**FAMILY COURT OF AUSTRALIA**

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| * **WATSON & BURTON** | * **[****2015] FamCA 549** |

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| FAMILY LAW – CHILDREN – sole parental responsibility – where equal time not in children’s best interest – where mother poses a psychological risk to children – where mother made a number of false allegations of sexual abuse by the father and previous partners – where the Family Report writer did not consider the effect of the mother’s allegations upon the father. |

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| * Family Law Act 1975 (Cth) s 60B s 60CA s 60CC s 61DA s 65DAA s 65DAC * Evidence Act 1999 (Cth) s 140 |

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| *Banks & Banks* [2015] FamCAFC 36  *Mauldera & Orbel* (2014) FLC 93-602  *Wacando v The Commonwealth* (1981) 148 CLR 1  *S v Australian Crime Commission* (2005) 144 FCR 431  *Neat Holdings Pty Ltd v Karajan & Holdings Pty Ltd* (1992) 67 ALJR 170  *K v R* (1997) 22 FamLR 592  *Re W (sex abuse – standard of proof)* [2004] FamCA 768  *M v M* (1988) 166 CLR 69  *T v N* [2001] FMCAfam 222 |

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| **APPLICANT:** | Mr Watson |

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| **RESPONDENT:** | Ms Burton |

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| **Independent children’s lawyer:** | Ms Sheehy |

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| **FILE NUMBER:** | BRC | 12037 |  | of | 2007 |

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| **DATE DELIVERED:** | 16 July 2015 |

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| **PLACE DELIVERED:** | Townsville |

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| **PLACE HEARD:** | Brisbane |

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| **JUDGMENT OF:** | Tree J |

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| **HEARING DATE:** | 19, 20 and 21 May 2015 |

REPRESENTATION

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| **COUNSEL FOR THE APPLICANT:** | Mr Slade-Jones |

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| **SOLICITORs FOR THE APPLICANT:** | Natalie McDonald Law |

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| **COUNSEL FOR THE RESPONDENT:** | Mr Glenday |

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| **SOLICiTORs FOR THE RESPONDENT:** | Sarah Cleeland Family Lawyer |

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| **COUNSEL FOR THE Independent Children's Lawyer:** | Ms Black |

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| **solicitors for the Independent Children's Lawyer:** | Rhonda Sheehy & Associates |

# Orders

1. All previous parenting orders be discharged.
2. The children B born … 2004 and C born … 2008 (“the children”) shall live with the father.
3. The father shall have sole parental responsibility for all decisions concerning the long-term care and welfare and development of the children, but otherwise each parent shall have the sole responsibility for all decisions concerning day-to-day care, welfare and development of the children for the time that they are in that parent’s care.
4. The father is to notify the mother in writing of all decisions made by him concerning the long-term care, welfare and development of the children pursuant to Order 3 of these Orders.
5. The mother shall spend time with the children at all times as may be mutually agreed, but failing agreement each alternate week from after school on Thursday to before school on Monday.
6. Notwithstanding the above, the children spend time with each of the parents on special occasions as follows:
7. With the mother on Mother’s Day from 9:00am to 5:00pm;
8. With the father on Father’s Day from 9:00am to 5:00pm;
9. Half of the Queensland gazetted school holidays with the mother to have the children for the first half of holidays in odd numbered years and the second half in even numbered years;
10. With the mother from 12:00pm Christmas Eve to 3:00pm Christmas Day in even numbered years and from 3:00pm Christmas Day to 12 :00pm Boxing day in odd numbered years;
11. With the father from 3:00pm Christmas Day to 12:00pm Boxing day in odd numbered years and from 12:00pm Christmas eve to 3:00pm Christmas Day in even numbered years.
12. On the children’s birthdays each child to spend half day with each parent to be pre-arranged and agreed by the parents.
13. The children will spend time with each parent on each parent’s respective birthday between 9:00am and 5:00pm, if this falls on a weekend or non-school day. If this falls on a school day the children shall spend time with that parent from after school to before school the following day, with the parent to collect the children from school and return them to school the following morning before school begins;
14. With the mother at Easter from 12:00pm Easter Saturday to 12:00pm Easter Sunday in odd numbered years;
15. With the father at Easter from 12:00pm Easter Saturday to 12:00pm Easter Sunday in even numbered years.
16. All changeovers that do not occur at the children’s school occur at the Coles Carpark, D Town.
17. Telephone contact between the children and the mother occur on Thursdays between 4:30pm and 5:00pm with the mother to initiate the call and the father to facilitate the call.
18. When the children are with the mother during school holidays, the father be at liberty to contact the children on Thursdays between 4:30pm and 5:00pm with the father to initiate the call and the mother to facilitate the call.
19. The mother and father be at liberty to attend all school functions including, but not limited to, sports days, carnivals, concerts, plays, fetes, parent/teacher meeting and the like.
20. The mother and father take all steps necessary with the Principal/secretary of the school where the children attend to enable each to receive at his/her address and at his/her expense all copies of the children’s school reports, school photographs and newsletters.
21. Each party will keep the other informed in writing of his/her current residential address and contact telephone numbers and of any change within forty-eight (48) hours of any such change.
22. The mother and father by these Orders, authorise all health care providers and educational experts involved with the children to liaise directly with each parent at his/her request and at his/her expense. The mother and father shall immediately provide the names, addresses and contact details of all health care providers and educational experts to each other by text message.
23. Each party shall contact the other in the event of any medical emergency or other emergency involving the children whilst they are spending time with him/her.
24. The Independent Children's Lawyer is forthwith discharged with the thanks of the court upon the later of the expiration of the appeal period in respect of these orders, or the determination of any appeal.
25. Otherwise all extant Applications be dismissed and the matter is removed from the list of active pending cases.

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

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| Family Court of Australia at brisbane |

FILE NUMBER: BRC12037/2007

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| Mr Watson |

Applicant

And

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| **Ms Burton** |

Respondent

REASONS FOR JUDGMENT

# INTRODUCTION

1. These proceedings raise for determination the appropriate parenting arrangements for the parties’ two children, B (born in 2004 and therefore presently 10 years of age) and C (born in 2008 and therefore 7 years of age) (“the children”). As contained in his Amended Case Information filed 15 May 2015, Mr Watson (“the father”) seeks orders that he have sole parental responsibility for the children who would live with him. He seeks further orders that the mother spend time with the children each alternate weekend and overnight on alternate Wednesdays, together with time on various special days, and one half of the Queensland gazetted school holidays on a week about basis.
2. By her Amended Response to Initiating Application filed 26 September 2014 Ms Burton (“the mother”) sought orders that she have sole parental responsibility for the children, who would live with her, and spend alternate weekend with the father, together with alternate Wednesday overnights, half of school holidays (in blocks of one half) and various special days. However on the first day of trial, the mother changed her position to reflect the orders which had by then been identified as those contended for by the Independent Children's Lawyer. Those orders (which reflected recommendations in the most recent Family Report) were that the parties have equal shared parental responsibility for the children, who should live on a week about equal time basis with both the mother and father. The Independent Children's Lawyer also contended that the children should spend one half of school holidays with each parent (in a block) and various time on special days.
3. As at the time of trial, the regime of interim orders which prevailed were those ordered by Principal Registrar Filippello by consent on 11 September 2014. They provided a regime of orders largely identical to that contended for on a final basis by the father, namely that the father have sole parental responsibility, that the children live with him, but spend time with the mother on alternate weekends and alternate Wednesdays, together with time on special days. The only difference between those orders and those contended for by the father was that school holidays were to be shared equally, but in blocks of one half.
4. During the course of the trial I also raised with the parties two alternative scenarios. The first was that the orders sought by the Independent Children's Lawyer and the mother might be ordered on an interim basis, in order to determine the effect upon the children and the parties of such a regime. The second alternative was to increase the time which the mother spends with the children not to equal time, but rather to a block of four or five nights per fortnight, including one weekend.

**THE FACTS**

**The father**

1. The father was born in 1971 and hence is presently 43 years of age. He left school in grade 9 and has worked full time since. He first married at about 19 years of age but separated four years later. There was one child of that marriage, Ms E (“Ms E”) who gave evidence before me. The father and Ms E’s mother are said to have continued on good terms notwithstanding their separation, and shared the care of Ms E during her childhood.
2. He met the mother in around 2002 when he was 31 years of age.

