

**JURISDICTION** : FAMILY COURT OF WESTERN AUSTRALIA  
**ACT** : FAMILY LAW ACT 1975  
**LOCATION** : PERTH  
**CITATION** : GORMAN and GORMAN [2010] FCWA 25  
**CORAM** : CROOKS J  
**HEARD** : 15 & 16 JULY 2009  
**DELIVERED** : 16 FEBRUARY 2010  
**FILE NO/S** : PT 6400 of 2008  
**BETWEEN** : GORMAN  
Applicant/Father  
  
AND  
  
GORMAN  
Respondent/Mother

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*Catchwords:*

Parenting orders  
Relocation to Japan

*Legislation:*

*Family Law Act 1975, s 60B, s 60CC*

*Category:* Not Reportable

**Representation:**

*Counsel:*

Applicant : Mr M Rynne  
Respondent : Mr S Jones

*Solicitors:*

Applicant : Paterson & Dowding  
Respondent : Mony De Kerloy

**Case(s) referred to in judgment(s):**

Mazorski v Albright (2007) 37 FamLR 518  
McCall & Clark [2008] FamCAFC 92  
Morgan and Miles [2007] FamCA 1230  
T & N [2001] FMCAfam 222

1 [Mr Gorman] and [Mrs Gorman] have been unable to agree on the parenting  
arrangements to be made for their son, [Kasey], aged 9 years and their daughter,  
[Hanna], aged 7 years. Mrs Gorman wishes to live with the children in Japan. Mr  
Gorman seeks that the children remain in Perth and live with the parties on an equal  
time basis. Mrs Gorman will not leave Australia without the children.

### **Brief background**

2 Mrs Gorman is Japanese and was born in Japan in January 1969.

3 Mr Gorman is Australian was born in Perth in May 1973.

4 The parties met in Perth in late 1996 when Mrs Gorman was in Australia on a  
student visa studying English and doing a secretarial course.

5 Mr Gorman and Mrs Gorman started living together in Perth in early 1997.

6 In December 1997 the parties travelled to Japan where Mr Gorman completed  
Japanese language studies. Whilst in Japan the parties lived with Mrs Gorman's  
parents at Osaka.

7 Mr Gorman and Mrs Gorman were married in Japan on 19 December 1998 and  
then returned to Australia on 1 January 1999 so Mr Gorman could resume his  
university studies.

8 In late 1999 the parties returned to Japan where Mr Gorman was offered work  
over his summer break. Mr Gorman and Mrs Gorman lived in Japan for about two  
months before they returned to Perth for the start of the 2000 academic year.

9 Kasey was born in Australia in May 2000.

10 In about late 2001, Mr Gorman and Mrs Gorman returned with Kasey to Japan  
where they lived for a time. Hanna was born in Japan in December 2002.

11 Between early 2003 and December 2006 the parties lived either in Japan or in  
Perth. There were also periods when Mr Gorman lived in Perth finishing his studies  
and Mrs Gorman lived in Japan with the children.

12 The parties separated in July 2005 when Mrs Gorman left the city where they  
were then living and moved into her parents' home in Osaka with the children.

13 The parties disagree over whether July 2005 was the time of their final  
separation.

14 Mr Gorman's position is that the parties reconciled in December 2005 after  
counselling when Mrs Gorman moved back with the children to the parties' flat in the  
city. Whilst Mrs Gorman agrees she did return to the parties' flat with the children in  
December, she denies they were able to fully resolve their differences. Mrs Gorman  
says she returned to Mr Gorman for the children's sake.

15 After Mrs Gorman moved back with Mr Gorman in December 2005, they socialised together, particularly with the children and visited family. Mr Gorman also continued to provide financially for the family and Mrs Gorman looked after the home and the children full-time.

16 [Anna] and [Linda], Mr Gorman's mother and sister, say they have seen Mr Gorman and Mrs Gorman together as a couple on many occasions since Mrs Gorman returned to the home in December 2005. They further say Mr Gorman and Mrs Gorman appeared to them as a married couple, they shared a bedroom when they stayed with them and attended functions together. Whilst Mrs Gorman's feelings for Mr Gorman as a husband may have changed following their separation in July 2005, I am not satisfied the parties continued to live separately and apart after Mrs Gorman moved back with the children in December 2005.

17 Mr Gorman returned to Perth in about April 2006 to take up a work position. Mrs Gorman stayed on with the children in Japan until December 2006 and then she joined Mr Gorman in Australia.

18 Mrs Gorman holidayed with the children in Japan over Christmas in 2007 for about two months and returned to Perth at the end of January 2008.

19 Mr Gorman says the parties finally separated in July 2008 although they continued to share the home in the suburbs until about 22 November 2008 when Mrs Gorman left with the children. There is no dispute that since November 2008 the parties have not shared a home together.

### **Relevant history of court proceedings**

20 Mr Gorman filed an application on 22 December 2008 and on 29 December 2008 the Court made various orders until further order including the following:

- (a) the parties be restrained from removing the children from Australia;
- (b) the children's passports be held by the Court Registrar;
- (c) the children live with Mrs Gorman;
- (d) the children spend time with Mr Gorman for parts of each weekend and on each Tuesday evening until 7.00pm;
- (e) the parties communicate by a communication book; and
- (f) Mr Gorman return the children to Mrs Gorman if either child becomes distressed whilst in his care.

21 There was a further hearing on 24 March 2009 when the Court made further interim orders including:

- (a) the parties have equal shared parental responsibility of the children;

- (b) the time Mr Gorman spends with the children each Tuesday continue until the commencement of school the following morning; and
- (c) the children spend one half of all school holiday periods including Easter with each parent.

### **The evidence**

22 Mrs Gorman was represented by Mr Jones of counsel. She was cross-examined and also relied upon:

- (a) her trial affidavit filed 10 July 2009; and
- (b) affidavit of her father, [Mr K], filed 10 July 2009 which was translated from Japanese to English.

23 Mr Gorman was represented by Mr Rynne of counsel. He was cross-examined at the hearing and also relied upon:

- (a) his trial affidavit filed 2 July 2009;
- (b) affidavit of his mother, Anna Gorman, filed 18 March 2009;
- (c) affidavit of his sister, Linda Gorman, filed 30 June 2009; and
- (d) affidavit of an American lawyer, Jeremy David Morley, filed 9 June 2009.

24 No Independent Children's Lawyer was appointed for this case, nor did I have the benefit of any report from a Family Consultant or Single Expert. Reference was, however, made by Mr Jones to the paper "Shared Care and Children's Best Interests in Conflicted Separation – a cautionary tale from current research" by Jennifer MacIntosh and the Honourable Richard Chisholm.

### **Positions of the parties**

#### **Mr Gorman's position**

25 Mr Gorman proposes that he and Mrs Gorman have equal shared parental responsibility for the children. When he filed his application in December 2008, Mr Gorman sought orders for the children to live with Mrs Gorman in Perth and to spend time with him each week during school terms, together with one half of all school holidays and on special occasions during the year.

26 Mr Gorman sought further orders to ensure that both parents are kept advised of the children's educational progress and any serious health issues involving the children.

27 Mr Gorman later amended his proposals and at the trial sought orders for the children to live with him and Mrs Gorman on an alternating week-about basis. He further sought to prevent Mrs Gorman from living with the children outside Perth.

28 Since December 2006 Mr Gorman has rented a home in the suburbs which contains three bedrooms and two bathrooms. He proposes that Kasey and Hanna live at the home during his time with them. In the longer term Mr Gorman's aim is to purchase his own home. He intends that the children continue their education at the local primary school.

29 If Mrs Gorman is allowed to relocate with the children to Japan, Mr Gorman seeks to spend time with them in Australia for their entire summer vacation period in July of each year and for a further period of not less than 10 days either in April or December when the children have mid-term school breaks in Japan.

30 Mr Gorman does not regard moving to Japan himself as a viable option or in the children's interests.

### **Mrs Gorman's position**

31 Mrs Gorman agrees she and Mr Gorman should have equal shared parental responsibility of Kasey and Hanna. She seeks that the children live with her in Japan, initially at her parents' home in Osaka. In the longer term, Mrs Gorman intends to find a home of her own close to her parents' home. Kasey previously attended a local primary school in Japan for about two months and Mrs Gorman proposes that both children go to this school which is a short distance from her parents' home. In her Minute of Orders Sought, Mrs Gorman seeks that Mr Gorman spend time with the children during their school holidays.

32 Mrs Gorman will not leave Perth without the children and if she is not allowed to relocate, she seeks to continue to have the main role in the children's care. She opposes the children spending equal time with Mr Gorman.

