such response prior to making any such decision;
 - d. Advise the father in writing as soon as reasonably practicable of her intended decision and before taking any actions necessary for, or associated with, the implementation of that decision.
4. Each party shall have parental responsibility for the day to day decisions about the care, welfare and development of the children while they are in his or her care pursuant to these orders.

Live With

5. The children shall live with the mother.

Time and Communication

6. The children shall spend time with and communicate with the father at all such times as might be agreed between the parties in writing but failing agreement in accordance with the succeeding provisions of these orders.

Week to Week Time

7. The children shall spend time with the father during gazetted school term time:
 - a. Each Sunday from 10.00am until 4.00pm supervised by Ms A until such time as these orders have been explained to the children by the Independent Children's Lawyer in accordance with these orders;
 - b. From the Sunday immediately following the said explanation of these orders by the Independent Children's Lawyer and for three consecutive Sundays thereafter, from 10.00am until 4.00pm; then
 - c. For 4 weeks from 5.00pm Saturday until 5.00pm Sunday; then

- d. For the next 3 months, on a 2 weekly cycle from after school Thursday until before school Friday in the first week and from after school Friday until 5.00pm Sunday in the alternate week; then
- e. Thereafter, on a 2 weekly cycle from after school Thursday until before school Friday and in the alternate week from after school Friday until before school Monday.

School Holiday Time

- 8. The children shall spend time with the father during gazetted Queensland school holiday periods:
 - a. Commencing in the winter holidays 2015 for 4 consecutive nights; and
 - b. For the spring holidays 2015 for 7 consecutive nights; and
 - c. In alternate weeks during the 2015/16 Christmas holidays; then
 - d. The first half of each school holiday period in even numbered years; and
 - e. The second half of each school holiday period in odd numbered years;
 - f. For the purpose of these orders, school holiday time shall be calculated by the number of nights gazetted as school holidays (including weekend nights; the night school concludes and the night before the commencement of the relevant school term) and shall commence:
 - i. When the father's time falls in the first half of the holidays from after school on the day the school term concludes;
 - ii. When the father's time falls in the second half of the holidays from 5.00pm on the day which is the halfway point of those holidays calculated to represent half of the holidays when spending time shall end at 9.00am on the day the school term recommences;

Special Occasions

- 9. The children shall spend time with the parent with whom they are not otherwise spending time in accordance with these orders:
 - a. For three hours from after school if a school day or for three hours from 2.00pm until 5.00pm if on a weekend on each of:
 - (i) The mother's and father's birthdays
 - (ii) Each of the children's birthdays
 - b. From 9.00am until 5.00pm on Mother's Day;
 - c. From 9.00am until 5.00pm on Father's Day;
 - d. From 2.00pm until 5.00pm on Easter Sunday;
- 10. Notwithstanding paragraphs 8 c, d and e of these Orders, the children shall spend time at Christmas:

- a. In even numbered years with the mother from 2.00pm on Christmas Eve until 2.00pm on Christmas Day and with the father from 2.00pm Christmas Day until 2.00pm Boxing Day; and
- b. In odd numbered years with the mother from 2.00pm Christmas Day until 2.00pm Boxing Day and with the father from 2.00pm Christmas Eve until 2.00pm Christmas Day.

Communication

11. Each of the mother and father shall do all such things as might be necessary so as to facilitate each of the children communicating with the other parent at all such reasonable times as might be agreed and failing agreement:
 - a. With the father each Wednesday at 6.00pm with the children to initiate the call;
 - b. In school holiday time with the parent they are not spending time with each Wednesday at 6.00pm with the children to initiate the call.

Changeovers

12. Except as otherwise agreed in writing between the parties, the changeover point for the transition for the children between the households shall be at School B if a school day, if not a school day then at C Shopping Centre.
13. The parents may collect the children in person or by their nominee provided that the nominee is an adult who is known to the children and the other parent.

Exchange of Information

14. The parties shall keep the other informed of:
 - a. The name and contact details for each of the children's doctors, health care and other treatment providers;
 - b. Any medical condition, significant illness or other significant health condition suffered by the children;
 - c. Any daycare, school, educational facility or extracurricular activity provider;
 - d. The means by which the other parent might purchase or obtain any school or extra-curricular activity photographs or awards;
 - e. The address at which the children will reside when in their care and a contact telephone number and each parent shall notify the other parent at least 7 days prior to relocating the children's residence beyond a 20 kilometre radius from where they currently reside.

Authorisations

15. Each party shall do all such things and sign all such documents so as to authorize the other parent to:

- a. Receive all information from the children's school or pre-school to which parents are ordinarily entitled including but not limited to, their academic, sporting and social progress;
 - b. Receive all information from the children's school or pre-school to which parents are ordinarily entitled as to events to which parents are entitled to attend or participate;
 - c. Receive any and all information to which parents are lawfully entitled from any doctor, hospital, therapist or other health professional who either child consults or by whom either child is treated;
16. In the event that either parent refuses or fails to provide the authorisations required by these orders, or in the event of doubt expressed by any or all of the persons to whom any such authorization is directed, this Order shall itself operate so as to provide the authorization that would otherwise be given by one or both parents of the children.

Publication

17. Pursuant to s 121(9)(g) of the Act and so as to avoid doubt, the father or the Independent Children's Lawyer is hereby authorised to publish an account of these proceedings, namely these Orders and the Reasons for Judgment delivered herewith, to:
- a. Mr D; Dr R; Mr F; Dr G and Dr H;
 - b. Ms A;
 - c. Detective J and any police officer charged with the responsibility of investigating any criminal complaint pertaining to the father's conduct toward the children;
 - d. The Director of any office of the Department of Communities, Child Safety and Disability Services, to whom complaint or notification has been made in respect of the children.

IT IS DIRECTED THAT

18. The Independent Children's Lawyer shall, at the earliest opportunity, explain to the children the terms and effects of these orders utilizing a court counsellor or such other professional assistance as she might consider appropriate.
19. The mother shall make the children available for the purpose of carrying into effect the previous order.
20. The mother's father, MR E be forthwith released from the undertaking given by him to the Court on 28 August 2013.

IT IS FURTHER ORDERED THAT

21. All extant applications be otherwise dismissed and removed from the list of cases awaiting finalisation.

22. Following the expiration of the Appeal period, all subpoenaed documents be returned to the persons or institutions from which they emanated and all exhibits are returned to the person or persons who tendered the same.
23. The Independent Children's Lawyer is discharged upon the later of the expiration of the appeal period in respect of these Orders, or the hearing of any appeal.
24. 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.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Thornton & Thornton* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT BRISBANE

FILE NUMBER: BRC 8946 of 2012

Ms Thornton
Applicant

And

Mr Thornton
Respondent

And

Independent Children's Lawyer

REASONS FOR JUDGMENT

- 1 The mother of G (born in 2005) and V (born in 2009) asserts a belief that each of her daughters has been subjected to sexual abuse by their father. That belief is asserted as shared by the mother's family. When the parties separated in April 2012, the children were aged six and three.
- 2 The girls' father denies any untoward behaviour of any type. Indeed, he asserts the allegations against him are part of a "conspiracy" designed to achieve a significant restriction (or, perhaps, cessation) of the time he spends with his daughters. He contends that the "conspiracy" is spearheaded by the mother's father.
- 3 Those very serious assertions dictate, effectively, the parties' respective contentions as to the parenting orders which they assert best meet the best interests of their children¹. If the mother's primary contention² is sustained, the children will not spend any time with their father. If the father's primary contention is sustained, the children will live with him and spend time with their mother, initially, five nights per fortnight.

¹ Noting, of course, that the Court's central task is not to determine abuse unless the evidence compels such a finding, but to determine the best interests of the children informed by whether proposed orders present an "unacceptable risk" to them. *M v M* (1988) 166 CLR 69. Despite the fact that the Act's mandatory requirements have altered in the approximately 25 years since that case was decided by the High Court, the principles remain equally applicable.

² The parties' alternative proposals will be considered later in these reasons to the extent they remain relevant in light of the findings to be made.

- 4 The mother's assertion that the children have been subjected to sexual abuse by their father is based essentially on things she attributes the children as having said and her observations of their behaviours including, she asserts, a fear of their father evident from their words and actions.
- 5 In addition, the mother deposes to the father's "addiction" to pornography during the relationship. No pornography is deposed as having - directly or indirectly - any connection with the parties' children, or any children³. Inferentially, the mother asserts that the father's general character is such that he is capable of the behaviours toward the children which she alleges. The mother's father (Mr E)⁴ directly asserts as much.
- 6 While the motive for the father's overarching assertion of "conspiracy" might be seen as relatively clear (a desire to remove him from the mother's life and the lives of their children as "revenge"), the factual foundations upon which the asserted finding of "conspiracy" might be made are less clear.
- 7 The allegation appears to centre upon what is said to be a stark coincidence in timing between the breakdown in negotiations in respect of financial issues and the making of the allegations. It is asserted that this occurs against a background of the mother (and, it appears to be alleged, her family) seeking to significantly limit the time between him and the children post-separation. Significant reliance is placed upon emails passing between the father and Mr E as persuasive of both the coincidence in timing earlier referred to and an asserted underlying antipathy exhibited by Mr E to the father.
- 8 The mother tape recorded V on 26 July. An agreed transcript will later be quoted. A video recording taken by the father on a visit with the children on 16⁵ September 2012, when the mother was also present, is in evidence. G has participated in two 93A interviews⁶ on 31 July and 13 October 2012. The video of each is in evidence together with an accompanying agreed transcript.

UNACCEPTABLE RISK

Gravity of the Allegations and their Ramifications

- 9 The notion that children might be used (directly or indirectly) for the sexual gratification of adults is wholly repugnant to any sane person. To the extent that it is possible (or desirable) to identify or quantify that, it might be said that

³ Although an elusive assertion *alluding* to "child pornography" emerged during the mother's conversations with a psychologist, Dr R, and will be referred to later in these reasons.

⁴ For clarity, the mother's father will be referred to, as he was in the evidence and throughout the proceedings, as "Mr E". Similarly, the mother's mother will be referred to as "Ms E".

⁵ Exhibit M5 of the agreed transcript of the recording says "on or about 16 September" however it is noted that 16 September is a Sunday.

⁶ The expression "93A interview" is a shorthand used almost universally in this State to describe formal interviews between police and children in sexual cases; it is a reference to s 93A of the *Evidence Act 1977* (Qld) . The expression was used throughout this case and is accordingly used in these reasons.

particular repugnance attaches – and should attach - to a parent of a child using or exposing their own child in that manner. Expressed in terms familiar to the *Family Law Act 1975* (Cth) (“the Act”), the conduct is as complete and repugnant an abdication of parental responsibility as can be imagined.

- 10 Parenting cases in which allegations of the instant type are made present significant challenges for this court. Not the least of those challenges - and one evident in this case - is the nature, extent and quality of the evidence from which the court is asked to make findings in respect of very difficult central issues.
- 11 Section 140 of the *Evidence Act 1995* (Cth) recognises that “the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved”.⁷ The gravity of findings bear upon the decision as to whether the evidence as a whole persuades me to the requisite standard that they should be made⁸. Grave findings should not be made by reference to “inexact proofs, indefinite testimony or indirect inferences”.⁹ Nor, as Dixon J observed “... circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation.”¹⁰
- 12 The evidence before me reveals the possibility of a number of very grave findings:
- That the father has used both of his young children for sexual purposes and has falsely denied it;
 - That the mother and Mr E have conspired to make false allegations to that effect;
 - That Mr E has inculcated in G the false notion that the father has sexually abused them and has promulgated that false allegation to the mother, the broader family and the mother’s friends;
 - That the father has induced G to tell and promulgate a lie (that Mr E engaged in the conduct just described) by bribing her with a promised payment of \$100.
- 13 The gravity of a finding that a father has sexually abused his children is matched by the gravity of its corollary; a finding that the father has *not* engaged in behaviour of that type has, if it is erroneous, obviously grave consequences for the children. Equally, a finding of unacceptable risk carries with it very significant consequences for the children and has, axiomatically, a dramatic impact on their relationship with the father as well as ramifications for how the

⁷ *Qantas Airways v Gama* (2008) 167 FCR 537 at [139] per Branson J; French and Jacobson JJ agreeing.

⁸ *Evidence Act 1995* (Cth) s 140(2).

⁹ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 cited in: *M and M* (1988) 166 CLR 69. See also *K v B* (1994) FLC 92-478; *Re W (Sex Abuse: Standard of Proof)* (2004) FLC 93-192 at [15]

¹⁰ *Briginshaw*, above at 368.

father might be viewed in the future.¹¹ Again, by way of corollary, a finding that an alleged abuser does not pose an unacceptable risk obviously also has potentially grave consequences for a child if it be erroneous.

Origin and Context of the Allegations

- 14 The genesis of the allegations that the father has sexually abused each of his daughters is in the statements made by the younger girl, V, to Ms E (the mother's mother) and the mother in late July 2012, about three months after the parties separated. As will be seen, sinister meaning is attributed retrospectively to earlier statements and behaviours.
- 15 It is the July statements which prompted the mother to have both children genitally examined by a paediatrician and, a few days later, a formal police interview of G (and an unsuccessful attempt to interview V) on 31 July.
- 16 As seems almost ubiquitous in cases of this type, the evidence here consists of regular and increasing statements by the children of one sort or another, repeated to family members and others, all of which are said to be indicative of sexual abuse.
- 17 Equally ubiquitous in cases of this type, and again present here, the alleged statements are said to be accompanied by observed behaviours in the children which are causally attributed to the abuse: nightmares; stress accompanied by physical symptoms; fear of the father and repeated behaviour (and statements) to the effect that the children do not want to see their father. Contrary to the axiom familiar to science and statistics, correlation is said to imply causation.
- 18 The evidence in respect of these matters emerges from statements made by one or both of the children, predominantly to the mother, but also to members of her family and her friends. Affidavits from each depose to those statements. The father, too, asserts that the children have made statements to him; he asserts those statements are to the effect that he has not engaged in the conduct attributed to him. He deposes to observations of behaviours in the children when they are with him that are diametrically opposed to the picture presented by the mother and her witnesses, and to statements by the children to the effect that they not only want to see him but to spend more time with him. Almost all of the statements and behaviours to which the father deposes have occurred within the context of time that has been supervised by Ms A.
- 19 Ms A was initially suggested as a supervisor by the mother and agreed to by the father. After a short period of suspension instigated by the mother immediately consequent upon statements made by G, her continued supervision

¹¹ For example, Warnick J has observed: "Once a finding of unacceptable risk is made, imperfect though the process that leads to that result may be, the findings can come down between parent and child like an iron gate that no subsequent efforts can raise". *Napier v Hepburn* (2006) 36 FamLR 395 cited subsequently with approval in *Potter v Potter* (2007) FLC 93-326; *Partington v Cade (No 2)* (2009) FLC 93-422.

was formalised by a consent order. An Independent Children's Lawyer ("ICL") was appointed and Ms A was aware that she would be required ultimately to produce a report to the ICL. Ms A supervised time with the children over an approximate period of 20 months prior to being cross-examined in August 2014. Time occurred weekly on a Sunday and, for the majority of the time, at Ms A's home. In the latter part of that period her supervision was conducted at other places, including the father's home.

- 20 Apart from statements made by the children as alleged by the father, the mother and the mother's family and friends, statements said to be relevant to a determination of the issue of abuse (and unacceptable risk) are also asserted to have been made to, or in the presence of, Ms A and to witnesses asserted to have expertise. The latter include: Dr R, a psychologist whose consultations were initiated by the mother and who saw "[V] and/or [G]" on nine occasions; Mr D, a psychologist jointly commissioned by the parties to produce a family report and Mr F, a social worker commissioned by the ICL to prepare a family report.
- 21 In addition, Dr G, a psychiatrist, was commissioned to prepare a report on the parties by the ICL. He did not see the children. Also, the mother called a paediatrician, Dr H, as a witness.

THE ALLEGATIONS OF ABUSE AS THEY EMERGE FROM THE EVIDENCE

- 22 Exhibits ICL 8 and ICL 9 consist of a listed summary of statements and behaviours deposed to by the mother in respect of each child. The list of statements and behaviours continue until early 2014 prior to the commencement of the trial. The lists comprise in total some 24 typed pages and 169 separate items. The lists include non-particularised references to alleged pre-separation observations, for example: "Generally throughout" the parties' relationship "the children cried, had tantrums and begged [the mother] not to leave them with [the father] whenever [the mother] left the children in the father's care"; "the children were wary of males" and "[G] generally slept with many soft toys around her, as if trying to hide".
- 23 In respect of an event apparently said by the mother to resonate in events two years later pertaining to G, it is also said that, on Christmas Day 2010 (some sixteen months pre-separation when G and V were aged 5.2 and almost 2 respectively):
- [G], [V] and their cousins were in their bedrooms when [the mother] walked past and overheard them talking "bottom talk". "When [the mother] discussed this with [the father], [he] was very calm and said 'isn't that what kids do'".

- 24 Examples of behaviours deposed to by the mother as indicative of abuse or as, effectively, “corroborating” statements by the children said to be indicative of abuse include:
- “Generally when the children lived with [the mother’s] parents”: “[V] acted aggressively toward males on various occasions. [V] acted clingy toward [the mother]. [V] regularly suffered from nightmares and would scream”.
 - “The children dry retch, vomit and shake before and after visits with [the father]”.
 - “[G] said ‘I don’t want to see daddy again’ and [V] replied ‘daddy’s dead’”.
 - On 24.3.2013 “[G] dry retched over the toilet for half an hour and said to [the mother] ‘mum I don’t think I can go to see dad at [Ms A’s] today.
 - On 27.01.2013 “the children spent supervised time with [the father]”. V wet the bed that night.
 - On 17.02.2013 V woke up screaming “no, no, no” and dry retched.

Events and Statements Prior to 31 July 2012 Police Interview

- 25 An incident occurring between the children and their cousins on 4 June 2012 is deposed to as is a statement by G to the father in the mother’s presence on 10 July 2012. The mother deposes that, on 19 July 2012 (consequent upon a period of overnight time the previous night), V said that she “had a sore bottom ‘cause of whiskers”. The mother says she “did not know what she meant”. The mother also deposes to observing various contemporaneous behavioural disturbances (stomach pains, breathlessness and kicking and screaming at night). The combination of each appears to mark the start of her concerns about sexual abuse of V; concerns which she says were cemented a week later, specifically after statements by V recorded by the mother on her phone.
- 26 In paragraph 33 of the mother’s affidavit she states that the father sent a message on 24 July at 4.45pm saying “Nothing urgent. All good. Just funny story. Short version – [V] peed all over me. All good”. The mother swears in her affidavit: “I did not respond to the text message”. That evidence is false. In cross-examination she was confronted with a text sent by her to the father in response to his text. The text said: “Ha ha. Clean clothes in her kindy bag and jumper in [G’s] sports bag. Keep her warm. Welcome to parenthood.”
- 27 Ms E deposes to a conversation with V on 25 July¹² consequent upon a period of overnight time with the father the previous night. Ms E says that V said her “bottom is sore” and asserts that “[V] then said to me words to the effect of

¹² Ms E’s affidavit filed 14 December 2012 deposes to 24 July. She corrected it in the witness box to 25 July. I accept the former was a mistake.

‘Nanna, I have whiskers down there’”. The mother deposes to Ms E telling her that V had said to her that her bottom was sore “‘cause of whiskers in her bottom”. Other things are said at that time by V, but they are not there deposed to. They will be referred to later in these reasons.

- 28 That conversation prompted, it seems, a conversation between the mother and V occurring the next evening at bath time. The mother said in the witness box that she initiated that conversation. Part of that conversation was recorded by the mother on her mobile telephone. The presence of the mobile phone in the bathroom at bath time is said to be serendipitous. The recording and the mother’s transcript of it was sent by email to Mr E. It is headed:

Evidence [V] against her Father [Mr Thornton] Sexual

Child Abuse

Documented and recorded 4.30pm 2mis 54 seconds 26/7/12

Questioning Conducted by mother [Ms Thornton] to her daughter [V]

Documentation of attached audio file

- 29 The transcription as it appears in the email will be quoted in full later in these reasons as will the cross-examination of the mother in respect of the circumstances of its recording.

- 30 That first tape recording was succeeded by another; on the mother’s account, twenty-three minutes after the first. In cross-examination, the mother said that the first was recorded when V was on the toilet before her bath and the second after the child finished her bath.

- 31 The transcript of what is said to be the relevant parts of that later recording was also forwarded by the mother to Mr E by email a short time after the first. It, too, will be quoted in full later in these reasons. The email prefaces the transcript with the words:

Recorded transcript from above verbal recording between [V] .../.../09 3 years of age and [Ms Thornton] her mother at 4.53pm”.

- 32 Police records (Exhibit ICL 15) posit the conversation of 26 July as the catalyst for the mother’s complaint to the police and the mother’s apparent belief that abuse had occurred subsequent to separation. The complaint to the police is recorded as including, “[the mother] noticed a rash on [V’s] behind and that [the father] has stubble growth on his face which may explain the rash ...” The police notes record that the mother’s allegations pertained specifically only to statements made by V and record the mother telling police that “... [G] did not want to talk to her mother about any occurrences however the mother suspects that this child may also have been interfered with by the father”. Subsequent to the first police interview, the police records note that the mother stated that she “didn’t believe anything had occurred with [G] as she had never said anything ...”.

33 The events of 26 July also prompted the mother to have both children genitally examined by a paediatrician at a hospital on 27 July. Each revealed no abnormalities. The paediatrician observed that a normal finding does not exclude the possibility that sexual abuse has occurred. Each of the children is reported as suggesting, separately and some months later, that physical injury had been caused to them by their father.¹³ There is no evidence of any opinion sought from the examining paediatrician, or any other doctor, subsequent to either of those statements. Nor is anything referred to by the paediatrician pertaining to any rash.

34 The mother deposes in her affidavit of evidence-in-chief at [45]:

When [V], [G], my mother and I were walking out of the examination [by the paediatrician at Hospital K] I can recall [V] saying words to the effect of “that Daddy puts his fingers in her bottom like how the doctor put her fingers in her bottom” and “what the doctor did to me is what Daddy does to me”. [V] also said “Daddy had her last week and he touched her bottom and she put him in the naughty corner”.

35 The mother goes on to depose, at [46], to behaviours said to have been observed later that evening which she appears to attribute as causally linked: “... [V] waking up and trying to vomit ... gagging and she had a high temperature ... nightmares through the night and [... saying ...] ‘No no no no no Dadda, stop it! Don’t show me your bottom that’s not a magic show.’”

36 Prior to making a complaint to the police on 27 July, contact was made with a Mr L who is, apparently, a police officer and a friend of Mr E. Mr L was not called as a witness. Mr E deposes that Mr L said words to the effect of “The odds are, check – get them both checked. Usually in these cases, they’re both – something has happened”. Also apparently acting on the advice of Mr L, the mother and Ms E attended the matrimonial home where they found a yellow blanket which prompted a conversation between the mother and V, the effect of which was that the blanket was put into V’s bottom. The blanket was never given to the police nor mentioned to them.