**The mother**

1. The mother was born in 1965, and is therefore presently 50 years of age. Her parents separated at about the time of her birth, and she had a difficult childhood. In 2013 the mother told Dr F, a psychiatrist, that as a child, her mother would disappear for weeks, and that she was physically and emotionally abusive of her. She only saw her father on occasions. She was placed in foster care by government authorities at various times during her childhood, and she reported that she was sexually abused from the ages of 6 to 7 by a neighbour, and was also abused in care. She attended multiple primary schools and was bullied on occasions. She left school in year 10, studied office management and then found work as an office manager where she remained for about two years. She was first married at the age of 18, but the relationship proved to be a physically and verbally abusive one. She had three children to that relationship, all of whom were removed from her care by the Department of Communities, Child Safety and Disability Services (“DoCS” or the “Department”). The relationship ended at that time.
2. She married again when she was 25 years of age, which marriage lasted a further 12 years. The mother told Dr F that this husband was very controlling and would “threaten her with guns”. She had another three children to that relationship.
3. After 12 years the relationship failed, and Family Court proceedings ensued. I will deal with those in detail later in these reasons, however they involved quite remarkable allegations being made by the mother against that husband. Those proceedings concluded with the care of those three children being given to their father, and the mother only having supervised time with them. Judgment in that proceeding was delivered 21 June 2001.
4. Later in 2001 the mother met the father and formed a relationship. She was then 36 years of age.

**The relationship**

1. The parties commenced cohabiting in 2002, shortly after they met. They married in 2003. B was born in 2004. The parties finally separated in January 2005, but then maintained an “on-off” relationship through to late 2008. C was born in 2008.
2. The parties differ as to the reasons for the failure of the relationship. The mother asserts that it deteriorated because there was conflict over the father allegedly selling and using illicit drugs, and being unfaithful to her. According to the father it deteriorated because of the mother’s incessant false accusations that he was being unfaithful, as well as verbal and physical abuse by the mother seemingly associated with her excessive use of alcohol.
3. During occasions between 2005 and 2008 when the parties were not cohabiting, B remained in the mother’s primary care.
4. Shortly after C’s birth, DoCS started receiving notifications alleging sexual harm of B by the father. I will detail that history in due course. However for present purposes, it is suffice to say that in March 2010, both children were removed from the mother’s care by DoCS and placed with foster carers. Although the Department had at that time substantiated that the father was an unacceptable risk of emotional and physical harm to the children arising from sexual abuse, a review of that finding found it to be flawed. In consequence the father commenced spending time with the children, and in October 2010 (albeit pursuant to orders made in this Court) the children went into the father’s care, where they have thereafter remained. Initially the mother saw the children on a supervised basis at a Contact Centre, but progressively that time increased and ultimately the supervision requirement was removed. The Department ceased to be involved in the Family Court proceedings in August 2012.
5. After separation the mother formed a new relationship in about 2009 with Mr G. He swore an affidavit in these proceedings which was relied upon by the mother. He was not required for cross-examination. He said the relationship he has with the mother is a good one and he has a good relationship with the children.
6. The father has not re-partnered post-separation. At the time of trial he was cohabiting with the children and Ms E. Ms E came to live with the father not long after separation from the mother.

**THE ISSUES**

1. During the course of the hearing with the assistance of counsel for the parties, the following were identified as the issues likely to substantially determine the outcome of these proceedings namely:

1. Is the mother a risk of psychological and/or emotional harm to the children?

2. How can the children obtain the optimum benefit from a meaningful relationship with the mother?

3. Will the father facilitate a meaningful relationship between the children and the mother?

4. Does the father present a risk of psychological and/or emotional harm to one or more of the children?

5. What impact would the proposals of the mother (and Independent Children's Lawyer) have upon the children?

6. Can the parties in fact exercise equal shared parental responsibility as a matter of practical reality?

1. Once I have considered the relevant statutory provisions and legal principles, I will discuss those issues before undertaking a general traverse of the section 60CC considerations. I will then consider the issues of parental responsibility, with whom the children should live, and in the event that there is not equal time ordered, what time and communication regime should prevail in relation to the other non-primary resident’s parent.

**RELEVANT STATUTORY PROVISIONS AND LEGAL PRINCIPLES**

**The statutory regime**

1. Part VII of the *Family Law Act* contains the relevant statutory provisions dealing with children. Section 60B specifies the objects of Part VII, and the principles underlying those objects in the following terms:

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that (except when it is or would be contrary to a child’s best interests):

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

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

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

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

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

1. Section 61DA(1) of the *Family Law Act* provides that the court must apply a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child.
2. However s 61DA(2) provides that the presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in either abuse of the child or another child who, at the time, was a member of the parent’s family (or that other person’s family) or family violence. Further, subsection 61DA(4) provides that the presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for its parents to have equal shared parental responsibility.
3. In this context it is convenient to also advert to section 65DAC, which sets out the effect of a parenting order that provides for shared parental responsibility. By subsection (3) such an order is taken to require each of the persons subject to it to consult with the other person in relation to the decision to be made about any major long-term issue in relation to the child, and make a genuine effort to come to a joint decision about that issue. It can therefore be seen that the obligations which an order effecting equal shared parental responsibility imposes are potentially onerous.
4. In the event that equal shared parental responsibility is ordered, then if it is both in the child’s best interests and reasonably practicable, the court is obliged pursuant to s 65DAA(1) to then consider whether the child should spend equal time with each of the parents. If it does not so order, then it is obliged pursuant to s 65DAA(2) to then consider, if it is both in the child’s best interests and reasonably practicable, whether the child should spend substantial and significant time with each of the parents. In either case, the matters which the court must have regard to in assessing reasonable practicability are enumerated in s 65DAA(5).
5. Finally s 60CA provides that in deciding whether to make a particular parenting order, the court must regard the best interests of the child as the paramount consideration. The matters which a court must consider in determining the best interests of a child are set out in s 60CC. Consideration does not mean discussion: *Banks & Banks* [2015] FamCAFC 36 at [49].
6. In *Mauldera & Orbel* (2014) FLC 93-602 the Full Court had occasion to consider the interrelationship between s 60B and ss 60CC. At [72] the Court applied the principles enunciated in *Wacando v The Commonwealth* (1981) 148 CLR 1 in concluding that objects clauses, such as those contained within s 60B(1) can be used as an aid to the construction of words of legislation, but cannot be used to cut down the plain and unambiguous meaning of a provision if that meaning in its textual and contextual surroundings is clear (quoting from *S v Australian Crime Commission* (2005) 144 FCR 431 at [22] per Mansfield J). At [79] the Court concluded that the primary Judge could not attach greater weight to the factors referred to in s 60B than to the outcome of her s 60CC deliberations, and in doing so, her Honour had erred.

**The standard of satisfaction required**

1. Section 140 of the *Evidence Act 1999* (Cth) provides as follows:

140(1) In a civil proceeding, the Court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the Court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence;

(b) the nature of the subject-matter of the proceedings;

(c) the gravity of the matters alleged.

1. In *Neat Holdings Pty Ltd v Karajan & Holdings Pty Ltd* (1992) 67 ALJR 170 at 170-171 the majority of the High Court stated:

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand the strength of the evidence necessary to establish a fact or fact on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a Court should not likely make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

1. Therefore consistent with s 140(2), in taking into account the gravity of the parties’ allegations against each other, I propose to carefully evaluate the evidence relied upon in support of such a contended finding and be particularly vigilant to identify and place reduced weight upon “inexact proofs, indefinite testimony or indirect inferences.”[[1]](#footnote-2)

**The notion of unacceptable risk**

1. It is useful to consider the authorities which give some guidance as to what is an unacceptable risk, and particularly the relationship of any such risk with the orders that the Court is contemplating. A useful starting point is the decision of the Full Court in *N & S & The Separate Representative* (1996) FLC 92-655, where in the well-known passage at 82,713-4, Fogarty J said:

Thus, the essential importance of the unacceptable risk question as I see it is in its direction to Judges to give real and substantial consideration to the facts of the case, and to decide whether or not, and why or why not, those facts could be said to raise an unacceptable risk of harm to the child. Thus, the value of the expression is not in a magical provision of an appropriate standard, but in its direction to Judges to consider deeply where the facts of a particular case fall, and explain adequately their findings in this regard.

1. In *M v M* (1988) 166 CLR 69, the High Court had occasion to consider the approach in Family Court proceedings where there are allegations of sexual abuse of a child. At [20]-[25] the Court said as follows:

20. But it is a mistake to think that the Family Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the party for a criminal offence. Proceedings for custody or access are not disputes inter parties in the ordinary sense of that expression: *Reynolds v Reynolds* (1973) 47 ALJR 499; 1 ALR 318; *McKee v McKee* (1951) AC 352, at pp 364-365. In proceedings of that kind the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child. In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in a child's interests to maintain the filial relationship with both parents: cf. *J. v Lieschke* [1987] HCA 4; (1987) 162 CLR 447, at pp 450, 458, 462, 463-464.