### **Observations**

33 This is not a case where I accept the evidence of one party whenever it conflicts with the evidence of the other. Whilst there were some differences in the parties' evidence on relevant matters, this in my view had more to do with the interpretation they placed on events which took place. Mr Gorman in particular, put the worst possible interpretation on certain events, no doubt to try and strengthen his case.

34 Although English is not Mrs Gorman's first language, I am satisfied she was able to understand what was being said to her. Mrs Gorman would, however, regularly pause for what seemed to be long periods before answering questions she was asked. I did not regard this, however, as any attempt by Mrs Gorman to avoid or delay her answers but was rather due to her difficulties in being able to properly express herself in English. Having made these comments, my view of each of the parties is that they are decent and honest people who did their best to tell the truth as

they saw it. Mr Gorman and Mrs Gorman readily agreed that each of them dearly loved and were committed to the children and they in turn loved them.

35 Mr Gorman's mother, Anna, and his sister, Linda, were not required for cross-examination. Both spoke positively about Mrs Gorman as a mother and agree she remains welcome in their homes even though the marriage between Mr Gorman and Mrs Gorman has broken down. There is no reason for me to doubt the reliability of their evidence.

36 Mrs Gorman's father, [Mr K] was also not required for cross-examination. Mr K says he still thinks of Mr Gorman "as a son" and would welcome Mr Gorman and his family at his home should they ever wish to visit the children in Japan. I intend to accept Mr K's evidence. No reason was advanced why I should not do so.

37 Jeremy Morley was cross-examined by telephone linkup from New York. Mr Morley's report includes details of his formal qualifications and extensive experience focusing on international family law cases with particular interest in cases involving Japan. Mr Morley explained the difficulties Mr Gorman would face under existing Japanese law to secure the return of the children if Mrs Gorman decided to keep them in Japan in breach of an Australian court order. I will consider Mr Morley's evidence in detail when it becomes relevant to particular aspects of the case.

### **The law**

38 In deciding whether to make a parenting order, I must regard the best interests of the children as the paramount consideration.

39 For the purpose of determining what is in the children's best interests, I must consider the "primary" and "additional" considerations set out in s 60CC(2) and (3) of the *Family Law Act 1975*.

40 The primary considerations are:

- (a) *the benefit to the children of having a meaningful relationship with both of the children's parents;*
- (b) *the need to protect the children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.*

41 I must also have regard to s 60B of the Act which sets out the objects of the Act which deal with children and the principles which underlie those objects.

42 S 60B is as follows:

- "(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)."

43 I will consider other relevant provisions of the Act when I deal with particular aspects of the case.

### **Principles to be applied in relocation cases**

44 In *Morgan and Miles* [2007] FamCA 1230 (delivered 17 October 2007) the Full Court considered the principles to be applied in determining a parenting application when one party wishes to relocate following the Shared Parental Responsibility Amendments. Boland J said at paragraph 74 of her reasons:



“The Act does not contain any presumption against a parenting order which involves relocation, nor any presumption in favour of a parent, with whom a child lives predominantly at the time of the application obtain such an order. The Act provides for the careful exercise of a structured discretion to determine the appropriate order to be made.”

45 At paragraph 80 her Honour further said:

“80. It follows from my exposition of the legislation, that earlier core principles:

- that the child’s best interests remain the paramount but not sole consideration;
- that a parent wishing to move does not need to demonstrate “compelling” reasons;
- that a judicial officer must consider all proposals, and may himself or herself be required to formulate proposals in the child’s best interests; and
- the child’s best interests must be weighed and balanced with the “right” of the proposed relocating parent’s freedom of movement,

remain valid.”

### Primary considerations

46 I will deal firstly with the primary considerations in determining what would be most likely to promote the children’s best interests.

***The benefit to the child of having a meaningful relationship with both of the child's parents.***

47 The Full Court in *McCall & Clark* [2008] FamCAFC 92 accepted as appropriate the interpretation of “meaningful relationship” set out by Brown J in *Mazorski v Albright* (2007) 37 FamLR 518 where her Honour said at page 526:

“I proceed on the basis that when considering the primary considerations and the application of the object and principles, a meaningful relationship or a meaningful involvement is one which is important, significant and valuable to the child. It is a qualitative adjective, not a strictly quantitative one.”

48 When the parties lived together, Mr Gorman was not as involved in the children’s care as Mrs Gorman because of his work and study commitments. There were also times, as earlier noted, when Mrs Gorman looked after the children in Japan whilst Mr Gorman was in Australia. This occurred in early 2003 when Mr Gorman lived apart from Mrs Gorman and the children for about three months. There was a

longer period between about April 2006 and late December 2006 when Mr Gorman again lived in Perth and Mrs Gorman remained in Japan with the children. During this period Mrs Gorman helped care for her mother who had suffered a stroke.

49           Apart from periods when the parties lived apart for reasons unrelated to any problems in the marriage, it is agreed as earlier noted that in July 2005 Mrs Gorman left Mr Gorman in Japan and lived at her parents' home with the children until December 2005 when the parties moved back together.

50           Mr Gorman acknowledges that when the children were younger, particularly when they lived in Japan, Mrs Gorman had the main responsibility for their care. Mrs Gorman was a full-time parent at that time. Mr Gorman worked to provide financially for the family and I accept at times he worked longer than full-time hours. Since Mrs Gorman moved to her own home in November 2008, the children have lived primarily with her and have spent time with Mr Gorman as set out in the Court orders earlier mentioned.

51           Whilst I am satisfied Mrs Gorman had the primary role with the care of the children from the time of their births, I accept Mr Gorman took a keen interest in the children and involved himself in their care as best he could, given his work and study commitments. I further accept Mr Gorman played a greater role with the children during the last few years of the parties' marriage than was the position previously and his involvement has been significant, although not as great as Mrs Gorman's.

52           There is no question in my view both parties are "important, significant and valuable" to the children, to adopt the words of Brown J in *Mazorski's* case, who will benefit from continuing to have a meaningful relationship with both of their parents.

***The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.***

53           This is not a case where either party alleges the other parent has been physically abusive or violent to the children. Mrs Gorman does, however, say that in December 2007 she was shouted at and abused by Mr Gorman shortly prior to flying back to Japan with the children for a holiday at Christmas. She further says that during this incident Mr Gorman blocked her path as she walked past him and held her wrists to stop her getting past. This, Mrs Gorman says, was seen by the children who became distressed at witnessing their father's behaviour. Mr Gorman admits an incident took place but says he restrained Mrs Gorman because she was coming at him. He also concedes the parties would "sometimes" shout and argue in front of the children and that Mrs Gorman was scared of him when there was conflict as she suffered from a panic disorder.

54           Incidents of this kind in the presence of children are clearly inappropriate and expose the children to the risk of psychological and emotional harm. That said, Mrs Gorman acknowledges Mr Gorman has not been physically abusive to her in the children's presence since the incident in December 2007 and I am satisfied it is unlikely to occur in future, particularly given the parties no longer share the same home.

55 Mrs Gorman is also critical of Mr Gorman telling the children he will be “sad” and “upset” if they were to move to Japan. In his discussions with the Family Consultant at the case assessment conference in December 2008 Mr Gorman conceded this has occurred. He further stated attending the “Mums & Dads Forever Programme” would help him deal with the break-up and to not involve the children inappropriately. Both parties have since attended this course. I am confident Mr Gorman will not continue to emotionally burden the children in this manner. Overall, I am satisfied that neither Mrs Gorman or Mr Gorman are likely to expose Kasey and Hanna to any risk of abuse, neglect or family violence when they are in their care.

### **Additional considerations**

56 I now turn to the additional considerations.

(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;*

57 Mrs Gorman says Kasey told her he wants to live in Japan and refers in particular to comments Kasey made in March, April and May 2009 such as “I want to go back to Japan right now” and “I am going to the airport” because “I want to go back to Japan right now”.

58 Mrs Gorman mentions amongst other things Kasey’s love of baseball which he began playing in Japan and says he believes the baseball programme offered in Japan is better than in Australia.

59 Mrs Gorman further says Kasey has friends in Japan and enjoys watching Japanese movies and reading Japanese comics.

60 Mr Gorman accepts the children want to visit Japan but does not agree they want to live in Japan. He maintains they are happy living in Australia. After receiving Mrs Gorman’s trial affidavit where she refers to Kasey’s wish to live in Japan, Mr Gorman says he told the children “mummy is thinking about going back forever” and both children became upset.

61 Mr Gorman further says the children believed they were only going back to Japan for a holiday when making those comments to Mrs Gorman. For Mr Gorman to put what he did to the children was, in my view, most inappropriate. I accept his statement could have been understood by the children to mean Mrs Gorman was seeking to cut all ties with Australia which is clearly not her position.