The 31 July 2012 Police Interview

37 On 31 July, the police attempted to interview V but she would not engage in the process. Detective J conducted a 93A interview with G¹⁴. Her statements to the police officer will be referred to specifically later in these reasons. The interview is summarised in police records (Exhibit ICL 15).

38 In the interview, G said she had seen her father kissing V on the bottom. She said it was on the side of the bottom. When asked to describe the kiss she did

¹³ The mother deposes that on 2 September 2012 V said that her father had “... tore her skin”. Exhibit ICL 16 (Departmental notes) record G saying (apparently on 10 October 2012) that “daddy cut me there not with a knife”.

¹⁴ An agreed transcript of the interview is Exhibit ICL 2. The recording is Exhibit ICL 11.

so on the palm of her hand. The police officer describes it as “a peck style kiss”. That description describes accurately what I saw G demonstrate on the video. Nothing was said to V by the father in conjunction with the kiss.

- 39 Although initially saying she “doesn’t feel comfortable” with her father, “... on elaboration [she] states not being comfortable with dad relates to him being loud when he is downstairs with his friends and she is trying to get to sleep”. G said that her father “... had not touched her”. The records also record “she is not scared of her father but feels that V is always allowed to do things but she is not”.
- 40 The police record that, “[a]t this stage there is insufficient evidence to substantiate any criminal offence has occurred”. The police notes also record that: “Mother stated that the child [V] had made disclosures to her relating to the father kissing her and was documenting it and would email. Further review to be conducted once documents provided by mother”. The police records do not record any “documents” subsequently being provided by the mother; the “supplementary report” following the matters just referred to pertains to a subsequent complaint by the mother, and consequent 93A interview, in October.

Events and Statements Subsequent to the 31 July 2012 Police Interview¹⁵

- 41 G was interviewed by the same police officer on a second occasion on 13 October. Despite G’s denial to the police on 31 July that improper conduct had been directed to her, the 31 July - 13 October period sees statements by G said to be indicative that she, too, has been sexually abused by her father.
- 42 On 1 August 2012, the day after G was interviewed by the police, the mother initiated a conversation with V about “the afternoon she had spent with her father on 24 July 2012”. The mother’s account of what V said is that the father “...was pretending to be a monster on my bed and he weed on my bed...” The mother deposes that “...[V] [said] words to the effect of ‘Daddy did pop offs on her face and in her mouth, he kissed her on the bottom.’ She said she was crying and it was disgusting. She then said that ‘He used the blanket and pretended he was a monster and that daddy was jumping up and down pretending to be a monster on my bed and he weed on my bed’. She also said that ‘he put blankey in her bottom and that dad didn’t say he was sorry’...”. “She then showed me what he did and jumped on the bed”.
- 43 The evidence does not reveal that the event and statements were witnessed by anyone else. In that respect the mother deposes that V said that G was at a dancing lesson and, as a result was not present when the alleged behaviour allegedly occurred.

¹⁵ Excluded from the list of statements made by the children outlined hereafter are those said to have been made by either of the children during sessions with a therapist, Dr R. Dr R’s evidence will be dealt with separately below.

44 The mother and her witnesses depose to a number of statements made by the children within the week following the 31 July interview, to which, plainly, the mother (and her family) attach significance in concluding that both children have been sexually abused by their father:

- Ms I, a friend and business partner of the mother, says that on 3 August V said “out of the blue”, words to the effect of “*You know what my daddy did, [Ms I]? ... “He kissed me on the bottom and it was disgusting.” ... Ms I said that she told V that her father’s action were “not nice”. V said words to the effect of “I tell him to stop but he doesn’t”.*
- Ms E swears that on 4 August, when bathing V and G, V said words to the effect of “*Only Daddy can touch my bottom.*”
- Ms E also deposes that, two days later on 6 August, when collecting the girls from school and kindy, V said to G words to the effect of “do you want to see daddy? ... I miss daddy”. G then said words to the effect of “but he kisses your bottom” and V said “ok”.
- Ms I deposes that on 8 August, when at a park with her son M and V, she recalls hearing V say to M words to the effect of “[M], I have got a secret to tell you”. M’s response “was a typical four-year-old ‘ew’”. Ms I “asked [M] what [V] had said [and] he told me words to the effect of ‘[V] said her daddy weed on her bed and her face’”. After V again whispered to M “[M] then blurted out words to the effect of ‘[V] said her daddy kisses her bottom and she doesn’t like it.’” The mother also deposes to this incident – based, it seems, entirely on what Ms I told her: “[Ms I] told me that [M] told her that [V] whispered in [M’s] ear about the things her Daddy had done to her. [Ms I] also told me that [V] had told her when we were at the park, that Daddy had weed in her eyes”.

45 Thereafter, further statements made by the children and observations of their behaviours are deposed to by the mother:

- a) The mother reports V saying during a telephone call with her father on 14 August (which was, the mother says, the first time V had spoken to her father since she made her statements on 26 July 2012: “I love you dad, but did you kiss my bottom” to which, the mother says, the father replied, “stop talking silly talk, we don’t talk silly talk”.
- b) The mother deposes to a statement asserted to have been made to a Ms S – a counsellor or therapist to whom the mother took V for one session. The mother says that on 21 August, V told Ms S that “daddy kisses her on the bottom” and when Ms S asked V why, she

said words to the effect “Because he loves me”. Ms S is not a witness. Counsel for the father asked the mother about this to which the mother replied: “I believe she gave notes”. No notes were tendered. No report is in evidence.

- c) The mother says that on 23 August 2012 she observed V putting her fingers into G’s bottom and when asked why she had done it, V said “... her Dad had shown her”.
- d) On 28 August 2012 the mother says that V asked her “...to ensure that ‘daddy would not kiss her bottom’...”. On the same day, the mother deposes that G was sleeping with her and “... screamed three or four times during the night as she was scared.” When the mother asked her why she was scared, G said words to the effect of “because of what daddy does to [V] I am scared”. The mother deposes that she then asked G if it had happened to her. “She nodded her head and broke down crying and then said words to the effect that ‘she couldn’t remember’ and that ‘I can’t talk about it until I am older, it’s not the right time to talk about it’”.
- e) On 1 September 2012, the mother says that V said to her words to the effect of “mummy, I asked daddy and he promised he would not kiss and lick me on the bottom again”.
- f) The following day, the mother says she observed V urinate on G in the bath and when the mother reprimanded her for doing so, V said words to the effect of “daddy wees on me”. The mother deposes that G said “no he doesn’t” and V responded with words to the effect of “yes he does, he wees on my bottom”. The mother further deposes that when she put V to bed that night, V said words to the effect of “I don’t want to see daddy again, mumma he hurt me he tore my skin” and when the mother asked her where, V “...pulled down the back of her pants and pointed to her bottom...”.
- g) The mother reports a nightmare which G had on 6 September 2012 about the tooth fairy. She says that G kept saying “I can’t talk about it until I am older, it is not the right time to talk about it”.
- h) The mother says that on 8 September, V had “...asked [her mother] to promise that her father would not kiss her on the bottom again...”.

46 It can be seen that the mother deposes to an event on 28 August whereby she appears to infer that words and an apparent non-verbal assignation by G indicate that she had been abused by her father. As will be seen, from about 9 October, evidence is given by the mother of direct statements said to have been made by G indicating that she, too, had been subjected to abuse by her father.

That specific evidence emerges from statements consequent upon an incident on that date as a result of which G was chastised for behaviour involving her cousin. On the mother's account, "[t]hey were showing each other their bottoms". Having asked the girls to desist and making it clear that it was "unacceptable behaviour", the mother called G into the bathroom. The mother "asked [G] if someone had done that to her". G:

... said 'no' and was silent but then said that 'dad had licked his two (2) fingers and wiped them on her stomach'. When I asked [G] if he ever touched her anywhere else she said "no, just licked his fingers and rubbed them on her stomach." (at [72]).

47 In her evidence-in-chief, the mother deposes that on 9 October:

73. I spoke to [G] and asked her again why she continued to do these things. [G] told me that [the father] had touched her on 24 June 2012 which was the night that she had a sleep over with [the father]¹⁶ and lost her first front big tooth. When I asked [G] why she was doing this she told me that her father had done it to her.

74. [G] told me that [the father] had said to her that he was the tooth fairy and that he put two of his fingers inside her bottom that night. [G] said words to the effect of 'he put his fingers in slowly and it hurt'. [G] demonstrated what she had said [the father] had done to her. She put two fingers in her mouth and started licking them and twisting them in a sexualised manner in her mouth with sound effects. I was horrified and sick to my stomach when I saw her do this as that is what [the father] used to do to me when we had sex.

75. I asked [G] why she had not told me earlier and [G] told me that [the father] had said to her not to tell me as 'Mummy would kill Daddy'. She started crying and said 'dad licks his fingers and touches my stomach and the night she lost her tooth when the tooth fairy came, dad came in and said he was the tooth fairy but I knew it was him. He put his fingers in my bottom'. I said to [G] 'I know you love daddy and daddy loves you but it was wrong of daddy to do that'. She told me that she could not remember it happening any other time.

48 Consequent upon this conversation, the mother "stopped the children spending time with [the father]".

49 The mother's brother-in-law Mr N deposes to a conversation he had with G on the same night of 9 October. In his affidavit, he deposes that he asked G if she

¹⁶ The mother's affidavit of evidence-in-chief deposes that time between the father and the children "... after separation included time during the day, time at the home of my parents and time overnight with [the father] alone". Only two specific periods of overnight time (described by the mother as "sleepovers") are earlier deposed to – 18 July and 24 July. Her (unsworn) case outline includes in a chronology a third occasion, 10 July. Other evidence suggests a fourth. In any event, no cross-examination challenged the assertion that overnight time occurred on 24 June and I assume it is uncontroversial.

wanted to talk to him “about the allegations”. He says that she told him “that she had been holding a secret”. That occurred at about 7.30 at night subsequent to G’s conversation with the mother. He deposes to his question of G being prompted by both the mother and G being upset. Mr N said in cross-examination that G put two fingers together and she said words to the effect of “Daddy puts his fingers down there,” pointing at her vagina, “And smells his fingers and licks them”. He asked G how this made her feel and she said “It’s disgusting. I don’t want [him] to do it anymore,” and it happened when “he was being the tooth fairy.” In his affidavit Mr N reports G as saying “he says that he is the tooth fairy... I just pretend I am asleep ... I want him to stop doing it”.

- 50 The mother’s sister Ms N said in cross-examination that the following day, 10 October, she said to G “that it was good that she had a big talk with her mum last night” and that G then said “Yes, Daddy pretends to be the tooth fairy, licks his fingers and touches my bottom.”¹⁷ In her affidavit, Ms N deposes to G saying “front bottom”.
- 51 The mother again raised with G the incident and conversation just referred to three days later on 12 October.
- 52 The mother says when she was driving to the airport she asked G why she had not spoken before about what [the father] had done, to which G responded with words to the effect of “daddy said if I told you, you would kill him ... I cried every time you went to training ... how come you didn’t listen to me.” G also told her mother that [the father] did it to her “because he loves me” and that it had been happening since she was five years old.
- 53 Documents produced under subpoena from the Department of Communities, Child Safety and Disability Services were tendered by the ICL. (Exhibit ICL 16). They record a notification to that Department made (by an unidentified notifier) on 12 October. Among the notified concerns, it is recorded that: “... [G] said that ‘daddy cut me there, not with a knife. Daddy was pretending to be the tooth fairy that night. [G] has been having nightmares about the tooth fairy hurting her for the past couple of months”.

¹⁷ Transcript of proceedings 21 May 2014, page 315 ln 43-44

The Children are seen by the Psychologist Dr R

- 54 At the mother's instigation, Dr R, a psychologist, saw "[V] and/or [G]" on nine occasions. Six of those sessions occurred approximately weekly prior to a second police interview with G which took place on 13 October¹⁸. The last of those six sessions occurred on the day before that police interview. The first session subsequent to the second police interview occurred five days after it on 18 October.
- 55 Dr R was the third therapist or counsellor to whom V was taken by the mother in the approximate five months between separation and G's second police interview. The mother deposes to him being the first to whom G was taken.
- 56 Although it is not referred to in Dr R's report, it seems to be uncontroversial that the father was invited to participate in this process but he declined, seeking in fact that the process cease. I reject the submission by the mother that the father's lack of participation in Dr R's process was unreasonable or that some inference adverse to him should be drawn from it. There was at that time (and still is) a high degree of conflict and suspicion between the parties (including a suspicion by the father that the mother was "evidence shopping") and Dr R was chosen unilaterally by the mother. Whether or not the first suspicion is ultimately correct or not is not to the point in assessing the reasonableness of the father's then conduct.
- 57 Although not established through direct questions of Dr R, it is clear that the focus of his sessions with "[V] and/or [G]" was therapeutic as distinct from forensic. In that respect, not only was the father not seen by Dr R, either alone or interacting with the children, but, in addition, the report itself says that, "...[e]ssentially the focus was on giving [the mother] and [V] both skills to manage current symptoms".
- 58 The presenting issue as summarised in the report was that "[V] had disclosed possible sexual abuse to [the mother] by her [i.e. V's] father". The report goes on to record that the "... alleged abuse had occurred on multiple occasions and included [the father] kissing/licking/touching her bottom". A series of V's behaviours recounted by the mother is there also recorded. No concerns or allegations of sexual abuse of G are referred to as constituting any of the presenting issues. The first session was on 4 September 2012.
- 59 Dr R's report refers to seeing "[V] and/or [G]"; it does not specifically refer to the fact, which emerged in his oral evidence, that the mother was present for seven of those nine sessions. Neither the report nor oral evidence specifies each of the sessions for which she was present. The report says that "[G] also attended *some* sessions with [V] to help build resilience for [G] and to help [V]

¹⁸ Report of Dr R: 4/9/12; 11/9/12; 18/9/12; 25/9/12; 5/10/12 and 12/10/12. The remaining three sessions occurred on 18/10/12; 24/10/12 and 9/11/12.

engage more in the sessions as V was very quiet and shy in the sessions with me by herself” (my emphasis). The report does not specify how many, or which, sessions saw both children present. Dr R stated in cross-examination that he saw G and V together without their mother on two of the nine sessions, that there were only “a few sessions that I had that [G] was involved in”, and that “most of my sessions were with [V] and [the mother]”.

- 60 Although Dr R makes mention of being the third therapist to whom V had been taken in an approximate five-month period, he makes no mention of any enquiries made of those earlier therapists. It is also not known whether Dr R was made aware that G had been interviewed by the police some six weeks prior to his first session and, in that interview, had denied that any improper conduct had been directed toward her. There is also no indication that he was aware that the police were unable to have V engage in an interview.
- 61 Particulars of the statements said to have been made to Dr R by each of G and V will be referred to later in these reasons. For present purposes it might be observed that his report says that, “[d]uring the course of the sessions [G] disclosed her own sexual abuse to *[the mother]*” ...while recording later in the report that, “When we were discussing various types of feelings, [G] did disclose her abuse *to me* ...”. [Emphasis added in each case]. In cross-examination Dr R confirmed that G’s disclosure to her mother “definitely occurred outside my room”.
- 62 The latter “disclosure” did not occur verbally; G refused to do so. Dr R acquiesced in that refusal. He asked her to write her statements on a whiteboard. G agreed. There is no record of what G wrote on the whiteboard. In oral evidence, Dr R said he would “ordinarily” take a photo of what a child wrote on the whiteboard. However, not only would G not say anything verbally to him, he says that she also refused to permit him to take a photo of the whiteboard. He also acquiesced in this refusal.
- 63 As mentioned, the terms of the initial referral pertained, on his account, to concerns about sexual abuse of only V. No mention is made of any statement by V in any of the nine sessions save for one. In recording G’s “disclosures” to him as just described, Dr R said that when he “...asked [V] whether this had ever happened to her she buried her head behind G and said that Daddy put his fingers in her bottom.”
- 64 Dr R reported the “incidents of sexual abuse” to relevant authorities. In addition, he says in his report that he also “...spoke to Taskforce Argos¹⁹ regarding [the father] and the possibility that he may be engaged in child pornography offences.” Nothing in Dr R’s report or evidence suggests any basis for the latter report save for statements by the mother about something which, on his account, is said by the mother to have occurred over eleven years

¹⁹ A branch of the Queensland Police Service dealing with sexual offences against children.

previously: “[the mother] did relay that when she first started dating [the father]²⁰ he had been in a big argument with his brother about files that his brother found on [the father’s] computer.” The father complained during his interviews with Mr F that his “computers were seized”. There is no other evidence before me in relation to that seizure; that the police took any action arising from that seizure, or that there is any on-going investigation in respect of same.

The 13 October 2012 Police Interview

- 65 Consequent upon the statements made by the children in the period after the first police interview and, it seems, the October statements of G in particular, G was again interviewed by Detective J on 13 October 2012.²¹
- 66 Again, particulars of what G said during that interview relevant to abuse or risk will be given later in these reasons. During that interview, G alleged that her father had engaged in specific sexual conduct towards her. The subpoenaed police notes record in that respect that, save for the details given by G, “[w]hen attempting to obtain further particularisation child was unable to enhance further”.
- 67 Despite G saying a number of things to the police officer that might be construed as indicative of abuse, the police determined that “there was insufficient evidence to substantiate any offence has taken place sufficient for a [criminal] court proceeding”.

The Father’s Covert Video Recording

- 68 On 16 September 2012 (that is, about three weeks before the second police interview) the father took a video recording of part of an interaction between the mother, the children and him at a shopping centre. (Exhibit M5).
- 69 The video was taken covertly – that is, without the knowledge of the mother (or the children). The recording is plainly self-serving – it is covert, part only of the interaction and, importantly, only a part selected by the father.
- 70 An attempt was made at the hearing to agree on a transcript of the words recorded. A transcript was agreed with one exception. Toward the end of the transcript, two alternatives are given to a response from V to a direct question from her father as to why she had said he touched her bottom. One records “because you didn’t”; the other “because you did it”. As I said in court, I consider that the recording reveals the former. Counsel for the father agreed. However, counsel for the mother suggests the latter. Despite listening to the recording multiple times, I consider the recording insufficiently clear to stand on its own as evidence of either.

²⁰ The mother deposes to the commencement of the relationship with the father commencing “in or around July 2001”.

²¹ An agreed transcript of the 93A interview is Exhibit ICL 3. The video recording is Exhibit ICL 12.

- 71 In any event, I accord no weight to either version of the statement in assessing whether abuse did or did not occur or in assessing whether time with their father involves an unacceptable risk to the children. (Nor do I attach significance to any other words used as indicative of abuse or as indicative that it did not occur).

The Mother's Assertions After the Second (13 October 2012) Police Interview

- 72 The mother deposes in her evidence-in-chief to statements made by V and G subsequent to the second police interview.

- 73 Examples include:

- a) On 18 October, five days after the second police interview, V started putting her fingers in her bottom and making G smell them. When told by the mother not to do it to G "or anyone else", the mother says that V said words to the effect of "is it just for daddys to do".
- b) Later that evening, the mother says V said "out of the blue" words to the effect of "oh that's wee wee" "he put his fingers in my mouth with stinky bottoms on it, I spat it out and spit the bottom at dad."
- c) The mother recounts G saying on the following day, 19 October, that the father had said to her that "mummy hates dad and that mummy would kill dad if [G] told mum the secret".
- d) On 10 December, G asked the mother why she and the father had separated and the mother responded:

...that it did not have anything to do with her or [V], that we both love her and [V] and that it was just best for us not to be together. I asked her how that made her feel. [G] told me that it made her feel sad but that she did not like what [the father] did to her. I asked [G] if she wanted to tell me about what [the father] had done to her. She said to me 'He put his fingers in and said he was the tooth fairy'. I asked [G] if that was what [the father] had said each time. She said 'no, he said he was a spiritual ghost'. I asked [G] how it happened. She said 'Daddy would wait until I rolled on my side, he said he was pulling the blankets up but he wasn't really he put his fingers in' I asked where he put his fingers. [G] told me 'in my back bottom'. I asked 'are you sure'. She said 'yes, he licked his fingers and put them in my bottom.

 - G saying that "... her father had taken a photo of her and [V's] bottoms in the bath and had asked her to stand up and wash her bottom and he took photos of her".

- 74 The mother also deposes to a number of physical symptoms and observed behaviours which she attributes to the abuse of the children by their father and their consequent fear of him. Those observed behaviours and statements

include statements and behaviours said to be indicative of a floridly-expressed unwillingness to see the father. Examples include:

- The mother deposing to and annexing a medical report that V had “... been a patient of the above listed practice from 15/3/13 to 10/04/13” (that is, about three weeks) V had “... presented with some physical signs associated with the stress and anxiety that has been happening in her life” that included “worsening eczema which was over her entire body and she had peeling of the skin on her fingers as well associated with the stress. She has red raw fingers associated with excessive peeling of the skin.
- In a similar vein, a report in respect of G (who had been a patient of the practice for about 10 weeks from 6/2/13 to 29/4/13 says that she has “... presented with some physical symptoms associated with the stress and anxiety she has recently been through ... [including] dry retching, some vomiting and also breakouts of her eczema and peeling of her fingers that at times were extremely red and raw due to the peeling of her skin”.
- G saying “no, no, no” when reminded it was time to telephone her father and appearing “quite distraught ... She begged me and was sobbing uncontrollably saying that ‘she did not want to speak to Daddy”’.
- G saying “out of the blue” words to the effect of “mum what if I was playing in the park with dad and he tried to steal me”.
- After a period of supervised time with Ms A on 9 December, the mother asserts V was angry “ ... punching and hitting [G], pushing her dinner over and not eating her food” and when asked why she was angry, V said words to the effect of “I am angry because I saw Dad and I never want to see him again”.
- Both girls “crying and becom[ing] distressed” when she encouraged them to telephone their father.
- G “screaming outside [the supervisor] Ms A’s residence” on 6 January 2013 “as she did not want to see her father.” G “started to yell” at her mother and “begged [the mother] and kept saying words to the effect of “I don’t want to see dad”. G is alleged to have “had a stomach ache and wet the bed that night”.

The Children are seen by Reporting Psychologist Mr D

- 75 Mr D, a psychologist, first saw the parties and children on 28 November 2012. He had been commissioned “on the joint request” of the parties’ legal practitioners. Although commissioned in that manner, he says “that my work in preparing a report is fundamentally and ultimately for the court”.
- 76 The circumstances surrounding the subsequent preparation of two reports by Mr D – a “Brief Family Report” (Exhibit ICL 5) dated 18 October 2012 and a “Partial Family Report” (Exhibit ICL 6) which is undated – are highly unusual and will be discussed below. His (extensive) notes were also produced and became Exhibits ICL 1 and ICL 7.
- 77 The “Partial Family Report” outlines a series of interviews and telephone discussions said to have occurred in April 2013. The persons there referred to are not the parties to these proceedings, nor do they have any connection with this case. It is agreed they refer to a family wholly unconnected with these proceedings.
- 78 Mr D’s Brief report indicates that he interviewed the father on 28 November 2012 and observed the father interacting with the children on the same date. Yet, nothing at all appears in his report in respect of either.
- 79 The collateral information obtained by Mr D from Ms A (in two telephone conversations on 18 December 2012 and 8 May 2013) will be referred to in the context of discussing her evidence later in these reasons.
- 80 Again, the statements made by either of the children to Mr D will be particularised later in these reasons.
- 81 Mr D was asked why he had produced, ultimately, only a partial report. His evidence was puzzling – all the more so as it comes from an experienced report writer:

I cannot explain that entirely. There was something about this matter that I became very – very stuck on. I could not work through this to a point that I could reach a production [sic] conclusion. I’ve thought long and hard about this and I knew I – I knew I would have to address this question today but I – I don’t think I can give a fuller answer than that.