21. Viewed in this setting, the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child. The Family Court's consideration of the paramount issue which it is enjoined to decide cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegation of sexual abuse. The Family Court's wide-ranging discretion to decide what is in the child's best interests cannot be qualified by requiring the court to try the case as if it were no more than a contest between the parents to be decided solely by reference to the acceptance or rejection of the allegation of sexual abuse on the balance of probabilities.

22. In considering an allegation of sexual abuse, the court should not make a positive finding that the allegation is true unless the court is so satisfied according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, at p 362. There Dixon J. said:

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

His Honour's remarks have a direct application to an allegation that a parent has sexually abused a child, an allegation which is often easy to make, but difficult to refute. It does not follow that if an allegation of sexual abuse has not been made out, according to the civil onus as stated in *Briginshaw*, that conclusion determines the wider issue which confronts the court when it is called upon to decide what is in the best interests of the child.

23. No doubt there will be some cases in which the court is able to come to a positive finding that the allegation is well-founded. In all but the most extraordinary cases, that finding will have a decisive impact on the order to be made respecting custody and access. There will be cases also in which the court has no hesitation in rejecting the allegation as groundless. Again, in the nature of things there will be very many cases, such as the present case, in which the court cannot confidently make a finding that sexual abuse has taken place. And there are strong practical family reasons why the court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so.

24. In resolving the wider issue the court must determine 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. After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's welfare. The existence and magnitude of the risk of sexual abuse, as with other risks of harm to the welfare of a child, is a fundamental matter to be taken into account in deciding issues of custody and access. In access cases, the magnitude of the risk may be less if the order in contemplation is supervised access. Even in such a case, however, there may be a risk of disturbance to a child who is compulsorily brought into contact with a parent who has sexually abused her or whom the child believes to have sexually abused her. But that is not the issue in this case.

25. Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a "risk of serious harm" (*A v A* [1976] VicRp 24; (1976) VR 298, at p 300), "an element of risk" or "an appreciable risk" (*Marriage of M* (1987) 11 Fam LR 765, at p 770 and p 771 respectively), "a real possibility" (*B. v. B*. (Access) (1986) FLC 91-758, at p 75,545), a "real risk" (*Leveque v Leveque* (1983) 54 B CLR 164, at p 167), and an "unacceptable risk" (*In re G. (a minor)* (1987) 1 WLR 1461, at p 1469). This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.

**IS THE MOTHER A RISK OF PSYCHOLOGICAL AND/OR EMOTIONAL HARM**

**Overview**

1. The father says that the mother is a risk of psychological and/or emotional harm to the children because of her propensity to generate false allegations that the father is abusing one or more of the children, and her involvement of the children in that process. He points to the mother’s long history of such conduct, including in relation to her second marriage. He says that the risk of the mother so generating false allegations is, in effect, proportional to the amount of time which she spends with the children. He says that at present the amount of time the children spend with the mother has not seen her revert to directly involving the children in such allegations, although he does point to some matters of concern that have been raised by the mother from time to time, which he says indicates a continuing propensity to make allegations of abuse. He says that if the mother were to spend equal time, or amounts of time approaching equal time, with the children, the risk that the mother would again generate allegations of serious abuse is an unacceptable one. He says that involving the children in such allegations is likely to psychologically and/or emotionally harm them.
2. The mother and the Independent Children's Lawyer say that the mother has been seeking professional assistance from a psychologist and psychiatrist, and no longer represents an unacceptable risk of harm, seemingly because her conceded past propensity to generate false complaints is no longer a feature of her current presentation.

**Mother’s history of complaints of abuse**

1. Other than knowing that the mother’s three children from her first marriage were temporarily placed in foster care, but subsequently restored to her care, I know little of any problems surrounding the mother and her care of the children arising from the first marriage. However there is considerable material that was relied upon by the father pertaining to the issues raised by the mother consequent upon her separation from her second husband. Those are detailed in the judgment of May J in the proceedings then on foot between the mother and her second husband. At [43]-[44] her Honour recorded as follows:

43. [The mother] told the doctor she had *“kicked out [Mr H]”* because of his infidelity, physical violence and he was favouring an older daughter. She said in September 1998, the children began making graphic disclosures of sexual abuse by the father and his friend. [The mother] said she was shocked and horrified. This was followed by a litany of sexualized complaints from [J] and [K]. The allegations included [L], the children’s half-sister, a daughter of the father, and other adults abusing the children by having vaginal, anal and oral sex and the use of implements to penetrate them in various cavities. The allegations included descriptions of the adults urinating and defecating on each other and themselves, torture to the children using needles under their fingernails and toenails. They described satanic ritual abuse by numerous people, including their father. These activities:

“…..included the participants dancing naked in front of altars, praying to the devil and killing numerous babies by decapitation and then cutting their genitals off. They also apparently described episodes where [Mr H] sacrificed various animals ate their body parts and then forced the children to drink the animals’ blood. The children not only described this but also insisted on drawing numerous primitive scenes of [Mr H] killing babies with knives as well as sexually abusing them and others in various ways.”

44. In the opinion of [Dr I], the mother became overwhelmed by the horrific nature of these allegations and became convinced the terrible things had happened to them. She was angry at her ex-partner for abusing her children, guilty she had allowed it to happen and had been unable to protect her children. She also felt foolish she had not been aware of this side of her partner’s personality. She took the children to the Police and insisted they tell the Police everything which had occurred. She said the Police did not totally believe the tales and were somewhat unwilling to act on them. This further frustrated the mother.

1. Later in her Honour’s reasons, May J recorded that the relevant children were themselves were interviewed by Dr I, a psychiatrist, and disclosed sexual abuse.
2. At [54] of those reasons, her Honour noted that in a later interview between the children and Dr I, they “disclosed in very graphic fashion, that they had both been the victims of ritualistic satanic physical and sexual abuse by a large cult of people led by [the mother’s second husband] that included murdering babies, bestiality, cannibalism and gang rape. These allegations continued over the next three weeks with threats to present their case to the media however by 6/8/99, the children both admitted that they had made up this story to help get the other children back…”
3. This apparently caused the mother to become angry with Dr I, and she became convinced that there was a conspiracy against her children. She threatened to go to the media to expose the paedophile ring and police inefficiencies.
4. The children continued to make disclosures.
5. Shortly thereafter the children were removed from her care. Dr I reviewed them two years after that. According to [72] of the Reasons of May J, his opinion was that after two years with no contact with the mother, “the children have improved significantly in all areas of their lives.” He concluded that he did “not believe that [the mother] can be trusted to have any meaningful contact with her three younger children.” Any time that she spent with them needed to be strictly supervised and limited. The purpose of such contact “would be to reassure the children that the mother is still around and cares for them in her own way.”
6. Another psychiatrist, Dr M, prepared reports and gave evidence before May J in relation to the children of the mother’s second marriage. Whilst he also supported supervised time between the mother and the child, he expressed that that should be “contingent upon the cessation of provocative or threatening comments by [the mother] and her three older children to [the mother’s second husband] and his friends. If such behaviour recommences or persists, or if [the mother] persists in making or pursuing allegations of sexual abuse, considerations should be given to the cessation of supervised contact.”
7. Both Dr I and Dr M diagnosed the mother as having symptoms consistent with borderline personality disorder. Both associated her highly unstable history as being part of the complex cause for her behaviours.
8. Ultimately May J ordered that the children live with the father and spend only limited supervised time with the mother in accordance with the psychiatrist’s recommendations. Plainly her Honour accepted that the mother was an unacceptable risk of harm to the children if anything other than limited supervised time was permitted with them.
9. In March 2008 the Department first received a notification which alleged that the father [in these proceedings] had sexually abused B. The ensuing investigation did not substantiate that notification. In December 2008 a further notification was received “alleging that the father had sexually abused B with a more detailed alleged disclosure this time that the father had put toys up her bottom and licked her private parts.” The subsequent ICARE interview identified that B “had no idea about the allegations put to her.” The Department concluded that the allegations were malicious. In May 2009 a further notification was made when B disclosed that her father had sexually abused her. Further, when the Department saw the children, it is recorded that they were “filthy, in soiled clothing and covered in vomit and wearing nappies that had not been changed in many hours.” The Department substantiated the outcome of the father being an unacceptable risk of physical and emotional harm caused by sexual abuse, and the mother for causing harm comprising a risk of physical and emotional harm caused by neglect.
10. Further allegations of sexual abuse, not by the father but other teenagers or adults, continued to thereafter to be made to the Department, seemingly involving the mother’s children from pervious relationships. In March 2010 the children were placed in foster care.
11. Ms N is the Family Report writer in this case. However her initial involvement with the family was in the context of Children’s Court proceedings, in which she provided a social assessment report for the Separate Representative. That Report is dated 15 September 2010. At paragraph 52 Ms N reported:

52. [The mother] is incredibly distressed and anxious. She desperately fears losing her children and the thought of not being able to share in their lives. She believes the father is a risk to the children. She believes the Department is erroneous in allowing him to have unsupervised contact. At this stage she is filled with a mixture of anger and distress and understandably says she will fight for her children to be returned to her care.