62 When cross-examined about this, Mr Gorman said the children “have a right to know” what is going on. Whilst the children may need to have an understanding of their situation, there are means by which their views can be properly sought by those who have the skill to do so, if the children’s wishes are considered relevant. Neither party here, however, sought the preparation of a “wishes” report as earlier noted.

63 The children are no doubt fully aware of Mrs Gorman’s strong desire to relocate and Mr Gorman’s strong desire that they remain in Perth. Mr Gorman concedes

Kasey and Hanna love each of their parents and are likely to say things to please both of them. In my view, it is unlikely the children would say anything which they thought might disappoint either parent.

64 The children are likely, in my opinion, to be excited by the prospect of returning to live in Japan with their mother but are also likely to be sad about the possibility of seeing less of Mr Gorman and their extended family and friends if they were to leave Perth. That said, I am not satisfied the children have a sufficient level of maturity or understanding of the consequences of the views they have expressed to their parents for their views to be given any significant weight.

**(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);**

65 I have already considered the very close and loving relationship Kasey and Hanna have with each of the parties. I also accept the children have a close relationship with extended family members on both sides.

66 Mr Gorman is the youngest of four children. Two of his three sisters, Linda and [Nicole], live in Perth with their families. His sister, [Karen], lives in the eastern states with her two children.

67 Mr Gorman, Mrs Gorman and the two children lived with Mr Gorman's parents, Anna and [Bert] during 2003 and I accept they have always shown a very keen and supportive interest in the children and have spent frequent and regular periods with Kasey and Hanna when they have lived in Australia.

68 Linda, Anna and Bert also travelled to Japan to spend time with the parties and the children. I accept Mr Gorman is part of a very supportive family in Australia who want the best for Kasey and Hanna.

69 Mrs Gorman agrees the children have always appeared to enjoy the time they have spent with Mr Gorman's family. Mrs Gorman further agrees Mr Gorman's family have also made her welcome and she continues to have a good relationship with them. She also concedes Mr Gorman's family would help her if she was ever in need.

70 It is clear Mr Gorman's family are significant in the children's lives and they will benefit from maintaining a close relationship with them.

71 As earlier noted, Mrs Gorman's parents, her brother and his family, including their two children, live in Japan. There is no question Mrs Gorman is very close to her family and I accept they too, particularly Mrs Gorman's parents, enjoy a close relationship with the children. As earlier noted, Mr Gorman, Mrs Gorman and the children lived with Mrs Gorman's parents for significant periods during their time in Japan.

72 Like Mr Gorman's family, it is clear Mrs Gorman's parents have also been very supportive of Mrs Gorman, Mr Gorman and the children. Although Mr Gorman says his own relationship with Mrs Gorman's parents "soured" when his relationship with Mrs Gorman deteriorated in 2005, Mr K says he would continue to welcome Mr Gorman to his home and I accept his evidence.

73 Mrs Gorman's family are significant in the children's lives and in my view, they would benefit from being able to maintain a close association with Mrs Gorman's family in Japan.

(c) *the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;*

74 This is a very important consideration. Mr Gorman asserts that whilst in other respects he considers Mrs Gorman "to be a very good parent", he is concerned about her ability or willingness to recognise his importance in the future upbringing of the children and promote future relationships with him.

75 Mr Gorman refers to many instances of Mrs Gorman's conduct which he says support his concerns. I intend to deal with those examples I view as being most significant. Those I do not specifically mention do not materially affect my conclusions about this aspect of the case.

#### **Mrs Gorman's visits to her parents in 2004**

76 Mr Gorman says that during 2004 when the parties were living about 80 kilometres from Mrs Gorman's parents' home, Mrs Gorman "was less than accommodating of my relationship with the children". He asserts Mrs Gorman insisted on the entire family returning to her parents' home each weekend which meant Kasey and Hanna were "unable to bond" with local neighbourhood children or unable to spend time with him away from Mrs Gorman's parents. Mr Gorman further asserts when he tried to discuss cutting back on the number of weekends the family would spend with her parents, Mrs Gorman said she would continue to take the children to visit them even if Mr Gorman refused to go.

77 Mrs Gorman did not give evidence about these assertions nor was anything put to her in cross-examination about the matter. Even if I was to accept Mrs Gorman wanted to spend every weekend with her parents, there is no question she and the children enjoyed a very close relationship with her parents and wanting to see them each weekend, does not, in my view, establish or support that Mrs Gorman had a negative attitude towards Mr Gorman's role with the children.

78 Mrs Gorman wanted the entire family to spend weekends with her parents including Mr Gorman. To suggest these visits prevented the children from bonding with other children in the local neighbourhood, when presumably there would have been time during the week for the children in the neighbourhood to play, was "clutching at straws", particularly given Hanna was less than two years old at the time. In my view, Mr Gorman's criticism of the mother is unwarranted.

**Mrs Gorman's conduct during the separation June 2005 – November 2005**

79 Mr Gorman says that Mrs Gorman would not allow him to see the children during this period other than about five times and then only for short periods. Mr Gorman further says that Mrs Gorman did “seem to be happier” for the children to spend time with his mother and sister when they visited Japan than with him.

80 Mr Gorman told his mother after the separation in July 2005 that Mrs Gorman would not allow him to spend “much time with the children”. Anna later flew to Japan in August to try and help the parties sort out their differences. She helped make arrangements for the parties to attend counselling.

81 When cross-examined, Mrs Gorman could not remember whether Mr Gorman saw the children only five times but did say Mr Gorman was working long hours at the time. I took this to mean Mr Gorman's working hours made it more difficult to make the contact arrangements. This was not, however, put to Mr Gorman. Mrs Gorman further says Mr Gorman threatened her soon after the separation and this “scared me”. This was not challenged by Mr Gorman. What is clear, however, from Anna's evidence is that the children stayed with Mr Gorman or at least spent significant time with him each day during the week Mr Gorman had off from his teaching work. I am not satisfied what took place during the parties' separation in late 2005 supports any conclusion that Mrs Gorman would be unwilling to encourage Mr Gorman's relationship with the children even if, previously it took some intervention from Anna to help resolve problems between them.

**Mrs Gorman's conduct post-separation in 2008**

82 Mr Gorman is further critical of Mrs Gorman who, he says, was “very restrictive” in allowing him time with the children after she left in November 2008. Mr Gorman says in particular that Mrs Gorman would not allow him to see the children for any more than two nights per fortnight.

83 Before Mrs Gorman left the home with the children in November 2008, the parties had agreed to attend mediation and had their first session in September 2008. This failed to resolve their differences and a second mediation appointment was made for 10 November 2008. Mrs Gorman's evidence that Mr Gorman cancelled the second mediation appointment was not challenged by Mr Gorman who then instructed lawyers to write to Mrs Gorman on 4 December 2008 setting out his proposals for the children to spend time with him.

84 In her trial affidavit (paragraph 126), Mrs Gorman set out the periods Mr Gorman spent with the children from late November until 27 December 2008. Her evidence was not challenged. Mrs Gorman says that Mr Gorman spent time with the children on two days each week which included one overnight stay. Mr Gorman also had the children from 20 December 2008 until 23 December 2008 and then from 24 December 2008 until 27 December 2008. Whilst this is less than Mr Gorman wanted, I am not satisfied Mrs Gorman's position was unreasonable or that it indicates a reluctance or unwillingness on her part to involve Mr Gorman in the children's lives.

### **Allegations Mrs Gorman breached court order**

85 As earlier noted, this case was first listed for hearing on 29 December 2008 when orders were made for the children to spend time with Mr Gorman on each weekend and on Tuesday afternoons until 7.00pm. These orders would appear to have been made with the parties' consent or at least were not opposed by them. Mr Gorman is critical of Mrs Gorman, who, he alleges, knowingly breached the Court orders by not allowing him time on the Tuesday first following the orders and that it was necessary for him to contact his lawyer so he could see the children the following Saturday. Mrs Gorman explained she did not think the orders started until after New Year, which is a very important period in Japanese culture. Mrs Gorman further says she agreed to the children remaining with Mr Gorman over Christmas until 27 December 2008 expecting she would then have the children over New Year. Whilst Mrs Gorman did fail to strictly comply with the orders by not permitting time on the Tuesday, I am satisfied with her explanation that she misunderstood her obligations under the order. Mrs Gorman's evidence on this issue was not shaken during cross-examination.