- 82 Under questioning from counsel for the ICL he continued:

COUNSEL: Now, when you say you got stuck, does that mean you got stuck in terms of expressing an opinion and conclusions? - -

MR D: Not entirely. Not entirely. There was something about this matter that whenever I went near it I – whenever I read, whenever I thought about it, whenever I read some more affidavits, it – it became much more complex than I – I felt I was able to address, I think. I’m not sure if that’s entirely the case. Well, as I said, I don’t have the complete answer for you.

- 83 That prompted questions from me:

HIS HONOUR: And, yet, oddly, as it seems to me at least, the four paragraphs of opinion [in the Brief Report] and conclusions appear at least to pre-date the other material. I would have – now, I don't know but I would have thought that, if you had got stuck, it would be the other way around. In other words, that you look at a whole bunch of stuff, you think, “Well, I've got a tentative conclusion A or a tentative opinion B or tentative conclusion C, but I'm stuck,” for whatever reason and therefore what would be missing is the opinion and the conclusion. But this is the other way around ... the opinion and conclusions come first and then there's some other material based on the interviews, observations, etc, and then ... as you describe it, getting stuck?---

MR D: That's right. So in that – in that brief family report, that was something – you know, I was very tentative in offering that and I – I used my language carefully. I think the “stuck” point came when it came time to be more conclusive and elaborate in what I was able to present to the court.

- 84 Counsel for the ICL then asked, “But are you able to assist us with any opinion and conclusions?” to which Mr D replied, “I haven't worked through all of this material to the point that I could confidently assist you, I believe.”

Dr H's Letters and “Report”

- 85 The mother relied upon an affidavit by Dr H, a paediatrician, filed on 2 April 2014. The doctor was not required for cross-examination by either the father or the ICL.
- 86 Having met with the mother and V, the doctor wrote a letter dated 14 November 2013 that was provided to Bravehearts; the Department of Communities, Child Safety and Disability Services; the “Child Protection Investigation Unit”; and “SCAN – Hospital K”. The letter recites in part that V had, “... developed some deeply disturbing behaviours” and postulated her suffering “ ... some extraordinarily traumatic experiences in the past”. The doctor's letter goes on to record that, “[i]n taking her history it would appear all of this is consistent with child sexual abuse”.
- 87 The doctor's letter then goes on to provide an exhortation for there to be “a major police investigation” and to comment that it was “incomprehensible” that “[V] is allowed to be in the company of the alleged perpetrator”.
- 88 It is not clear from either the doctor's letter or his affidavit what data, save for the mother's account (and any statements by V – which are not recorded in either), the doctor had available to him, including, for example whether he was aware that there had already been two police interviews with G and an inability to have V participate in either.
- 89 In a subsequent letter to the mother's solicitors dated 4 March 2014 (described in the affidavit as a short report written at their request), Dr H stated that, he:

...was never engaged to undertake any medico-legal work with respect to the child. As a direct result of that it was on the basis of what was told to me by the mother that I felt that it was imperative that I ensure that investigations had been undertaken by the appropriate people... [and that he] ... did not examine [V] with respect to the reported child abuse on the basis that this had been undertaken by others...

The Children are seen by the Family Report Writer, Mr F

- 90 Mr F conducted interviews with the parties, the children and Mr E and Ms E on 12 September 2013. The same day, he undertook observations of the children with each of the parties (and the parties together).
- 91 Mr F is one of three people independent of the parties or their witnesses who have had the opportunity of both speaking to the children and observing their interaction with each of their parents. (The others are Mr D and Ms A.)
- 92 I accept the evidence of Mr F recording statements by the children and his observations of their behaviours and their interactions with their father as accurate and reliable. Indeed, they were not challenged as otherwise.

The Evidence of the Psychiatrist, Dr G

- 93 Dr G is a psychiatrist commissioned by the Independent Children's Lawyer to prepare a "report in relation to this family". He saw the father on 16 May 2013 and the mother on 17 May and again on 3 June. He did not see the children or observe any interactions between the children and either of their parents.
- 94 Dr G's psychiatric opinion of each of the parties was, relevantly, unremarkable.
- 95 He saw no evidence of any pervasive depression in the father. Although there was "no disorder of the form of thought", the father was nevertheless "... circumstantial and tangential at times" – a trait I observed frequently for myself in the witness box. Also entirely consistent with my observations of the father's demeanour in court, Dr G said of the father: "... I note an idealised account of the marriage apart from the last few years and also an idealised picture of his ex-wife whose physical attributes he described in glowing terms".
- 96 Having noted "no organic mental state, psychosis, major mood disorder or anxiety state", Dr G turned to the father's personality where he assessed:
- ... narcissistic features ... but further information is required with respect to whether there is any disorder. He presents as having a poorly defined sense of who he is ... some aspects of his attitude to the marital relationship also suggest he engages in what may be called 'part object relations' as evidenced by his difficulties in describing his wife as a person as against her physical characteristics ...

Importantly, the father's personality vulnerabilities as discussed should not be taken as evidence that sexual abuse of the children has occurred or that

it is likely to occur although narcissism has certainly contributed to the break down of marital relationship.

- 97 In respect of the mother, Dr G similarly noted “no organic mental state, psychosis, major mood disorder or anxiety state”:

From a psychiatric perspective it is difficult to know what to make of the mother’s beliefs that the father has sexually abused both the children based on what the children have said and their associated behaviours

- 98 As to personality, the report opines that the mother “is within the normal range ... There may be some issues of dependency but further information is required on this”.

Time with the Father Supervised by Ms A

- 99 The first visit supervised by Ms A was on 30 September 2012. Ms A continued to supervise time during the period spanned by the trial (which needed to be adjourned part-heard and concluded some three months later). Senior counsel for the mother required Ms A’s personal attendance to be cross-examined, indicating early in the trial that “... her credit will be in issue”. Ms A gave evidence in August 2014, when the part-heard proceedings continued.
- 100 Ms A’s evidence is very important. As will be seen, extremely serious allegations arise from events in early 2013 to which she was a witness. Her evidence and the challenges to it will be examined in detail below.

ISSUES EMERGING FROM THE EVIDENCE

- 101 There is no physical evidence that sexual abuse has occurred; the genital examination performed by a paediatrician detected no abnormalities. As she points out, that does not mean that abuse has not occurred.
- 102 In the absence of any physical evidence, ultimate findings as to abuse or risk must be based in significant measure on an assessment of what children have said and, importantly, what they have said to different people at different times and in different circumstances.
- 103 Obviously enough, the mother (and her family) seek to attribute decisive weight to the children’s statements which, she contends, are indicative of abuse of the girls at the hands of their father. So, too, with their behaviours and asserted unwillingness to see their father and their fear of him. Doing so involves giving little or no weight to other statements, and other evidence of the children’s behaviours to the opposite effect of what she contends for.
- 104 The complexity of the findings that might be open in that respect emerges from issues which will already be apparent from the outline of the evidence given above. Examples include:

- The speed and intensity with which allegations of abuse emerged from and after V's statements to her grandmother;
- The circumstances surrounding, and manner in which, statements by V were recorded by the mother very shortly thereafter and embraced immediately as indicative of abuse by the mother and her parents;
- The assertion by the father that the circumstances surrounding those events are part of a "conspiracy" against him;
- A denial by G that any sexually improper behaviour had been directed toward her and subsequent statements that it had, including during a police interview marked by her exhibiting significantly different demeanour;
- The diametrically opposed accounts of the children's behaviours when with their father and their expressed attitude toward seeing him and alleged fear of him;
- The nature, extent and frequency of questioning of the children and the attention paid to statements made about their father, the mother and Mr E.

105 An added layer of complexity emerges by reference to events at and around Ms A's supervision of the children from early 2013. During her supervision during the early part of 2013, evidence of the following matters, given here by way of overview, emerges:

- Statements are said to have been made by G that, on their face, suggest that the mother has been instrumental in prompting allegations of abuse from her.
- Statements are said to have been made by V to similar effect.
- G has made statements to the effect that the mother played the tape recording of V of 26 July 2012. She says it was played when they were driving in the car, that it was played "loud" and was played "all the time".
- Statements are said to have been made by G in which she denied to the father in Ms A's presence that her father had "touched her bottom".
- Statements are said to have been made by G to the same effect to Ms A alone.
- Statements are said to have been made by G in which she says that Mr E had "made her" say that her father had touched her bottom.
- Further in that respect, statements are said to have been made by G to the effect that Mr E had told her that she "had to lie".

- Subsequently, statements are said to have been made by G to the effect that her lie was a lie.
- Further in that respect, statements are said to have been made by G to the effect that the latter lie was prompted by her father offering her \$100 to tell that lie.

106 Obviously enough, issues of the gravest seriousness are raised by that evidence.

107 Further, despite the highly-conflicted nature of the evidence, uncontroversial findings pertaining to the children's statements emerge from that evidence:

- G has been questioned about important matters by each of her mother, her father and by Ms A;
- G has made statements, including accounts of events, that are different depending upon the audience receiving them;
- On *either* the father's account (supported by Ms A) *or* the mother's and Mr E's account, G has, as they respectively assert, made untruthful statements;
- On *either* the father's account (supported by Ms A) or the mother's account, G has told untruths that are attended by detail and in respect of matters of significance involving people who she loves and who are central to her welfare and nurturing.

108 A judgment needs to be made in respect of three separate, but integrally related, central issues – each of which, and the interrelationship of which, is illustrated starkly by reference to the allegations emerging from supervised time with Ms A. Those three issues are:

1. The veracity and reliability of statements made by the children: That is, what precisely did each child say and what should be made of its content;
2. The veracity and reliability of the *reports* of the children's statements: That is, should *the reporter's* account be accepted as an honest and reliable account of what each child said, when it was said and the circumstances in which it was said. Similarly, the veracity and reliability of the reports of the children's behaviours and alleged fear of their father is important; should the reporter's account of those matters and the circumstances in which they occurred be accepted as honest and reliable; and
3. Contextual factors and circumstances that impinge on each of those two issues.

109 Plainly, central decisions about the reliability – and truthfulness – of evidence are central to a resolution to all three issues. Findings as to the truthfulness and

reliability of each of the parties, Mr E and Ms E, and Ms A are crucial to informing findings as to those issues and, ultimately, abuse or risk.

- 110 Findings as to the reliability of the opinions expressed by Mr D and Dr R and the weight to be attached to those opinions are also important. Neither Dr G's opinions, nor the observations of Mr F, were seriously challenged as inaccurate or unreliable.

THE TRUTHFULNESS AND RELIABILITY OF EVIDENCE

Contextual Factors and Circumstances

Loyalty, Unconscious Bias and High Emotion

- 111 Here, many of the plethora of statements attributed to the children emerge from the evidence of each of the parents and the mother's family members or friends. Other statements emerge from the evidence of Dr R, Mr D, Ms A and police interviews²².
- 112 Contextual factors and circumstances apply to each (although not necessarily the same ones).
- 113 The comments of Lord Pearce made in the House of Lords nearly 50 years ago in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403,²³ are not only as true now as they were then, but can be seen as particularly apposite in the highly-charged atmosphere of this case:

... Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he [or she], though a truthful person, telling something less than the truth on this issue or, though an untruthful person, telling the truth on this issue? Thirdly, although he [or she] is a truthful person telling the truth as he [or she] sees it, did he [or she] register the intentions of the conversations correctly and, if so, has his [or her] memory correctly retained them? Also, has his [or her] recollection been subsequently altered by unconscious bias or wishful thinking or by over-much discussion of it with others?

- 114 His Honour went on to say, importantly as I see it to the current context:

Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. ... And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process ...

²² Sections 69ZT and 69ZV of the Act, and Division 12A more generally, pertain.

²³ This passage has served as useful commentary in several Australian decisions, see for example: *Brandon v Hanley* [2014] VSC 103, [224]; *Lane v R* [2013] NSWCCA 317, [168]; *Withyman v New South Wales* [2013] NSWCA 10, [65].

- 115 More recently, to similar effect – and, again, particularly apposite in my view to this case - Legatt J said in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC (Comm) 3560, at [19]

The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

- 116 Legatt J's comments are made in the context of a commercial case. They are in my respectful view all the more powerful when what is at stake is the welfare and protection of children. Allegations of the present type properly invoke strong feelings among those who care for the children the subject of the proceedings. As will be seen, those strong feelings are overt in this case.
- 117 I consider that their Honours' statements resonate loudly in this case. To their Honours' lists of considerations I would respectfully add that, in cases of the instant type, the reliability and veracity of the evidence can be coloured by the belief that the end (protection of children from abuse or the defence of false accusations as to abuse) justifies the means (exaggeration or "stretching" or manipulation of the truth). Again, as will be seen, I think that factor is manifest here.

Demeanour and Behaviour

- 118 Caution should attend findings as to the veracity and reliability of evidence based on the demeanour of witnesses observed in the witness box, if only because: "judges are increasingly aware of their own limitations and of the fact that, in a courtroom, the habitual liar may be confident and plausible and the conscientious truthful witness may be hesitant and uncertain"²⁴.
- 119 So, too, judicial assessments of the behaviour of parents as revealed by the evidence – and what "should" or "should not" be expected of parents in those situations – must recognise that not only is every person different but that every parent parents according to their own lights, usually informed by their upbringing, beliefs and values (and very often imbued with a resolve to not make the same "mistakes" their own parents made). Values differ. Values often inform perceptions. Parenting cases often involve values as much as facts.²⁵

²⁴ *DeVries v Australian National Railways Commission* (1993) 177 CLR 472 at 480 per Deane and Dawson JJ.

²⁵ See, for example, Kirby J in *CDJ & VAJ* (1998) 197 CLR 172 at 219

- 120 Yet, while recognising the caution that should be applied emanating from those considerations, the observation of witnesses as they give their evidence can, equally "... legitimately [play] a significant and even decisive part in assessing credibility and in making factual findings".²⁶ So, too, incongruities between assertions and observed actions can, albeit attended by caution in respect of attaching homogeneity to the latter just referred to, be important in assessing the reliability (or veracity) of the former.
- 121 The views of relationship partners and, often, their broader family, are filtered through the prism of a broken relationship. Blame is frequently attributed. The views of family members about a son or daughter's choice of partner often intervene and a broken relationship is often seen to be a vindication of long-standing views about the lack of suitability of a son or daughter's partner. I consider that this, too, is a feature of the evidence in this case. Sections of emails from Mr E and the father in my view resonate with this undercurrent.

The Evidence of the Father

- 122 The father was confronted with statements he had made to Airline O. They pertained to the frequency of his flights with them in the course of his business. They were, it seems, designed to extract greater benefits, or more preferential treatment, from that airline. His statements were, as I find, false. His attempts to explain what, as I find, are demonstrably false statements at times bordered on farce.
- 123 The cross-examination on this topic had as its purpose, as I apprehend it, the intention of extracting a finding that the father was prepared to lie if it suited his purpose. The inference sought to be drawn was, in effect, that if he told lies in this context for this purpose, why should his evidence be believed about the instant issues.
- 124 Added to that established untruthfulness was a marked oddity in the manner in which the father gave his evidence in the witness box. His counsel described the father in closing submissions as "a unique character". That submission was made, as I apprehend it, in an attempt to explain or give context to a decidedly odd manner evident in his oral evidence.
- 125 While his statements to Airline O were, I think, plainly untruthful, they struck me as odd lies; they seemed to me much more redolent of a childish, and child-like, need for self-aggrandisement than as a measured attempt at deception. Indeed, those untruths, and the behaviour more generally, seems to me entirely consistent with the narcissistic traits assessed by Dr G. Indeed, much of the father's demeanour in the witness box seemed to me to be redolent of precisely the same traits: by turns narcissistic and a child-like need to be loved and admired.

²⁶ DeVries, above.

- 126 There is no doubt that the father has asked questions of the children in respect of the allegations. He has done so contrary to express requirements to not do so. The father knew (as did Ms A) that he was not to speak to the children of the allegations. The father did so for the third time on 30 December 2012 (the sixth visit) having been told on two prior occasions not to. He did so having been told on the second of those two earlier occasions that, if he continued to do so, Ms A would cease supervising visits (with the resultant consequence that he would not see the girls). A moment's reflection would (or should) have revealed to the father that he could expect any such comments to be reported on - as they in fact were.
- 127 That he did so is in my view a stark example of, at least, the father's lack of insight and narcissism, each of which formed a central component of Dr G's assessment of him.
- 128 In his statements to the children the father can be seen to be seeking to influence the children; the nature of the questions asked were, on Ms A's evidence, usually suggestive of a required answer. An example is Ms A's evidence in respect of the 30 December visit. She stated that he had been "asking [G] questions about her allegations of him having touched her" and that "... he said something like, you know, 'I didn't do anything to you, did I?'"
- 129 I think it highly likely, by dint primarily of the personality traits referred to by Dr G, that had further opportunities to question the children not been constrained by supervision, the father would have done so. As will be shortly seen, I find that the father questioned the children significantly less frequently and significantly less relentlessly than the mother. However I consider that is reflective of a lack of opportunity rather than being reflective of any appreciation of the detrimental effect that doing so may have on the children or, indeed, on the *content* of what the children might say.
- 130 Each of the mother and father (and, indeed, others within the wider family groupings) may hold to the view that questioning of the children about these allegations is appropriate – or, at least, understandable. The father might claim that his questioning of the children was prompted by (as he might see it) an understandable desire to have them confirm what he alleges to be true, (as he asserts). Although his opportunities to question the children were, as I find, relatively limited by reason of supervision, the very existence of supervision should have seen him alive to the pressure the children might feel as a result. The mother might claim that her questioning of the children was prompted by (as she would see it) an understandable desire to have them confirm what she alleges to be true, and the heinousness of what she alleges to be true, so as to offer a foundation for added protection of them. (The end justifies the means). Yet, that, too, shows a lack of insight for the impact upon the children and the

potential impact upon the *content* of what the children might say. As will be seen, her questioning, too, is overtly suggestive of the answers she expects.

- 131 The questioning of the children and, worse, the questioning of the children in a leading or suggestive way, causes significant doubts to attend the accounts of what each child has said as evidence of the truth (or accuracy) of what is said by the child. A large body of research across the world informs expert opinion about the questioning and evidence of young children: how children are influenced by the questions they are asked; by the person who is questioning them; by leading questions and how answers are influenced by a range of factors. I do not have evidence of that research before me, nor was it otherwise referred to²⁷. However, Dr G's unchallenged opinion was that "if children are questioned in a particular way, they may feel certain answers are required". That opinion followed a comment that these children "have been observed a lot"; something that could hardly be doubted.
- 132 In that respect, it should be recorded that the questioning of both parties was occurring while the children were coping with the separation of their parents – itself an extremely stressful and upsetting event. (As an example, G only expressed one wish when asked by Mr F to nominate three: for her parents "to not to split up. That's one. Then I have no idea"). The questioning by their parents – predominantly, as I find, by the mother – also occurred within the broader context of the interviews and assessments set out earlier in these reasons.
- 133 I find it inconceivable that the children have not become aware of an on-going interest in their words and actions that has occupied a central place in their young lives. I have little doubt that the children have become acutely aware that each of their parents expect answers or behaviours of them and that their words – and actions – follow.
- 134 An essential question about the truthfulness of the father's evidence should be addressed: should his denial of any untoward sexual conduct be accepted? It must be accepted that a father desirous of having an unimpeded future relationship with his children will deny any improper conduct. Thus, I regard the *fact of* denial as mattering little. However, an assessment must nevertheless be made as to the truth or otherwise of that denial.
- 135 I do not draw any inference that, because he told lies to Airline O he would tell lies about sexual conduct towards his children. The sending of a text to the mother on one of his first periods of post-separation overnight time that V had "peed all over me" does not strike me as a perpetrator of sinister conduct seeking to mask that conduct; rather it strikes me as wholly consistent with the

²⁷ Compare, for example, the parties' consent in proceedings before Thackray J in *Mother and Father* [2006] FCWA 89 to the use of the amicus brief prepared by Ceci and Bruck and used in proceedings in the Supreme Court of New Jersey.

rather child-like and needy person described by Dr G and observed by me in the witness box.

- 136 Despite the lies to Airline O, the impropriety of his conduct in questioning his children during supervision, and for all the oddities in his presentation, I was not left with the impression of dishonesty in his answers or accounts in so far as they affected the children. I believe his denials of improper conduct. Despite placing appropriate caveats on what might be drawn from observations of children's behaviours, I am buoyed in that conclusion by evidence which I accept of the children's interactions with the father and their expressed desire to spend more time with him.

The Evidence of the Mother

- 137 I have pondered deeply two extremely serious questions. Does the mother genuinely believe that the father has sexually abused his children? Or, by way of contrast, has the mother sought to influence the children in what they have said and the way they have behaved so as to present a false picture of the risk presented to the children by the father? If those conclusions were drawn, they would likely have a profound effect upon the parenting orders ultimately made because serious questions would arise as to whether the need to protect the children from that harm should predominate over the benefit of the plainly meaningful relationship the children have with her.²⁸
- 138 Those questions arise through my conclusions that the mother has given evidence which is intentionally misleading by omission or disingenuousness, and, in some cases untruthful, about matters of importance with respect to the children and the issue of abuse or risk. In one instance, I consider that less than truthful evidence was given to mask the fact that she had sought to influence G to make a false allegation against the father.
- 139 The matters of importance to which I have just made reference, broadly described, are:
- The evidence pertaining to the father's text on 24 July 2012 about V "peeing" on him;
 - What was said, and importantly not said, about the presence of a ball in the bath at the time V made statements about "whiskers";
 - The alleged serendipitous presence of the mother's phone and the recording of V's statements on 26 July 2012;
 - The mother's denial that she played her recording of V in her car so that the children could hear it;

²⁸

Section 60CC(2A).

- The mother's evidence in respect of the events of 10 March 2013 and G's alleged statement that the father had offered G a \$100 bribe to make false allegations about Mr E; and
- The mother's assertions that the children were/are fearful of Ms A;
- The father's video and incongruities in the mother's behaviours.

140 I have grave doubts about the reliability of much of her evidence, in particular in respect of the accuracy of what she reports the children having said. I think it highly likely that much of her evidence is exaggerated. The evidence of the mother (and her witnesses) is replete with speculation and comment. Her evidence is also replete with the attribution of conclusions, or suspicions, derived from vague assertions of past conduct (for example, that a child was "wary of males"). I regard that "evidence" as having no weight.