53. Given the historical patterns regarding the mother’s allegations of sexual harm of her various children and given the opinions of several experts, the Department is very concerned about the risk of emotional and psychological harm [the mother] poses to the children.

1. At paragraphs 59 – 60 of that Report, Ms N continued:

59. From the Department’s affidavit material it is noted that an IPA was commenced after the mother made allegations in April 2009 that the father sexually abused [B]. It is noted she first made such allegation in March 2008, which the Department and CPIU investigated at that time be determined the allegation unsubstantiated. It seems that following a further report by the mother in May 2009, the Department identified other concerns related to neglect of the children’s care, as well as noting the historical child protection information centring on the same themes being raised by the mother and forming a substantiated outcome, they commenced the IPA with the mother in June 2009. The father refused to participate in the IPA, vehemently denying the allegations against him.

60. The Department reported that during the IPA, the mother gradually reported a string of allegations against the father in terms of him being heavily involved in the use and distribution of drubs and that he had sexually harmed [B] both when they were together and after final separation during his contact time with her. It seems that as time went by during that IPA, the detail forming the mother’s allegations became increasingly elaborate and eventually most extraordinary. Very late in the IPA period around December 2009, the mother also made reports, which raised concern that her son, [redacted] who stayed with her for a very brief time in later 2009, had sexually harmed both of the focus children.

1. There is some significance to these paragraphs in that before me, the mother denied that she had ever made a notification to the Department about B.
2. Later at paragraphs 75 – 77 Ms N said as follows:

75. [The mother] talked about the Department referring to the past history in relation to the [H] children and said it is not fair that they rely upon that to make decisions about the current matter. She believes the Family Court erred in giving [Mr H] custody of those children. She believes [Mr H] sexually harmed all of those children as well has her children from her first marriage and she insisted I talk to [redacted] about those allegations. She expressed her belief that every professional involved in the Family Court process were deceived by [Mr H] and subsequently erroneous in their conclusions. She believes the [H] children continue to be abused by [Mr H].

76. She talked about the father in this matter wanting to get revenge but for what she could not really say. She said he has a female friend and together, along with his family they have been making malicious telephone calls to her telling her she is going to lose the children. She talked about the father being heavily involved in drugs and being a very violent man. She indicated her belief that the current situation with the Department has transpired as part of the father’s ploy to get custody of the children.

77. The mother talked disjointedly at a rapid rate, voicing numerous allegations about the father with regards to his alleged drug use and how she has seen him with a bag of Ecstasy.

1. Later in the Report, Ms N referred to a conversation she had with a Ms O, the mother’s then counsellor. At paragraph 160 she said:

160. As [Ms O] understands it, the mother is adamant that the children should remain in foster care rather than being placed with the father if they cannot be returned to her care. From understanding the mother is adamant that the father is a paedophile.

1. Ms N’s then relevant conclusions appear at paragraphs 171 to 178 of her Report as follows:

171. The mother presents as a genuine, caring woman who deeply loves and cares for her children and who desperately fears losing her role in their lives. She also presents as a woman with poor insight into the impact of her childhood abuse upon her own life or if she does have good insight, she chooses not to recognise how her past has been affecting her thoughts and behaviours throughout her life as a mother and a partner and thereby has been unable to affect personal change in the areas needed.

172. In my view, the main issue in this matter resides with the mother’s mental health, stemming from an exceptionally traumatic childhood and how those subconsciously embedded traumas have impacted upon her perception of reality and subsequent functioning in adult relationships, functioning as a parent and her functioning in general.

173. The mother holds the firm conviction that the father in this matter sexually abused [B] and that he remains a high risk of sexual harm to the focus children. The timing of the abuse allegations coincides with the significant breakdown of the marital relationship and concomitant increasing issues associated with money and contact arrangements. Similar unfolding of events occurred in relation to the allegations regarding the [H] children, such that sexual abuse allegations arose around the time of the breakdown of that marriage and commencement of Family Court proceedings.

174. The allegations in relation to the [H] children became increasingly less plausible and more extraordinary as time progressed and the Family Court proceedings gained more momentum. What became evident during the course of those proceedings was that not only were the allegations unsubstantiated but also that two of the children confirmed to police that they had been instructed by their mother and thereby that the allegations were untrue, and that the mother’s mental health was raised as a concern observed and assessed by a number of professionals in different areas including hospital staff.

175. During the current child protection matter, an uncanny resemblance to the H Family Court matter has emerged. At the time of final separation in early 2008 sexual abuse allegations in relation to [B] commenced and by late 2008 and throughout 2009 those allegations as well as allegations regarding the father using and selling drugs became more elaborate. As with the [H] matter the mother’s fixation of obsession with the alleged sexual abuse became more entrenched with time and as the prospect of any reconciliation with the father disappeared.

176. Ironically, despite the mother working with the Department during the IPA in 2009 with the children remaining in her full-time care and agreeing to the condition that she not facilitate unsupervised contact between the children and their father and despite her ongoing allegations, she continued to facilitate such contact. While her reasoning behind that decision is that the father allegedly continued to threaten to take the children away from her and that she did not “want” to believe the allegations, such explanation does not make sense given the nature of and aim of the Department’s involvement during that period, which appears to have been to ensure the safety of the children in the mother’s care and given that she was the notifier. Such action on the part of the mother simply raises question about what other issues for her were running under the surface of the child protection allegations she was raising. I surmised that issues related to the property and money and perhaps even support with the care of the children may have been central to her continuing to facilitate contact. If that was actually the case then serious question is raised regarding the veracity of the sexual abuse allegations as that issue then takes on a much lesser importance for the mother, compared to the other matters.

177. Unlike the [H] matter which was much more convoluted due to reports from older and thereby more verbally and cognitively developed children – including the mother’s children from her marriage prior to [Mr H] – and thereby who would be more susceptible to cognitive manipulations and more capable of speaking out for themselves, the children in this matter were much younger and less developed and thereby not a malleable because they simply do not have the cognitive development that would enable them to comprehend the suggested themes of abuse. As such, when questioned by the investigating persons, including the police, there were no reports or even indicators that supported the allegations. In this current matter, there were only the more recent reports concerned with [redacted] and [redacted] now in their mid to late adolescence, about [Mr H] abusing them and about [redacted] having allegedly sexually harmed [B] and [C]. In any event, despite those issues arising, it is understood that both [redacted] and [redacted] returned to the care of [Mr H].

178. Whilst the mother clearly loves her children and as noted by other professional evaluations, while she would never intentionally harm her children, unfortunately it appears that the negative programming from the significant traumas she experienced as a child and adolescent seem to continue to play a subconscious role in her life with all of her children, manifesting in allegations stemming from a distorted belief system and occurring in the context of marital discord and breakdown. As noted in [Dr I’s] report of March 1999, the mother has innate anxieties due to her childhood history of abuse and neglect and at the time of the [H] Family Court matter, the [H] children became “caught up in the hysteria and their attempts to please their mother ...” I noted during the preparation of this report that same sense of hysteria and high level of anxiety occurring again the form of the mother incessantly sending the report writer hand written letters, SMS messages and having other people telephone me to talk. As noted by [Dr M] in his report of February 2001 where he asks “What hypothesis can be suggested concerning the reason why [Ms Burton] panicked and has been so persistent in her need to investigate the allegations? I think the origin lies in her childhood.” All professional views are congruent.