### **Refusal to communicate**

86 Mr Gorman further criticises Mrs Gorman for what he says is her refusal to communicate with him on even very minor matters concerning the children, instead saying "talk to my lawyer". Without apportioning blame, which I do not consider to be useful, I accept the parties had serious difficulties communicating at about the time of their separation. Mrs Gorman says Mr Gorman blamed her for the marriage breakdown and she "felt scared" talking to Mr Gorman about their marital problems because he would get angry. Mrs Gorman further says she needed to see a doctor because of her feelings of anxiety and I accept this evidence. The parties' relationship was clearly strained and I am satisfied Mrs Gorman found it difficult to discuss issues with Mr Gorman because she felt pressured and intimidated by him.

87 One of the orders made by the Court on 29 December 2008 was for the parties to communicate by communication book, which is an indication of the extent of the difficulties the parties had in communicating at that time. I do not view Mr Gorman's criticism of Mrs Gorman for wanting to resolve even minor matters through the lawyers during what was obviously a very difficult period for both parties to be justified.

### **Mrs Gorman's inflexible attitude**

88 Mr Gorman asserts that Mrs Gorman has not offered him any additional time with the children, even though paragraph 6(d) of the orders made 27 October 2008 provides he could have extra time "as otherwise agreed by the parties in writing". In contrast, Mr Gorman says he agreed to his time with the children on the first weekend of each two weekly cycle finishing at 3.00pm on the Saturday so Mrs Gorman could have some weekend time with the children. It might equally be said Mrs Gorman made concessions to Mr Gorman in agreeing to him spending all of one weekend and from Friday evening until 3.00pm Saturday on the other weekend with the children.

89 Mrs Gorman, in my view, generally prefers Mr Gorman to have the time with the children that is specified by the Court orders and not to be involved in regular discussions to vary arrangements for the children. Mr Gorman would prefer Mrs Gorman to be more flexible with the children's arrangements, particularly when it comes to his punctuality. Whilst the orders do provide for Mr Gorman to have extra time with the children if the parties are able to agree, they have on occasion been unable to agree. In my opinion, Mrs Gorman's refusal to agree to Mr Gorman having extra time with the children does not indicate any refusal on her part to respect or acknowledge the importance of Mr Gorman in the lives of Kasey and Hanna. Mr Gorman agrees he has generally enjoyed the times with the children specified by the Court.

### **Influence of Japanese culture**

90 When dealing with this consideration, Mr Gorman asserts many Japanese couples prefer "a clean break approach" to parenting arrangements following separation which generally results in children living with their mother and having no contact with their father. Mr Gorman refers to this Japanese culture as perhaps explaining why he considers Mrs Gorman has displayed a restrictive attitude towards his contact after separation.

91 When cross-examined, Mr Gorman conceded he has no special knowledge which would qualify him to give opinions on Japanese culture and I do not intend to give his opinions any weight.

### **Hague convention – Japanese legal system – compliance with orders**

92 Japan is not a party to the Hague Convention and the parties agree any orders I may make for Mr Gorman to spend time with the children will not be enforced under the Japanese legal system if Mrs Gorman was to fail to return the children to Australia or fail to make them available to Mr Gorman in Japan as may be ordered by this Court. For these reasons, and what Mr Gorman asserts is Mrs Gorman's past attitude to his relationship with the children and the "longstanding Japanese culture", he does not trust Mrs Gorman to comply with orders of this Court.

93 As earlier noted, Mr Gorman called as an expert, Jeremy David Morley, who is admitted to practice law in New York, having first qualified in 1975. Mr Morley's list of qualifications forms part of his report. He obtained post-graduate qualifications in international law from the University College in London and his work includes an appointment as assistant professor at the faculty of law, University of New Brunswick, Canada. He does not have any qualifications in sociology or psychology.

94 Mr Morley's evidence that Japan was not a party to the Hague Convention and overseas parenting orders could not be enforced in Japan was never in dispute. On Mr Morley's website, he made reference to Japan's intention to become a party to the Convention. When cross-examined, Mr Morley said that he did not include this in his report for trial because it had not occurred and he had doubts about whether Japan would finally become a party to the Convention. There is no evidence before me to



suggest any commitment from Japan to become a party to the Convention and my judgment is based on this position.

95 Mr Morley concluded his report by expressing the opinion “if the mother takes the children to Japan and chooses to stay there, Mr Gorman will likely be entirely precluded from ever again having any meaningful access to them”.

96 In support of this conclusion, Mr Morley said at paragraph 37 of his report:

“37. I deal frequently with situations involving unhappy Japanese nationals in this country who are married to non-Japanese husbands. When that relationship sours, they invariably want to “go home” to Japan. If the Japanese spouse is a woman she invariably wants to take their children to Japan and she will believe that she is being terribly mistreated if the foreign father wants to continue to “bother” her and the children by demanding an ongoing relationship with the children. She will very typically use the excuse of the illness of a parent as a ploy to secure permission to take her children for a supposedly quick emergency visit to Japan. If her or the children’s passports have been deposited in court or handed to the father she will typically obtain a quick replacement passport or other travel authorization from the nearest Japanese consulate. If she succeeds in taking the children to Japan without the father’s permission she will invariably never allow them to return to the father’s custody for fear that the father will keep them there. Her position will always be supported by Japanese society, specifically including the Japanese court system. The foreigner will always be an outsider and his desire to participate meaningfully in the life of his Japanese children in Japan will invariably be rejected.”

97 When assessing the weight to be given to Mr Morley’s report, it must first be noted he did not have any contact with Mrs Gorman or her lawyers nor does it appear he was provided with copies of her trial affidavits.

98 Whilst Mr Morley may have dealt with cases where Japanese mothers behave in the manner described at paragraph 37 of his report, I do not find this to be the case here. There is no suggestion by Mrs Gorman she is being “terribly mistreated” by Mr Gorman in wanting to see the children on an ongoing basis. Mrs Gorman did mention the illness of her mother as part of her case for wanting to take the children to Japan, however, there is no evidence to suggest this was “a ploy” on Mrs Gorman’s part. Indeed, Mr Gorman concedes Mrs Gorman’s mother has been very seriously ill.

99 Mr Morley also refers to his experience of mothers “typically” obtaining travel documents from a Japanese consulate to enable them to remove children. Mr Gorman acknowledges Mrs Gorman has never threatened to take the children to Japan without his consent.

100 Mr Gorman also did not seek to challenge Mrs Gorman’s evidence that after the parties went to mediation on 22 September 2008 she told him she wanted to take the

children to Japan for a holiday. Mr Gorman refused this request. Even though Mrs Gorman had known Mr Gorman would not agree to her taking the children back to Japan even for a holiday, from about late September 2008, there is no evidence to suggest she made any attempt after this to leave Australia with the children if that was something she was considering.

101 Mr Gorman's lawyers first wrote to Mrs Gorman's lawyers on 4 December 2008 which is Annexure HG1 to Mrs Gorman's affidavit. Mr Gorman proposed in that letter that both parties be restrained from moving the children from Perth without the other's consent. There is no evidence to suggest that Mrs Gorman made any attempt to obtain travel documents for the children either before or after she received the lawyer's letter at which time there was no restraint on her leaving Australia with the children. Indeed, Mrs Gorman says before receiving Mr Gorman's application filed 23 December 2008, she had given him Kasey's passport and Hanna's passport had expired. Mr Gorman did not seek to challenge this evidence from Mrs Gorman which I accept.

102 It should also be noted that when Mr Gorman's application came on for hearing on 29 December 2008, Mrs Gorman did not oppose the making of an injunction preventing her from removing the children from Australia and from making any application for travel documents for the children. Further she did not oppose the children's names being placed on the PASS Alert System.

103 I am satisfied Mrs Gorman has made no attempt to remove the children from Australia since June 2008 when Mr Gorman regards the marriage as having ended, and I accept it was always her intention to seek this Court's permission to take them to Japan after Mr Gorman refused his permission.

104 I observed and listened carefully to Mrs Gorman over the two day trial. She does not, in my opinion, "fit the mould" of the "Japanese nationalities" Mr Morley described at paragraph 37 of his report and in my opinion, his report is of little assistance.

105 At the end of his cross-examination, Mr Morley indeed conceded his conclusion that Mr Gorman "will likely be entirely precluded from ever again having any meaningful access" to the children if Mrs Gorman relocated, should be qualified as applying on the basis that Mrs Gorman did not voluntarily meet her obligations to allow Mr Gorman time with the children.

106 I am satisfied Mrs Gorman is law abiding and can be relied upon to comply with orders of this Court for Mr Gorman to spend time with the children, whether she is living in Japan or Australia.

107 As earlier mentioned, Mr Gorman returned to Perth from Japan in about April 2006 and Mrs Gorman stayed on with the children until December 2006. Mr Gorman says that when he left Japan in April he was worried about whether Mrs Gorman would come back to Australia given the parties' separation and marital problems in 2005. There is no suggestion Mrs Gorman did not return as she promised I which have taken into account in reaching my conclusions in relation to this consideration.