141 I consider the evidence of the mother (and her witnesses) is affected by the consideration that they were prepared to "assume the worst" from what the children are reported as having said. The speed and intensity of the mother, Ms E and Mr E's belief based upon tape recordings of V is testament to that as, in Mr E's case, are emails immediately consequent to it. That is an important factor in my view. I consider it plain on the evidence that each has closed their mind to alternative explanations for statements and behaviours - both initially and as they later emerge - and, as a result, has filtered each through the prism of a pre-existing and entrenched belief that they are attributable to abuse. In that respect, I repeat what I earlier said about factors which I consider impinge upon their evidence.

142 After much deliberation, having considered all of those matters and, in some cases, in spite of them, I have come to the view that the mother does genuinely believe that the children have been abused by their father.

143 The evidence of Ms A, and my ultimate acceptance of it, is central to findings in respect of many (but not all) of the specific concerns in respect of the mother's evidence enumerated above. It is also important as to her observations of the children in the father's company and their words and actions while interacting with him.

144 Ms A's evidence was, understandably, subject to significant challenge by the mother's senior counsel. That evidence, and the challenge to it, needs to be examined in detail. It is convenient to do so before referring in detail to the specific matters just outlined.

The Evidence of Ms A

145 Ms A is an experienced supervisor. She undertakes the work commercially (as distinct from altruistically at the request of particular parties). Her evidence reveals she was well aware of the nature and extent of the allegations in this

case and her consequent (onerous) responsibilities. She was, initially, appointed by agreement between the parties and subsequently by court orders.

- 146 Those matters provide important context to the challenge to Ms A's recollection. In addition, and importantly, Ms A's specific responses in cross-examination that she could not recall are, in my view, reflective of a desire to not be didactic or certain in respect of assertions that do not admit of same, and of a desire to not expressly call into question what, primarily, the mother sought to assert. I consider that Ms A's raising of the possibility of the children "whispering" such that she *may* not have heard, to be an example of the latter. When Mr North SC asked her about the reservation, "that's not to say that he didn't whisper it in her ear" in her note of the 30 December (which will be referred to specifically below) and whether "is that there simply as a mere possibility or ... because, on occasions, you had seen him speaking softly to one or other of the girls?", Ms A replied, "No, that's – it was just me saying it – that it was possible that he could have."
- 147 I referred earlier to the fact that senior counsel for the mother indicated early in the trial that Ms A was required to be present in court to be cross-examined as "her credit will be in issue". No part of the challenge to Ms A's evidence suggests ultimately that her evidence is untruthful.
- 148 The insistence upon Ms A's presence in court to be cross-examined gave me the opportunity to observe her carefully in the witness box. My observations of her, her demeanour, the care with which she answered questions and the manner in which she sought to distinguish certainty from possibility impressed me greatly.
- 149 Ms A did not rely on recall; she gave evidence of contemporaneous note-taking. She said she "scribbled" notes as things happened or were said, and later – generally that night at the conclusion of visits - turned her scribbled notes into a fuller typed account. She said that she did not record what occurred on each and every visit, but did record anything which she regarded as significant. She was aware that her supervision was occurring in the shadow of court proceedings in respect of the children and she was aware that, consequent upon the appointment of the ICL, she would, ultimately, need to prepare a report of the entirety of her supervision for the ICL.
- 150 I acknowledge that Ms A's familiarity with the father over a period of 20 months or so²⁹ and familiarity with, as she contends, warm and spontaneously joyful interactions between him and the children, has the potential to have been an influence upon her and, consequently, upon her evidence. (The words of Lord Pearce and Legatt J quoted above pertain.) However, I do not consider that Ms A's evidence is affected by any such influence here such that it impacts upon the reliability of her evidence. Indeed, I consider her evidence redolent of

²⁹ By the time she gave her oral evidence in August 2014.

professionalism, genuine care for the children and an impartial reporting to the mother of relevant events occurring during supervision.

151 I consider that each of the parents, and Mr E's, words and actions should be judged within a context of extreme conflict emanating from very serious allegations in respect of young children and the entrenched positions in respect of them. So, too, Ms A's words and actions fall to be judged within extremely difficult circumstances. She was caught in the middle of extreme conflict and, in particular, a situation where she was receiving diametrically opposed information about serious matters involving young children.

152 Ms A's evidence is challenged by the mother in a number of specific respects:

- It is said that some matters of importance were not included in her notes and that there were discrepancies between her notes and her affidavit. That challenge embraces challenges that are made by reference to what the mother deposes of interactions between Ms A and her;
- It is said that Ms A did not, or may not, have heard all that was said between the children and their father. This is said to arise from the father "whispering" to the children so that it was inaudible to Ms A and/or because she was supervising other children such that she was unable to hear what was said;
- Ms A's recollection of events is said to be "not that good";
- It is said that Ms A "acquiesced in the father's questioning" of the children and that she "interrogated" the children;
- Generally, it is implied, at least, that Ms A acted other than with impartiality and total propriety.

153 Cross-examination was directed to what the mother swore in her affidavit of evidence-in-chief as having occurred on 11 January 2013. The gravamen of what is alleged is that, on that (erroneous) date, (a) G told the father that "he had done it" and (b) that he had responded "no, I didn't" to which she responded "yes you did" and (c) the father "rolled his eyes and laughed and said, okay, yes I did". Secondly, and separately, the mother deposes (at [188]) that on that same date she "... spoke with Ms [A] after the visit and she told me that [G] had told her what had happened to her when 'Daddy put his fingers in'".

154 Initially, in response to what counsel put to her based on that (wrong) date, [Ms A] responded, "No, I don't recall that at all, I'm sorry". When asked, in respect of that (wrong) date, if it was "... possible the conversation occurred", Ms A responded, "Well, if I don't – if I didn't write it – well, anything is possible". She went on to swear in response to the specific assertions as to the father rolling his eyes and laughing "No, I don't recall that at all, sorry".

- 155 I raised with counsel that no event could have occurred on 11 January (the date deposed to by the mother and put to Ms A by counsel); 11 January was not a Sunday and it is uncontroversial that all time with Ms A occurred on a Sunday. The error as to date was conceded. Of course, that meant that there was *no* evidence of any date on which the event allegedly occurred.
- 156 Ms A was then asked about this conversation in respect of "... a contact visit before the 14th, *probably or possibly* the 13th or the 6th". The question was not objected to. No notes correspond to those dates. Consistent with her evidence as to her general approach, Ms A responded that, if there were no entries for those dates, "... it was probably just a routine thing that, you know, they came, they had fun, they went home".
- 157 Later, Mr North SC modified his question again and Ms A was asked whether she'd had a conversation to the above-mentioned effect "in January of 2013". Later still, the question was modified again to, "Ha[ve] there been any prior conversations between you and G before 10 March where she had spoken about what had happened when her father had put his fingers in?" Ms A responded: "[G] didn't tell – ever tell me – her father had put his fingers in, that I can recall."
- 158 Nothing to that effect is contained in any note (save G on 10 March accusing Mr E of suggesting that to her).
- 159 In a similar vein, Ms A was asked whether "at some time prior to 14 January" the father had been angry at G for "telling the police and [Mr D]" about the allegations. That question was based on an answer G had given to Mr D. Ms A responded that she had "never heard [G] say [Mr D's] name". She said that she could recall no occasions when the father had been angry with G during supervised time.
- 160 Ms A was asked about an assertion by the mother based on a report by G that the father had shown G pictures of him kissing a woman. Ms A's evidence was that, while the father showed the children photos, including one which depicted him and a woman, "... he never showed them a picture of a woman kissing".
- 161 Ms A was also asked about an event by reference to correspondence passing between solicitors (and the ICL). The affidavit of each of the parties references correspondence passing after many of the supervised visits replete with numerous issues and allegations pertaining to them. A letter from the mother's solicitors dated 14 January, contends that "the children have told [the mother] that during the supervised time [the father] continues to speak with them about the allegations of sexual abuse despite Ms A's attempts to stop such conversations". Neither date nor conduct is there specified.
- 162 A passage of a letter from an apparently responsive letter from the father's solicitors was put to Ms A. That letter is dated 23 January and says in part that

the father "... instructs that on the last occasion³⁰ that the children spent time with him there was no discussion in relation to these proceedings or the children's interview with [Mr D]. [The father], however acknowledges that those issues were previously raised during supervised time which is regrettable". In terms, that response suggests plainly, by the use of the expression "those issues", that a concession is made as to discussion of proceedings *and* the children's interview with Mr D.

163 Ms A's evidence is referred to earlier. When the father was cross-examined about this issue, it was by no means clear that he was conceding *both* that he had spoken about the allegations (when he knew that he shouldn't) *and* that, specifically, he had spoken about the interviews with Mr D.³¹

164 It was suggested that there were discrepancies between Ms A's affidavit and her notes. Ms A said that she "sent a copy of her notes to the lawyers" (I infer the ICL) "and they prepared the affidavit for me. And I just thought that they had condensed it because mine was so detailed". I accept that evidence; it has the ring of truth and accords with not-infrequent judicial experience in respect of the conversion of notes to affidavit form. Any such discrepancies do not persuade me of any lack of recollection or lack of reliability more generally.

165 Ms A gave evidence that a computer virus had rendered unobtainable notes of early visits. It was not suggested that this was anything other than true. I accept it as such.

Ms A's Alleged Inattention: Whispering and Distractions

166 A distinct challenge to the reliability of Ms A's evidence is based on the possibility that things might have been said to the children by the father that were inaudible to Ms A. As earlier referred to, a specific assertion in that respect that the father had been "whispering" to the children seems to emerge from events of 30 December (which was the sixth supervised visit) recorded by Ms A. That date was the third occasion upon which the father spoke to the children of the allegations (despite having been chided for previously doing so, having been warned not to, and having been told that if he did it again, supervision would cease). Ms A's notes of the events of that day record:

The girls and [the father] played well together. [The father] phoned his dad and the girls spoke to him but only for a short while. The girls didn't show any signs of being afraid of [the father] or not wanting him to touch them. He was sitting on the lounge on the patio and [V] sat next to him and [G] was on the other side laying down with her legs across his legs and said she was comfortable and wanted to stay like that when I asked her. They were playing in the garden when [the father] spoke to [G].

³⁰ Mr North properly and fairly conceded that, despite there being a visit on 20 January, the letter is not referring to that visit but to the visit prior to it.

³¹ See transcript of proceedings, 11 August 2014, p 8

I called [G] and asked her what Dad had said and she told me he said he didn't do those things. I asked her if she was ok and she said yes. As [the father] was leaving I spoke to him and said he was not allowed to speak about things like that with the girls. I also said if he continued to do this visits would have to be cancelled. He assured me he would not do it again.

When [the mother] came I told her what had happened. She got a bit upset. Later she phoned me and said [V] had told her that [the father] has spoke to her about the same thing. I did not see him speak to [V] but that's not to say he didn't whisper it in her ear.³²

167 When it was suggested to Ms A that "[y]ou clearly didn't hear what [the father] said [on 30 December] did you?", Ms A said that "I heard – not every word but I did hear that he said something, you know, about touching her". When asked whether the father was "speaking softly", Ms A responded "[n]o, he was just speaking normally".

168 Ms A's evidence proceeded:

MR NORTH: ... during that conversation did [the father] ... say anything to [V] that led you to believe that he was demanding that she respond in a particular way?

[MS A]: No.

MR NORTH: Or suggesting that she respond in a particular way?

[MS A]: No.

MR NORTH: There was certainly a conversation in your presence where they gave contradictory accounts about what had happened, wasn't there?

[MS A]: Who?

MR NORTH: [V] and her father. Where [V] said---?---

[MS A]: Yes. And---

MR NORTH: And he denied it?

[MS A]: Yes.

MR NORTH: You're quite confident that there had been no whispering going on that day?

[MS A]: Yes, I am.

169 Ms A's evidence is to the effect that while she couldn't swear to having heard every word said between father and children, she was aware when things (of all types) were being said; was alive to same and sought to ascertain the content of what was being said. I accept her evidence.

Ms A's Alleged Inattention Due to Supervising Other Children

³² Ms A's note is one continuous paragraph. It has been paragraphed by me for ease of reference. No relevance should be attached to the placement of the paragraphs.

- 170 Another specific component to the challenge to Ms A's evidence is based on the assertion that things may have been said to one child (or both) when Ms A either was not present or when her attention was directed to the supervision of other children in her care or because supervision was conducted by other people under her direction or control (in effect, employees of hers). Mr North SC submitted, "It is clear, in my respectful submission, that [Ms A] was on occasion distracted and there were opportunities for the father to speak to the children about matters, which he seized."
- 171 Ms A said she "supervised [the father] by myself" (as distinct from relying on employees or others). That evidence was not challenged by reference to any evidence save for the mother's supposition and consequent assertion based on statements she asserts were made by the children from which she drew the conclusion that others had supervised the children. I accept Ms A's evidence.
- 172 Ms A conceded that, at times, she supervises more than one family's children. She was asked if it was possible that she "... might have been supervising more than one family [while supervising [V] and [G]]". She replied: "It's possible, but I don't think so. [The father] was never left by himself". I accept that evidence.

Ms A's Conduct and Alleged Inappropriateness

- 173 It is asserted on behalf of the mother in written submissions that Ms A's supervision was "inappropriate" and, in oral submissions that she "misapprehended her role". It was not made clear in either submission what findings should, in any event, emerge from any such conclusion.
- 174 The submissions seem to reflect the views of the mother and also those of Mr E. Mr E penned a document which he sent to Bravehearts (Exhibit ICL 20). Within that document he asserts that the father: "... has [Ms A] do an affidavit tell this story and that she had heard [G] say this and then in another part [G] says I did not say it and that she lied. She also said she [i.e. G] was also offered a \$100 to say this?" There is, as it seems to me, a clear – albeit implicit – assertion that Ms A's sworn account of, at least, the March events earlier referred to, was, in some unspecified respect, the result of influence brought to bear by the father and that statements attributed to the children result from fear of both the father *and* Ms A. If that be the suggestion, I reject it.
- 175 The findings that seem to there be alluded to in the submissions on behalf of the mother are those emanating from the other contentions about her supervision earlier discussed: that there were things said that Ms A did not hear; there were opportunities for things to be said by the father to the children that Ms A permitted or was not present for or that her attention was focussed on other children or activities and not on the task of supervision.

- 176 A specific assertion put to Ms A in some detail concerns the events of 20 January 2013 when V initiated a conversation with her father. It was put to Ms A that she permitted the conversation to continue in that she did not intervene or did not intervene sufficiently quickly. Further questions were then directed to the issue of Ms A having a conversation with V alone. In a similar vein, it is asserted that Ms A “interrogated” G (and, perhaps, both children). The assertion of “interrogation” might be seen to be, at best, ironic in light of the fact that Ms A asserts, and I accept, that the mother questioned G for 45 minutes in the presence of Ms A and V during which the mother made it clear that she thought G was lying. The irony is compounded by the fact that, a week later, the mother specifically requested that Ms A speak to G alone on an issue of some sensitivity (G having told lies) and to do so in the absence of the father.
- 177 To the extent that Ms A’s conduct is challenged and my judgment of its “appropriateness” relevant, I make it plain that I offer no criticism. She was, as I have earlier said, caught in the middle of extremely difficult circumstances. (The same circumstances had, in a different context, caused an experienced report writer to abandon completion of his commissioned task). Further, and crucially, Ms A is not a robot; she is a human being and a mother. Her conduct should be judged – just as I propose to judge conduct of the mother, father and Mr E – by reference to what might be expected of human beings, and parents, caught in extremely difficult situations doing only that which we can all hope to do, namely our best.
- 178 To the extent that those matters are said to impugn Ms A’s reliability as a witness, I reject that suggestion.
- 179 In summary:
- I consider Ms A to be an honest, reliable witness;
 - She impressed me as an independent and impartial witness doing her best to give an honest and accurate account of the events which she recorded and about which she was asked;
 - I reject the attack on her recall. To the extent that her recall was called upon independent of her notes, I regard it as commensurate with that expected of an honest witness attempting to give an account of historical events;
 - I accept the accuracy of her notes;
 - I reject otherwise the specific challenges to her reliability. It should be accepted, of course, as is accepted by Ms A herself, that she could not hear every word ever said between the father and the children. This is an honest concession which also underscores the reliability of her evidence generally. However, I accept that her supervision was such

that she could hear sufficiently what was said so as to appreciate the subject matter and context; to take proper account of it and to raise it with the father, the children and, later, the mother;

- Similarly, Ms A accepts – again as it might be expected an honest witness would – that she could not swear to having both children in her sight and hearing for every minute of every visit. Again, however, I accept that her supervision was such that she could see, hear and otherwise monitor, appropriately, the interactions between the children and their father; and
- I accept the submission that the father did indeed seize opportunities to speak to the children about the allegations. Doing so does him no credit and all the more so after he was warned not to do so. I do not, however, accept that any such conduct impinges on the reliability of Ms A's evidence.

180 I turn now to explain my concerns and findings in respect of the specific parts of the mother's evidence enumerated earlier.

The Text Message About V "Peeing" on the Father

181 The recording by the mother on 26 July was preceded by the children's overnight visit with the father on 24 July.

182 When Dr G asked the mother why she had recorded V, the mother said "it must have been because she may say something or not". She told him she had never recorded V before and she did on this occasion "only because that night [the father] had sent (her) two SMS".

183 The mother told Dr G that the SMS related to the father reporting the child giving him a cuddle (about which the mother told Dr G, "I thought at the time this was typical of [the father]" "he should have been giving the child cuddles not the other way round") and with respect to being "peed on". The mother told Dr G, she thought this was "weird" and "bizarre". The mother also told him that V had "never peed on me" and that "[V] was upset the whole day" and that "[G] had said that [V] had wanted me while they were with their father". (It will be recalled that, during that visit, the father sent a text to the mother in which he says: "Nothing urgent. All good. Just funny story. Short version – [V] peed all over me. All good.")

184 Two things of importance can be seen. The mother attributes her 26 July tape recording of V to the "weird" and "bizarre" texts and what she implicitly, but plainly, suggests is unusual behaviour by V. Dr G's report is silent as to whether he asked the mother whether she responded to the texts. There can be little doubt that the mother gives a sinister, or potentially sinister, connotation to the father's text when speaking to Dr G.

- 185 In her affidavit of evidence-in-chief, the mother swore that she did not respond to the father's text. That evidence is untruthful.
- 186 The mother was confronted by her responsive text in cross-examination: "Ha ha. Clean clothes in her kindy bag and jumper in [G's] sports bag. Keep her warm. Welcome to parenthood". In my view, her reply cannot reasonably be seen other than that she, too, saw it as humorous ("ha ha") and, inferentially, that such behaviour by V (and/or children of that age in general), was not out of the ordinary ("welcome to parenthood"). It will also be recalled that, subsequently, the mother asserts that V has said to her that *the father weed on her* and a sinister connotation is attached to it.

Whiskers and the Ball in the Bath

- 187 The day prior to recording V, the mother and Ms E depose to conversations between them in which Ms E recounts V saying her bottom is sore and that she "has whiskers down there". However, neither the mother nor Ms E deposes to an additional matter which the mother recounts to Dr G (and which Ms E recounts to Mr F).
- 188 To Dr G, the mother recounts a conversation occurring on 25 July – the day before she recorded V. When V said there were "whiskers" in her bottom, Ms E said (as the mother recalls it) "I don't know what you mean". Ms E told the mother there was "a ball in the bath with spikes in it" and, when Ms E asked V what she meant when she referred to whiskers, V said, "it's just the ball". The mother's version of what Ms E then told her, as recounted by Dr G, is that "[m]y mother said it was weird because she *was not sitting on the ball*, however we did not make a lot of it".
- 189 Ms E gives a different account as recorded by Mr F. She posits both V and G in the bath on that night and says to Mr F: "They [i.e. V and G] had been playing with a rubber ball *by sitting on it* and letting it go. They splashed and spilled water in the bathroom. [V] complained of having a sore bottom". It will be observed that not only does Ms E tell Mr F that the children were sitting on the ball, but that this joint activity precedes V's statement about a sore bottom.
- 190 V's comment about the ball – which attributes "whiskers" to the ball ("it's *just the ball*") – is not repeated in the mother or Ms E's affidavit of evidence-in-chief. Nothing on the mother's tape recording of V, nor any other evidence before me, suggests that the mother took up V's own attribution of the cause of "whiskers" with her.
- 191 The mother's account of what preceded her tape recording of V in her affidavit of evidence-in-chief is:

39. On 26 July 2012 I asked [V] if her bottom was still sore. She said words to the effect of "she had whiskers in her bottom". I asked her

“what were the whiskers”. She said words to the effect of “Dadda kisses me on the bottom its disgusting”. “It’s really stinky and dad smells it.” He touches it all over my bottom”, “with his tongue he licks it all over my gummies bottom” “ he kisses it and he licks it in my bedroom”.

40. I was shocked. [V] said that [G] had been at ballet when her father had kissed her on the bottom. I recall after [V] telling me that her father had kissed her on the bottom and it was really stinky that I picked up my mobile telephone and recorded the conversation as I was not quite sure what else to do. I was in shock and I asked [V] to tell me what she just told me and tried to ask her more questions to verify what she was telling me.

- 192 The mother told counsel for the father in cross-examination that what is sworn to at those paragraphs is a “summary” of what is said by V during the conversation that is recorded. Importantly, there is no evidence of the specific matters there deposed to (“kisses on the bottom”; “stinky and smells it”; “with his tongue”; “licks it all over gummies bottom”) emerging from any evidence *prior* to the mother’s tape recording of V.

The Serendipitous Presence of the Phone and Recording of V

- 193 The mother’s recording of V on 26 July 2012 constitutes the only evidence in which V’s precise words can be heard and assessed.
- 194 The mother filed an affidavit on 7 December 2012. That affidavit responded to the father’s introduction of children’s matters into the proceedings. In that affidavit, the mother refers to 26 July and to asking V “if he[r] bottom was still sore”. No mention was there made of having recorded the conversation.
- 195 Much of the detail referred to in the passages of the affidavit of evidence-in-chief just quoted is absent from the mother’s essentially contemporaneous account sent in the email to her father, which attaches an audio file of that recording. The transcript of the recording is preceded by:

Evidence [V] against her Father [Mr Thornton] Sexual

Child Abuse

Documented and recorded 4.30pm 2mis 54 seconds 26/7/12

Questioning Conducted by mother [Ms Thornton] to her daughter [V]

Documentation of attached audio file

I had just bathed [V] and she told mum the night before in the bath that she had a sore bottom with whiskers. I asked her if she still had a sore bottom, she said it was better now. I asked her what the whiskers were that she had told Nanna about the night before. She said that the whiskers were from Dad. I grabbed my iPhone and started recording from here. [The transcript of what was said then follows and will be quoted later in these reasons].

196 The mother was cross-examined about the apparent serendipitous presence of her mobile phone so as to effect the relevant recording. I was entirely unconvinced by her evidence.

197 The mother told the court that V had come “home from the visit screaming, clinging to me, saying “I don’t want dada, I don’t want dada” and “had nightmares that night saying “Stop it. No, dad”. The mother then asked her on the night of the recording whether her bottom was still sore and said to V “nanna said that you had a sore bottom because of whiskers” and V said, according to the mother:

Dada kisses me on the bottom” and that’s when I freaked out and I – she was on the toilet and I just happened to have my phone. If I didn’t have my phone there I wouldn’t have recorded, like, it just happened to be there.

198 Later, the mother said:

HIS HONOUR: ... and so having heard the statement from the child which, am I right in thinking you thought meant that she had been sexually harmed in some way or sexually dealt with in some way, and, as it were, to confirm your worst fears you then – it was then that you grabbed the phone and we heard the sequence we’ve just heard? Is that right?

THE MOTHER: Yes. As soon as she said it was dada who kissed her, like, I just – I just wanted to make sure, (a), I was hearing it correctly. That I wasn’t leading her. I just wanted to hear the truth and I didn’t want it to be any, I don’t know, confusion as to what she was telling me. I didn’t want her, then, forget or make up anything that she had said or she hadn’t said. It was just my gut reaction.

HIS HONOUR: Did you get – give the tape to the police?

THE MOTHER: Yes. No. I tried to but he said that – I think I actually did end up emailing. I told him I had it available but he said he wasn’t interested. He said if I wanted to email it through I could which I did.

HIS HONOUR: But after he had spoken to [G]?

THE MOTHER: No. It was before – when we went to the police station they sent us away and said they would call us so when I got back and told him – I told him about that and he said there’s no point, you know. If she’s not going to talk to me, you know, from what you’re telling me you will just be like one of those, you know, psycho mums who comes in here making up allegations so he’s, like, you know, he basically didn’t want me to even tell him about – I said don’t you want to hear what she’s told me and he’s, like, you think very carefully before you tell me what she’s said so I didn’t know what to do so I emailed him anyway.

HIS HONOUR: Right. So in the context of having made a complaint to the police that you had concerns that your daughter had somehow been sexually interfered with or dealt with improperly by her father and indicating to the police officer that you had a tape that indicated that he

said, essentially, or said words to the effect that gave you the impression that he wasn't interested in hearing about it?

THE MOTHER: Yes.

199 I do not believe the mother's account of the serendipitous presence of her phone which, she said, "was in the bathroom behind the basin". On a consideration of the whole of the evidence in respect of this incident, I think it significantly more probable than not that the mother initiated a conversation with V with the pre-conceived intention of recording it.

200 Given my general dissatisfaction with the mother's evidence and my specific findings in respect of the car tape and the conversation of 15 March in relation to "the bribe" to which reference will shortly be made, I consider it extremely likely that significant prior (unrecorded) conversation occurred between V and the mother directly relating to the events thereafter recorded.

The Events of 10 March 2013, Mr E's Alleged Influence and "The Bribe"

201 The father deposes to a conversation said to have occurred on Sunday 10 March 2013 which he alleges was initiated by G and which he says occurred in the presence of V and Ms A:

130. [G], [V], [Ms A] and I were in the front lounge room of the house. At or about 3:20pm, and in the presence of [Ms A] and [V], [G] said to me, "Dad, you know it wasn't mummy who did all this, it was Poppy [i.e. Mr E]".

131. [G] said this to me in response to my statement, "You know I still love mummy, don't you?"

132. I responded to [G's] comment, "What do you mean?"

133. [G] responded, "It was Poppy that made me say you touched my bottom."

134. I asked again, "What do you mean?"

135. [G] replied, "That time at the police, Poppy said to me that I had to lie and say you touched my bottom and that you put your fingers in my bottom."

136. I said, "What did he say?"

137. [G] responded, "Poppy asked me if you ever touch my bottom. I said no, and that you hadn't. He said that I had to say yes, you did, and that you did touch my bottom and say that to people".

138. I asked, "What about mummy?"

139. [G] responded, "Mummy said to say it too".

140: I asked, "What did mummy say?"

- 141: [G] replied, “Poppy told mummy to say it and Nanna too, then they told [Ms N] [Ms Thornton’s sister] and [Ms I] [Ms Thornton’s friend] to all say it as well.”
142. I said to [G], “[G], did I ever do anything like that to you?”
143. [G] said, “No. But Poppy told me that I had to say it or I was in trouble.”
144. I then asked [G] if Poppy had said the same things to [V] and [G] said she didn’t know.
145. I then asked [V] if I had ever touched her bottom and [V] quickly replied “no”.
146. At that point, [Ms A] then stopped the conversation and took [G] away from [V] and I and continued the conversation with her outside the room.

202 Ms A’s notes of that day are materially corroborative of the father’s account.

203 As can be seen, the evidence contains not only a denial by G and V that the father had perpetrated untoward conduct, but that Mr E was instrumental in inculcating and promoting an allegation that was false.

204 Importantly, I accept, as Ms A’s note records, that at the conclusion of the visit on 10 March 2013, Ms A told the mother what G had earlier told her, (i.e. to the effect that Mr E had made G make statements about her father inappropriately touching her). Ms A notes that at that time G told the mother “the same thing she told me”. Ms A’s notes then record:

[The mother] asked her why she told me that and [G] said “I don’t know”. [The mother] asked if it was true and she said “yes”. [The mother] immediately challenged that statement of [G’s] saying that her father “wasn’t even in the country”.

205 Ms A then notes that the mother repeatedly asked G why she said it and G kept saying “I don’t know”:

[G] never changed her story. [The mother] said that there are a lot of things that have been going on to prove [the father] did touch the girls. They have nightmares quite often. The girls used to cry when she had to go out of a night begging her not to go.

Ms A then notes that:

After about 45 minutes of questioning [G], [the mother] left with the girls.

206 Ms A’s account in this respect was not the subject of specific challenge. It can be seen that the mother challenged G in the presence of others. She challenged as untruthful, an account of what G had asserted to an earlier, different audience was truthful. She questioned G for about 45 minutes.

207 The mother deposes in her affidavit of evidence-in-chief to a conversation which she alleges she had with G on Friday 15 March, five days after the

events of Sunday 10 March and two days prior to the next visit with her father on Sunday 17 March. The mother deposes:

261. ... I asked her how her visit was with her father the previous Sunday [i.e. 10 March]. She told me that [the father] had told her that if she went up to [Ms A] and told [Ms A] that her Poppy had told her to say the things about her Daddy touching her bottom that he would give her \$100.00. I asked [G] if that was the truth. [G] shook her head and had tears in her eyes when she said words to the effect of "*No, Daddy really did it*". She said words to the effect of "*I thought he would give me the money*". I said words to the effect of "*honey do you think he will give it to you?*" and [G] just shook her head and said "*No*". I asked [G] if [Ms A] was with her when her father said that. She said that [Ms A] "*was helping some other kids*". [Italics in original]

208 Counsel for the father asked the mother whether she had discussed the 10 March 2013 visit with G prior to Friday 15 March. She said "I don't think so. I don't think I knew about it". When asked "[d]id they [i.e. the children] say anything about the [10 March] visit", she said "not about that [i.e. the allegations involving [Mr E]]. When pressed about that the mother said "I think I got a letter from [the father's] lawyer telling me about it".

209 While the last statement is true of itself, it is an answer which, in combination with the mother's earlier-quoted answers, is in my judgment, disingenuous and misleading. It seeks to mask the fact that the mother was well aware that she had, as Ms A asserts and I accept, a 45-minute conversation with G about that very topic some five days earlier. I consider that the mother sought to mask that fact because of what I find occurred between G and her on 15 March, to which I will shortly refer.

210 At the next supervised visit on Sunday 17 March 2013, the mother took up with Ms A both what G was reported as saying on 10 March and what the mother asserts G said to her on 15 March in respect of this issue. Ms A's notes of the 17 March 2013 visit record:

[The mother] brought the children and had a talk to me. She told me that what [G] told me last week was a lie. She said [G] told me [the father] said he would give her \$100.00 if she told [Ms A] poppy told her to say that she did. [The mother] told me that her dad wasn't even in the country when all of this happened. She asked me to talk to [G] and see what she said before [the father] arrives because [the father] intimidates the girls and they are afraid to talk in front of him. I said I would the[n] [the mother] left.

[The mother] left so I talked with [G] by herself. I spoke to [G] and she told me that she had told a lie and poppy didn't say that. I asked her if she was sure and she looked at the ground and said yes. Poppy never told me to say anything. Funny that last week she never changed her story at all. Told me the same thing she told [the mother]. Then went home for a week and

came back and completely changed her story. She told me that [the father] *didn't* say anything about giving her \$100.00. She said that poppy didn't tell her to say anything. [Emphasis added].

I told her it was very important to only tell the truth. I said I promise that she won't get into any trouble from mum or dad if she told me the honest truth right now. She told me that dad poked her on the bottom with one finger. She said one of her teeth fell out and she lost the tooth and daddy came into the bedroom to play the tooth fairy. [G] was in bed and daddy poked her bottom. He did not take off or take down her pants. He poked her with one finger on the side of her bum cheek. At no time did [the father] ever take her pants down. She also told me that she told a lie to me because she told mum that dad had put his fingers in her bottom but he never did it. I told her never tell a lie again.

We went outside and [the father] arrived and the visit started. The girls had a good time. [G] and [the father] spoke again about telephone calls. [G] said she might ask mum if she can ring but she would probably say no. I said [their mother] told me that if the girls wanted to ring their daddy they could. [G] said that if she wanted to ring her dad she would ask mum but if she didn't want to ring her dad she wouldn't.

211 The mother deposes in respect of that visit:

264. When I was collecting the children from [Ms A's] residence after the [17 March 2013] visit [Ms A] spoke with me and said that [G] had said to her that she had lied to her and that her father had not made her lie she had just felt like saying those things out of the blue. In front of [Ms A] I said to [G] words to the effect of "*[G] that is not what you told me*". [G] insisted that it was the truth. [Ms A] also told me that [G] had told her that her father had never touched her bottom that it was just on the side.

265. I was shocked that [G] was making these comments after telling me for almost a year what her father had done to her however I did not question [G] as I did not want to upset or confuse her any further.

212 Then, in evidence that should tear at the heart of anyone involved with these children (as it did with me), the mother records this:

266. During the car trip home from the supervised visit [G] was sobbing and crying saying words to the effect of "*I just feel like I've changed into a stupid person, I think I've turned into another stranger I am nothing*". [G] also said that her father "*used to push it*". I asked [G] what her father would push and she responded "*on the side of my bottom*" and words to the effect of "*I am scared of Dad he does all this stuff to me and I had dreams of him trying to turn me into invisible and then I died and you never saw me again*". [G] kept saying that words to the effect of "*she did not know what he did because she was asleep the whole time and then he ran and he would have his fingers on the side of her bottom*". [G] also said that "*Daddy said every time he did it that she was not to tell me*".

267. When we arrived home [G] was visibly distressed and said words to the effect of “*I was telling a lie to [Ms A] because I am scared of Dad*”. She said that she thought her father might have “*come back to [Ms A’s]*”. She also told me that she lied to [Ms A] at the start of the supervised visit because “*she knew Daddy was coming and he might have heard her*”. [G] told me that she had lied to me in the car as her father had told her that he lives at [Suburb C] (near where we lived) and that he could have been following her.
268. [G] had received a set of Barbies and a bubble blowing machine from [the father] as gifts from his trip to Singapore however she refused to open them.
269. At around 8:00pm that evening [G] again told me that she is scared to tell the truth because she is scared of “*Dad and Ms A*”. [G] told me that [Ms A], [the father] and [V] had all discussed the incident during the supervised visit. [Ms A] has previously told me that she has had to stop [the father] talking about the court proceedings with the children during supervising visits.

(Italics in original)

- 213 No mention of \$100, or any other words suggesting any other amount or any other inducement was made during the interchange that took place on 10 March 2013, whether by reference to the mother’s account, or Ms A’s account.
- 214 Ms A’s account of the events which occurred on 17 March 2013 (that is to say the visit immediately following the 10 March visit and two days after the mother’s alleged conversation with G on 15 March), records that *the mother* told Ms A that “G told her that [the father] said he would give her \$100 if she told [Ms A] poppy told her to say what she did”.
- 215 Thereafter, G gave Ms A an account broadly in accordance with what the mother said G had said to her, including that she had told a lie on the previous Sunday. However, there is a material difference: omitted from the account G gave Ms A is any mention of \$100, or indeed anything else providing any inducement; indeed G specifically denied that the father had said such a thing. It is, as far as I can see, the only material difference in G’s account and the mother’s account of what G had said.
- 216 While Mr E deposes to events consequent upon the allegation that he had (effectively) instigated a false account of abuse, nowhere in his affidavit nor in his oral evidence does he refer to any conversation either with the child or with the mother about any alleged bribe, the sum of \$100, any other sum or any other gift or inducement³³.
- 217 It will be recalled that Mr D asked G whether “she had told [Ms A] anything about [Mr E]”. Mr D records G telling him that she had told Ms A that “...

³³ As has been seen, he does mention it in his report to Bravehearts, but there gives an account of *the account* as to the bribe (as distinct from anything said to him by G).

poppy said to say [the father] had touched her bottom ..." but that it "didn't happen". Mr D specifically asked G why she had said that to which, as has been seen, she responded with comments about her father's anger. Nothing at all was said by G to suggest that the father had offered her \$100, money or, indeed, any other inducement.

- 218 Paragraph 39 of an affidavit sworn by the mother earlier than her affidavit of evidence-in-chief, and closer to the events referred to, recounts the statements by G about her grandfather later said to be false. The mother admitted in cross-examination that, despite deposing to that issue and the events just referred to, no mention at all is there made of the \$100 (nor any other alleged inducement) offered by the father for G's asserted false statement.
- 219 Among the various challenges to Ms A's evidence, it was not put to her specifically that any or all of the various matters said to impinge on her supervision provided the opportunity for the father to say anything to G about giving her \$100 during the 10 March visit. I consider that there was no reasonable opportunity for the father to do so without Ms A hearing it or being alive to the possibility of such a conversation and I consider that it would not have occurred, or anything like it have occurred, without Ms A making a record of it.
- 220 There is no evidence of G making any statement about the offer of a \$100 bribe from the father independent of the mother's evidence.
- 221 I think it extremely likely that *if* G made any statements to her mother on 15 March to the effect that her father had offered her money, they are statements resulting from the mother's influence or encouragement to that effect and that those suggestions were suggestions or encouragement that they should be repeated to Ms A. I by no means dismiss the possibility that the mother has concocted the statement and persuaded G of it. The allegation of this specific "bribe" in this specific instance bears a very uncomfortable similarity to the explanation that the mother (and Mr E) each give for such affection as they are prepared to concede is shown by the children to their father. (As will be seen, in short they assert that any such joy and affection they express to or with their father is as a result of the father bribing them with lollies or gifts).
- 222 There is evidence which I regard as reliable that G said the words earlier referred to (that Mr E suggested statements to her). Those words plainly on their face suggest that Mr E has said things, or engaged in conduct, which have "made" G say that her father has touched her bottom. Those statements might lend weight to the father's conspiracy theory.
- 223 However, while I find that G did in fact say the things attributed to her, I do not accept those statements as truth of what they contain. That is, I do not consider that, through deliberate and conscious words or actions, Mr E has sought to

inculcate a belief in G and/or sought to have her repeat that inculcated belief to anyone else.

224 I make that finding despite also finding Mr E's evidence untruthful in two respects. He denied that he had said to the paternal grandfather in a telephone call on 30 July 2012 when speaking of the father, "I wish the cunt was dead". In cross-examination, Mr E said initially that he couldn't recall saying that. I did not believe that answer. Later, he conceded that he *may* have said it. I think it extremely likely that he did say it. Mr E also denied the proposition that he had said of the father during the same conversation that "he's been right up both of them". I reject his denial; I think he did say it. I thought his denials unconvincing. Both statements attributed to Mr E are, as I find, entirely consistent with the tone and content of the emails sent by Mr E in the aftermath of the mother's recording of V and the deep vitriol toward the father within them.

225 If, as I have found, G was not bribed by the father to say what she said of Mr E and if, as I have found, Mr E did not say (or do) what G attributes to him, an alternative explanation for G saying those things must exist. I consider that an explanation emerges readily from the evidence. Primarily, it lies, in my view, in the children seeking to adopt for each of the polarised camps within which their primary loved objects reside, words and actions which they perceive as desired by those camps.

Questioning of the Children

226 Independent of my findings about "the bribe" and playing the recording of V's statements in the car, the evidence is replete with the mother questioning every word and action of the children. Indeed, her affidavit of evidence-in-chief is effectively a week-by-week account of what either or both the children have said or how they have reacted before and after periods of time with their father.

227 Much of that evidence can only have come from what, as she alleges, the children have said. I do not accept that those statements have issued from the children spontaneously and without prompting by questions from the mother. Her own evidence is that she has questioned them about important matters and, indeed, has done so with regularity. She told G that she (G) was telling lies about her grandfather during the course of questioning her for over 45 minutes with Ms A in the presence of V. She questioned G again about the same events five days later. She told G to give Ms A an account of that conversation two days after it occurred.

228 I have already made findings that the father, too, has questioned the children. Of course, his opportunities to do so have been significantly restricted, notwithstanding his high-handed and narcissistic attitude to the restrictions placed upon him in that respect and my finding that, but for supervision, his questioning, too, is likely to have been regular and unrestrained.

229 Leaving aside *parental* questioning, these young children have, on any view of the evidence, been exposed to significant disruption and high conflict over more than two years since their parents separated. During that time, not only have the children been questioned by their parents but also:

- V had been seen by three therapists in five months post-separation and G had been to one therapist;
- The children have been spoken to by the police twice (and G formally interviewed twice);
- Both children had been genitally examined by a paediatrician;
- The children had been interviewed by Mr D;
- The children had been interviewed by Mr F;
- The actions and words of the children have been the subject of interest and comment by wider members of the mother's family and her friends;
- All contact with their father had been supervised by a person who was, initially at least, a stranger to them; and
- Both children had been asked questions by Ms A.

230 I consider that evidence points to a firm conclusion that the children have been exposed to relentless attention being given to their words and actions about their father and his conduct toward them. I have very little doubt that the children have been spoken to and asked questions about their father and, specifically, his conduct toward them concerning "their bottoms" or such like. Indeed, I consider it extremely likely that their young lives have been dominated by it.

Playing the Tape in the Car

231 The father deposes to a conversation during a supervised visit with G on 27 October 2013 in which:

194. ... [G] said to me "Dad, did you know Mummy used to play this thing on her iPhone with [V] and Mummy talking about touching bottoms?"

195. I said, "What do you mean?"

196. [G] went on to say, "Well it was on her phone and she would play it loud while we were in the car. She used to do it all the time."

197. I then said to [G], "All I care about is that you know that I am the best daddy and that you can talk to me about anything."

198. [G] then said, "Mummy knows you didn't touch my bottom, but I've heard her telling people. She told [Mr P] when we were all at the farm."

232 Ms A's account of that event is:

[The father], [G] and [V] were on the lounge in my family room waiting to leave to go to [the father's] home. [G] said to [the father] Dad did you know mummy used to play this thing on her iPhone. It was [V] and mummy talking about touching bottoms. [The father] asked [G] what she meant. [G] said it's on her phone and she would play it loud while we were in the car. She did it all the time. [G] said she doesn't know if [V] heard it. [The father] told [G] you know you will never get into trouble if you tell the truth. [G] said it was [V] and mum talking. [G] said mum played the tape to us in the car. [G] said it was [V] saying what Dad did. [The father] then said not to worry about things like that, it is time to go to our home.

- 233 I accept that G made the statements attributed to her by the father and Ms A.
- 234 It is not suggested that G could be referring to any tape other than the mother's recording of V on 26 July 2012. The mother denied that she played the recording of V made by her on 26 July in her car in the presence of the children. She said she was sure that she had not done so. I thought her denial was entirely unconvincing.
- 235 On either the father's account or Ms A's account, the statement is made without any prior interest in the topic being shown by either child or anyone else, and, indeed, without there being any discussion of the mother or anything to do with her. That is, it does not emerge from a context that might give weight to the proposition that she was giving an account of an event that might accord with her father's overt or implicit expectations of her.
- 236 There is no other evidence to suggest that the playing of that recording had been the subject of any allegation by one parent against the other or the subject of any inquiry of the children by anyone. (In that respect, it might be contrasted with statements about bottoms, touching and who might have done what to whom). I have not been made aware of any evidence to suggest that the father, or for that matter Ms A, was aware of the possibility of the tape being played such that, either consciously or unconsciously, statements about it could have been prompted or suggested by them.
- 237 I can see nothing that G might have expected to gain from raising a matter which, as reported, seems, on its face, benign and about which her father could not otherwise have known.
- 238 I reject the mother's denial. I find that her evidence in that respect is deliberately untruthful. I am well satisfied that she has, in fact played the 26 July tape of V, that she has done so in the car and done so more than once at a volume where it was audible to G.

The Father's Video and Incongruities in the Mother's Behaviour

- 239 Dr G reports being “troubled” by an observed incongruity; he was struck by the mother exhibiting “no obvious distress” when she was “describing what she believed happened to the children”.
- 240 In referring to a statement by the mother to him to the effect that the father “... genuinely loves and ... cares for [the children]”, Dr G said “... that belief [about] the father, doesn’t fit with the allegation of sexual abuse”. He continued: “[s]econdly, she continues to ... have contact with the father – sees him at changeover, is quite civil to him. Now, ... that’s a good sign in the sense that she’s behaving – keeping her emotions in check for the benefit of the children ... so as not to upset the children. But, ... if a mother strongly believes that the father has sexually interfered with the children, as she does, you would expect she would want nothing to do with him”.³⁴
- 241 When asked by counsel for the father whether that “... led to the view that maybe she doesn’t genuinely believe that the children have been abused”, Dr G made the obvious point that he didn’t “have access into her thoughts” and then said, “I can only make inferences that there are things that are puzzling”. I, too, was “troubled” and “puzzled” by it; so much so that I took it up with Dr G during the hearing. I remain very troubled and puzzled by it.
- 242 Equally, I was struck by what I regard as a similar incongruity emerging from the mother’s behaviour depicted within the father’s video recording on 16 September.
- 243 In oral submissions, Mr North contends that the mother was attempting to hold her emotions in check and to, as it were, put on a brave face for the children. I accept that factor may have been at play. I note also that the interaction was in a public place and that behaviour might be thought to be modified accordingly. I am also very conscious that, even as to behaviour, the video is self-serving in the sense that some behaviour might have been excluded and its content is chosen by the father. In those respects, however, no behaviour observed on the video struck me as different or discordant to what I observed of the mother in the witness box. In looking at the mother’s behaviour on the video, I am also mindful of what I said earlier about attributing homogeneity to human/parental reactions.
- 244 Yet, none of those matters separately, nor the combination of any or all of them, renders less than remarkable what was observed during the part that was recorded nor remove my pervading feeling that her behaviours sit very oddly with a mother who believes that her former partner has used his then three year old child for his sexual gratification.³⁵ Remarkably, for example, the father

³⁴ Transcript of proceedings 20 May 2014, pages 130 & 131

³⁵ When the video was taken, the only allegations pertained to V.

held V in his arms for part of the recording. Further, noting again the same caveats, the mother did not at all strike me as someone who was remotely scared or wary of the father. Nor, I should observe, did I see anything to suggest that the children displayed the slightest fear or apprehension of their father. Again, the same caveats apply, together with the fact that, of course, their mother was present.

- 245 Acknowledging those various factors and caveats, I am, however, unable to shake the overwhelming impression of an entirely unexceptional social interaction between conflicted separated parents which, again remarkably in light of the central allegations involving V, involved assertion and counter assertion about issues of conflict between them wholly unconnected with the alleged behaviour.

Alleged Fear of Ms A

- 246 The allegation that the children were frightened of Ms A emerged during questioning of each of the mother and Mr E concerning the evidence of the father and Ms A to the effect that the children enjoyed their time with their father and had expressed a desire to spend more time with him.
- 247 Mr E asserted in a document sent by him to Bravehearts (Exhibit ICL 20) that G had apologised to him for “saying these things” (about him putting her up to making false allegations against the father) but “she said poppy, daddy made me say these things and I am sorry. I am so scared of him and [Ms A]”.
- 248 The mother, too, was asked whether the observations of Ms A (and Mr F) suggested to her that the children might not harbour the fear of their father which she asserts or that they might in fact want to spend more time with their father. Her thoughts accord, it seems, with her father’s. In cross-examination by counsel for the father, this exchange occurred:

MR JORDAN: Yes. So your take on this – on the expressions of both [G] and [V] is that that’s as a result of their father bribing them by buying them things; is that right?

MOTHER: It’s definitely a big part of it: all the things that they’re going to get, but they can only get when they live there.

MR JORDAN: Don’t you think it might be just a little bit more that they just love their father, they love spending time with him, and they would love to spend a lot more time with him?

MOTHER: No, because [G] – [G] still says things, that she would like to see less or – they’re – they’re heaps better than what they were, yes. They enjoy spending time more now, but prior to that, no. For the last two years it has been quite traumatic.

MR JORDAN: You want [Ms A] replaced as a supervisor?

MOTHER: Yes.

MR JORDAN: The children have a good rapport with her?

MOTHER: [G] is also scared of her.

MR JORDAN: [G] is scared of her?

MOTHER: She has made quite a few comments over the years.

249 Ms A was never asked whether she noticed anything or heard anything from the children that suggested to her any fear of her on their part. Nor was she asked whether she herself had any such perception. Nor was it put to her that the children were scared of her or harboured any fears of her.

250 There is no evidence to suggest that the mother ever took up the issue of the children's alleged fear with Ms A or alluded to it with her, in particular in or about the events of March 2013. None of Ms A's notes either record any signs or expressions of fear of her by the children. None of Ms A's notes record the mother ever suggesting to Ms A that the children were frightened of her or them saying that they were frightened of her.

251 I am extremely dubious, even if consistent with what I have said earlier that the children have said things to that effect in a desire to conform with what they perceive their mother and grandfather want to hear, that the mother believes the children are scared of Ms A.

252 I consider that statements to that effect are being used by the mother (and Mr E) as a means of avoiding something which they might otherwise have to accept and process, namely that the children exhibit spontaneous happiness when with their father and express a desire to see more of him. That is, they seize upon something that allows them to close their mind to that possibility.

The Alleged Conspiracy

253 The finding earlier made in respect of G's statements implicating Mr E in suggesting statements to her can be seen as indicative of the finding that I make that there has been no "conspiracy" between Mr E and the mother as asserted by the father.

254 I accept Mr E's denial to that effect. I do not consider that his untruthful answers, as I have found them, are indicative of a broader lack of truthfulness. Nor do I consider those untruths are indicative of a willingness to tell lies about a centrally important issue such as the concoction of a false allegation of such seriousness.

255 His case is, as I have earlier said, poorly articulated; it is also long on assumption and speculation and short on factual premises.

256 The father's suggestion must have at its core an allegation that the mother and her father have planned to tell, and have told, a series of very serious lies. If there is a conspiracy, it is deeply Machiavellian and particularly evil: it involves Mr E and the mother formulating a plan to inculcate, and then, in the

mother's case record, statements of children. It involves them exposing the children to an invasive genital examination knowing that there is no basis for it. It involves the making of false allegations to the police.

257 I can see no firm evidence that could properly sustain those profoundly serious findings.

THE OPINIONS OF MR D AND DR R

Dr R

258 I gained a generally unfavourable impression of the reliability of Dr R's evidence from reading his report and listening to his evidence.

259 Nothing in Dr R's report or evidence permits any finding of the context in which things were said by G. For example: on what occasions was the mother present?; what questions were asked of either child and by whom?; was Dr R made aware of what, precisely, G had said on and after 9 October and what was said about that, by whom and when? His oral evidence as to G's "disclosure" is, he conceded, based not on notes but on recall. I was not impressed by his recall. In that respect, for example, his oral evidence was that "[G] had disclosed the night before" the session (although this appears to be in reliance of the mother's account, not G's). Neither Exhibit ICL 8 nor the mother's affidavit of evidence-in-chief speak of any "disclosure" on 17 October (i.e. the "night before" the session).

260 Despite taking the serious step of reporting "incidents of sexual abuse" to relevant authorities and having acquiesced in G's refusals to permit contemporaneous notes *or* a contemporaneous (photographic) record of what she had written, Dr R did not, subsequent to any specific sessions, or the totality of them, make any written notes of what had been said. Curiously, Dr R said he *did* make notes but, oddly, he confirmed in the witness box that his notes contained only matters that were entirely innocuous.

261 I do not consider that weight should be given to the statements that the children are said to have made to him in assessing whether abuse has, or has not, occurred or in assessing unacceptable risk³⁶ having regard to the following matters which I consider to be of importance:

- The fact that Dr R's process was clinical as distinct from forensic;
- The absence of any reference to collateral information from the police and in particular the denials of behaviour by G in the first police

³⁶ I make the obvious point that I am speaking of appropriateness and/or utility of what was done or not done as of assistance to the instant forensic process; I do not make comment on those matters from a clinical point of view.

interview and an apparent change in her and her statements in the second interview;

- The lack of contemporaneous notes or other record;
- Neither notes nor any other report or document permits of an adequate assessment of what precisely was said by either child. Having heard his oral evidence, I am not persuaded that what is in his report should be accorded significant reliability in that respect;
- In any event, and importantly, the alleged statements by the children are entirely lacking in what I consider to be important context, including what questions were asked of each child and by whom;
- The presence of the mother with the children in sessions and the absence of any context as to what part she played in interactions which elicited, or did not elicit, responses from the children impacts adversely on the weight I attach to what is reported to be the children's statements (or behaviour);
- I consider that Dr R's report and evidence is redolent of his process and observations having been significantly influenced by the mother's account of what had occurred to V (and, later, G) and a ready acceptance of her conviction that abuse had occurred as distinct from professional opinions gained independently through clinical process, observation and reliable collateral information; and
- There is no evidence to support Dr R's specific expertise to express a specific opinion as to whether sexual abuse has occurred.³⁷

Mr D

262 Mr D's own evidence that he "got stuck"; the difficulties he had with the asserted complexities of the matter (for example that he was "tied in a knot"); the uncorrected error in the issued report as to the "wrong family" earlier referred to; the reference to the obtaining of important data (from the father and his interactions with the children) not subsequently included within the report; the failure to at all address the impact (if any) that important data had on any opinions expressed and, of itself, the failure to complete his report, detract markedly from the weight I attach to Mr D's evidence generally.

263 In its essence, the Brief Family Report comprises three paragraphs of "opinion and conclusions". Those paragraphs commence: "[V] has reported information to me which, in my opinion, and after I have considered all the information available to me, suggest to me that she may have been sexually assaulted by her father". As Mr D confirmed in cross-examination³⁸ the reference to V is

³⁷ This issue is discussed further when referring to Mr D's evidence.

³⁸ Transcript of proceedings 19 May 2014 page 35

incorrect and should in fact be a reference to G. As Mr D's notes and evidence reveal, V in fact said very little to him.

- 264 In answer to an additional question from counsel for the ICL, he apparently qualified that opinion:

COUNSEL: In light of the other information which is listed on page 4 of that report which was available to you and to which you had regard. Is that right?---

[MR D]: The point I'm trying to make there is that I have information which suggests she may have been sexually assaulted. That's not my – I'm not concluding that she has been or that it was likely that she was.

- 265 After an interchange between myself and senior counsel for the mother, reference is made by counsel to Mr D's statement that "... at this stage my opinion [is] that her reports to me indicate that what she has stated represents her true recollection of reality. I also accept that they may not". After that evidence, this exchange occurred under further questioning from counsel for the ICL:

COUNSEL: So you're not saying that you are certain that this represents a true statement of her reality but you incline to that view. Isn't that right?---

[MR D]: Yes. And the best answer I can give to the court is if I also refer to paragraph 8 when I'm talking about the idea that there may be further information available I may be able to be provided with some assistance by the ICL and the idea of that is that I would then – you know, I'm – I'm earmarking the idea that I would then be able to present a more conclusive opinion.

- 266 No application is made to have the relevant rules of evidence apply (s 69ZT(3)). As a result, the provisions of the *Evidence Act 1995* (Cth) in respect of, relevantly, opinion evidence do not apply. Accordingly, opinions can be offered without relevant expertise for them being established. The *admissibility* of those opinions must be accepted.

- 267 Yet, even in the absence of an application pursuant to s 69ZT(3), when the issues are as serious as those relating to the sexual abuse of children, I am extremely uncomfortable about attaching weight to an opinion that abuse has (or has not) occurred in the absence of established expertise for that opinion. In assessing the weight of opinions about sexual abuse, the question of whether appropriate qualifications, training or experience permits a psychologist, or other expert witness, to give an opinion as to whether a child has been sexually abused or is at risk of same, must be a significant factor. (Indeed, the question of whether *any* qualifications, training or experience qualifies *any* person as an

expert capable of giving opinions about that specific issue should not be assumed.³⁹)

- 268 In this case, that consideration applies to Mr D as much as it does to Dr R. (It also applies to Mr F, who was at pains to point out that he did not purport to possess such expertise or to offer any such opinion. Similarly, despite Dr G's extensive training, qualifications and experience set out in his report, the doctor does not claim any such specific expertise in that respect.)
- 269 That issue aside, I attach little weight to the respective opinions of Dr R or Mr D as to the occurrence of abuse for the reasons earlier advanced. It seems Mr D himself expresses doubt about the opinion expressed in respect of V [properly G] in his Brief Report. I confess that I was not left with any confidence about just what any such opinion might now be. Be that as it may, to the extent that Mr D maintains any such opinion, I give it no weight.
- 270 Mr D's Brief Report indicates that he interviewed the father on 28 November 2012 and observed the father interacting with the children on the same date. Yet, nothing at all appears in his report in respect of either. Of significant importance is the fact that nothing within the report seeks to synthesise any observations made of the father and his interactions with the children and any opinions arising therefrom, with other observations and opinions expressed within the reports – particularly the opinion expressed in the first "Brief Family Report". The same is true of collateral data obtained from Ms A.
- 271 In my view, that is a significant omission. It has the potential to be important because of the highly unusual circumstances which saw Mr D not completing his commissioned task and producing in lieu only a partially complete report.
- 272 Those factors, and the matters mentioned earlier in these reasons relating to Mr D's process, cause me to place little weight on any opinions expressed within Mr D's report.
- 273 Those important matters aside, I have perused Mr D's very extensive handwritten contemporaneous notes. Those notes, and the fact that it was not put to Mr D that either the statements of the children, or their observed behaviours which he records, are other than recorded accurately persuades me to find that each occurred as he reports them. He interviewed the children in the absence of each parent.

THE CHILDREN'S BEHAVIOURS

- 274 I have already referred to evidence from the mother (and some of her witnesses) as to the children's florid manifestations of their expressed fear of

³⁹ See, for example, the discussion in *Carpenter & Carpenter* (2012) FamCA 1005, at [64] – [94]; *Carpenter & Carpenter* (2014) FamCAFC 100, at [38] – [42]

their father and their apparently regularly-expressed and implacable desire not to see him.

275 The notes taken by Ms A span an approximate 16-month period. They encompass observations of visits between the father and children at her home and, later, away from her home including at the father's residence and, on one occasion at Dreamworld where the father was performing professionally. The tenor of the observed interactions between the children and their father is of happy, excited interactions redolent of spontaneous warmth and affection. Examples over that 16-month period include:

- “The girls and [the father] played well together. The girls didn’t show any signs of being afraid of [the father] or not wanting him to touch them. He was sitting on the lounge on the patio and [V] sat next to him and [G] was on the other side laying down with her legs across his legs and said she was comfortable and wanted to stay like that when I asked her” (30.12.12);
- “The girls were pleased to see their dad ... The girls had a good time”. (25.2.13);
- “The girls were both very happy and played on the I-pad and tablet and then went into the kitchen and we cooked scrambled eggs: (10.3.12);
- “The girls came in and were pleased to see their dad ... [the father] and the girls went into the lounge. They had a good time playing with each other. (26.5.13);
- “We went to [the father’s] home as usual. The girls were very excited”. (15.9.13);
- “... we went back to [the father’s] house and the girls wanted to go swimming again. ... They all had a wonderful time. ...” (22.9.13);
- “The girls were very excited because they told me they saw daddy at the airport in Sydney ... The girls had a good day” (3.11.13);
- “The girls were really pleased to see [the father] ... they had a good time.” (10.11.13);
- “The girls arrived very excited to see dad ... the girls had a good time with everyone”. (12.1.14);
- “The girls arrived and were very excited to seeing [sic] their dad. When [the father] arrived they gave him big cuddles and kisses ...” (2.2.14);
- “The kids were very cuddly today” (5.2.14);
- “The girls always enjoy their time with their dad” (19.3.14);
- “The girls were both happy...” (2.4.14);

- In respect of the visit to Dreamworld and seeing, and participating in the father's [business]: "The girls were very excited". (6.4.14)

276 Ms A records two occasions when one or other of the girls were upset. In respect of the visit on 28 April 2013 Ms A reports a reluctance on G's part to leave her mother's car. Ms A records that "[a]fter a short time" the children came into her home and, later, she records the father asking G why she didn't want to come in earlier. G said she "feels shy because she hasn't seen him for a long time". G then asked the father "... what 7 x 24 was and [the father] said 168 and [the father] asked [G] why. She said that's how many hours it's been since I've seen you. [The father] then gave [G] a cuddle". Ms A says that G then told the father that " ... she would like to see him more". "[V] then went over to [the father] and put her head on his shoulder and her arm around his neck and said Daddy I love you. She then went back to doing her glitter picture".

277 In a similar vein, Ms A also records that, on 26 March "... [V] didn't want to get out of her car seat so [the father] went over to [the mother's] car and ...carried them both in. Once inside she sat in the [car] seat for a while but then got out of it and played as normal. The girls had a good afternoon".

278 Mr F records in his report:

75. ... The children did not appear concerned about the notion of the father returning to the office soon. They played with toys and chatted happily with their mother ...

76. The father arrived. [G] went to him and displayed some affection. [V] remained closer to her mother. The father greeted the children warmly. He had a rather intense and upbeat presentation The father commented on missing the children. [G] leaned into her father.

77. The mother left with minimal intensity. The children did not appear upset or concerned at her leaving. They hopped on and off their father's lap. The father was bright and good-humoured. He had a rather intense manner, asking a number of questions of the children. He was quite verbose and directive. He engaged them in memory games in an inclusive way.

78. The play became more physical, with the children doing familiar acrobatic jumps with their father. They looked out of the window. There was a lot of affection and laughter in the interaction.

79. The children appeared quite relaxed after their father left ...

279 Ms A's notes also record statements by the children to the effect that they wanted to spend more time with their father; that they wanted to speak to him more often on the telephone and, in addition, record words and behaviours from the children to the effect that the children did not want the time with their father to end. Each sits in stark contrast to the picture painted by the mother

(and others in her family) of regular and consistent statements by the children that they are frightened of their father and do not wish to see him and by (more recent) allegations by the mother and Mr E that the children are frightened of Ms A.

280 Each of the mother and Mr E was asked whether evidence of the type just described from Ms A (and the evidence in Mr F's report, particularly that quoted above) caused them pause in light of their respective evidence about the children's statements and behaviours alleged to have been witnessed by them redolent of reluctance to see their father and fear of him.

281 Mr E deposed in his affidavit to witnessing "trauma symptoms that G and V consistently present with". He agreed in cross-examination that he concluded that, as at the date of his affidavit, the children did not enjoy spending time with their father at all. He said that the children had told him nothing to the contrary since that date, but he had "noticed the difference".

282 He attributes, though, any such difference not to any relationship the girls have with their father, or any relationship they yearn for, but, rather:

I think they're probably at the moment happy to go there, because I think [V] owns the lolly stand at Sanctuary Cove, [G] gets told that she's been given watches, gets half the profits from his business and all this sort of thing.

283 I took the matter up again with Mr E during his cross-examination by counsel for the ICL. He said that, based "purely on what he had observed", he had noticed a change in the children's behaviours "in the last two or three months of this year". The following exchange occurred:

HIS HONOUR: Now, you attribute that, as I understood what you told [counsel for the father], [to] the fact that, what, [V] owns the lolly machine at Sanctuary Cove and that, what, [G] has been told she will get half the profits of the business or something?

THE WITNESS: Yes, and she's – gets an iPhone and she's getting money.

HIS HONOUR: Right?

THE WITNESS: Not that they've ever seen anything.

HIS HONOUR: Right?

THE WITNESS: And toys.

HIS HONOUR: Putting it in crude terms, they've been bribed?

THE WITNESS: True

284 In light of the matters earlier discussed in these reasons, including in particular the questioning and processes to which the children have been subjected and my findings with respect to the evidence of the mother, I consider the

explanation offered by the mother and Mr E for the diametrically-opposed accounts of behaviours and statements by the children to be fatuously self-serving.

285 It is also, in my judgment, a telling example of each closing their respective minds to thoughts or explanations that do not accord with their own, and to a collective belief system that abuse has occurred, which such belief system is inflexible and does not admit of alternative explanations and possibilities.

286 I consider the evidence of Mr F reliable as to the statements and behaviours of the children recorded within it.

287 Despite the reservations I have expressed in and about the reports prepared by Mr D and my lack of confidence in his reports as a result, I nevertheless accept as reliable the evidence emerging from his notes as to the statements and behaviours of the children recorded within them.

288 While I am sceptical of the veracity and reliability of the mother's evidence and while I consider that she has exaggerated her evidence as to the expressed reluctance of the children's behaviours, I accept it as more likely than not that the children have said things to her (and to members of her family and friends), and exhibited behaviours to the effect that they do not wish to spend time with their father. I am equally convinced that the children are acutely aware that this accords with what their mother, their grandfather and their wider family want.

289 Restrictions in the type and quantity of the father's time means that the children are not exposed to their father "doing the hard yards" and maintaining for them the tedious controls that a proper parenting routine requires. The father is, very much, the parent for fun times while the mother is, very much, the parent who maintains discipline and the parameters of a day to day routine. So much is a familiar conflict inherent in separated parenting regimes. But the differences here, as deposed to by the mother, (and others) cannot, if accepted, be explained by these factors.

290 The overwhelming impression is that when with their mother and her family and exposed to discussions about their father and his alleged behaviours (which, I consider, happen frequently) they are children under pressure burdened by the concerns of adults. When with their father, the overwhelming impression is of children enjoying being children. Again, however, while so ever these allegations have hung over him, I think the presence of Ms A has permitted that to flourish. I am not particularly confident that the same freedom might have been afforded the children had his time with them not been supervised by her.

291 I have little doubt that the words and actions of the mother, Mr E and members of the mother's family have left the children with no doubts about the deep animosity felt by them toward the father and that they consider he has done

things to their “bottoms” which they regard as wrong. I have no doubt that the children have picked up on words and emotions expressed in accordance therewith.

THE CHILDREN’S STATEMENTS

- 292 I put little weight *per se* on the fact that statements by the children have been repeated to a number of different people over time to allegedly similar effect as those related by the mother. Again, alleged statements are often recorded as “words to the effect of”. Actual words, and their import and context, are often lost in the re-telling.
- 293 I consider that the mother’s witnesses are affected by the factor referred to by Lord Pearce to which I have earlier referred: without exception, they care very deeply for these two girls; have persuaded themselves that the father has sexually abused them and, as a result, seek to give as much loving support to their family member or friend as they can and a concomitant condemnation of the father. They have, as Legatt J said in the passage earlier quoted, “a desire to assist, or at least not to prejudice” the mother’s case.
- 294 Similarly, individual differences and values are important: while some parents might pass off some conduct or statements of children as “kids being kids”, other parents see similar conduct and behaviour as having deep or sinister significance. Some observations are more susceptible to individual impression than others. It is a rare case of this type where those factors do not play a part in assessing the evidence.
- 295 I have no doubt that each and all of those matters have materially affected the evidence of the mother’s witnesses. They are, to borrow Lord Pearce’s words “emotional” (in the sense in which the expression is there used – i.e. affected by emotion) and “think they are morally in the right”. *If* they are right, each is both understandable and, I venture to say, proper. But, in the context of the court seeking to ascertain whether evidence justifies findings and ultimate outcomes, they are factors which in my view materially affect the reliability (or credibility more generally) of their evidence.
- 296 In a different context, Lord Pearce refers to the effect being to “conjure up a legal right that did not exist”. Here, the effects are, in my view, to conjure up meaning that may not exist in the words and actions of the children and to ameliorate precision in the recounting of those words. In my view, those factors impinge, for example, upon the evidence of the mother’s sister and brother-in-law; her parents and Ms I. As has been seen, I also consider they impinge significantly upon the evidence of the mother.

- 297 I accept each of the tapes of the 93A interviews as accurate reports of the whole of what was said relevantly by G on each occasion. I was able to observe G's demeanour for myself in each instance.
- 298 Each of the tape and video recordings taken, respectively, by the mother and father are self-serving in the sense earlier described and, given that each is admitted to be part only of an event or conversation, they each beg a central question: what happened, or what was said, that is not recorded on the tape? I am not confident about accepting the evidence of, respectively the mother or the father as to the contents of conversations that are not depicted on the tape or video.
- 299 I do not consider that weight should attach to what is said by V in either tape as evidence of the truth of its content. In respect of the mother's tape recording, other issues to be discussed shortly additionally impact that finding.
- 300 However, I consider that each has other evidentiary value. I have already made findings in respect of the behaviour of the mother depicted in the father's video. As will be seen, I consider the same is true of the mother's tape recording of V.
- 301 Hearsay statements are rendered admissible in parenting proceedings by s 69ZT and s 69ZV of the Act. Hearsay evidence of what *children* have said pervades cases of this type, and this case is no exception.
- 302 Permitting the reception of hearsay evidence as the general rule in parenting cases might be seen as a reflection of the fact that the assessment of the relevant mandatory considerations is, frequently, as much about an assessment of values as it is a determination of facts⁴⁰. However, parenting cases in which one parent alleges that the other has sexually abused their children are, of their nature, "forensic" and very often involve decisions about many serious facts. Yet, as is common, here the court is confronted with ascertaining what weight should be given to *a number* of hearsay accounts, many of which are accounts by others of the statements of young children and, indeed, the statements of children about the statements of other young children and, indeed, the statements of children about the statements of other young children. Not only does this impact on the weight to be given to the statements⁴¹, but it also in my view magnifies the factors just mentioned.
- 303 So, too, where, as here, the evidence consists not of the precise words used by children in circumstances where firm findings can be made as to the context which pervades the making of the statements, but of evidence punctuated by

⁴⁰ "It is a mistake to think that there is always one right answer to the question of what the best interests of a child require. Each judge is duty bound to make an order which he or she thinks is in the best interests of a child. But the fact that other judges think that the best interests of the child require a different order does not necessarily prove that the first order was not in the best interests of the child. Best interests are values, not facts": *CDJ v VAJ* per Kirby J (1998) 197 CLR 172, 219.

⁴¹ Sections 69ZT(2), 69ZV(3).

the expression “words to the effect of”. The latter statement axiomatically implies, at least in part, the intervention of the listener’s interpretation of the words as distinct from the words themselves.

- 304 Those matters must be kept very much in mind in assessing the veracity and reliability of the children’s statements as relayed through the words of others. That is all the more so, of course, where I have doubts about the accuracy or reliability of the account of the report of the statement.

V’s Statements in the Mother’s 26 July Tape Recording

- 305 The accuracy of the transcript of the recording contained within the mother’s email to her father is in evidence. As to the words which it records, it is not challenged (save that, as will be seen, a passage of the tape is indistinct). The transcript, which follows the introduction earlier quoted is:

[Ms Thornton]: So who kisses you on the bottom?
[V]: “Oh Dada”
[Ms Thornton]: “Does He dad?”
[V]: “yeah”
[Ms Thornton]: “Do you like it when he does that?”
[V]: “No its disgusting, when he kisses me on the bottom its disgusting”
[Ms Thornton]: “Do you say stop it I don’t like it?”
[V]: “Well its stink really stink and my Dad smells it
[Ms Thornton]: He smells your bottom?
[Ms Thornton]: Does he?
[V]: Yeah, and its really stinky”
[Ms Thornton]: “Does he touch it ever?”
[V]: Yeah he does
[Ms Thornton]: What does he do?
[V]: He touches it and he smells it
[Ms Thornton]: Does he?
[Ms Thornton]: Can you show me what he does?
[V]: “He kisses it and he smells it”
[Ms Thornton]: “You show me what he does”
[V]: “When he gets home he will show you”
Ms Thornton: “Does he touch the front bottom or back bottom?”
V: He does it all over my bottom
[Ms Thornton]: Does he with what? WHAT does he touch it with?
[V]: “His mouth,
[Ms Thornton]: He touches it with his mouth?
[V]: Yeah and its disgusting
[Ms Thornton]: That’s Oh ... and you say stop it I don’t like it”

1. [V]: “but [Q] just got in trouble by me...”

Ms Thornton: What did [Q] get in trouble for?

[The transcript leaves a gap at this point. The recording is of indistinct chatter. The mother asserts that no such chatter is connected with the instant

allegations. Equally, however, it is not possible to discern what allegedly non-material matters are discussed.]

[Ms Thornton]: “So what Daddy kisses the front bottom?”

[V]: “All over”

[Ms Thornton]: “All over with his tongue? Yes, With his mouth does he?”

[V]: “Yes, with his tongue he licks it all over my gerrmies bottom.”

[Ms Thornton]: “Are you serious? When does he do that?”

[V]: “On Sat Friday”

[Ms Thornton]: “Does he do it in your bedroom”

[V]: “Yeah and he kisses it and he licks it in my bedroom.”

[Ms Thornton]: “Does he?”

[V]: “Yeah”

[Ms Thornton]: “Is [G] there, has [G] ever seen him do it?”

[V]: “Yeah”

[Ms Thornton]: “How does it make you feel honey”

[V]: “Can I have a shower”

306 As to the purpose of the second recording shortly following the first, the mother said:

I think I was bathing her, so by the time I got her out of the bath, and I thought I would clarify to see whether it had happened. ... Or if it – how many times it had happened, because then I would know.

307 This recording was also played in court. As has earlier been seen, the second recording occurs 23 minutes after the first. It is clear from the recording that some minor corrections should be made to the accompanying transcript which should read (corrections in square brackets):

[V]: “12345678910 ... that’s how many times”

[Ms Thornton]: “So tell me what did he do?”

[V]: “He licked it”

[Ms Thornton]: “He licked your bottom?”

[V]: “Yeah”

[Ms Thornton]: “Like] how many times”

[V]: “Like 16”

[Ms Thornton]: “OK, alright”.

308 Taking together the accounts deposed to by the mother and Ms E, the reports of what each said respectively to Dr G and Mr F, and the tape recording, the following points emerge:

- V is about 3½ when the taped conversation occurred;
- There is conflicting evidence of what has been said by the mother to V prior to the taping commencing;
- There is, in any event, no clear evidence of what was said by the mother prior to the tape commencing, the length of time over which

any such things were said and whether G was present for some or all of any conversations;

- In particular, it is not known whether and to what extent leading questions were asked of V prior to the commencement of the tape;
- Despite, in answer to my question, the mother saying that her intention was to not ask leading questions, the first question recorded is a leading question;
- The notion that the father “kisses” V on the bottom emerges from a leading question by the mother and a follow-up question which assumes that to have occurred;
- The questions then asked by the mother assume a sinister connotation to the “kisses” as distinct from playful conduct to which a non-sinister connotation could be given. (This has the potential to be important in light of descriptions of conduct subsequently given by G to the police and Ms A in respect of alleged conduct toward her);
- The notion of the father “touching” V’s bottom is raised first by the mother in a leading question. “Touching” is a neutral expression – there may be many reasons a father would, quite properly, “touch” a 3½ year-old’s bottom if a sinister, adult connotation of the word “touch” is removed;
- Nothing transcribed from the recording (and nothing distinct from the recording itself) suggests that V’s reference to Q (which *may* be related to the events earlier described as it is “Q” who “just got in trouble by me”) is taken up with V: the answer to the mother’s question in that respect is neither transcribed or deposed to;
- The first question asked of V after the non-transcribed, indistinct part of the tape is a leading question that introduces an entirely new notion not emerging from anything recorded in the first part of the tape, namely that kissing involves the vagina (assuming that is what is meant by “front bottom”);
- The conduct is said by V to occur in V’s bedroom (a matter that, as will be seen, has the potential for significance in respect of other statements by the children.

309 Similar considerations can be seen to attend the short second recording:

- There is no evidence of what is said in the 23 minutes between the two recordings, and in particular what questions were asked of the child in the intervening period;

- It is not known if G was present for the whole of that time and, if so, what she heard or was asked during that time;
- Again, the opening portion of what is recorded has no context, and, in particular, any conversation or questions which precedes it;
- The child's response that he licked "it" is followed by a leading question which assumes that any licking occurred to V's bottom;
- Despite a clear answer from V that it had occurred 16 times, the mother made it clear in cross-examination that she did not believe that to be the case. It was unclear why that answer was rejected as false while others were not.

Other Statements by V

- 310 V could not be engaged by the police such as to give an interview to them. Evidence of things said by V subsequent to the mother's tape recording from sources giving reliable accounts are sparse. Indeed, the evidence plainly reveals that, having initially denied to the police that anything happened to her, it is G, not V, whose statements attract significantly more attention and about which there is significantly more evidence in the period after the first police interview.
- 311 To the extent that reliable evidence reveals any statements by V, they are ambiguous; refer to what her mother said, or are denials that her father touched her bottom:
- On 28 November 2012, V told Mr D: "... My daddy's always naughty." She later "strongly denied" ever making such a statement. Mr D does not record V saying anything else to the effect of what is recorded on the mother's tape recording.
 - On 20 January 2013, Ms A records that V said "Mummy said you [ie the father] did naughty things to me. You touched my bum with your tongue ... [father denies] yes you did, mummy said so".
 - On 23 February 2014, Ms A records the father asking V "has anyone ever touched your bottom" to which V said "no".
 - On 12 September 2013, neither V nor G made any statement to Mr F suggestive of abuse.
- 312 As can be seen from a comparison of the mother's affidavit of evidence-in-chief with the transcription of the mother's recording of V, a central inconsistency pertains to whether G did, or could have, seen the alleged conduct perpetrated on V.
- 313 The mother's affidavit of evidence-in-chief deposes that G could not have seen the father's alleged conduct because V said that "[G] had been at ballet when her father had kissed her on the bottom", V says in the second part of the

recording (in response to a question that permits of an answer that G had either been there *and/or* “seen him do it”) that she *had* been there (*and/or* had “seen him do it”).

- 314 There is only one piece of evidence from a source I regard as reliable to suggest that G *may* have seen *something*.
- 315 It emerges from what G told the police officer during the first police interview. She said “Because sometime when we are about to have a bath [the father] kisses [V’s] bottom... like just on the side not right in ... (G is tapping the side of her leg) ... (What sort of kisses?): short ones (G raise her right hand and quickly kisses the palm of her hand).” Plainly enough, G is suggesting she has seen *something*, but what she describes is both a long way removed from conduct of the type described on the tape *and*, is conduct that may be entirely consistent with an innocent action. When the police officer followed up with a question “How many times have you seen dad kiss [V] on the bottom?” G responded, “I am not sure”.
- 316 There are, however, suggestions from G that V has *told* her things about what the father has done to her. In assessing the weight to be attached to those statements, I am particularly conscious of the fact that they are the child’s account of the statement of an even younger child.

Statement made on	Statement made to	Statement
31/07/2012	QPS ⁴²	(What has [V] said to you?): That he kisses her bottom and she has very scary nightmares about it really happening. (When did she tell you that?): I am not very sure ... I think it was about a week ago or something.
13/10/2012	QPS	(Whereabouts was [V]?): She was in her room and it has happened the same thing with [V]. (How do you know what?): She’s told me ... She wants to have a speak to you about what happened ...
13/10/2012	QPS	Cause he is starting to do it to [V] as well again. (And how do you know he is starting to do it to [V] again?): I meant he did it umm he did it a long time ago with [V] and he is like this is my private this is my private
28/11/2012	D	[G] told [D] that it had happened to [V] and that she knew because [V] had told her... She told me what happened to her ... that dad had put his fingers in her B U M. She told her mother immediately after [V] had told her.

⁴²

Statements By, and Pertaining To, G

317 G was aged about 6¾ at the time of the first police interview and aged 7 when interviewed the second time by the police and by Mr D.

Statement made on	Statement made to	Statement
13/10/2012	QPS	<p>(Tell me all about what dad did): umm well he was pretending to be a tooth fairy and umm but then umm I thought he was the tooth fairy but then he came into my room and stuck umm licked two fingers (with her left hand touching the index and middle finger on her right hand) and put it up my (pointing between her legs a couple of times). ... well he was doing that but then umm I noticed that umm it wasn't the tooth fairy it was just dad but I didn't like it ... I know he did that to me but I don't know umm if the tooth fairy was actually a umm just one minute behind him or before ... like if the tooth fairy was before when dad came in or after ... well he was pretending to be the tooth fairy umm but then I noticed he wasn't because then he licked his fingers and put it up my front B U M</p>
13/10/2012	QPS	<p>Well I thought he was the tooth fairy but it was just dad but then he did umm the thing putting the fingers ... I only know what he did to me I just don't know what actually really what happened on that night I just remember what he did to me</p>
13/10/2012	QPS	<p>Well umm he licked his fingers and he stuck it up my umm front here (pointing between her legs). Well he ([G] wipes her index and middle finger of her right hand across her mouth from left to right) just wiped it across his thing and then did it. Well he umm licked his fingers and he umm pulled my sheet off and then well he but then he didn't pull my pants down he just did it. (So he didn't pull your pants off tell me all about that...?): He just did it umm without doing it like right in and then he just for a minute then he pulled it out. (When you say that he pushed pulled it in tell me all about that...?) I didn't mean pull it in I meant put it in. Umm well he just did it for one minute then he</p>

		<p>pulled it out.</p> <p>He did the thing for one minute.</p> <p>I mean like umm he didn't just keep doing it over and over he just do it did it once for one minute then he pulled it out.</p> <p>(... what did he put in and where did he put it into?): He put it into the front bit. (Front bit of what?): Umm here (pointing between her legs a couple of times). (What's there?): My privates.</p> <p>(... what does that privates that your talking about do what's that for?): Its for going to the toilet ... to do the number one or the number two. (So what's the number one?) the W-E-E. (... and what's number 2?): P-O-O.</p> <p>(So that's poo so does that hole where you're saying your private is does that do both does it?): ([G] nodding head yes). (So how many privates do you have?): One. (And you say you had your pants on?): ([G] nodding head yes). I was wearing my pyjamas and then umm my long pants.</p>
13/10/2012	QPS	<p>(So what did dad put into your privates?): Two fingers.</p> <p>(How do you know it was two fingers?): Cause I felt two.</p> <p>(How far into your privates did he put them?): Just in a little for one minute then took it out.</p> <p>(How do you know it was for one minute?): Cause I counted in my head ... umm 60 seconds ... I know that was how much it was it takes to do one minute.</p> <p>(But how come you were counting?): So he doesn't hold it for too long ... I mean so he gets it out quick.</p> <p>(And has this happened before?): No</p> <p>(And has it happened again?): No only once.</p>
13/10/2012	QPS	<p>I told mummy that he umm that he umm did it for one minute and I didn't like it.</p>
13/10/2012	QPS	<p>(So did dad say anything when he did it?): No he only said I am the tooth fairy.</p>
13/10/2012	QPS	<p>(You told me earlier that you can't remember whether daddy came before the tooth fairy or after the tooth fairy.): Yeah I don't know which.</p> <p>(So how do you know the tooth fairy came?): Because I heard her ... because we had creeky stairs and umm and we had creeky floor downstairs and she was very loud ... I meant dad was loud, so I knew it wasn't the tooth fairy ...</p>

13/10/2012	QPS	(So this is the only time that it has happened?): Yes
28/11/2012	D	“Dad put his fingers up my B U M ... that’s all he did ...”. (per [D]: Her father only did it to her once. ... she later confirmed that it was her anus into which her father had placed his fingers).
28/11/2012	D	(When asked how she felt about what her father had done) “... she had felt sad because I didn’t like it happening”. (per [D]: ... No other person has done what her father did to her): “No. Just dad.”
28/11/2012	D	“He used to talk about it just to me. He said: ‘Why did I even think about putting my fingers up your B U M?’”
28/11/2012	D	(Wished for her father to be turned into a toilet.) “Because he did that to me... Then people will have to wee on him.”
07/05/2013	D	([G] said that she) “had told [Ms A] ‘that dad had touched my bottom’”.
07/05/2013	D	(What did he do): “ He just came up and touched me when I had my pants on ... pyjama pants.” (per [D]: She then exd [explained] that her father touched her once, on the outside of her pyjama pants. ...) “Just with one finger, but he did it hard on the [anus].”
12/09/2013	F	Neither child makes any statements to [Mr F] in respect of abuse.

Denials by G

318 As has been seen, statements made by G said to be indicative of abuse are made some 10 or 11 weeks consequent upon a denial in a police interview that any such thing had occurred to her.

319 Other evidence also refers to G making denials (including evidence that G has denied her denials). That evidence can be summarised as follows⁴³:

Statement made on	Statement made to	Statement
31/07/2012	QPS	(Does [the father] do that [kissing [V’s] bottom] to you?): No.
31/07/2012	QPS	(... so you said dad doesn’t do anything to you?): No.
10/03/2013	Ms A	[G] said to the father: “it was poppy that made me say you touched my bottom ... and that you put your

⁴³ For completeness statements in respect of allegations against Mr E and “the bribe” are included.

		<p>fingers in my bottom.” “that time at the police, poppy said to me that I had to lie” ... “Poppy asked me if you ever touched my bottom and I said no that you hadn’t.”</p> <p>[G] said to [Ms A]: A long time ago poppy told her that daddy touched her bottom. [G] told poppy he didn’t but poppy said yes he did and you had to tell everyone that. ... daddy never did anything to me.</p>
17/03/2013	Ms A	<p>[G] said to [Ms A] that [the father] didn’t say anything about giving her \$100 ... “Poppy never told me to say anything ...”</p> <p>One of her teeth fell out “... daddy came into the bedroom to play the tooth fairy” ... he did not take off or take down her pants ... daddy poked her with one finger on the side of her bum cheek ... she told a lie to [Ms A] because she told mum that dad had put his fingers in her bottom but he never did it.</p>
07/05/2013	D	<p>([G] was asked if she had told [Ms A] anything about the maternal grandfather.) “Yes – that poppy said to say [her father] had touched my bottom, but it didn’t even happen. Poppy didn’t tell me to do that.”</p> <p>When asked whether she had, on another occasion, told [Ms A] that her father had <i>not</i> touched her bottom? She said “No I didn’t. No I didn’t”.</p> <p>[Mr D] sought to check that answer by repeating it. [G] repeated “no I didn’t”.</p>
19/05/2013	Ms A	<p>[G] said to her father: “poppy did tell me to say you touched my bottom”.</p>
23/06/2013	Ms A	<p>[G] asked her father “if it was because of what poppy had made me say that I can’t come and see you anymore.</p>

Statements as to When and Where Conduct to G May Have Occurred

- 320 The mother seems to now clearly assert that sexual abuse of both children occurred before separation. The basis for that assertion appears to emerge from what the mother deposes in her affidavit of evidence-in-chief as to G saying that “I cried every time you went to training” and that “it has been happening since she was five years old”.
- 321 The proximity of what is said by V on 25 and 26 July 2012 to a period of overnight time on 24 July (together with the mother’s and Ms E’s assertions as to their concerns emerging from events on that date (the SMS from the father);

Ms E's conversation on 25 July, and the suggested immediacy of V's conduct (clinging, nightmares etc) suggests that the mother (and indeed Ms E) believed something abusive occurred to V on the period of overnight time on 24 July.

- 322 Unsurprisingly, questions posed by both the police officer and by Mr D sought to posit statements made by the children in time, including by reference to a specific occasion or occasions. That information has, of course, very significant forensic potential: among other things it provides for the possibility of obtaining collateral information that might assist in assessing the veracity or reliability of children's statements; it provides a means for assessing if an alleged perpetrator had reasonable opportunity to carry out the actions alleged and it can provide measures for any inconsistencies in account that might be thought significant.
- 323 As might be expected of a child of her age, none of the statements attributed to V posit an event by reference to time frames or places. She does say that "it" occurred "when [G] was at ballet" and "in my bedroom". Of course, if that is true then, contrary to other statements made by V and G, G was neither there nor saw it occur.
- 324 By way of contrast, G does pinpoint an event in time and place. So, indeed, does the mother. As has been seen, the mother told the police that she attributes the father's sexual conduct toward G as having occurred on 24 June 2012. That accords with the mother's own evidence. That statement can be seen, in turn, to be referenced to G's statements which are said to link some conduct with the appearance of the tooth fairy. That same event can be seen to underlie much of what G said to the police officer and to Mr D.
- 325 It will have been seen that V refers (in the mother's tape) to behaviour having occurred in *her* bedroom. That is the only evidence by which it might be ascertained *where* any alleged conduct to V occurred.
- 326 Again, by way of contrast G does make comments to suggest where behaviour might have occurred. However, G has made a number of *different* statements as to when and where events have occurred:

Statement made on	Statement made to	Statement
31/07/2012	QPS	(... you said it is when he puts her [V] into the bath?): "No not when he puts her into the bath, just when he is about to ... He picks her up and then does it [kissing on the bottom] ... the bath is in my dad's bedroom".
13/10/2012	QPS	As to when: "Well it was the night before the Tavern but after when he did that the next morning [V] was vomiting and being real sick." "... when I was 3 he did it ... just wait, no I mean

		when I was 5” As to where: “... we went to our old house ...”
28/11/2012	D	As to when: “when I was five ... it was when I lost my tooth...” As to where: “... at my old house ... in my bedroom at night ...”
28/11/2012	D	As to when and where: (Where was mum) “Out training. Swimming. Going up to the rec. centre.” ... (per D: she stated that the incident had occurred prior to the time that her mother had moved out of the home she had shared with [the father]).
07/05/2013	D	“In bed – when I was asleep and he was pretending to be the tooth fairy and I lost my tooth that night ... the touching had occurred “a long time ago” – when she was four years of age.
07/05/2013	D	Asked when she told her mother what her father had done, she said “Yes. When I was 6 and $\frac{3}{4}$ at my cousins house having a sleep-over”. When asked why she chose to tell her mother at that time, she said “so I wouldn’t have any bad dreams. I have all nightmares and stuff”. ([D] noted that she couldn’t recall the dreams and nightmares but noted that “she no longer had them”).

The Difference in G’s Demeanour Between the 1st and 2nd Police Interviews

327 As I have earlier mentioned, there was a stark and troubling contrast between G’s demeanour during the second police interview when compared with the first interview. She was asked about this by both the interviewing police officer and Mr D:

Statement made on	Statement made to	Statement
13/10/2012	QPS	[G] said she could recall speaking to the police officer on the last occasion but didn't say anything then because "I was shy and I was scared to talk about it on my first time".. (Why) "because I haven't spoken to you before". (But remember I asked you about whether daddy had done something like this to you before). "Yeah, I know but I was shy to say it"
28/11/2012	D	[G] said she spoke to police officer on first occasion "because my mum said 'go tell em what happened but I was too scared to tell em what happened.'" Asked how she "managed to summon the courage on the second occasion, she said she did so "because my mum said to tell em the truth this time".

- 328 While, of course, at least partially dependent on assessing what a 6¾ year old child was thinking as at 31 July 2012, I find it almost impossible to accept G's self-description of same when, on 13 October, she explains to the police officer why she did not tell him what had allegedly occurred to her at their earlier interview some ten or eleven weeks previously.
- 329 My observations of G in the first police interview were of a bright, cheerful, engaged child with whom the police officer struck an excellent rapport. She answered questions spontaneously, cheerfully and without noticeable hesitation. Her demeanour appeared calm and relaxed (despite the fact that, as she accurately said in the second interview, she did not know the police officer and it being, after all, a formal police interview).
- 330 The startling contrast with her demeanour on the second occasion, the long pauses before answering, the hesitancy in answering many questions, the changing of answers and a markedly flat affect all struck me as signs of a child under enormous stress. I found it excruciatingly painful to observe.
- 331 I have already made findings that the mother has inculcated or encouraged in G the notion or story that her father has bribed G to tell a false story about Mr E. I have already found that the mother has played the tape of V's recording in the car so that it could be heard – and heard more than once – by G. I have already rejected the mother's account of the placement of her mobile phone (and, thus, the capacity for her to record V) as being serendipitous.
- 332 I consider it highly likely that G was "primed" by the mother for the second police interview in that she made it clear to G what she was to say to the police

officer. I am fortified in that view not only by the findings earlier referred to, but in particular by G's statement to Mr D that she was able to tell the police officer the things that she did in the second interview "because my mum said to tell 'em the truth this time". Not only is this an indication of the fact that the mother spoke to G about the first police interview but, in addition, it is, in terms, a clear indication *to G* that her mother thought she *didn't* tell the truth on the previous interview with the police.

333 Further to those matters, G's statements to the police in October have very significant oddities.

334 If, as the mother would contend, full faith is to be given to statements which are said to be indicative of abuse, why should full faith not also be given to other statements that do not sit so easily with any such adult perception? The corollary is also true; if some statements are dismissed, why ought other statements also not be dismissed.

335 G says that she thought the father *was* the tooth fairy; "he" came into the room, licked two fingers and put it up. Later, however, she says "*he* was doing that *but then* umm I noticed that *it wasn't the tooth fairy*, it was just dad." Later, however, she (a) speaks of two separate visits – one by the tooth fairy and one by her father; and (b) attributes the tooth fairy as existing ("I don't know if the tooth fairy was actually umm just one minute behind him or before him"); and (c) appears to confuse or conflate the tooth fairy with her father ("well I thought he was the tooth fairy but it was just dad").

336 Later again, when the police officer again takes up this issue, G again attributes reality to something that is not real (the tooth fairy) and refers to the tooth fairy as a female "because I heard *her* ... because we had creaky stairs and um we had creaky floor downstairs and *she* was very loud ... *I meant dad was loud*, so I knew it wasn't the tooth fairy...".

337 Apart from the confusion readily apparent from these statements, G also told the police officer that "well I *thought* he was the tooth fairy but it was just dad but he did umm the thing putting the fingers ... I only know what he did to me *I just don't know what actually really what happened on that night, I just remember what he did to me*".

338 In my view, it cannot be said that inconsistencies readily apparent from the second interview with the police officer (and also from Mr D's interview with G) are insignificant. Indeed, I consider them to be very significant. In respect of when conduct might have occurred to her G says:

- a. That it did not happen (QPS interview 31.7.12).
- b. An event happened by reference to an event, namely the loss of a tooth, the mother fixes that event plainly in time – 24 June 2012 – because that is the date upon which G lost that tooth. The police and her evidence

confirm it. Having then given an account to police in respect of an event tied to the apparent appearance of the tooth fairy, G says that:

- The event happened when she was three (QPS 13.10.12);
- The event happened when she was five (QPS 13.10.12);
- The event happened when she lost her tooth when she was five (D 28.11.12);
- The event happened when her mother was “out training, swimming, going up to the rec centre” which D clarified as being prior to separation – that is prior to April 2012 (D 28.11.12);
- The event happened when G “*was asleep*” (D 7.5.13);
- The event happened “a long time ago” when G was “four years of age” (D 7.5.13);
- She told her mother about it when she was 6¾ (that is July 2012). The evidence does not reveal G saying anything to her mother at that time. But, of course, the mother recorded V saying something about what had happened to V at that time.

339 The use of the singular in the evidence just traversed should be noticed. Whatever event G might be seen to be describing, if any, it is plain that she is describing one incident only. She was asked about that by the police officer on more than one occasion. In response to more than one question, and on each occasion, G indicated that “it” happened only once. She said the same thing to Mr D and Mr D’s exploration of the issue referred to “the incident”.

340 She also referred to one event with Ms A (17.3.13). That one event was also linked to “the tooth fairy” and when “one of her teeth fell out”. However, that incident is described as being her father “poking her with one finger on the side of her bum cheek” and that “he did not take off or take down her pants”.

341 That latter statement is entirely consistent with what she told Mr D on 7 May 2013 (“when I had my pants on ... pyjama pants”) to which Mr D adds that G explained that “her father touched her once, on the outside of pyjama pant ... just with one finger, but he did it hard on the [anus]”.

342 It is also entirely consistent with what G told the police in her second interview in October “... pulled my sheet off and then well he but then he didn’t pull my pants down he just did it”. When the police returned to that topic (“you said you had your pants on”) G nodded yes, and when asked what she was wearing she said “I was wearing my pyjamas and then my long pants”.

343 There is a remarkable congruence between what can be gleaned of what G says about specifics relating to the conduct (“licking fingers”; “fingers into the anus” and the like) with the mother’s complaint about sexual conduct directed towards her during the course of the relationship by the father. The mother

suggests, as it seems to me, that this coincidence reveals an underlying or hallmark pattern of behaviour by the father. In light of my findings about the regularity and relentlessness of the mother's questioning of the children and her interest in the subject of what the father may or may not have done to the children, I consider it much more likely as indicative of the nature and content of leading questions asked by the mother of G.

G's Demonstrations

344 As has earlier been seen, during the first police interview G demonstrated the kiss that she asserted she had seen the father give V's bottom by giving what the police officer described as a "peck-style" kiss on the palm of her hand.

345 Ms A, too, gives evidence of a demonstration by G – this time in respect of her father's alleged touching of her. Cross-examination proceeded as follows:

MR NORTH: And you say in paragraph 33: G then held up one finger, and poked herself on the right buttock, which is entirely consistent with what G had said and shown me on a number of occasions previously.

[MS A]: Mmm.

MR NORTH: Now, that would have been a significant event on each such previous occasion, wouldn't it? That [G] had done that?

[MS A]: Well, to me it wasn't because she was only poking her bottom. She wasn't putting her fingers anywhere. Like, had been spoken to before.

MR NORTH: How did daddy poke you? And where did daddy poke you?

[MS A]: Mmm.

MR NORTH: And she gestured in a particular way; poking her finger into her buttock?

[MS A]: On the right side of her - - -

MR NORTH: On the right side of her buttock?

[MS A]: The cheek of her bottom, right.

MR NORTH: And you say that she done that in response to similar inquiry on a number of occasions before?

[MS A]: Mmm.

346 And, further:

[MS A]: On the cheek of her bottom.

HIS HONOUR: Thank you.

[MR NORTH]: You told this court earlier that there had been no conversations about the father putting his fingers inside [G]? Didn't you just give that evidence earlier today?

[MS A]: Pardon?

MR NORTH: Did you not give evidence earlier today that you had - there had been no conversations about the father putting his fingers inside [G]?

[MS A]: No, there haven't. The only time that [G] has said it, as she has said it herself.

MR NORTH: Well, you see, I suggest to you that there have been conversations about the allegations of assault and/or the allegations made by the girls about their father - - -?

[MS A]: Yes, but when - the thing about her - - -

MR NORTH: - - - that haven't been recorded by you?

[MS A]: No. The thing about her poking her bottom. She showed - she poked it - she poked her bottom when she talked about it in the lounge room. She poked her bottom when I talked to [Ms Thornton] about it, and we all spoke together. And then she poked her bottom exactly the same the next week when I spoke to her about it.

HIS HONOUR: Sorry. In lounge room. What was the second one? When something [Ms Thornton]? I missed?

[MS A]: [Ms Thornton], and [G], and I - when I was telling [Ms Thornton] after the visit what happened.

HIS HONOUR: Right?

[MS A]: She did it again, then.

HIS HONOUR: Yes?

[MS A]: And then she did it on the following week when [Ms Thornton] asked me to ask [G] again what happened.

347 It can be seen that Ms A both described what G did and asserts that G demonstrated it to the mother in Ms A's presence. It was not suggested to Ms A that either assertion was false. The mother makes no mention of this event in her evidence. That demonstration is referred to as being a poke on the side of the buttock.

THE CHILDREN'S STATEMENTS: CONCLUSIONS AND FINDINGS

348 I accept the concordant evidence of Ms A and the father to the effect that G said quite specific and detailed things to them to the effect that Mr E had told her to tell lies about her father. I have found those statements by G to be untrue. I have accepted the concordant evidence of Ms A and the father that G has denied to each of them that her father has "touched her bottom". Yet, at the same time, I accept that Mr D has accurately recorded G as saying (and confirming to a later question) that she had *not* said that to Ms A. The latter statement by G is untrue. I accept that Mr D has accurately recorded G as saying that she told her mother of her father's alleged improper behaviour when she was 6¾ (that is, in July 2012). That is untrue.

- 349 I do not think for a moment that G is “a liar”. I do not think for one moment that she has set out to deceive her mother, Ms A, her father, a police officer or Mr D. I *do* think that she (and V) are prepared to, and will, say things which they think will please each of their primary loved objects – their mother and father, and other important adults in their lives.
- 350 I consider that G and V have been subjected to a pervasive and inflexible belief system by the mother and by members of her wider family. I consider that their belief system has emerged from a flimsy foundation and that information has been fed to it that serves the belief, and that information has been rejected that does not serve that belief. Their minds have been closed to alternative explanations and implacably so.
- 351 I consider that the children are acutely aware of the views of the mother and her family, including specifically the view that the father presents a sexual danger to them. The evidence is strongly persuasive that the subject of their “bottoms” and the father’s conduct said to be connected with their bottoms has been a constant source of questions and interest by the mother and her wider family.
- 352 The children are, to borrow Dr G’s words, acutely aware that words and actions are expected of them when their father is spoken of by the mother and her family.
- 353 I am very firmly convinced that the mother has engaged in deliberate and intentional conduct that has sought to influence the words and behaviours of the children in and about their father. The playing of the tape in the car; the conversation on 15 March and the “priming” of G for her second police interview are telling examples. The stark contrast in G’s demeanour between the two police interviews is not the only extremely concerning evidence in that respect; their oppositional behaviour with their mother when time with the father is contemplated compared with the evidence of spontaneous happiness when with the father supervised by Ms A is another.
- 354 I consider that the diametrically opposed evidence about the children’s behaviours in and about seeing their father deposed to by the mother (and other of her witnesses) and the evidence of the father and Ms A is explained by the factors just referred to: the children know how their mother expects them to behave when going to their father and are free to express themselves when they are with him and she is not there.
- 355 The evidence of the mother and Mr E when asked to give consideration to what Mr A says of their time with the father (even if they are not prepared to give credence to the father’s account) and the inherent glib rejection of the possibility of young children seeking a relationship with their father is, I think, a powerful pointer to the pervading atmosphere in the mother’s household, and her family more broadly, of which the children are very well aware.

- 356 I consider there is a marked lack of coherence in the children's statements and I regard them as unreliable indicators that abuse has been perpetrated upon them. Inconsistencies in them are not minor discrepancies that might be expected of young children seeking to recall events at the request of adults. Rather, in my view, they are fundamental to any satisfaction as to improper conduct or risk of same. They include wildly disparate accounts of when an alleged incident occurred; the attribution of it occurring when "I was asleep"; and the attribution of reality to something that is not real: the tooth fairy.
- 357 In V's case, there is extremely sparse evidence from any source that I regard as reliable that she has said anything persuasive of abuse having been perpetrated upon her. I consider the mother's tape recording to be wholly unreliable for the reasons I have earlier referred to.
- 358 The findings just discussed and made earlier in these reasons lead to the following conclusions:
- The evidence in this case falls a long way short of evidence which would compel a finding that the father has sexually abused his children or, to be clear, that he has engaged in any improper conduct toward them;
 - As to "... whether, on the evidence, there is a risk of sexual abuse occurring if custody or access be granted and assessing the magnitude of that risk"⁴⁴, I consider the weight of the evidence is strongly persuasive of there being no unacceptable risk to these children from living with or spending time with, their father; and
 - The children have a loving relationship with their father, are not fearful of him and desire spending more time with him.

BEST INTERESTS AND ORDERS

- 359 The findings earlier made in so far as they concern the mother and her conduct in seeking to influence the children bear directly upon findings that need to be made by reference to s 60CC in assessing the children's best interests.
- 360 It will be clear from what I have earlier said that I consider that a degree of moral opprobrium should attach to aspects of the conduct of both parents.
- 361 The insightful and high-handed conduct of the father in questioning the children when specifically prevented from doing so and doing so in a way that compromised the position of Ms A does him no credit. So, too, although not related to parenting per se, telling lies to an airline. The mother's conduct can be seen to be more directly related to the parenting of the children. Bringing pressure to bear upon young children is emotionally abusive. Exposing

⁴⁴ *M v M* (1988) 166 CLR 69, 77-78

children to relentless questioning as to their behaviours and relationship with their parent in the aftermath of a parental separation is emotionally abusive.

362 If I concluded that she did so because she sought to curtail significantly the father's relationship with the children without any genuine belief that he had perpetrated the actions of which she accuses him, that would be an extremely serious breach of the responsibilities of parenthood and the duties inherent in parental responsibility. If I considered that the father's actions in questioning the children were unrelated to them and entirely based in a tit for tat desire to extract a benefit in his conflict with the mother, similar considerations apply.

363 As I have sought to point out earlier in these reasons, human actions and reactions are complex and all the more so when a relationship has ended. The reactions of separating parents as it affects their parenting complicates their actions and reactions dramatically and all the more so when allegations of heinous conduct toward children is involved. When parents think the end is moral - and what is more moral than seeking to protect one's children - the means to that end become aberrant. I think that has occurred here.

364 That does not excuse poor conduct. However, the issue is not a judgment about that conduct but, rather, how that conduct should be judged within the matrix of a range of factors mandated by the Act, ultimately directed toward a determination of orders that best meet the best interests of the children in the difficult circumstances in which they find themselves.

365 The assessment of those matters should, in my view, be based on an ultimate conclusion that the conduct of each of the parents which might properly be judged harshly and, in particular, that of the mother in the specific instances earlier referred to, should be seen as aberrant and as each of them thinking that a particularly moral end justifies means that are, objectively analysed, emotionally harmful to their children.

Parental Responsibility

366 Section 65DAC of the Act requires that, when two or more persons share parental responsibility for a child, they must, in exercising that parental responsibility in respect of major long term issues, consult and "... make a genuine effort to come to a joint decision about" the relevant issue or issues.

367 In circumstances where significant high conflict attends a co-parenting relationship, and in particular where serious allegations of the type under consideration here have created significant animosity, that requirement has the potential to exacerbate conflict. When, as here, children have been exposed to a lengthy period of significant post-separation conflict and have been the centre of allegations, the exacerbation of conflict (or the creation of new conflict) is a real possibility. Any such conflict is, in my view, antithetical to their best interests.

- 368 To the extent that orders might do so, they should seek to avoid that conflict. That can be achieved by vesting parental responsibility solely in, relevantly, one of the two parents.
- 369 However, as I have sought to point out in other cases⁴⁵ the potential exclusion of one parent from decision-making about major long term issues by the interpretation of an order for “sole parental responsibility” which accords to “the other parent” *no* rights, duties or responsibilities in respect of major long term issues at all, is a significant interference with that parent’s rights and the parental responsibility that the parent otherwise enjoys and assumes by reason of parenthood. Of course, the children’s best interests should prevail over the interests of the parent, but that does not render the latter irrelevant⁴⁶. If orders can be framed to take account of both considerations consistent with the children’s best interests predominating, they should be preferred over orders that exclude, or might be interpreted as excluding, a parent from those decisions.
- 370 In my view, orders can be, and in this case should be, shaped so as to meet concerns arising from the likelihood of the parents not co-operating or their competing assertions creating conflict likely to embroil the children, while at the same time paying regard to the interests of the “other” parent.
- 371 There is little doubt in my mind that the mother has been the primary nurturer of these children. Quite apart from other evidence (including what I consider to be, effectively, a concession made by the father to that effect), so much is evident from G’s statements. Historically, I think it plain that the mother has taken the primary role for making decisions for the children. I have already indicated that I consider that the father’s narcissistic traits and lack of insight can impact upon his decision making and parenting.
- 372 I will make orders that vest sole parental responsibility in the mother, but entrenching a process that, while requiring notice and the receipt of the father’s views much as the Act requires, nevertheless provides for the mother to make the sole ultimate decision about those issues (on notice to the father). In addition, in seeking to balance the factors just referred to, the father should be involved in the children’s day to day lives through the provision of information relating to where they live, their schooling and their health. (Equally, the mother should know where the children will be staying when spending time with the father). I will make orders facilitating the provision of information and authorisations so as to permit that flow of information.

⁴⁵ See, for example, *Hardie & Capris* [2010] FamCA 1046; *Donaghey & Donaghey* (2011) 45 Fam LR 183.

⁴⁶ See, analogously, *U v U* (2002) 211 CLR 238 at 159 per Kirby J.

- 373 Put in terms familiar to s 61DA(4) of the Act, I consider that the best interests of the children require a rebuttal of the presumption of equal shared parental responsibility for the reasons just given.
- 374 That being the case, to use the expression used by the Full Court in *Goode and Goode*⁴⁷ a decision about the parenting orders which best meet the best interests of these children is “at large”.

Live With and Time Orders

- 375 I repeat that it cannot, I think, be contended other than that the primary nurturer of these children has been their mother. Although G’s statements come from a relatively immature girl and were directed to the amount of time she sought with her respective parents (she indicated plainly that she wished to spend more time with her father but nevertheless did not see him as being the parent with whom she would primarily reside), I think her statements are the (relatively immature) expression of something deeper. I think she sees her mother as the parent from whom she receives her primary nurturing and so much is understandable in light of the parties’ parenting history. I consider the same is true of V.
- 376 Issues relating to abuse or unacceptable risk dominate parenting proceedings of this type, but they also frequently illuminate considerations which are directly relevant to the matters enumerated within s 60CC. That is the case here.
- 377 Equally, the alternative orders put forward by the mother (and the orders put forward by the Independent Children’s Lawyer) also effectively illuminate of themselves some of those relevant considerations.
- 378 In that regard, the alternative proposals of the mother in the event that the court does not find sexual abuse has occurred or finds that there is no unacceptable risk of same, sees the children living with her (consequent upon an order for sole parental responsibility) and orders for time in favour of the father which would see him having regular time with the children the quantity of which increases over time. The same is true of school holiday time which increases over a period of two years. Orders sought by the Independent Children’s Lawyer are broadly to similar effect, albeit that the speed with which the increase occurs, and the quantity of time, differs.
- 379 Each, on the assumption of the findings just referred to, acknowledge implicitly the benefit for the children in having a meaningful relationship with their father and each does not otherwise assert a need to protect the children from harm as a relevant consideration.
- 380 So, too, the father contends (in circumstances where the court finds that the mother is not genuine in maintaining her allegations of sexual abuse and/or

⁴⁷ *Goode & Goode* (2006) FLC 93-286, 80, 899.

unacceptable risk), that the children live with him and spend time with the mother. The father seeks (consequent upon a build-up of time over eight months) a situation where ultimately, the children spend equal amounts of time with each parent (from Tuesday to Friday in one week and from Thursday until Monday in the second week). Those proposed orders make the same implicit concessions in respect of each of s 60CC's Primary Considerations.

381 The orders also implicitly acknowledge, of themselves, concessions in respect of a number of the Additional Considerations within s 60CC(3).

382 In particular, they can be seen to effectively assume findings in respect of the nature of the relationship of the children with each of their parents, a capacity of the parents to provide for the needs of the child and the practical difficulty and expense of the children spending time with each parent. So, too, the attitudes to the children and the responsibilities of parenthood demonstrated by each parent.

383 While the mother, in particular, criticised aspects of the father's parenting, her orders do not suggest (again absent the findings referred to) that any such parenting deficiencies should sound in orders that, for example, would see the father either not seeing the children or spending supervised time with him. That, in my view, is a proper (implicit) concession.

384 Her proposed orders can, though, be seen to site the children's primary care with her and a role of lesser quantity (but not, it should be emphasised, necessarily quality) with their father.

385 Consideration of all of the evidence and my earlier findings will, I think, illustrate sufficiently that aspects of the father's personality, what I judge to be deficiencies in insight and a self-focussed view of parenting, lead me to a conclusion that broadly accords with the mother's position.

386 I have already referred to the views the children have expressed about spending more time with their father. It will be clear that I recognise that such views as the children express are expressed by yet young children whose level of consequent relative immaturity should be taken into account and result in weight being attributed directly to their views only cautiously.

387 That said, it is important for the voices of the children to be heard in these proceedings in a manner consistent with their age and maturity. It seems to me clear on the evidence that, while the children have expressed a desire to spend more time with their father (as I find), they nevertheless express a desire to continue to receive their primary nurturing from their mother. I record that I have taken account of their views and that *some* weight is given to them.

388 I consider that arrangements for the children to spend time with their father as extensive as what he suggests would be a significant change to their erstwhile circumstances and I consider that any such change may well have a detrimental

effect on them. These children have been exposed to almost three years of post-separation conflict between their parents and, as I have said many times in these reasons, are caught in the cross-fire of a very serious set of allegations and counter-allegations.

- 389 Consistent with my earlier findings, I do not doubt that the children have been acutely aware of these proceedings and also aware that they are the focus of them. I also have no doubt that they are acutely aware that they are the focus of competing claims and counter-claims by their parents, each of whom they love dearly. I consider that orders which minimise the amount of change to be in their best interests. These children need to, as it were, find their feet, with as much support and as little disruption as possible.
- 390 I am not entirely confident that any orders made by this court would be less likely to lead to the institution of further proceedings than any other orders.
- 391 I also have some concerns about the mother's expressed willingness to implement my orders consequent upon findings which, I strongly suspect, she will disagree with. That said, the mother has assured me in evidence that, consequent upon the findings made by me, she will abide them and abide the orders for co-parenting made as a consequence. I propose to take her at her word. I consider that the mother has her children's best interests at heart and, left to her own parenting devices and free of any dependence upon others, she will seek to do what she says she will do.
- 392 Balancing all of the considerations I consider relevant to a decision about the orders that best meet the best interests of these children, I will make orders that broadly accord with the thrust of the orders sought by the mother and the ICL prefaced upon the findings as to abuse and risk which I have made.
- 393 I have made some variations to the manner in which time increases as I consider that those variations better take account of the need for the "dust to settle" for these children and to minimise the impact of any change but consistent with my strong view that these children desire more time with their father.
- 394 In light of my findings as to the children's knowledge of these proceedings and what they have been exposed to within them, I consider it appropriate that a person independent of the parents explain the orders in child-appropriate language. I will require the ICL to explain these orders to the children utilising such professional assistance as she might consider appropriate.
- 395 I have considered whether some time immediately consequent upon the orders should be supervised, specifically for the purpose of the children adjusting to their new circumstances. However, in light of statements made by the children, as manifest in the evidence of Ms A, I am satisfied that they are not only able to sustain that time without supervision but that they are looking forward to it.

However, I consider time should remain supervised until the ICL explains the orders as I will direct which, in turn, I will direct should take place with all possible expedition.

396 In light of my findings, I see no reason why, as sought by the mother, Mr E should not be excused from his undertaking given on 28 August 2013 that he will not spend time with the children, other than in the company of at least one other adult.

397 The mother also seeks an order to the effect that the therapy the children are undertaking with (another) therapist should continue. I don't consider that the circumstances reveal the need for any such order; orders for parental responsibility have been made.

398 It is frequently said that the requirements of s 121 of the Act can operate to prevent those with a *proper* interest in the proceedings outside of the parties having access to the court's reasons. In addition, the repeated lesson emerging from numerous Inquiries throughout Australia about how agencies can better serve children is the need for information to be shared appropriately.

399 While embracing the protections to which the section is directed, I consider it appropriate, if only to avoid doubt, to make orders providing for a copy of these Orders and reasons to be provided to Dr G, Dr R, Mr D, Mr F, Dr H, Detective J and the Director of any office of the Department of Communities, Child Safety and Disability Services to which a notification has been made in this case.

400 I order accordingly.

I certify that the preceding four hundred (400) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Murphy delivered on 23 February 2015.

Associate:

Date: 23 February 2015