1. Ms N ultimately supported a guardianship order in relation to the children for a period of two years.
2. These proceedings commenced in 2012. The mother has from time to time self-represented. On 15 October 2012 she filed an affidavit when she was self-representing. She did not rely upon it in her case; it was read by the father in his. At paragraph 4 of that affidavit she said “I have given up all hope of [my second husband] ever being made responsible for whatever he has done. I don’t ever want to go over it again, I don’t want to talk about it… As this is no longer my fight, I can promise the court I will be leaving it where it belongs, in the past, so I can at least live some kind of normal, happy life as I have come to accept sometimes this is just the way it has to be …
3. At paragraph 6 she said:

I just want this whole nightmare put behind me and just move on and be the great mum that I know I am. [B] and [C] have a lot of family members that miss them very much. I am still insisting strongly that [the father] be drug tested thoroughly and randomly as I myself are volunteering to do…

1. She annexed to that affidavit an affidavit of one of her children from her first marriage. In the course of explaining what it was, she said “this is only to show what disturbing things that [the relevant child] thinks and says. I am not saying that I believe it, but I find it disturbing that after all the years with his father, this is what he would say.”
2. In that affidavit the child said that the father (in these proceedings) had anally raped him and then held a .22 rifle to his head, threatening the child that if he told his mother or any family what had occurred, he would come back and kill the child and all of his family.
3. Ms N undertook the preparation of the first Family Report in these proceedings in June 2013. At paragraph 36 of that Report, it appears as though during Ms N’s interview with the mother, she still believed that there was truth to the allegations involving sexual abuse by her second husband of her three children to that relationship. Also during the course of that interview she expressed concerns that the father was continuing to use drugs. However at paragraph 46 of that report Ms N noted “[the mother] was clear to say at the current interviews that she does not believe that the father sexually abused [B]. She said she is happy to swear an undertaking to not make any further allegations or to talk to the children about anything concerning sexual abuse.”
4. Ms N recommended that both parents undergo a psychiatric evaluation. Dr F ultimately was the psychiatrist selected to undertake assessment of the mother. In his report dated 16 Sept 2013, Dr F recounted aspects of his interview with the mother. At paragraph 18 he noted:

When I enquired if she believed that the father had sexually abused the child [B] she said “I don’t know”. “The child mostly talked about him hitting her and holding her underwear but not too much about sexual stuff but I do wonder.”

1. When asked whether she had any concerns about the children in the father’s care, she only referred to his alleged drug use.
2. As is Dr F’s want, he recorded a provisional diagnosis prior to his evaluation of relevant documentation. His provisional diagnosis relevant to this aspect of this case was that “[the mother] appears ambivalent with the respect to the issue of allegations of sexual abuse.”
3. Ultimately Dr F’s conclusions relevant to this matter are as follows:

…

With respect to the diagnostic issues for the [the mother], I note that there have been concerns raised about her suffering from a delusional disorder. Whilst it is clear that she has held on to a fixed firm belief with respect to the sexual abuse of her children from her second marriage, it appears at some level that she has been able to compartmentalise them to at least some degree and that it is not an ongoing preoccupation for her.

I also note that there were observations that her speech is somewhat disjointed. Whilst this may indicate the presence of formal thought disorder, in my interview with [the mother] there was no such evidence she did present as circumstantial at times and over-inclusive but my view would be that formal thought disorder could be excluded. The mother also does not appear to suffer any negative symptoms associated with Schizophrenia or related psychotic illness. Whilst it is possible that the mother may suffer a delusional disorder, my opinion would be that these beliefs have arisen in the context of a very vulnerable woman with significant prejudicial features in her own childhood which have affected her view of herself as well as othe4rs and would be better explained by her underlying characterlogical difficulties rather than the presence of a psychotic disorder.

…

1. In his recommendations, Dr F opined that the mother’s psychiatric disorder did not pose a significant risk to the children “except insofar as she would seek to undermine the children’s relationship with the father by exposing them to her views with respect to the father’s sexual or drug behaviour.” He continued “however it would be wrong to say that the risk has completely ceased, and I would agree with the Family Report writer that any increased contact with the mother occur on a cautious and graduated basis with close monitoring for any recurrence of behaviours which may seek to undermine the children’s relationship with the father, either on a conscious or unconscious level.”
2. Seemingly in consequence of that report, the mother commenced to spend unsupervised time with the children.
3. On 18 April 2014 Ms N prepared a second Family Report. At paragraph 84 she records in relation to her interview with B as follows:

84. In looking as to whether either of her parents say things about the other parent, [B] said in a parrot, list like fashion that one time her mother said “that dad kept hurting us (and) that dad stole the water pump to the pool. And she said she paid for all the toys when dad paid for them. And that she didn’t throw out dad’s trophies. And last time on the phone mum wanted to talk to dad cause we couldn’t see her on Saturday (over the upcoming Easter weekend).” She also said she told her father that her mother said her father “tried to kick ‘her’ down the stairs but that wasn’t true. I think ‘he’ accidentally fell down the stairs.” In trying to clarify who was supposed to have fallen or been kicked down the stairs and as to whether it was her mother or her father that reported this [B] seemed confused. She further added “[B] said that last year on her birthday mum said happy birthday to her on Face Book”

1. At paragraphs 106 and following she dealt with an analysis of the history of the matter. She noted that “historically the main issue in this matter has pertained mostly remote background history for the mother with respect to sexual abuse allegations against the fathers of her children and as to whether she presents as an ongoing risk of future harm in that regard.”
2. At [113] she noted that the father’s concern is “since commencing unsupervised time, the mother’s prior historical presentation has re-emerged, thereby purporting as to no underlying change for the mother with respect to the prior issues.”
3. Ultimately Ms N recommended an increase in overnight time between the children and the mother, which was shortly thereafter the subject of consent orders to like effect.
4. The mother filed an affidavit on 18 July 2014. In that affidavit she disclosed that on occasions C had said that he “hated himself”. She also stated that C had said to her on an occasion when she was walking slowly “do you want to feel my fist.” She went on to say “this is what their father used to say to me regularly when we were together. I believe they are getting confused by the father putting things in their heads about us.”
5. The mother filed another affidavit on 23 August 2014. In that affidavit she recounted that “[C] constantly puts his head down and says “I’m stupid” and will start crying out of the blue. I have observed that [C] will start bashing his head and running into walls as a form of punishment. When the children start to spend more time with me, I hope to work (sic) them to address their behavioural issues.”
6. On 11 September 2014 further consent orders were negotiated and made, increasing the mother’s overnight time with the children. Those orders were prefaced with the words “AND UPON the mother withdrawing any outstanding allegations of sexual abuse against the father.” This appears to be the first time that the mother had formally abandoned her prior allegations in relation to B.
7. In cross-examination the mother was pressed as to why she has still not formally apologised to the father for making those allegations. Her answer appeared to be on two levels. With some considerable emotion, she denied that she was the one who had ever made notifications to the Department that the father had sexually abused B. This appears at odds with the reports in Ms N’s material, although that said, I accept that that is very much second hand evidence. No party sought to tender any original material from the Department, and in any event in accordance with its legal obligations, inevitably the identity of notifiers would be redacted.
8. Her second means of dealing with it was to assert that in fact in the past she had written letters to the father apologising for what she had done. She said that she had photocopies of those letters at home. She was asked to produce them to court the next morning but ultimately no party sought to tender any such letters. I am left with some real doubt as to whether they exist. However she was at pains that they did not contain an apology for making the allegations to the Department because “I didn’t say them”. When asked whether her case was that she no longer believed the father had abused B, she said that that was indeed her case, but went on to say that she thought that someone had been playing with her by making the notifications to the Department. When asked whether she believed there was any truth in the allegations in relation to B, her answer was to the effect that B hadn’t said anything to her. As to why she had in 2012 annexed her son’s affidavit to her own, in which he alleged being raped by the father, she said that she “had bad legal advice” at the time. Of course at the time in fact she was self-represented. When asked whether she believed that the father had anally raped that child, she said “not now”. She agreed that she had tried to put it all behind her.
9. She was then pressed as to why she had (according to her evidence) written apologies to the father some years prior. Her answer was to the effect that she had done it “because the father is the sort of person that you need to apologise to, to get anywhere with.” She was then asked what, given the preamble to the September 2014 orders to the effect that she was withdrawing allegations, she was in fact withdrawing. She was unable to be specific, but said that it was intended to be the end of any suggestion of sexual abuse. She denied that she was doing so for tactical or forensic reasons.
10. However she was less inclined to give up on her allegations that the father is a drug abuser. She said that that is what the children are saying and she had witnessed it herself in the past. When asked whether she was prepared to withdraw the drug allegation or not she said “I don’t know what he is doing.” When pressed as to whether she held concerns as to whether the father was a drug user or dealer, she said “I don’t know now.”

**The future**

1. The father says that:

* I should be satisfied that in the past the mother has held and acted upon patently fanciful beliefs that children of hers have been sexually abused;
* That, albeit many years ago, Dr I and Dr M had both formed the view that the mother was unlikely to relinquish those sorts of beliefs, and their evidence had informed the court in previous parenting proceedings in relation to different children, so as to restrain the mother from spending other than supervised time with those children;
* That the mother then peddled allegations of sexual abuse by the father of B, and only withdrew them in September 2014 because she perceived there was a forensic advantage in doing so;
* The mother’s behaviours continue to suggest that she uses her time with the children to identify and investigate any concerns she has in relation to their care whilst with the father;
* That although the mother appears to be undertaking psychological and psychiatric treatment to assist her to recognise the impact which her own terrible childhood had and has upon her, there is no report from any such therapist;
* That the only psychiatric report in relation to the mother is from Dr F who recognised a risk that the mother would continue to undermine the children’s relationship with the father by exposing them to her views with respect to the father’s sexual or drug behaviour. Specifically he said that the risk had not then “completely ceased” and recommended a course “cautious and graduated” increase of contact “with close monitoring”;
* I therefore should be persuaded that the mother still presents a real risk of emotional and psychiatric harm, which logically is proportional to the amount of time which the children spend with her;
* She appears not to have disavowed a belief in the truth of sexual abuse of her children by her second husband; and
* Her disavowal of notifying the Department that the father sexually abused B is inconsistent with the contemporaneous DoCS’ records and in any event unclear and equivocal.