**Conclusion**

108 Overall, I am satisfied each of the parties recognise the importance of the other  
in the children's lives and each can be relied upon to facilitate and encourage a close  
and continuing relationship between the children and the other parent.

(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;*

109 This consideration is also very important.

110 If Mrs Gorman moves with the children to Japan and Mr Gorman remains in  
Australia, his time with the children will be greatly reduced. It will also mean Mr  
Gorman's involvement in the day to day lives of the children will be significantly less  
than it is at present where he has time with the children every week and is involved in  
their ongoing activities and interests.

111 In Japan the children's long school break of six weeks commences in July and  
the children have two weeks holiday during shorter breaks in March/April and  
December/January.

112 During 2010 Mrs Gorman proposes that Mr Gorman spend holiday time with the  
children in Japan for two weeks in each of the short holidays and for not more than  
three consecutive weeks during the long break. From 2011 Mrs Gorman agrees to the  
children coming to Perth for no more than three consecutive weeks each July.

113 If the children move to Japan, Mr Gorman seeks that the children spend their  
entire summer vacation period with him in Australia and for no less than 10 days in  
either the April or December term breaks.

114 Unless Mr Gorman can travel to Japan to spend time with the children in  
addition to his proposed school holiday time, his physical contact with Kasey and  
Hanna will be reduced to less than eight weeks each year. The time Mr Gorman's  
family can spend with the children will also be reduced and given Mrs Gorman's  
proposal that the children not return to Australia until the long summer break in July  
2011, Mr Gorman's family will not have any face to face contact with the children for  
nearly 18 months, unless they are able to travel to Japan in the meantime.

115 Mr Gorman is concerned about the effect on his very close relationship with the  
children if Mrs Gorman moves with them to Japan. Mrs Gorman concedes that  
moving with the children will affect them emotionally and I accept this is likely to be  
the case. I am also satisfied this very significant cutback in the face to face time Mr  
Gorman will have with Kasey and Hanna is likely to have a negative impact on their  
relationship. I do accept, however, given the children's ages that the extent of this  
impact is likely to be lessened by frequent telephone contact and contact by electronic

means between holiday periods when Mr Gorman will have face to face time with the children.

116 If relocation is permitted, Mrs Gorman will be able to return to Japan where she was born. Although I am satisfied Mrs Gorman has made a life for herself in Australia, having employment she enjoys and good friends, I accept she longs to return to her home country and live close to her family, particularly her mother. To permit Mrs Gorman to return to Japan will also enable Kasey and Hanna to see their maternal grandparents and other family members far more often than could occur if the children remain living in Perth.

### **Japanese economy**

117 In his trial affidavit, Mr Gorman expresses opinions and refers to various articles as to the difficulties with the Japanese economy which he describes as being in “severe recession”. These include articles from the Japanese Times (Annexure J), an excerpt from an OECD report as to the employment position of “mother returners” in Japan (Annexure H), and an article from the Economist suggesting the economic future of Japan remains bleak (Annexure I). Mr Gorman is not qualified to express opinions on the state of the Japanese economy nor to make comparisons with the Australian economy. I intend to base my decision on the evidence before me dealing with the particular circumstances of this case and will not give any weight to Mr Gorman’s opinions or the various publications produced as to the financial difficulties generally suffered by single mother households or the economic climate in Japan.

### **Cultural tolerance**

118 Mr Gorman asserts there is “a lot of racism and discrimination against non-Japanese citizens in Japan.” He also asserts “there is a general feeling of distrust against foreigners” which is compounded by the Japanese government “regularly portraying foreigners as criminals”. Mr Gorman says based on his own experience of living in Japan, Kasey and Hanna, being of mixed racial appearance, “would attract considerable racist or at least discriminatory treatment in Japan.” He also asserts the children are likely to face “an identity crisis and come to resent their Australian heritage” if they are exposed to the discrimination he observed in Japan.

119 Mr Gorman is not qualified to compare and make judgments about racism and discrimination existing in Japan and Australia and I do not intend to take Mr Gorman’s opinions on these issues into account. Nor do I consider the report from the United Nations on racism and discrimination in Japan dated 24 January 2006 (Annexure D to Mr Gorman’s trial affidavit) to be relevant in dealing with the particular circumstances of this case.

120 In my view, Mrs Gorman is a concerned and responsible parent and would do her best to protect the children from any racist or discriminatory treatment whether they were living in Japan or Australia.

(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;*

121 This is also an important factor since the costs of Mr Gorman spending time with the children will be high if they move to Japan.

122 The parties agree the approximate cost of return airfares for one adult and two children to travel between Perth and Osaka is about \$5,000. Neither party says they have any significant capital behind them which I accept is the case. Mr Gorman does appear, however, to be in a much stronger income position than Mrs Gorman. His annual earnings are about \$82,000. Mr Gorman says his parents are self funded retirees and they paid about \$40,000 towards his legal fees for this case. Without conceding in cross-examination his parents would be able or willing to continue to provide him with financial support, Mr Gorman did not deny he could expect his parents' help if it was needed. Given the support Mr Gorman has received from his family in the past and their obvious concern about his and their own ongoing involvement with the children, my impression is they would be likely to assist Mr Gorman with travel costs if it was needed. In summary, if relocation was permitted, I am satisfied Mr Gorman will be able to fund the costs of airfares for himself and the children to spend at least the one long holiday period with the children each year in Australia. Mr Gorman does, however, seek that Mrs Gorman contribute to the children's travel costs if Mrs Gorman is allowed to move.

123 Mrs Gorman's position financially is far more uncertain. She does not have a job to go to in Japan nor has she made any application for work. [Her father] says he is not able to assist Mrs Gorman financially and Mrs Gorman accepts this position. Mrs Gorman says if she can move she will try and help with the costs for the children travelling to Australia from 2011 which will give her time to save. I accept Mrs Gorman would do her best. I do, nonetheless, have concerns about her ability to save any significant funds in Japan after meeting her and the children's living costs even with Mr Gorman's child support. When asked about the work she would do in Japan, Mrs Gorman said she would like to counsel foreigners and was confident she has the English skills to find such work. Mrs Gorman does not, however, have any prior experience in this type of work and did not dispute Mr Gorman's evidence she has not worked in Japan for at least 10 years. There is too little information and too much uncertainty for me to be confident about Mrs Gorman finding suitable work in Japan from which she could contribute to the children's travel costs, even from 2011.

124 Mrs Gorman is willing to move out of her home during any time Mr Gorman travels to Japan to help reduce his costs of seeing the children. Mr Gorman raised no concerns about staying with the children in the absence of Mrs Gorman which would appear to be reasonable and cost saving if he does not wish to arrange his own accommodation in Japan.

125 Although Mrs Gorman offers Mr Gorman time with the children during the three holiday periods in Japan for up to seven weeks, she did not seek to question Mr Gorman's evidence that he presently has only four weeks annual leave entitlements each year. On this basis, I accept it would be impractical for Mr Gorman to spend the time with the children in Japan that Mrs Gorman proposes, at least during 2010. He

would, however, be in a position, with family support and vacation care to spend more time with the children in Australia during school holidays than he could spend in Japan.

126 Apart from the travel costs to enable Mr Gorman to spend time with the children if they move to Japan, the substantial distance between the two countries would necessitate Kasey and Hanna spending many hours in flying time each year to spend time with Mr Gorman. No evidence was led to suggest that the children have been unable to cope with the long flights they have made in the past and I do not view the rigours of the children flying between Australia and Japan to be a significant factor.

*(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;*

### **Accommodation**

127 If Mrs Gorman is allowed to relocate to Japan, she intends to live with the children at her parents' home until she is able to find a home close by. There is no suggestion the accommodation offered at [her father's home] home fails to adequately meet the accommodation needs of the children. In her Perth, both parties presently rent homes and I accept each of the parties can offer the children comfortable and appropriate accommodation in Perth.

### **Supervision and financial needs**

128 Mrs Gorman presently works on a part-time basis and Mr Gorman works full-time, leaving home at about 7.30am and returning about 5.30pm. Mr Gorman's employer, indicated in its letter dated 9 January 2009 it is presently able to offer staff a "flexible working environment" which includes the opportunity to work from home for short periods if considered appropriate. Neither party suggests the children's financial needs are not being adequately met from their present incomes.

129 It is also not in dispute that the children have settled well into the child care arrangements made for them in Australia and between the parties and members of Mr Gorman's family, in particular his parents, the children have a very strong support network in Perth.

130 Whether Mrs Gorman lives in Perth or in Japan, I accept she will need to work and will likely need help with the supervision of the children when she is at work and the children are not at school.

131 The deterioration in the health of Mrs Gorman's mother has meant she is unable to assist with the children's care as she has done in the past and much of [her father's] time he says is spent caring for his wife.

132 Whilst I accept that Mrs Gorman is a very capable and focused parent who will do her best to ensure the children are properly provided for, I do have concerns as to how Mrs Gorman will manage to meet the children's financial needs if she is unable to find suitable employment or is unable to secure suitable child care facilities in Japan to fit in with her hours of work.

133 Mrs Gorman did not challenge Mr Gorman's evidence that when she remained in Japan with the children for eight months in 2006 and Mr Gorman was in Australia, it was necessary for her to seek extra funds from Mr Gorman because she could not find suitable work. Mr Gorman says he was in a position at this time to provide extra funds for Mrs Gorman because he was living with his parents and could afford to do so. If Mrs Gorman is unable to secure appropriate employment in Japan, I am not satisfied Mr Gorman would be in a position to provide from his current income any significant ongoing support for Mrs Gorman after meeting his own living costs, child support payments and trying to set aside funds for travel costs. Furthermore, no evidence was led to suggest Mrs Gorman would be entitled to any significant government benefits from which she could meet her expenses if she is unable to find suitable employment in Japan.

134 The state of the evidence is such that I can only speculate as to how Mrs Gorman will manage to provide for the children if she was unable to find suitable employment in Japan.

### **Intellectual and schooling needs**

135 The children both presently attend the local primary school where Kasey has completed Year 4 and Hanna has completed Year 1.

136 The parties agree Kasey is performing well at school and has been accepted into a special program for high achievers. His semester 1 school report for 2009 describes Kasey as "an extremely clever and capable boy who usually achieves good results in all subject areas, although he has not as yet achieved the standard of excellence that he is capable of".

137 Hanna is also achieving well at the school. In her semester 1 report, Hanna's teacher says:

"Hanna has grown into a confident and highly motivated student this semester. She sets goals for herself, strives hard to achieve them and consequently has made excellent progress in all areas. Hanna is a positive and engaged girl who focuses well on set tasks and is always ready to work".

138 The reports of both children also indicate no behavioural problems. I accept that both children are happily settled at the school and are making very pleasing progress of which their parents should be proud.

139 If Mrs Gorman relocates, she intends to enrol the children at the school they attended previously. Kasey attended the kindergarten attached to this school for nearly two years when the parties lived in Japan and he has already spent about two months at the primary school as earlier noted. I am satisfied both children are likely to receive an appropriate level of education whether they are schooled in Australia or Japan. They are fluent in both languages and appear to be children who strive to do well.

### **Social and emotional needs**

140 The children presently enjoy sporting interests and engage in other activities both during the week and on weekends which both parties support. They have made good friends, both at school and outside.

141 The children's school reports describe both children as consistently displaying social and civic responsibility and concern for the rights of others.

142 In his school report, Kasey's teacher describes him as "a very kind and loyal friend who is happy to offer his help to anyone who needs it and he has a strong sense of justice and fair play".

143 Hanna's teacher says of Hanna in her report "her peers value her for her friendly and caring nature and she is always polite and an excellent role model". There is no reason for me to doubt the children would also make good friends if they are living in Japan and enjoy various sporting and other interests. The parties agree Kasey, in particular, is looking forward to playing baseball in Japan.

144 Overall, I am satisfied the children's emotional needs and social needs will be properly provided for, whether they are living in Perth or Japan.

(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;*

145 Kasey and Hanna are of mixed ethnic background. As earlier noted, the parties and the children speak both English and Japanese. I accept the children's Japanese background and culture has been promoted by both parties during their time in Western Australia. I am satisfied in the event the children continue to reside in Western Australia, they will maintain an association with their Japanese heritage but this association is likely to be significantly greater if they are residing in Japan.

146 In his Papers for the Judge, Mr Gorman submits if the children relocate to Japan, there will be limited opportunity for them to be exposed to Australian culture. The children have lived virtually full-time in Australia since late 2006 and I accept they have adapted well to life in Australia. Whilst the children's opportunity to maintain an association with the Australian culture will be much less if they are residing in Japan, I accept Mrs Gorman will do her best to ensure the children maintain their cultural ties with Australia. They will also be spending significant holiday time with Mr Gorman in Australia, if relocation is permitted and I am satisfied the children are likely to



maintain an association with their Australian heritage if they move to Japan, although it would be much stronger if they continue living in Perth.

- (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;*

147 This consideration is not relevant to the case.

- (i) *the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*

148 Mrs Gorman acknowledges that Mr Gorman is “a wonderful and loving parent”. She does, however, express concerns that Mr Gorman has placed his own needs before those of the children in various ways, including his refusal to consider the children are being prevented from maintaining the same relationship with Mrs Gorman’s side of the family as they do with his family in Australia. Mr Gorman does not dispute the children are close to Mrs Gorman’s family in Japan, particularly her parents. I accept, however, Mr Gorman genuinely considers there is a “real risk” the children will not return to Australia, if they are permitted to relocate or holiday in Japan with Mrs Gorman and I do not view his opposition to Mrs Gorman’s application as motivated by a desire to stop the children spending time with Mrs Gorman’s family.

149 When assessing the parties’ attitudes to the responsibilities of parenthood, a very important factor is the likelihood of each parent positively promoting the children’s relationship with the other. The only reservation Mr Gorman expresses to Mrs Gorman’s attitude to the responsibilities of parenthood is her willingness to support his relationship with the children, particularly if they are living with Mrs Gorman in Japan. I have already made findings dealing with this aspect.

150 Overall, I am satisfied Mr Gorman and Mrs Gorman have each provided a proper standard of care for Kasey and Hanna and have generally shown a very positive and responsible attitude to their role as parents. Prior to the parties’ separation in June 2008, I am satisfied Mr Gorman fully supported the children and at times this meant him working long hours. He has also shown a very strong desire to involve himself in the care and upbringing of the children as best he could given his work and study commitments. Mrs Gorman, I accept has also been very committed to providing for the children’s needs both before and since the parties’ final separation.

- (j) *any family violence involving the child or a member of the child's family;*
- (k) *any family violence order that applies to the child or a member of the child's family, if:*
  - (i) *the order is a final order; or*

(ii) *the making of the order was contested by a person;*

151 There are no family violence orders which apply to Kasey and Hanna or to any family member and the issue of family violence has already been considered.

(l) *whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;*

152 It is nearly always preferable to make orders that are least likely to lead to further proceedings between the parties. Court proceedings in the future are likely to put significant financial and emotional strain on the parties and be harmful to the children.

153 If Mrs Gorman is permitted to live in Japan with the children, I am satisfied she can be relied upon to comply with orders of this Court as earlier noted. If relocation is not permitted, I am also confident both parties will comply with the parenting orders making any enforcement application unnecessary.

154 I do not, however, rule out the possibility of there being further proceedings between the parties' in the future. This is a finely balanced case and if Mrs Gorman is unsuccessful in her application, it would be open to her to reapply at some later stage to move to Japan with the children.

(m) *any other fact or circumstance that the court thinks is relevant;*

155 Apart from matters that may be considered in my discussion and conclusions, there is no fact or circumstance I view as being relevant.

### **Section 60CC(4) factors**

156 The Court is required under this section to consider the extent to which each party has fulfilled or failed to fulfill their parenting responsibilities. I am satisfied Mr Gorman and Mrs Gorman have participated in Kasey and Hanna's lives as fully as they were reasonably able to in the circumstances. All other matters I view as relevant to this section have been considered.

### **Discussion and conclusions**

#### **Parental responsibility**

157 As earlier mentioned, the parties agree that an order should be made for them to have equal shared parental responsibility for Kasey and Hanna. This does not relate to the time the children are to spend with each parent but rather the responsibility for decision making. I am satisfied that Kasey and Hanna will benefit from having each of their parents involved when future decisions are made on important long-term issues concerning them and I intend to make this order.

**Equal time or substantial and significant time**

158           Having determined the parties should have equal shared parental responsibility, I am required to consider whether Kasey and Hanna spending equal time with each of their parents would be in the children's best interests and is reasonably practicable.

159           If I am not prepared to make an order for the children to spend equal time with each parent, I must consider whether it would be in their best interests to spend substantial and significant time with each of the parties and if so, whether this would be reasonably practicable.

160           Equal time or substantial and significant time is reasonably practical if Mrs Gorman remains living in Perth. She does not dispute the parties presently live about three kilometres from each other and the children's school and after school care in Highgate is also reasonably close to where the parties live.