1. On the other hand the mother and the Independent Children's Lawyer argue in substance that:

* The mother’s behaviours in the past have not been identified as being deliberate, but an incident of her upbringing and personality;
* She has for some years been seeking and obtaining psychological and psychiatric assistance to help her deal with her psychological issues arising, in large part, from her terrible childhood;
* That there has been no recurrence of any sexual abuse allegations by the father in relation to B for many years;
* To the extent that the mother has raised any issues in relation to the children whilst in the father’s care, they are nothing more than her acting protectively, and in any event are of no moment;
* Therefore to the extent that the mother does pose any future risk of emotional or psychological harm to the children from false allegations, it is not of such a magnitude as would preclude her from spending equal time with the children.

1. It has to be acknowledged that in relation to the sexual abuse allegations of her children to her second marriage, the mother did indeed present as an unacceptable risk of harm. It does not appear to be in dispute that she caused the relevant children to make false allegations from time to time for forensic reasons. Likewise it does not appear to be in contest that the reason why the mother so acted was not out of some deliberate malice, but because of her own poor childhood and personality features. Necessarily those features are likely to be pervasive.
2. In essence, what the mother and Independent Children's Lawyer ask me to do is to be persuaded that the mother’s previous problems have now abated or been solved by therapy. However no evidence was led from any such therapist. No party sought to subpoena any records from therapeutic files. Somewhat remarkably, Ms N conceded that she had not spoken with the mother’s therapists. She appears to have been content to act upon the mother’s self-report. At paragraphs 61and 62 of second Family Report filed 20 May 2014, she refers to the mother’s report of her psychological assistance and says “she interprets those sessions as being about putting things into perspective.” In the following paragraphs she refers to the mother’s psychiatrist, Dr P, who the mother has been seeing for eight years, at least monthly. She said “[the mother] reports that [Dr P] sees how she is and if anything is bothering her and checks on her medication. .. She indicated the very trusting therapeutic relationship given the length of time she has been seeing [Dr P].”
3. No explanation was given in the evidence as to why no evidence from any relevant therapist was led. It might be that the answer lies in an absence of Legal Aid funding. It might also lie in the fact that Legal Aid funding has apparently only recently been restored for the mother. However such explanations only go so far. They do not allow an assumption that such evidence as might have been led would necessarily support the mother’s case. Moreover, in the light of Dr F’s opinion in 2013, and his then assessment of the magnitude of risk associated with the mother, the need for such additional evidence only becomes more apparent.
4. There is a further issue at play. Up until the first day of trial, the mother’s articulated position was that the primary care of the children should switch to her, and that the children should only spend time with the father on alternate weekends and alternate Wednesdays. The reason for that is unclear. It was, with respect to the mother, a fanciful proposal, and her abandonment of it sensible. However it is consistent with the mother continuing to hold a view that the father presents some risk to the children. Precisely what else other than such a concern could have justified a change in primary care is otherwise difficult to discern.
5. Patently, at least during the currency of the interim orders, the time which the mother has spent with the children has not been used by her to inculcate them with some false belief of sexual belief, or to cause such allegations to be raised with the relevant government agencies. However the mother’s conduct in the past leaves that as a real and substantial risk. Absent any evidence from her treating therapists, I assess that risk as substantial and ongoing.

**HOW CAN CHILDREN OBTAIN OPTIMUM BENEFIT OF MEANINGFUL RELATIONSHIP WITH MOTHER**

1. The mother concedes that the children have a meaningful relationship with her at present. She does not contend that unless there is an increase in time that the children get to spend with her, that they will be deprived of any meaningful relationship with her. Rather her case appears to be that the increase in time would enable the children to obtain greater benefit from that relationship.
2. The father did not appear to directly contradict this. Rather he mounted two arguments. The first was that as a matter of law, s 60CC only requires a court to apply as a primary consideration in determining the child’s best interests, whether the child would benefit from having a meaningful relationship with both parents. He says that is not directed towards a consideration of optimising a meaningful relationship. The second approach was to say that the risk that the mother poses to the children’s emotional and psychological health means that an increase in time may not in fact optimise the benefits of the relationship, but may degrade them.
3. In her most recent Family Report, Ms N identified that both children wish to spend more time with their mother. They appear to identify the mother’s home as being a place where they are happy. B enjoys spending one on one time with her mother, including “girls nights” which are “really fun”. On the other hand C demonstrated a desire for physical affection from his mother, and in Ms N’s opinion, was showing separation anxiety when he had to leave. Very worryingly, even as a seven year old grade three boy, he has soiling problems surrounding changeovers between mother and father. Ms N opined at paragraph [110] that “In my view the soiling issue is likely a physical manifestation of both separation anxiety when he has to leave his mother’s care; as well as returning to a less tender and more stressful home environment.”
4. I am satisfied that, on a simplistic level, both children would benefit from spending more time with their mother. I am satisfied that, to a point which the evidence does not enable me to determine, that increased time would likely optimise the benefit of the meaningful relationship which they have with the mother.

**WILL FATHER FACILITATE MEANINGFUL RELATIONSHIP BETWEEN CHILDREN AND MOTHER**

1. This is a major criticism made of the father by the Family Report writer in her most recent Report. It was also a theme that was beginning to develop in her Report filed 20 May 2014. In that earlier Report, at paragraph 96 the Report writer noted that the father appeared to hold both children back from going to see their mother upon being introduced to her, and that they appeared to feel “scared of acting naturally according to their feelings” when the father was there. By the time of her final Family Report she concluded at paragraph 105:

The information strongly supports the understanding that the issues that have arisen since overnight time commenced have little to nothing to do with the care of the children but rather the amount of power and control one has and/or wishes to retain. The Report extends the view that the father is struggling to accept the mother’s growing involvement at all aspects of the children’s lives and the children increasingly strong attachment to her.

1. Earlier in the Report however, Ms N had noted that the father in fact appeared supportive of the increasingly healthy relationship between the mother and children. For instance at paragraph 57 she had said:

When asked again as to his views about the current mother-children time, the father said “I think it is quite good that they are building the re they are building. I think it is doing the kids the world of good and I can’t speak for mum but I think it is probably doing the mum the world of good.”

1. Although acknowledging this at paragraph 106, at paragraph 109, having noted earlier that the father believes that C’s problematic behaviours upon returning “related to the quality of the mother’s parenting and care environment or attachments” she continued:

Although other information lends to the interpretation that the boys’ anxiety and concomitant anger management issues are likely embedded in parenting and modelling dysfunctions on the paternal side, as well as to the early childhood disruption in [C’s] attachment to his primary carer and a lack of swift reunification of the boy with his mother.

1. The reasoning behind those opinions is not disclosed. Given the highly dysfunctional behaviours of the mother in the past, one would ordinarily have expected “parenting and modelling dysfunctions on the paternal side” to have been specified, and their connection between them and C’s disturbing behaviours explained. They were not.
2. The father’s case, in essence, was that he has been very cautious about the children spending more time with the mother because of his stark fear that she will yet again cause allegations of misconduct by him to be raised and investigated. Mr Slade-Jones, who appeared as counsel for the father, was strident in his criticism, both in cross-examination of Ms N and in submissions, that she had simply glossed over the likely impact on the father of the horrendous allegations which the mother had either made, to the effect that he had sexually abused B or alternatively, if she had not made them, nonetheless not sought to have dismissed.
3. There is much in that submission. There is indeed a naivety in Ms N’s approach to this. Absent any firm professional opinion – other than Ms N’s bland acceptance of the mother’s self-report – that the mother had either been able to address massive issues arising from her childhood, or had been able to adapt her past behaviours in ways to accommodate them, there is indeed little reason for the father to lessen his suspicion that the mother may use the time with the children to again cause such allegations to be fabricated. The father did not strike me as being unaware of the adage “once bitten, twice shy.” Moreover, as Mr Slade-Jones identified, the father has consistently – save for the ultimate recommendations – conformed with the recommendations of Ms N and/or Dr F from time to time, and consented to orders increasing the mother’s time. True it is he may have done so through a prism of suspicion, but given the history of this matter, such is not unwarranted.
4. Particularly I note that the father was, prior to commencing a relationship with the mother – and indeed not until after they had separated – quite unaware of the highly disturbing behaviours of the mother during the earlier separation from her second husband. The extremely unlikely allegations which she was prepared to, if not directly peddle, then nonetheless support, in that case, would serve as a severe warning as to the sorts of allegations she is prepared to make, with little or no evidence to support them, and no apparent inclination to scepticism.
5. I accept that the mother’s past conduct in making allegations against her former partners including the father, probably does disincline the father to actively support the development of a relationship between the mother and the children. That said however, on the mother’s own concession, she has a meaningful relationship with the children, and that has plainly only been able to be achieved by the support of the father. Whether or not such support is begrudging is not really to the point; nonetheless a meaningful relationship has been able to be restored.
6. Therefore in essence, the answer to this question is that the father will facilitate that relationship, but not to the point where he feels that his own interests are imperilled. That is understandable in the circumstances.

**DOES THE FATHER PRESENT A RISK OF HARM TO THE CHILDREN**

1. I identified this as an issue in the course of the proceedings because the mother’s material obliquely suggested that it might be a plank in her case that the father was either himself, or permitting others to, physically discipline or harshly treat the children in his home. That did not emerge as a real issue at trial, and it needs no further discussion.

**WHAT IMPACT WOULD THE MOTHER’S PROPOSALS HAVE ON THE CHILDREN**

1. This is a major issue in this case. It is now nearly five years since the children spent anything other than alternate weekends and alternate Wednesdays with the mother. For much of that five years the time they spent with her was considerably less than that. A trial of equal time has never been made. The impact on the children therefore cannot be gauged. Nonetheless it is what Ms N and the Independent Children's Lawyer recommend.
2. During the course of exchanges with counsel in submissions, I admitted to considerable disquiet in relation to the reasoning process by which Ms N arrived at her recommendation for equal time. It is contained at paragraphs 111 to 114 as follows:

111. The children have now had the greater opportunity to experience their parent’s different parenting styles and different quality of home environments. On the information provided there seems to be quite a significant difference in how the respective households operate in terms of communication, discipline, parenting involvement and/or parent-child interaction, parenting attitudes and values, as well as child focused activities.

112. Evidently the quality of each of these factors and the extent to which the children are exposed to a higher quality in each of these areas, will significantly affect a child’s sense of security and overall wellbeing.

113. The report writer is of the view that the main issues as outlined above can possibly be sufficiently addressed with an increase of the children’s time in their mother’s care, as well as by a change in the division of parenting responsibility.

114. With increased time and with shared parental responsibility, [B] and [C] will be able to better benefit from the positive qualities their mother has to offer, whilst maintaining their relationship with their father.

1. There are several salient points to be made in relation to this. The first is that paragraph 111 seems to be consistent with there being two quite different regimes in each of the parents’ homes. Paragraph 112 is in the nature of a platitude: the better the quality of each home, the better the outcome for the children.
2. However it is the leap between paragraphs 111 and 112 on the one hand, and 113 on the other, which is worrying. Ms N opines, in effect, that somehow or other an increase in the children’s time in their mother’s care and a division of parental responsibility equally between the parties will “possibly” sufficiently address the “main issues as outlined above.”
3. She was pressed in relation to this logical leap in the course of cross-examination. She opined that the allocation of equal shared parental responsibility and equal division of time might overcome the reluctance of the father to facilitate a relationship between the mother and the children. Her evidence was that it would effect a balance in control and power as between the parents. She did not accept that what might ensue would be an unworkable muddle, but rather said that because the father had in the past stepped up and taken on board the recommendations, it is likely that he would do so again and comply with any order. With the greatest of respect to Ms N, that is hope triumphing over experience. There is all the world of difference between the father consenting to increased time on the one hand, and the parties being able to work co-operatively to achieve joint decision making and equal shared care on the other.
4. She was also asked in relation to the possible adverse effects on the children if they were to be moving between two quite different households. Her answer was to the effect that it can only be of benefit for the children to spend significantly more time in the mother’s care. She was not worried about the possibility of the children in effect moving between two worlds at “this stage”.
5. At about this point of the evidence I raised with her the possibility of there being a trial of the orders which she proposed, given that in paragraph 113 she herself only used the words “possible” to describe the benefits to the children. She acknowledged that it would be best to reality test any proposal. However that candid concession cannot detract from the fact that she was advocating, prior to then at least, for there to be final orders of equal time and equal shared parental responsibility.
6. In his submissions, Mr Slade-Jones referred me to the decision of Ryan FM (as her Honour then was) in *T v N* [2001] FMCAfam 222 where at [93] her Honour listed the following factors that the court “should particularly examining in cases where a party seeks orders that they share a time equally”:

The factors that the court should particularly examine in cases where a party seeks orders that share a child's time equally between its parents (or others) include the following:

* The parties’ capacity to communicate on matters relevant to the child's welfare.
* The physical proximity of the two households.
* Are the homes sufficiently proximate that the child can maintain their friendships in both homes?
* The prior history of caring for the child. Have the parties demonstrated that they can implement a 50/50 living arrangement without undermining the child's adjustment?
* Whether the parties agree or disagree on matters relevant to the child's day to day life. For example, methods of discipline, attitudes to homework, health and dental care, diet and sleeping pattern.
* Where they disagree on these matters the likelihood that they would be able to reach a reasonable compromise.
* Do they share similar ambitions for the child? For example, religious adherence, cultural identity and extra curricular activities.
* Can they address on a continuing basis the practical considerations that arise when a child lives in 2 homes? If the child leaves necessary school work or equipment at the other home will the parents readily rectify the problem?
* Whether or not the parties respect the other party as a parent.
* The child's wishes and the factors that influence those wishes.
* Where siblings live.

1. Whilst accepting that the legislative framework has changed since that decision, there is no reason to think that as a practical matter those considerations do not remain live in determining whether or not equal shared care is likely to work. Many of them are not met in this case.
2. The fundamental difficulty here is that I do not know what effect splitting the children between two quite potentially different homes is likely to have on them. It has not been tried. No party actively supported a trial of an interim arrangement to that effect. Beyond some suggestion that the child C would particularly benefit from increased maternal affection, there does not really appear to have been any proper analysis of the likely impact of equal time on the children by Ms N. Her preference for such orders, is worrying because the alleged advantages are only expressed as a “possibility” and more, it is presented as an “oracular pronouncement” without any exposure of reasoning behind it.
3. Whilst I cannot on the evidence gauge the potential adverse impacts upon the children of moving between two quite different homes, and then thus in a sense not having a home, I nonetheless am satisfied that there is a substantial risk of a significantly adverse outcome for the children.
4. During the course of submissions I attempted to raise the practicalities of this with counsel. I posed the question of whether the children will have different times of waking up and going to bed, different regimes of morning routines, different food stuffs for breakfast and the like, and different arrangements for school lunches. Although Ms N suggested that such things might be able to be addressed by a once a term “mediation session” all that does in my view is emphasise the poor communication between the parties, and the fact that they cannot be trusted to inform each other of the regimes in each other’s houses, and their likely reluctance to change them to co-ordinate with that in the others.
5. Ultimately I am of the view that equal time in this situation could be a recipe for disaster. Given that the parties propose final orders, it would be a permanent disaster.

**CAN THE PARTIES EXERCISE EQUAL SHARED PARENTAL RESPONSIBILITY**

1. The parties have not exercised equal shared parental responsibility since the children went into the father’s care in October 2010. In reality they have probably not exercised it since they finally separated in 2008. Given that since 2005 the children have lived with the mother during earlier separations, it is likely in fact that the parents have never in the last 10 years exercised equal shared parental responsibility.
2. The father does not trust the mother. The mother may have some lingering beliefs as to the risk which the father poses to the children. Their history of communication is not a particularly good one, but that said, does not seem to have as a characteristic the abusive emails, text messages and phone calls which are so often the hallmark of litigation in this court. However the absence of open hostility does not necessarily mean that the parties could jointly negotiate in a way which would not always see a stalemate reached.
3. The mother does have something of a history of acting unilaterally in relation to the children. For instance she took B to a doctor when she returned to her weekend care, because she was concerned that the child had suffered an injury when falling off a bike in the father’s care. At the time the father had sole parental responsibility. Even if that did not preclude the mother taking the child to the doctor, she did not tell the father she was doing so, whether before or after the event.
4. Like equal time, equal shared parental responsibility would be an experiment. It might work. It might not. If it does not, then the inevitable consequence is that these parties will need to either return to litigation, or the children’s lives will become dysfunctional. That cannot be in their best interests.

**SECTION 60CC FACTORS**

**Section 60CC(2)(a): The benefit to the child of having a meaningful relationship with both of the child's parents**

1. I have sufficiently addressed this earlier in these reasons. Both children would benefit from having a meaningful relationship with both of their parents. They presently do have such a relationship with both. The difficulty with increasing the mother’s time with the children is that it increases the level of risk which she presents to the children of emotional and psychological harm.

**Section 60CC(2)(b): The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence**

1. I have sufficiently addressed this earlier in these reasons.

**Section 60CC(3)(a): Any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views**

1. The children have expressed wishes to spend more time with the mother. They have also expressed, albeit in varying ways, in varying intensities and on varying occasions, a desire to live with the mother. They have not experienced living with their mother in any ongoing sense now for nearly five years. I give their views as to where they would wish to live little weight in those circumstances. However I do give their views that they would wish to spend more time with their mother some weight. I give B’s views more weight than C’s, given that she is older.

**Section60CC(3)(b): The nature of the relationship of the child with:**

**(i) each of the child's parents; and**

**(ii) other persons (including any grandparent or other relative of the child)**

1. The children have good relationships with both of their parents, with Ms E, and with the mother’s new partner, Mr G, and the mother’s son from a previous relationship, Q.

**Section 60CC(3)(c): The extent to which each of the child's parents has taken, or failed to take, the opportunity:**

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

**(ii) to spend time with the child; and**

**(iii) to communicate with the child**

1. This is not a relevant matter in this case, in the sense that both parents have taken all opportunities to involve themselves in the children’s lives.

**Section 60CC(3)(ca): The extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child**

1. In the last five years it appears as though the mother’s child support obligations have been very slight. She has not otherwise sought to maintain the children, even though they have been in the father’s care. She has been in that time, it seems, only in receipt of a social security benefits, which might explain her failure to fund the children’s costs.

**Section 60CC(3)(d): The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:**

**(i) either of his or her parents; or**

**(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living**

1. This case was not conducted on the basis that the children spending less time with the father would adversely affect them. It was conducted, in reality, on a contest between the risk which the mother posed if time was increased, versus the benefits to the children of that increase.

**Section 60CC(3)(e): The practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis**

1. This is not engaged given the parents live in close proximity to each other.

**Section 60CC(3)(f): The capacity of:**

**(i) each of the child's parents; and**

**(ii) any other person (including any grandparent or other relative of the child);**

**to provide for the needs of the child, including emotional and intellectual needs**

1. This matter is relevant but has been sufficiently discussed above.

**Section 60CC(3)(g): The maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant**

1. This is not a relevant consideration here.

**Section 60CC(3)(h): If the child is an Aboriginal child or a Torres Strait Islander child:**

**(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and**

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

1. This is not engaged.

**Section 60CC(3)(i): The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents**

1. This is relevant and has been sufficiently discussed already.

**Section 60CC(3)(j*)* Any family violence involving the child or a member of the child’s family**

1. This is not a relevant factor in this case.

**Section 60CC(3)(k): If a family violence order applies, or has applied, to the child or a member of the child's family – any relevant inferences that can be drawn from the order, taking into account the following:**

**(i) the nature of the order;**

**(ii) the circumstances in which the order was made;**

**(iii) any evidence admitted in proceedings for the order;**

**(iv) any findings made by the court in, or in proceedings for, the order;**

**(v) any other relevant matter**

1. This is not a relevant factor in this case.

**Section 60CC(3)(l): Whether it be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child**

1. This is an important matter insofar as at one stage I floated with the parties the prospect of interim orders. The reality is that at a minimum, any interim regime would need to be trial for a six month period. There would then, no doubt, be a further updated Family Report prepared. The trial of these proceedings would then need to resume and no doubt the ultimate decision would be reserved. It is therefore highly likely that a six month trial period would see an ultimate resolution of this proceeding delayed for another twelve months from the date of these reasons. That is a major issue in this case, given that the parties have now been litigating for three years already. In my view the desirability of putting an end to these proceedings is a major factor in this case.

**Section 60CC(3)(m) Any other fact or circumstance that the Court thinks relevant**

1. I cannot identify any other fact or circumstance beyond those which I have already addressed.

**PARENTAL RESPONSIBILITY**

1. All parties agreed that the s 61DA presumption applied here. The father sought to rebut it on the grounds that equal shared parental responsibility would not be in the best interests of the children, because it would simply not work. Particularly he said:

* The parties mistrust each other;
* The parties have poor communication, and in the past when they have been forced to mutually deal with things (for instance a visit to the doctor’s together) it has been productive of conflict rather than resolution;
* Equal shared parental responsibility has not been in operation for many years;
* There is no reason to think it would work.

1. On the other hand the mother asserts that equal shared parental responsibility would redress the alleged power imbalance between her and the father. There was however again an element of hope triumphing over experience in that submission.
2. I am not persuaded that equal shared parental responsibility would in fact be a practical possibility here. One parent will need to have the decision making power in relation to long term issues involving both children. In the event that I am of the view that one parent should be the primary residence parent, then it should be that parent. In the event that I am persuaded that equal time is appropriate, then the matter would need to be addressed from a different perspective.

**WITH WHOM SHOULD THE CHILDREN LIVE**

1. The proposal for equal time is a potentially dangerous experiment. Its benefits are that the children are likely to obtain the optimum advantage of increased maternal affection and interaction. The detriment is that they are likely to be moving between two quite different, mistrustful and conflictual worlds characterised by hostility, a lack of communication and different regimes. That cannot be in their best interests. Also there is the risk that the mother might again generate allegations of abuse by the father.
2. The children have lived with their father for the last five years. Whilst not above criticism, he has been a good parent. In my view the risks of equal time between both parents are too great on an experimental final basis. To trial it now would involve the delay of the resolution of these proceedings for perhaps as much as a year or even longer if there be an appeal. That cannot be in the children’s best interests.
3. I assess the children’s best interests as lying in them continuing to principally live with the father. There will be an order to that effect.

**TIME AND COMMUNICATION WITH MOTHER**

1. I accept the evidence that the children will benefit from spending increased time with the mother. The goal is to obtain that benefit but not to the point where either the amount of time spent with the mother is too disruptive of their daily routine and stability, or the risk which the mother poses to the children of instilling false beliefs in their minds as to sexual abuse reaches an unacceptable level.
2. The evidence is scant as to what increase would strike the balance between those considerations. That no doubt motivates the father to say that at the moment the present regime is “working” and so should be perpetuated. However the present regime is not working. C – aged 7 and in grade 3 – is regularly soiling his pants both at home and at school, at times seemingly associated with changeovers of care. That speaks loudly that the number of changeovers should be minimised. On the other hand, I am satisfied that a regime that clearly qualifies as significant and substantial time is appropriate here. However as I say that time should not be at a level that disrupts the children, or which exposes them to an unacceptable level of risk in the mother’s care.
3. As I have said, the evidence is scant in terms of assisting me as to the appropriate balance to be struck. Nonetheless doing the best that I can, I assess that the children should spend a period of four nights with the mother in each fortnight, starting from after school on Thursday and concluding at the commencement of school on Monday on each alternate week. There will therefore be orders to that effect.
4. I so conclude because I am satisfied that:

* It will effect an increase in the children’s time with the mother, and a decrease in the number of changeovers;
* It will see the mother spending time with the children in each week, notwithstanding the alternating weekends;
* It will minimise the risk of the mother using her time with the children to install them with false beliefs of abuse.

1. That then leaves the question of school holidays. The parties are agreed that there should be equal time over school holidays, but are not agreed as to whether it should be alternate weeks or one half of the school holidays as a block.
2. In reality this only involves the Christmas school holidays of about six weeks.
3. In my view, notwithstanding the risks which the mother does pose to the children, it would be in the children’s best interests for that holiday time to be experienced in a block. The backwards and forwards of week about time during those holidays would be too disruptive, and restrict the activities that could be undertaken then, including when in the father’s care. There will therefore be orders that the children spend holiday time with the mother in the first half of each holiday period in odd numbered years and in the second half on even numbered years.
4. The parties are agreed as to the communication regimes that should apply and there will be orders as they propose.

**OTHER ORDERS**

1. Otherwise there will be incidental orders as agreed between the parties.

**CONCLUSION**

1. For these reasons there will be orders as set out at the commencement of these Reasons.

I certify that the preceding one hundred and forty-two (142) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Tree delivered on 16 July 2015.

Associate:

Date: 16 July 2015

1. See *K v R* (1997) 22 FamLR 592 and *Re W* (sex abuse – standard of proof) [2004] FamCA 768 at [15]. [↑](#footnote-ref-2)