161           Mrs Gorman presently works for a Japanese company in Perth, as an administrative assistant. She says "I enjoy my work very much because I am surrounded by work colleagues who are both Japanese and non-Japanese". Mrs Gorman further says, and I accept, she has friends in Australia, mostly Japanese people, presently living here and she also tries to maintain friendships with the parents of some of Kasey's friends who used to go to Japanese school with him. Whilst I do not have clear details of Mrs Gorman's current income, she does not, as earlier noted, suggest being unable to meet the reasonable needs of herself and the children from her employment income, child support and any government benefits to which she is entitled.

162           Mrs Gorman does not assert it is a viable option for Mr Gorman to move to Japan and spend equal time or substantial and significant time with the children in that country. As earlier noted, Mr Gorman does not suggest he would move to Japan to be closer to the children if Mrs Gorman is permitted to relocate. Mr Gorman says his decision to return to Australia in 2006 was made in consultation with Mrs Gorman for various reasons, including his inability to find work to best use his qualifications and his desire for "a balanced work family life combination" which he could not find in Japan. I accept this evidence from Mr Gorman, who was not challenged on it.

163           It is also the case Mr Gorman does not have a current visa which would allow him to work in Japan and without having first found a potential employer willing to act as his sponsor, I accept an appropriate working visa could not be obtained. Mr Gorman further says he would find it very difficult because of his age and lack of teaching qualifications to obtain a working visa. Given that neither party submitted it was a viable option for Mr Gorman to move to Japan and the uncertainty as to whether Mr Gorman could find suitable employment in the city where Mrs Gorman intends to live in Japan, I am not satisfied it is reasonably practical for Mr Gorman to leave Perth and give up his current employment which offers favourable conditions, a good salary and the opportunity to make use of his qualifications to build a career. Even if Mr Gorman could obtain a working visa for Japan, I am not satisfied it would be in the children's best interest for this to occur. There is no evidence upon which I could be satisfied Mr Gorman would be able to provide both financially and emotionally for the children in Japan as well as he is able to in Australia.

**Mrs Gorman's claim to relocate with Hanna and Kasey to Japan**

164 This is a very difficult case where I am faced with two loving parents, each of whom has a great deal to offer Hanna and Kasey.

165 I am satisfied Mrs Gorman's reasons for wanting to return to Japan with the children are bona fide and not motivated by any desire to limit or prevent Mr Gorman from playing a significant role in the children's lives. I am further satisfied Mrs Gorman does not wish to move the children to Japan to try and damage Mr Gorman's relationship with them.

166 I also accept as earlier noted that Mr Gorman is genuinely concerned the very close relationship he has with Hanna and Kasey is likely to be severely harmed if Mrs Gorman is allowed to move back to Japan with the children.

167 My decision, however, must be based on the best interests of Hanna and Kasey remaining paramount and this has priority over the understandable desires of each of the parties.

168 As earlier noted, I accept Mrs Gorman's strong wish is to resettle the children in Japan. She misses her home country and family in Japan very much. It would have been extremely difficult for her to be unable to return with the children to Japan and be available to provide comfort and support to her mother when she has been seriously ill.

169 After balancing all of the relevant factors, I have concluded that Kasey and Hanna should continue to live in Perth and not be permitted to relocate to Japan.

170 Although Mrs Gorman is likely to be very unhappy with this outcome, I am confident she will accept the decision and continue to make the best life possible for herself and the children in Perth. Mrs Gorman, I regard, as being unlikely to allow the standard of care she presently gives the children to be affected by any disappointment due to her continuing to live in Perth. Whilst Mrs Gorman will not have the emotional support that living close to her family in Japan is likely to bring, she has, as earlier noted, made a comfortable home for herself and the children in Perth where they enjoy a close relationship with Mr Gorman's family who are willing to offer Mrs Gorman support if it was needed. In summary, this is not a case where I am satisfied Mrs Gorman would give the children less than her most optimal care if she continues to live in Perth.

171 I have mentioned my concerns about Mrs Gorman's ability to find suitable employment in Japan and her ability to adequately meet the children's financial needs in Japan if she cannot find suitable work. I also have concerns about whether she will be able to find work, involving reasonable working hours which will not compromise her capacity to provide an appropriate level of care for the children. In Perth, Mrs Gorman is able to call on Mr Gorman and members of his family for assistance if necessary, which is not available in Japan, given her own mother's failing health and her father's commitment to look after his wife.

172 In Australia the children have the ongoing benefit of significant involvement and input from both parents in their lives. If relocation is granted, Mr Gorman's face to

face time with the children is likely to be limited to about seven weeks each year and spread over two school holiday periods. This is likely to affect the very close relationship they have with Mr Gorman and will drastically limit his ability to have any significant involvement in the day to day care and upbringing of the children which they presently receive and benefit from.

173           Apart from the children's right to spend time with their parents and benefit from their involvement in their lives to the maximum extent consistent with their best interests, they also have the right to spend time with other significant people in their lives. By remaining in Perth, the children will also benefit from the time they are able to spend with Mr Gorman's family with whom they are close.

### **Should Mrs Gorman take the children to Japan?**

174           Kasey and Hanna have, as mentioned, been denied the opportunity to spend time with Mrs Gorman's parents and other family members in Japan for a significant period. Mrs Gorman's parents are not in a position to travel to Australia to spend time with them.

175           If relocation to Japan is refused, Mrs Gorman seeks orders which will permit her to take the children to Japan if either of her parents pass away or become so ill that such an event is likely. Mrs Gorman further seeks that she be entitled to spend not less than six weeks each year in Japan on giving Mr Gorman at least two weeks notice of her intended travel dates and providing travel details.

176           Mr Gorman's Minute of Orders for trial contained no provision for Mrs Gorman to travel to Japan with the children. This position changed on the first day of trial when Mr Gorman said to ensure the children returned from any trip to Japan, Mrs Gorman should be limited to taking only one child at a time to Japan.

177           Mr Gorman filed an amended Minute of Orders on 23 July 2009 detailing the orders sought to give effect to this position.

178           In my opinion, Mrs Gorman should be entitled to spend up to six weeks each year in Japan and take both children together. This travel period should include, however, any time Mrs Gorman may spend in Japan due to the death or failing health of her parents which I also intend to grant. Permitting Mrs Gorman to travel with the children will allow the children to spend significant time with their extended family in Japan accompanied by their mother. There are also, in my view, significant benefits to Kasey and Hanna in being able to spend time with Mrs Gorman in her country of birth and to again experience firsthand the culture of Japan. Given my earlier finding that Mrs Gorman can be relied upon to comply with orders of this Court including any order that she return to Australia after spending time in Japan, I am satisfied Mrs Gorman taking both children to Japan for these periods is in the children's best interests. I view Mr Gorman's proposal for Mrs Gorman to take one child at a time on any trip as unwarranted, unnecessary and likely to inflame the parties' differences.

179           The main focus of the trial was whether Kasey and Hanna should be able to relocate and neither party made submissions as to when the overseas travel should occur and the conditions which should apply to the travel, if any.

180 Unless the parties otherwise agree, in my opinion, the following conditions should apply to any overseas trip taken by Mrs Gorman to Japan:

- (a) Mrs Gorman should give written notice and provide the following details not later than 21 days prior to her intended departure date unless any trip is related to the death or seriously failing health of one of her parents in which event Mrs Gorman shall provide as much notice as is reasonably practical:
  - (i) a copy of the children's paid return air tickets or confirmation of the return flights having been booked and paid;
  - (ii) a travel itinerary for the trip; and
  - (iii) contact details for Mrs Gorman and the children whilst in Japan including the telephone number and addresses of where they will be staying.
- (b) the start of any holiday trip to Japan during the children's Christmas holiday period be not earlier than 28 December to allow Mr Gorman holiday time with the children in the early part of the Christmas holidays and time over Christmas; and
- (c) Mr Gorman be entitled to make-up time with the children for any holiday period he misses out on because of Mrs Gorman's travel to Japan.

### **Children's passports**

181 In his amended Minute of Orders filed after the trial, Mr Gorman sought orders entitling him to hold the children's passports and keep them valid. Mrs Gorman did not have any opportunity to respond to this proposal and unless otherwise agreed, I intend to order that the passports be held by the Registrar of this Court and for neither party to seek to obtain any travel documents without the prior written consent of the other party.

### **Should there be "equal time"?**

182 As earlier mentioned when Mr Gorman filed his application he sought orders for Kasey and Hanna to live with Mrs Gorman and spend time with him during school terms from each alternate Thursday until the commencement of school the following Monday and on each intervening Wednesday. Mr Gorman amended his application to seek the equal time week-about arrangement on 18 March 2009.

183 Mrs Gorman opposes the children spending equal time with the parties and seeks that the current arrangements for the children basically continue.

184 In *T & N* [2001] FMCAfam 222, Federal Magistrate Ryan, as she then was, set out the factors the Court should particularly examine where a party seeks an order that a child's time be equally shared between his/her parents. Without suggesting the list was necessarily exhaustive, the factors are as follows:

- 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.

185 Mr Gorman submits Kasey and Hanna would benefit from an equal time arrangement which will involve fewer changeovers than exist at present. Mr Gorman says he would be more available to assist with the children's homework if there was a week about arrangement and that Mrs Gorman has some difficulty in assisting the children with their homework due to her limitations with English skills. He further says recently he and Mrs Gorman have managed to work more cooperatively and he gives a number of examples of the parties cooperating including organising a birthday party for Kasey and successfully communicating in relation to Hanna's need for dental treatment and homework requirements.

186 Whilst relations between the parties, I accept, have improved since the very difficult and strained period the parties went through when they were living together in the same home, I am not satisfied the children's interests would be promoted by making orders for the equal time arrangement Mr Gorman seeks.

187 In my opinion, the children should continue to live predominantly with Mrs Gorman for the following reasons:

- (a) she has been the primary caregiver from the time of the children's births and since the parties' physical separation in November 2008. The children are settled and happy in their current living arrangements, which are working well and meeting their needs;
- (b) an equal time arrangement will mean fewer changeovers for the children. However, I am not satisfied the present number of changeovers cause any significant difficulties for the children, nor will an equal time arrangement necessarily avoid or reduce the need for the parties to be able to work together to discuss and resolve many issues which will no doubt arise on an ongoing basis for an equal time arrangement to work successfully. Although I accept the parties are not in a "high conflict" situation and their abilities to deal with one another have improved, I am not confident given the parties' past differences, they could successfully implement an equal time living arrangement without risking more disagreement or conflict which has the potential to cause emotional harm to the children; and
- (c) I accept the parties have different parenting styles. Mr Gorman says Mrs Gorman should be more flexible with arrangements for the children while Mrs Gorman prefers a set routine so she can plan her arrangements for the children. No better example of the difficulties this can cause arose after orders were made for Mr Gorman to return the children to Mrs Gorman by 7.00pm each Tuesday evening. I accept more often than not, Mr Gorman would fail to bring the children back on time. This then caused problems for Mrs Gorman with meals and ensuring the children then got enough sleep for what was planned for the following day. Whilst I accept Mr Gorman may well have found it difficult to get the children back on time, his failures to adhere to the times specified in the Court order created disagreements between the parties and showed little respect for Mrs Gorman and her position.

#### **Division of the children's time**

188 The current child care arrangements are working very well and allow Kasey and Hanna to spend five nights in each fortnight with Mr Gorman during school terms. They permit Mr Gorman to be involved in the children's daily routine and give him time during weekends, school holidays and on special occasions during the year. The arrangements also satisfy the definition of substantial and significant time and ensure Mr Gorman will have significant involvement in the children's lives whilst allowing them to continue to reside primarily with Mrs Gorman who has been their major caregiver.



189 In my view, Mr Gorman should continue to spend five nights each fortnight during school terms with the children and unless otherwise agreed between the parties, I propose making orders which will essentially continue the present arrangements.

### Time on significant days

190 The parties differed in their positions as to the time the children should spend with each of them on special days during the year. Neither made submissions in support of their orders sought and led very little, if any, evidence dealing with the time on significant days. The orders proposed, for those occasions, are what I consider to be in the children's best interests.

191 Subject to hearing from counsel, I propose making the following orders which I am satisfied are in the best interests of the children:

### Proposed orders

1. The children of the marriage, namely **KASEY G** born in May 2000 and **HANNA G** born in December 2002 ("the children") live with Mrs Gorman in Perth.
2. The parties have equal shared parental responsibility of the children.
3. Mr Gorman spend time with the children as follows:
  - (a) in week 1, from the conclusion of school or after school care on Friday until 7.00pm on Sunday;
  - (b) in week 2, from the conclusion of school or after school care on Friday until 3.00pm on Saturday;
  - (c) each Tuesday during school terms from the conclusion of school or after school care until the commencement of school the following morning;
  - (d) for the first half of each of the term school holiday period unless otherwise agreed;
  - (e) for one half of the Easter holiday period in the event Easter does not fall during a school holiday period;
  - (f) for the first half of the children's annual Christmas holiday period, unless otherwise agreed which shall not include from 5.00pm Christmas day until 5.00pm Boxing day;
  - (g) for a reasonable period on each of the children's birthdays and Mr Gorman's birthday;

- (h) from 5.00pm on the evening preceding Father's Day until 5.00pm Father's Day; and
  - (i) from 3.00pm Christmas Day until 5.00pm Boxing Day during alternate years commencing 2010 and from 5.00pm Christmas Eve until 3.00pm Christmas Day in the intervening years commencing 2011 .
4. Mr Gorman's time with the children as referred to in paragraph 3 above be suspended as follows:
- (a) on Mrs Gorman's birthday from 12 noon until 7.00pm, if the children are not in Mrs Gorman's care on her birthday;
  - (b) for a reasonable period on each of the children's birthdays;
  - (c) from 5.00pm on the evening preceding Mother's Day until 5.00pm Mother's Day; and
  - (d) during any period the children are with Mrs Gorman in Japan pursuant to these orders.
5. Mrs Gorman have liberty to remove the children from the jurisdiction of Australia to travel with them to Japan as follows:
- (a) in the event either or both of Mrs Gorman's parents become so ill that Mrs Gorman is advised that they are likely to pass away in the near future, for no longer than two weeks unless otherwise agreed between the parties;
  - (b) in the event either of Mrs Gorman's parents pass away, for no longer than two weeks unless otherwise agreed between the parties; and
  - (c) for a period not exceeding six weeks in each year, which is to include any time spent by Mrs Gorman in Japan pursuant to paragraphs 5(a) and (b) of these orders.
6. For the purposes of the time Mrs Gorman may spend with the children in Japan pursuant to paragraph 5 of these orders:
- (a) Mrs Gorman do give written notice and provide the following details to Mr Gorman not later than 21 days prior to her intended departure date unless any trip is related to the death or seriously failing health of her parents in which event Mrs Gorman do provide the notice and details as soon as is reasonably practical:

- (i) a copy of the children's paid return air tickets or confirmation of the return flights having been booked and paid;
    - (ii) a travel itinerary for the trip; and
    - (iii) contact details for Mrs Gorman and the children whilst in Japan including the telephone number and addresses of where they will be staying.
  - (b) unless otherwise agreed, the commencement date for any travel during the children's Christmas holidays be not earlier than 28 December; and
  - (c) Mr Gorman be entitled to have make-up time for any holiday time missed by reason of Mrs Gorman spending time with the children in Japan.
7. The parties do all acts necessary for the children to obtain valid passports and unless otherwise agreed, in writing, the passports be held by the Registrar of the Family Court pending written notification from Mr Gorman that he has received the information detailed in paragraph 6(a) of these orders which he do give as soon as practicable after receiving the information.
8. Upon the Registrar receiving the written notification from Mr Gorman referred to in paragraph 7 of these orders, he is authorised to make the children's passports available to Mrs Gorman.
9. As soon as practicable after Mrs Gorman returns from any trip to Japan, she return the children's passports to the Registrar of the Family Court to be held on the terms set out in paragraph 7.
10. Mrs Gorman be restrained by injunction from removing the children from the Commonwealth of Australia without Mr Gorman's written consent, unless it is pursuant to the leave granted in paragraph 5 of these orders.
11. Each of the parties be restrained and an injunction be granted restraining the parties from applying for any passport for either of the children without the written consent of the other or order of this Court.
12. The parties do keep each other informed at all times of their residential addresses and contact telephone numbers and promptly advise of any changes thereto, in writing.
13. The parties do keep each other informed urgently by either telephone, e-mail or text message of any serious illness suffered by

the children or of any significant medical or dental appointments that the children need to attend and provide each other with copies of any medical reports or other related reports received in relation to the children's health as soon as possible.

14. In the event of either or both of the children requiring medical treatment, including hospitalisation, the parent with whom the children are with at the time do inform the other parent urgently by telephone of the reasons and need for such treatment.
15. The parties do authorise the school, after-school care and vacation care attended by the children, to provide to the other party school reports and other information relating to the children, including notification of special school events such as sports days/carnivals, religious events, awards/presentations or excursions.
16. The applications of the parties otherwise be dismissed and all previous orders be discharged.

I certify that the preceding [191] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate