

JURISDICTION : FAMILY COURT OF WESTERN AUSTRALIA
ACT : FAMILY LAW ACT 1975
LOCATION : PERTH
CITATION : [Father] and [Mother] [2012] FCWA 4
CORAM : CRISFORD J
HEARD : 7, 8, 9, 10, 16 & 17 NOVEMBER 2011
DELIVERED : 19 JANUARY 2012
FILE NO/S : PTW 6443 of 2010
BETWEEN : [The Father]
Applicant

AND

[The Mother]
Respondent

AND

THE COMMISSIONER OF POLICE
Intervener

Catchwords:

CHILDREN'S ISSUES - spending time and communicating with a parent - mother in witness protection scheme - father a member of an outlaw motorcycle gang - threat of harm

Legislation:

Family Law Act 1975 (Cth)

Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)

Witness Protection (Western Australia) Act 1996 (WA)

Category: Not Reportable

Representation:

Counsel:

Applicant : Counsel for the Applicant
Respondent : Counsel for the Respondent
Intervener : Counsel for the Intervener
Independent Children's Lawyer : Counsel for the Independent Children's Lawyer

Solicitors:

Applicant : Solicitor for the Applicant
Respondent : Legal Aid WA
Intervener : State Solicitor's Office
Independent Children's Lawyer : Independent Children's Lawyer

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

Gypsy Jokers Motorcycle Club Inc. v Commissioner of Police (2008) 234 CLR 532
McCall & Clark (2009) FLC 93-405
T v F and Ors (1999) FLC 92-855

WORDS IN SQUARE BRACKETS REPLACE WORDS USED IN THE ORIGINAL JUDGMENT - PARTIES' NAMES AND IDENTIFYING DETAILS HAVE BEEN CHANGED

1 The father wants to spend time with his children [child A], now 6 years old, and [child B], now 4½ years old. He has not seen them since 9 September 2010. The children's mother is opposed to any form of contact or communication between the children and their father. This is not an uncommon scenario in the Family Court.

2 This matter is complicated, however, by the fact that in 2010 the mother and the children were accepted into the State Witness Protection Programme ("SWPP"). The father is a senior member of an outlaw motorcycle gang ("OMCG"), [the Gang].

3 On 14 December 2010 the Commissioner of Police was granted leave to intervene in the proceedings.

Orders sought by the parties

4 After the parties separated on 6 September 2010 the father filed an application for final orders on 12 November 2010. He sought comprehensive orders about where the children should live and how the parents should make decisions about their long-term care, welfare and development. At the same time he filed a Notice of Child Abuse alleging the mother posed a risk to the children by reason of her swearing and inappropriate parenting.

5 At trial, in view of the complete opposition by the mother, the Commissioner of Police and the Independent Children's Lawyer to the father spending any time or communicating with the children, the father initially sought to see the children on a supervised basis.

6 In his closing the father's senior counsel also sought some form of communication between the father and the children, for example, by way of Skype. The mother remains implacably opposed to such a course. The Independent Children's Lawyer and the Commissioner of Police are able, albeit with reservations, to consider an exchange of correspondence, facilitated by the Independent Children's Lawyer.

7 After the trial in correspondence sent to the Court on 21 November 2011, the father's solicitors advised that the orders he seeks are for the mother to have sole parental responsibility for the children, excluding issues to do with their religious upbringing, their connection to [European] culture and any change of name.

8 He otherwise seeks the following as set out in his trial affidavit:

10. I seek orders that, after a period of supervised time between the children and me they then spend regular time in my care:

- (1) commencing with all day Sunday each week, from 10.00 am until 4.00 pm for a period of 4-6 months;

- (2) from 10.00 am Saturday until 4.00 pm Sunday each week thereafter (which will include child A and child B spending time with me on or about their birthdays);
- (3) in addition to (2) above, at Christmas 2012 from 10.00 am on 24 December until 4.00 pm 25 December.

11. I propose that there be a review of the above arrangements in November 2012 and if following the review, there is no agreement between the mother (or her advisors) and me within 28 days regarding the [sic] my further time with child A and child B then either the mother or I may apply to the Court for further parenting orders.

9 On 20 January 2011 the Court made orders appointing Cris De Rooster, clinical psychologist, as the single expert in this matter. Mr De Rooster produced a report dated 8 July 2011. He reported that “information contained in the assessment does not indicate, and does not support, the children living with one parent and not having any contact with the other parent, ...”. He said any time the children spend with the father should be gradually reintroduced on a supervised basis.

The State Witness Protection Programme

10 The SWPP is administered by the Witness Protection Unit (“WPU”) on behalf of the Commissioner of Police. The legislative authority can be found in the *Witness Protection (Western Australia) Act 1996 (WA)* (“the WP Act”). The WPU is a covert business unit. It operates independently within the Western Australia Police Force “to avoid undue influence or compromise from other sections of the policing structure”.

11 Section 4 of the WP Act gives the definition of a “witness”. In addition to the specific criteria set out a person is a witness for the purpose of the programme if, in the opinion of the Commissioner of Police, there is a risk to the safety or welfare of the person for any reason.

12 The Commissioner of Police has the sole responsibility of deciding whether to include a witness in the SWPP. A police officer attached to the State Intelligence Division deposes the decision to include the mother and the children into the SWPP, here, took into account:

- the antecedents of the father;
- his criminal charges and criminal history;
- confidential West Australian Police information holdings;
- information provided by the respondent; and
- other.

13 The Commissioner’s obligations under the WP Act include taking appropriate necessary and reasonable action to protect the witness’ safety and welfare. This action

includes re-identification and relocation of the witness. These steps have been implemented in this matter.

14 The WP Act refers to the need for the witness to enter into a memorandum of understanding under s 11. This memorandum of understanding may contain an agreement by the participant not to compromise, directly or indirectly, the security of, or any other aspect of, the protection and assistance being provided. The memorandum of understanding in this matter was not produced. One of the reasons the Commissioner of Police sought to intervene in the proceedings is to ensure the operational integrity of the SWPP and the protection it affords its participants (including protected witnesses and officers) is not compromised.

15 Counsel for the Commissioner of Police referred the Court to the second reading speech of 8 May 1996 for the Witness Protection (Western Australia) Bill which sets out relevantly:

...The Government's commitment to law and order is further enhanced by the introduction of this legislation. The protection of witnesses has been shown to be an integral part of the fight against serious crime in Australian and international jurisdictions. This Bill will provide the capacity to protect an innocent person who witnesses a crime and reports it to authorities.

Apart from innocent witnesses, experience has shown that in the case of organised or serious crime, it is often necessary to provide protection to persons who are accomplices or who have some close knowledge of criminal activities. In those instances, the state witness protection programme may be utilised whenever such persons have given or agreed to give evidence on behalf of the Crown. Persons who are prepared to or have given evidence when there is a risk to that person's safety or welfare need to be protected. That protection also needs to be expended to the family of a witness.

...

...This Bill will provide for the Commissioner of Police to have sole responsibility for deciding whether to include a person in the program. The Commissioner is in the best position to assess the veracity of any threat or risk to a witness. Given the sensitivity of these issues, it is essential that the information not be widely disseminated. The more people who know about the circumstances that necessitate someone being placed on witness protection, the greater the risk of jeopardising the program. The protection of witnesses is clearly a police operational matter.

(Second Reading Speech for the Witness Protection (Western Australia) Bill (undated) Western Australia, Legislative Council (Hansard), 8 May 1996, P 1584).

Forensic difficulties – evidentiary limitations

16 A termination by the Court of child A and child B’s relationship with their father is a course of last resort. Counsel for the applicant, in referring to the applicability or otherwise of the rules of evidence as set out in Division 12A of the *Family Law Act 1975* (Cth) (“the Act”), drew attention to the fact that “...the provisions do constitute a move away from a set of rules which have developed in order to ensure high standards of fairness to persons whose legal rights are being affected” and of concern “...is the tendency to assume that along with the sweeping away of those rules of evidence, broader rules, such as the need to have probative evidence before making a finding, have also been abandoned”. (Penelope Giles, ‘TOUCHING THE VOID: Division 12A in the Rules of Evidence’ (Paper presented at Law on the Lounge Conference, Bali May 2010, and Penelope Giles ‘EVIDENCE: what evidence?’ (Paper presented at Law on the Lounge Conference, Bali 2009 update of earlier paper).

17 For a number of reasons I consider that both parties operate under a forensic disadvantage in this case.

18 The mother’s complete removal from her previous location and the restrictions placed on her having any contact with family members or people from her former life present obvious difficulties for her and her lawyers in the preparation and presentation of her case for trial.

19 On the other hand, the father was hampered in the preparation of his case. The mother’s relocation was treated as a *fait accompli*. The Commissioner of Police refers to the threat he considers the father poses to the mother. A police officer deposes:

55. The State Intelligence Division (SID) of the Western Australia police conducted two independent ‘Threat Assessments’ using ISO/AS/NZS 31000:2009 standard based on the information provided by the WPU, referring detectives, their own intelligence holdings, and the Respondent. The most recent was conducted on 12 October 2010.

56. Using the Threat Level Matrix, the capability of the Applicant has been determined to be “**Very High**”. The “Intent” of The Applicant has been determined to be Very High”, **this equates to a Very High**” Threat level. Accordingly the Police Level of Threat in this instance is determined to be **Level 1 – CERTAIN**.

57. SID threat assessment indicated that “the threat and / or harm against the Respondent **WILL** occur without external intervention.”

58. The SWPC was satisfied the Applicant presented a significant threat to the Respondent and her children and determined it was appropriate they be included in the SWPP.

20 The Commissioner of Police says that information used in making the assessment may have the effect of compromising the SWPP and the mother if it is

disclosed. Given the nature of the SWPP, the expectation appears to be the Court will accept the SWPP assessment at face value.

21 There is no doubt that the powers of the Court in exercising jurisdiction under the Act are hampered by evidentiary limitations contained in the WP Act. However, the Court obviously has jurisdiction to hear evidence about any risk to a child in the SWPP. As best it can, and subject to the evidentiary limitations of the WP Act, it must assess the extent of that risk independently of the Commissioner of Police. (*T v F and Ors* (1999) FLC 92-855)

22 The Court is to ensure the important element of transparency in judicial decision making is present.

23 Another matter that deserves mention in dealing with evidentiary issues is that of the father's membership of the Gang. He is a senior member and has been a member since 1999. He has been involved in both the [Place A] and [Place B] chapters of this OMCG. He is now operating primarily at the Place B club. His evidence is that the Gang has associations with other OMCGs such as the [Gang A] and [Gang B].

24 There was reference to the bikie lifestyle during the course of the evidence. This concept was never explored with any particularity. The Court was unclear as to what it was. The nature of the evidence was far from clear. The relevance of the husband's membership of this OMCG and how it did, in reality, impact on the parties' lifestyle and their corresponding ability to parent, became what is now commonly referred to as the elephant in the room.

25 Western Australia first introduced legislation ostensibly targeting OMCGs in 2001, purporting to create "the toughest laws in Australia for combating the sinister and complex activities of criminal gangs" (Second Reading Speech for the Criminal Investigation (Exceptional Powers and Fortification Removal Bill 2001, Western Australia. Legislative Assembly (Hansard), 6 November 2001, P 5038).

26 The *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002* (WA) came into effect in July 2002 and sought to facilitate the investigation of criminal activity and provide for the removal or modification of certain fortifications and other security measures. That Act was subsequently repealed, but similar provisions are now contained in Part 4 Division 6 of the *Corruption and Crime Commission Act 2003* (WA). The validity of these provisions was upheld by the High Court in *Gypsy Jokers Motorcycle Club Inc. v Commissioner of Police* (2008) 234 CLR 532.

27 One of the key purposes of the *Corruption and Crime Commission Act 2003* (WA) is "to combat and reduce the incidence of organised crime" (s 7A), which is achieved through the Corruption and Crime Commission created by the Act.

28 In November 2008, the then newly elected WA Government announced "a multi million dollar fighting fund to combat outlaw bikie gangs and other organised crime" (Government of Western Australia 'Criminals' money will target organised crime' (Media Statement, 30 November 2008). In the wake of gang violence in early 2009 and in June 2009 it was reported that the WA Government would "introduce the

toughest anti-bikie and organised crime laws in the country, with sweeping new powers covering property searches, arrests, undercover operations and surveillance delivering unprecedented authority to state police” (Barrass T ‘Toughest New Laws for Bikies’, *The Australian* (Sydney), 18 June 2009).

29 The Australian Crime Commission in its crime profile series reports:

Some members of outlaw motorcycle gangs are responsible for serious criminal offences and form part of organised crime networks. They have developed a strong presence in several illicit markets, particularly the illicit drug market.

NATURE OF OUTLAW MOTORCYCLE GANGS

Almost 40 motorcycle clubs linked to criminal activities in Australia describe themselves as outlaw motorcycle gangs (OMCGs). The reference to ‘outlaw’ is not a legal definition, rather it refers to their view of themselves as operating outside the law. Specifically, OMCGs describe themselves as the ‘one percenters’. If 99 percent of motorcyclists operate within the law society’s conventions, they see themselves as the one percent who don’t.

The criminal activities of OMCGs distinguish them from any recreational motorcycle riding clubs comprised of people who get together solely for the purpose of riding their motorcycles and socialising (although some OMCGs claim to be simply recreational riding clubs).

(Australian Crime Commission (Cth), Crime Profile Series – Outlaw Motorcycle Gangs (2011).

30 The father denied any involvement in illegal activities. He denied being involved in the consumption or manufacture of illicit drugs, the possession of firearms and any violence, save as reflected in his criminal record. He deposes that the main activity at the club is riding motorcycles. As stated in the crime profile series “**some**” members are responsible for serious criminal offences.

31 The Court cannot act on speculation about groups as a whole, especially when a considerable amount of the speculation is media generated. The Court must act on the evidence before it and not on generalisations.

32 In weighing up the competing proposals of both parties the Court finds itself in a difficult position.

Applicable law

33 These proceedings fall for determination under the Part VII of the Act as amended by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). The objects of Part VII 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 interest 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.

34 Section 60CA of the Act makes it clear that the best interests of the child is the paramount consideration in my determination. Section 60CC sets out the matters I must take into account in determining what is in the best interests of child A and child B. Section 60CC(2) details what are described as primary considerations and s 60CC(3) details additional considerations to be taken into account in determining what is in the children's best interests.

35 In making parenting orders I am required to apply a presumption that it is in the best interests of child A and child B for their parents to have equal shared parental responsibility. That presumption does not apply if there are reasonable grounds to believe that either parent has engaged in abuse of the children or family violence. If there are no reasonable grounds to believe there has been such violence or abuse, the presumption can only be rebutted by evidence to satisfy the Court that it would not be in child A and child B's best interests for their parents to have equal shared parental responsibility (Section 61DA(1)(2) and (4)).

36 Any order for shared parental responsibility imposes on parents an obligation to consult on major long-term issues. These long-term issues are specifically defined in the Act.

Section 4:

Major long-term issues, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

- (a) the child's education (both current and future); and
- (b) the child's religious and cultural upbringing; and
- (c) the child's health; and
- (d) the child's name; and

- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

37 The parties must make a genuine effort to come to a joint decision about the issues. The obligation to consult arises from an order for equal shared parental responsibility irrespective of the amount of time that either party spends with the children and irrespective of where each lives.

38 In this case neither party is seeking there be an order in terms of the presumption that they have equal shared parental responsibility. The father is seeking to retain some shared responsibility for issues relating to the religious upbringing of the children, any change of name and their connection to the European culture. The mother opposes any involvement by the father.

39 In terms of a change of name it appears that this step is highly likely to have already taken place. Given the relocation, the children's religious and cultural upbringing is also likely to have been, at least in recent times, in the sole province of the mother.

40 I intend to make an order that the mother has sole parental responsibility for the children. However, the areas into which the father has sought to have some input still need to be considered. I will canvass the reasons for my decision about parental responsibility in the course of my judgment to avoid duplication.

The parties

41 During the trial the father's love for his children was palpable. He has close relationships with his own parents. He has a coterie of loyal friends. The single expert says he is intelligent.

42 In contrast he can be an angry, aggressive and violent man. The single expert says it is probable he feels anger towards the mother. The father told both the single expert and the Court he has no interest whatsoever in the mother.

43 The single expert opined that the father is a dominant person who wants to be in control and can be aggressive towards his environment and to people. During cross-examination by the mother's counsel, the father largely maintained his control. However, at times he was very disrespectful and challenging of her. There was thinly disguised aggression. When examples of his alleged bad behaviour were put to him, his denials were minimal and unequivocal.

44 When the father was questioned about the mother, he resorted to using some inappropriate language. This was in the face of his evidence that he did not routinely swear, particularly in front of children or women. Later in the trial the father's mother told the Court she had never heard him swear. However, the mother said her mother-in-law would often chastise her son for calling his children inappropriate names such as little cunt and pussy cock. The father blamed the mother's counsel for his use of inappropriate language in the court room. He said she had tried to trick him with her questions.

45 The father also accused the police and the lawyers of tampering with some hospital notes produced under subpoena. In the Court's view, the notes of the hospital were completely equivocal. However, when a proposition was put to the father he had acted inappropriately at the hospital his immediate response was that others were actively conspiring against him and the hospital notes had been changed.

46 The mother is considerably younger than the father. She was about 16 years of age when they first commenced their relationship. He was about 33 years of age. The single expert says the mother tends to be immature and can act impulsively at times.

47 The mother was young and rebellious when the parties first met. She had a very troubled childhood. She was keen to involve herself in what, without much elaboration, was described as the bikie lifestyle. The mother said that at first she found their lifestyle exciting, but now, in hindsight, she saw it as toxic.

48 The father said that the mother was acceptable at the beginning of their relationship, but she changed. He said she did not think and she became a pain. She would argue with him about why he went to the Gang clubhouse.

49 Over time, and with two children to care, for I accept the mother's initial enchantment with the parties' lifestyle paled. I accept she was caught in a relationship which for various reasons was subject to a power imbalance. I return to this later in the judgment when dealing with the issue of domestic violence. I accept there were times when the father was aggressive towards the mother. His behaviour was impacting on the children. In the end his behaviour towards her and its impact on the children left her with little choice but to distance herself from the relationship.

50 I found the mother's version of events more accurate and reliable than that of the father. Although some of the incidents she recounts seem incredible and may offend most people, this by itself is not enough to doubt her version. She denied making up events she recounted. She said she did not have to make them up as the truth itself was bad enough. I accept there is likely to have been some imprecise recounting of history by the mother and also some exaggeration. I take into account her immaturity and her young age at the commencement of the relationship. However, by and large where there was a conflict in the evidence I preferred that of the mother. She made appropriate concessions and admissions against interest.

51 Some of the father's evidence did not marry with other less subjective observations. He described his relationship with his daughter, [A], who was born in September 2003 in glowing terms. He said that A loved him and they got on well together. He said he saw A all the time. He told the single expert he does not spend time with her overnight as she is close to her mother. His assessment of the relationship ran counter to the single expert's observations of him with A. Mr De Rooster remarked at A's discomfort in his presence. He said she was reluctant to go with the father and did not really speak with him. His impression was that A did not feel confident with the father and did not seem to have a spontaneous relationship with him.

52 The father was not prepared to make some obvious concessions about his own behaviour. He staunchly refused to take responsibility for any of his actions. He said

his pleas of guilty to criminal charges were entered simply on advice from lawyers and in order to gain a lighter sentence rather than being a genuine reflection of guilt. He blamed his drug taking on the mother. He said his current rocky relationship with his new girlfriend was a result of police harassment and that incidents of road rage arose because of the wrong doing of others. Where he admitted assaults on others he said it was in retaliation. The father generally lacked credibility.

53 The father said he tried not to swear in front of the children and rarely did so. However, his friend [D] accepted that both the mother and the father swore excessively in the household. Almost without exception the father minimised every aspect of his behaviour.

54 The mother involved herself in the father's lifestyle and at times embraced it with gusto. She is the first to admit that her own behaviours were completely inappropriate. Given her current presentation and her evidence I have no doubt that she has made significant changes to the manner in which she now lives.

Applying the facts to the law

55 I will firstly turn to the two primary considerations in determining what would be most likely to promote the best interests of child A and child B. There is a degree of tension between these two primary considerations in this case. They go to the very heart of the matter.

56 There is also an overlap of matters in some of the other considerations. Issues I have dealt with in one of the considerations could easily fall within another area.

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

57 It is now accepted that "meaningful" in this context is synonymous with "significant". Thus, to have a meaningful relationship is to have an important relationship or one of some consequence. The Full Court in the matter of *McCall & Clark* (2009) FLC 93-405 set out what it considered to be the three possible interpretations of s 60CC(2)(a):

118. ...

- (a) one interpretation is that the legislation requires a court to consider the benefit to the child of having a meaningful relationship with both of the child's parents by examination of evidence of the nature of the child's relationship at the date of the hearing, to make findings based on that evidence, which findings will be reflected in the orders ultimately made ('the present relationship approach');
- (b) a second interpretation is that the legislature intended that a court should assume that there is a benefit to all

children in having a meaningful relationship with both of their parents ('the presumption approach'); and

- (c) the third interpretation is that the court should consider and weigh the evidence at the date of the hearing and determine how, if it is in a child's best interests, orders can be framed to ensure the particular child has a meaningful relationship with both parents ('the prospective approach').

58 The court concluded that the preferred interpretation of the benefit to a child of having a meaningful relationship is the "prospective approach". However, the court accepted that depending upon the circumstances of the case, the present relationship approach may also be relevant. The court went on to say:

119... If the interpretation we have set out in (a) above were exclusively applied, that interpretation would limit a court making appropriate orders in circumstances where a significant relationship had not been established between a child and a parent at the date of trial.

59 The court said the legislation required a court to focus on the *benefit* to the child of having a meaningful or significant relationship. In order to consider the issue of child A and child B having the benefits of having a meaningful relationship with both parents some brief background material provides a context.

60 The father, who was born in ..., is now ... years. The mother was born in ... and is now ... years. In 1999 the father became a member of the Gang.

61 The parties met in 2004 and commenced a relationship. They started living together in 2005 when the mother became pregnant with child A. He was born in ... The mother was 17 years old.

62 The father has had two other children; A, already referred to, and a son [G], born in May 2001. G passed away in January 2004 due to a medical condition.

63 The parties married in February 2006 and their daughter, child B, was born in ... The mother was then 18 years old.

64 In September 2010 the parties separated and the husband left their home in [Place C]. As a result of an incident that is alleged to have taken place at the time, the father was charged with aggravated common assault. This was withdrawn some time after the mother was accepted into the SWPP.

65 On 8 September 2010, by agreement, the children stayed overnight with the father in Place A. The following day, on 9 September 2010, the parties went to the former matrimonial home in Place C together where an argument took place.

66 The father was charged with aggravated common assault and threats to injure, endanger or harm the mother. Again, the assault charge was later withdrawn. The father pleaded guilty to the charge of threats to injure, endanger or harm and was fined \$1,200.

67 In 2010 gang crime detectives referred the mother and children to the WPU and they were subsequently accepted into the SWPP.

68 The father commenced proceedings in this Court on 16 November 2010. The father has not spent any time with the children since 9 September 2010. They have had no contact at all with him.

69 The father says that he was a self-employed cabinet maker working from home during the time the parties were together. He says this gave him every opportunity to form a close and loving relationship with the children. He was available to assist in their care. He told the single expert he was a brilliant father. The father believes child A and child B had a very strong bond with him.

70 The mother reported to Mr De Rooster that she thought child A may have a bond with the father, but as he never really spent time looking after the children, they did not develop a very close bond. She reports that the father was often away from home and involved in motorcycle club activities. She said child B was a Daddy's girl until he became abusive and she would then hide from him. She believed the children became scared of the father leading up to the separation.

71 The mother's evidence and which I accept, suggests that in the year or so leading up to the separation the lifestyle of these parties was increasingly chaotic.

72 Apart from the period of time leading to the separation, I accept that the children generally had a good relationship with their father. I accept he was involved in pleasant leisure activities with them. They enjoyed this time with him. However, leading up to separation the father's behaviour was less than ideal. I refer to the mother's behaviour later in the judgment.

73 Examples of the father's behaviour, according to the mother, which impacted on the quality of his relationship with the children are:

- Although the parties took illicit drugs from time to time the father increased his intake in around 2009. As a result he was not sleeping properly and was what the mother described as paranoid. He was fearful of people coming to the house. His behaviour was very controlling.
- When he ran out of drugs, he would become aggressive and violent. He would damage the children's toys in front of them and hit walls. On one occasion he hit child A with a teddy bear which had a metal rod down the back of it. This hurt the boy. He had a lump on his head and a small cut. He was then very frightened if someone waved their arms near his head. He cowered if anyone raised their hands.
- Child A witnessed his father pull his mother's hair and hit her face. The children were in the car when he threatened to kill her on 9 September 2009. The mother deposes child A has said he wants to be able to protect her.

- On one occasion in the latter part of the marriage the father became angry with the mother and burnt all her clothes, shoes and hand bags. This not only occurred in the presence of the children, but the father enlisted child A's help in burning the possessions.
- He was verbally abusive to the mother and the children. He constantly denigrated the children. The mother says the children became petrified of their father. He hit child B and on two occasions when he was screaming at the mother child B urinated in her bed.
- At separation the mother says child A was leaking urine. She discussed this with the WPU psychologist.

74 Mr De Rooster assessment of child A's relationship with the father is qualified by the fact he was unable to see the children in the presence of the father. However, from his observations of child A at interview and from psychological testing, he concluded in his report of 8 July 2011:

- Child A was not estranged or extremely rejecting of the father and had some positive projections of him;
- Child A did not show intense fear or have any phobic reaction towards the father;
- Any negative feelings he had about the father were normal, realistic and developmentally appropriate, given what he had experienced; and
- On 7 May 2011 child A presented as a well adjusted, confident and well mannered child.

75 In the psychological testing child A had said negative things about and displayed negative feelings towards the father.

76 Mr De Rooster did not interview child B due to her young age, but observed her to be happy, conversing and interacting spontaneously with child A and the mother. The mother says she has not said anything negative about the father to the children since the separation. Child A has had psychological counselling since his admission into the SWPP.

77 There were times during this period when the mother's behaviour was also poorly controlled. She was an inappropriate role model and acted in a particularly immature and damaging fashion.

78 However, she was and continues to be the unchallenged primary caregiver of the children. There was no question the children would remain with her at separation. The real issue for the Court to grapple with here is whether the relationship between the children and their father should resume and continue.

79 I am satisfied that prior to separation the father and the children had developed a meaningful relationship. I also accept that leading up to separation there was some behaviour of both parties, but especially the father, which created difficulties for the children. I accept what the mother says in this regard. For example, the mother said child A remembers having to fetch her clothing and shoes for burning and apologises to her. He would cower if anyone raised their arms after he was chastised by the father. She said child B was very shy and would cry if men came to the house. Child B did not talk in front of strangers. D said child B did not talk.

80 The mother says that leading up to the parties separating child A was very angry and he would break things. He was swearing, throwing things, spitting and hitting child B. She describes him having “major meltdowns”. She said child B was very withdrawn.

81 With all this in mind it is necessary to determine whether the relationship that was once established between the children and the father should be allowed to recommence and continue into the future. In doing this, the Court needs to address whether there is any benefit for the children. There is also the question of the likelihood of any threat of harm to the mother, their primary caregiver, and whether that threat encompasses the children as well. If there is any such threat, is it likely to militate against benefits that may otherwise flow from an ongoing relationship between the father and the children. If there is a threat, what is the likelihood of it being carried out.

82 On the other hand the Court needs to consider whether a complete severance of the ties between the children and the father pose a risk to their long-term emotional development.

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

83 This issue arose in many different guises.

- Lifestyle generally (during relationship)

84 The mother described the parties as having an exciting lifestyle. There was considerable money coming into the household and the parties did not lack material possessions. The Court did not gain an impression of a household that operated to any set routine or that there was a great deal of daily structure.

85 The parties engaged in some drug taking together, especially early in their relationship. Each blames the other. I consider it likely that the consumption of illicit substances such as cocaine and methamphetamine happened in the household from time to time. I do not accept that the mother was the primary instigator of the drug taking, particularly as time went on. It is far more believable that the father continued drug taking both inside and outside of the family home. His drug taking increased in the latter stages of the relationship. The mother, to the single expert, said the father left drug paraphernalia around the house. She says he was dealing in drugs and made most of his money that way.

86 The mother deposes in an affidavit she swore on 4 November 2011:

55. ... In the last year of the relationship I felt like ringing the police when [the father] would make me drive to pick up drugs. We would have anywhere from one ounce to one pound of speed or cocaine in the car and I wanted to ring up and dob him in so badly that I actually gave an anonymous tip to crime stoppers about a future drug making project of the father's where he had enough chemical to make about \$14,0000 [sic] worth of ice. I just wanted the constant abuse and violence to stop and my kids away from the disgraceful life that the father was forcing us to live. I thought there was no way out.

87 On 9 September 2009 when the parties were driving to Place C the father accused the mother of wearing a wire, meaning a hidden recording device. The implication was that the mother was working for the police and was trying to illicit information from the father about his illegal activities. This appears to be part of the reason for their confrontation in the car in front of the children on that day. The father's suspicion, about the mother wearing a wire to record any discussions runs counter to his denials of being involved in any way, shape or form with illegal activities.

88 The mother has deposed to the family's wealth being partially generated from drug dealings. She says that the father's mother was aware of his activities and sometimes received money on his behalf for drug deals.

89 I find that both parties swore excessively, not only in front of the children, but at and about the children. The children were allowed to swear and this was considered amusing. Inappropriate name calling was condoned. I find the extent of the swearing to be not only socially unacceptable, but demeaning, lacking in respect and, at times, calculated to hurt.

90 I accept the mother's evidence there were firearms stored at the property. The mother says there was a hole behind a mirror in the bathroom. She also said the father would hide firearms and drugs under the children's car seats. I have little difficulty accepting that the parties had access to firearms. The mother accepts the police have searched the father's vehicle prior to separation without locating drugs or firearms, but she says any search was not a thorough search. Since separation there have been further searches. Unsurprisingly, no firearms have been located.

91 I accept the mother's evidence that not only did the parties have access to firearms, both utilised these firearms inappropriately.

92 The mother deposes to two instances of the father actively using firearms to either threaten other persons or to discharge them in a dangerous fashion.

93 The mother recounts that during her pregnancy with child B the father pulled a gun on a man who lived across the road from them. This was done in front of child A and the mother. The gun was held to the man's head and then put on the bonnet of the car. According to the mother, the gun was loaded and the police were called. The father categorically denied having access to firearms.

94 Both in her affidavit material and oral evidence the mother recounts an occasion where the parties drove a car with a trailer down a street in [Place D]. It was a cul-de-sac and they drove to the end of the road in order to do a U turn. They observed a man punching a tree. He made a sign to the parties suggesting a slitting motion across his throat. The father retrieved what the mother described as a loaded gun from under child A's car seat. The father called the man to the car and pointed the gun at him saying "if you ever come onto this street again I will blow your fucking head off". The man ran off. The father lowered the gun and it discharged through the floor of the car and a bullet pierced the radiator. The mother says the car was full of smoke. In her evidence at trial she expanded on this and said the car was taken to [Place E] for repair. Despite there being no independent evidence about this incident, I found the mother's evidence credible.

95 In her oral evidence when cross-examined by counsel for the Independent Children's Lawyer, she recounted another instance where one of the father's friends was doing some work at their home. There was an argument between the father and his friend. The father ran into the bathroom and retrieved a gun. The mother did not see what happened, although she says she heard gun shots and later observed bullet marks on the ground. She saw the father's friend limp off, enter his vehicle and leave. She accepted she could not see the interaction, but she did hear the gun go off twice.

96 She was further cross-examined by the father's counsel. She said that she did not know what the father did with the gun. She simply heard shots and saw the friend limp away, trying to run. He did not normally have a limp. She said she thought the father may have kicked him or something.

97 In a different vein, but as equally worrying, is the mother's use of what she says is a real hand gun with the children. The mother posted pictures of the children on Facebook, each clad in a balaclava holding some form of hand gun and aiming it at the camera. Some of the pictures were taken at the former matrimonial home. The father is not present. The mother says the children were provided with the father's hand gun and told to pose. The father denies that it is his gun or that it is a real gun. He denies that there was ever any real gun on the property. The mother says one of the pictures of child A was taken in [Place F] on a houseboat on which the parties had stayed in 2009. They were on the [Y] River for four to five nights. She says that some members of the Gang B OMC were present, as was the father. The father says he does not remember the photograph being taken and he doubts he was present. The photo shows child A making an obscene gesture.

98 I do not accept the father was unaware, at least, of some of the photographs being taken. The content of all the pictures are disturbing - young children handling firearms in the manner depicted, whether real or otherwise, is completely inappropriate for reasons that were readily recognised by both parties at trial.

99 I find the father had no knowledge of the posting of these pictures until after separation. However, I accept that the manner in which the parties were living was conducive to these sorts of happenings. I am not persuaded the father's post-separation disapproval relates solely to the children's welfare.

100 The mother also alleges that the parties and the father's mother were involved in, at the very least, the receipt of stolen property. In particular, the mother says that her mother-in-law retained gold jewellery which had been provided to her by her son, the father and which was stolen. The mother admits being the recipient of stolen goods herself. She says D was also aware of the husband's activities. The detail is lacking, but the mother says she surrendered gold chains to the police which she had been wearing and which were stolen. They were confiscated. She says that her mother-in-law had a ring which was the end product of a melting down of stolen gold. The mother-in-law considered any suggestion she was involved in illegal activities to be completely ludicrous. I do not consider I need to decide what involvement the father's mother may or may not have had in this regard. What is obvious is that the father's mother is totally, absolutely loyal to her son. She said her son idolised the ground she stood on. I have no doubt the sentiment is returned and that family is above everything. All in all, I have little doubt the parties dealt in stolen goods if such goods came their way.

101 Another worrying aspect of the parties' lifestyle is their propensity to engage in instances of road rage on what appears to be a voluntary basis. The father was charged on a number of occasions in relation to interactions arising from such incidents. Although there is nothing to suggest the mother's behaviour ever came to the attention of the police, it is clear from her own postings on Facebook and her general attitude when she was in a relationship with the father that she also relished these occasions. I have little doubt that the children were also privy to these violent and unprovoked exchanges between unsuspecting members of the general public.

102 Counsel for the Commissioner of the Police took some time in cross-examination to explore the father's known criminal activities and which have resulted in his current criminal record.

103 The Court had the father's criminal record, which he admitted. However, he disputed the circumstances surrounding some of the offences for which he had pleaded guilty. He has never received a sentence of immediate imprisonment. The father has a Children's Court record, which includes offences of violence. His adult record of note stretches from 2002 to the present.

104 There are offences of violence and of making threats directed towards women. In 2002 the father pleaded guilty to assaults against his then partner, [U], and her mother, [X]. He was fined \$2,000 and \$500 respectively.

105 Arising out of an incident referred to as road rage, the father was charged on 4 August 2008 with threats to injure, endanger or harm a person. This related to a woman he had an argument with at a McDonald's drive through restaurant. The charge was later amended to one of disorderly behaviour. He pleaded guilty to the amended charge and was fined \$1,000. On 9 September 2010 he was charged with threats to injure, endanger or harm the mother. He pleaded guilty to that charge and was fined \$1,200.

106 The father was convicted of a road rage incident and to which he pleaded guilty on 30 October 2009. The charges were reckless driving, unlawful damage and an assault occasioning bodily harm. He was fined \$10,000 for the assault component of

the activities which took place on that occasion. He received lesser fines for the other charges.

107 The mother recounts other incidents of road rage where physical violence was used against members of the public.

108 Whilst the father paints an anodyne picture of the Gang motorcycle club activities, the mother has a different story. The father talks of family days and Christmas functions. The mother, on the other hand, talks of naked bar staff, drug taking and occasions of unseemly behaviour. She says on one occasion where the father took child A to the clubhouse he rang her and the mother could hear child A in the background yelling out obscenities. Although the father says that the taking of drugs is banned in the clubhouse, his responses in cross-examination did not leave the Court with an impression of the clubhouse as a drug free environment.

109 Not surprisingly, the father raises the issue of the mother's parenting. He filed a Notice of Child Abuse or Family Violence on 16 November 2010. In describing the alleged risk of abuse he says the mother poses to the children, he identifies what he terms emotional abuse by reason of swearing and inappropriate parenting. He details that the mother continually swears at the children and she had posted pictures of the children on Facebook wearing a balaclava and holding a gun. He says as a consequence the children are at risk of harm whilst in her care. He says he needs to be present in the children's lives to ensure they come to no harm.

110 In the Notification of Alleged Abuse sent by the Court to the Department of Child Protection on 25 November 2010 the history is stated thus:

The father alleges that he and the mother would often argue in relation to the mother smoking in front of the children. He stated that the mother swears and screams at the children. He reports that the children have had their photographs taken in balaclavas whilst holding a gun. The father states that these photographs have been posted on Facebook. In one of the photographs words to the effect of "fuck u mum" are written across it. He is of the view that the mother allows the children to swear and that child A has made an obscene gesture while his photograph was taken which was then posted on Facebook.

111 The mother admits the concerns raised by the father. She explains that this was what their life had become. Constant swearing and ill manners were simply part of what they did on a daily basis. The Facebook entries demonstrate an unfortunate disregard for the children's welfare. The mother expressed what the Court considers to be genuine remorse about her actions.

- Present lifestyle

112 The mother, by necessity, has now changed her lifestyle. She was accepted into the SWPP on a voluntary basis. An unnamed officer who gave evidence at trial said she has been completely compliant with the requirements of the scheme. On 21 April 2011 the officer deposed that the mother and children were relocated to a confidential location to ensure their safety. The location is known only to the police.

113 The mother and child A have undergone psychological counselling since being referred to the WPU. The mother told the single expert she suffered from recurrent nightmares after separation.

114 The police officer further deposes:

60. The respondent and the children have been relocated successfully and are in a stable, safe environment. The respondent is actively seeking employment and is integrating well into her new surroundings. The children have settled well into their new environment, and have all made new friends.

115 A registered psychologist allied to the WA Police Organisational Psychology Unit conducted an informal discussion with child A on 4 October 2010. From this discussion he noted that child A referred to his father as a “bad man who calls me bad names” and he said that his father sent him to his room and broke his toys. The child said he missed his friend [R] and his Uncle [E]. The single expert confirmed he also received the same information.

116 In an affidavit sworn by the police officer on 22 August 2011 he says that the mother has significantly decreased her smoking habit and regularly attends health and fitness classes. She is currently engaged in study and is working towards obtaining employment qualifications.

117 The mother deposes that child A is attending pre-primary school. He is doing well and is settled. He has received two merit awards for his attitude towards his work and his behaviour. She says that child A is enjoying school very much. He is working with his counsellor in relation to finding appropriate ways of expressing anger. She says that in the time leading up to separation child A was having great difficulty in managing his anger. He now calms down quickly. She said he is a happy and intelligent child. Child B is also doing well and is less shy. She is confident and content rather than withdrawn.

118 The mother says that for the first time in the children’s lives they have a routine, a conflict free environment, regular outings and one on one time with her. She wishes to remain in her present circumstances for the foreseeable future.

119 There is little evidence about the father’s present circumstances. In an affidavit sworn 8 November 2011 he gives an address in Place D, which is his [relative’s] home. In the witness box he said he resided at [Place G], which is a friend’s home.

120 He said he is not working at present and is considerably depressed. It is clear from both his evidence, the evidence of his mother and D that once these proceedings are over he will quickly re-establish himself. There is no suggestion that financial support will pose a difficulty. It is also clear that given he is not seeing his children he does not consider it appropriate that any of his money be diverted to their support.

121 The father is presently in a new relationship with [I]. He was very keen to point out the superior culinary skills and sexual attraction of I, who is aged 23 years. He said “I have a lovely girlfriend. A lot hotter than she is.” - referring to the mother. He

said I brings him crêpes with melted white chocolate in bed for breakfast each morning whilst the children's mother utilised packaged food on a regular basis. He said I fled to [Place H] after a police assault on her.

122 The father says he is constantly harassed by police. He recounts an incident on 8 December 2010 at the [Place I]. He was requested to provide identification to a police officer. He said "he was my cop". He explained that the police officer was a member of the Gang response unit which is a unit established to monitor the activities of OMCGs and their members. The father was known to the police officer. He was indignant at having to provide identification on the basis that "his" police officer knew him.

123 The father says he has not taken any drugs since separation. He does not admit to much drug taking during the relationship. It is hardly surprising he does not now use drugs. He is constantly under surveillance by the police and knows he is at risk if caught. It cannot be assumed his abstinence reflects a change in lifestyle.

124 Although the father has said he would relinquish his involvement with the OMCG if it meant seeing his children, it is not a step he has taken to date.

- Domestic violence

125 In this case the mother raises the issue of the effect of domestic violence upon her.

126 Violence between partners is a complex and contentious issue that often arises in high conflict Family Court matters, especially in those involving children. More particularly, the term domestic violence is used most often to describe a pattern of behaviour in a relationship that is used to gain or maintain power and control over an intimate partner.

127 Here it involves domestic violence which loosely encompasses violence between a couple within their own family and household setting.

128 Domestic violence can be multifaceted - coercion and threats, intimidation, emotional abuse, economic abuse, isolation, minimising, denying, blaming and use of children as bargaining chips are just some aspects of it. The consequences for a victim can be far reaching, long lasting and insidious. Power and control by another can render a person helpless to act in a manner he or she determines out of free will.

129 This Court is acutely aware of the enormous impact that domestic violence can have on a victim's life. Judgment can be impaired, behaviour can be out of character and decision-making can be skewed.

130 The Court is often asked to determine issues of domestic violence on the basis of little tangible and concrete evidence. This makes the task of a judge very difficult. Domestic violence is often hidden, without any public face and with a lack of credible witnesses.

131 The mother told the single expert that the father was physically aggressive to her during their relationship and particularly at the end of the relationship. She said he

had threatened to kill her if she ever left him. He said he would throw her off their boat with concrete around her feet. He had also threatened harm to the children and himself. At separation he had made specific threats to kill her. She was very frightened. The single expert reports that she regards him as a serious threat to her and the children.

132 The mother complained of the father's control over her. She reported not being able to have meaningful social contact with friends and family. Although she was able to have friendships she was not able to socialise freely with her friends. She admitted to having about a hundred friends in a Facebook sense, but on a closer examination there was little, if any, real contact with these people. The mother said she would sneak out to socialise on a Tuesday evening when the father was at the Gang headquarters.

133 Although the single expert talks very positively of the father being protective of the mother, I consider in this case there is a fine line between being protective and being very controlling.

134 The mother admitted that she had gone to stay with her mother on a number of occasions, but was always persuaded to rejoin the relationship after the father's entreaties of her accompanied by flowers and soft toys.

135 The mother also says that after she fell pregnant with child A the father continually used derogatory names towards her. She gave examples of the names and they, in the Court's view, are calculated to strip a person of any self esteem. In the witness box the father explained that the mother had no "brain capacity". This is a kinder version of the words the mother described the father using towards her.

136 There was a vast difference in age and level of maturity between the parties when their relationship commenced. It is unsurprising that some imbalance in power would develop given their respective backgrounds. The father already had two children, he was a member of the Gang and had been for some six years. He comes from a close family with strong male oriented traditions. The mother was young and, at most, had previously had a few boyfriends. Her world experience was limited. She was diagnosed with ADHD and had an unhappy background.

137 In his report the single expert was accepting of the fact the father is very controlling and dominant of the mother and the children. In cross-examination he accepted he had made an error in his report when he stated there was no history that the father had physically assaulted the mother during the marriage, save for the incident surrounding separation.

138 He said to the mother's counsel that he accepted the mother's version of the violence over that of the father. He said that the behaviour described by the mother, if accepted by the Court, would constitute severe emotional abuse. He said that constant emotional abuse and degradation slowly erodes a person and their psychological state.

139 Mr De Rooster accepted that on analysing the dynamics between the parties here, it was a relationship punctuated by domestic violence. Like the Court, he accepted the mother's version of the relationship.

- any threats to the safety of the mother and the children

140 The Court has previously referred to and set out the threat the Commissioner of Police considers the father poses to the mother. The police officer said that the SID collected all the information available to it about the father. The information was assessed for credibility and whether it had been validated. The SID then analysed the material and came to a conclusion on the threat level. He said that specific analysts were used to identify an appropriate threat level using international standards. Such a person had undertaken appropriate study and had relevant experience. Further detail about specific criteria of study was lacking.

141 The police officer accepted that the threat assessment had been conducted in October 2010 and had not been updated between that time and the trial. The single expert's report had not been provided to those assessing the threat level of the father. The officer explained that the welfare of the children was not the uppermost consideration in the assessment.

142 The single expert had no criticism of the assessment made by the police save that he did not consider it presently relevant. He accepted at the time the assessment was undertaken on 12 October 2010 the conclusion was relevant and accurate. However, given the time that had passed Mr De Rooster did not consider the father posed the same level of threat to the mother or the children. He was of the view that whilst the father may say things that indicated a propensity to commit violence against the mother that this was a situational response only and would not or was unlikely to translate into action.

143 Although the single expert opined the father was dominant and controlling of the mother and he could threaten people, he said this did not mean the father would actually act on those threats. He reported the father was a moderate to low risk of harming the mother and of no risk of harming the children.

144 The case of the mother and that of the Commissioner of Police is this father has made substantial threats to the safety of the mother and the children and that he is likely to carry out those threats. The father pleaded guilty to threatening to kill the mother. This arose out of their argument at separation on 9 September 2010. The mother deposes:

36. I was driving and [the father] became very abusive in the car. He said to me that he and the kids are "going to be in some place happy, and you will never see them again". I understood that he meant he would kill himself and the children or would kill me. He accused me of working for the police and became paranoid that I was wearing a wire. He tore at my face with his hands and pulled my hair. He yelled at me "where's your fucking wire", I assume in reference to me having a recording device. We were on [T] Road when he reached across and grabbed the whole bottom of my face with his left hand and ripped it towards him. He was very aggressive towards me and was leaning over whispering into my ear "you are going to die, you are going to die".

145 When this was put to the father he said it was untrue. However, he accepted he had pleaded guilty to the charge. He said it was a spur of the moment occurrence and he admitted he said he would kill the mother. He said he regretted saying it. He did not accept that the mother was frightened of him. When further questioned about this incident by counsel for the Commissioner of Police he said “Yes, I slipped up. That is all you’ve got”.

146 Mr De Rooster said the mother had reason to be concerned, at that stage, about her and the children’s wellbeing and safety.

147 The father admitted the children were in the car when he made the threat to the mother. He said they were asleep. Given the heated exchange I find this highly unlikely.

148 The mother’s position is that it was not uncommon for the father to threaten to kill her, the children or himself. The mother deposes to having reached a stage where she could not accept the behaviour anymore.

149 The father said the fact the mother had removed the children from him had hurt him considerably. He said he would chop off his arm to get his children returned.

150 The father was very keen to distance himself from wanting to take revenge against the mother. He denied he was a threat to her or wanted to have anything to do with her. He drew attention to the fact he had a new partner. He denied that the Gang motto was “revenge is a dish best served cold...”

151 The mother believes the father will seek revenge. She said he would wait until things died down. The single expert said the mother has a genuine long-term fear the father may kill her.

152 The mother said the father had utilised private investigators in the past to ascertain addresses of people who had crossed him, for example, after instances of road rage.

153 The police officer deposes in the affidavit sworn 21 April 2011 that:

52. Since the respondent and her children have been with the WPU, police intelligence indicates that the applicant has made attempts to locate them by contacting family members and other associates. Information was received by WPU that the applicant had confronted an associate of the respondent’s brother in December 2010 and an altercation had ensued. The applicant has told the associate that he was looking for the respondent.

154 The Court is acutely aware of the limitations of this evidence. In the same vein, the single expert said that the father and the maternal grandmother are involved in civil court proceedings which would be settled if the mother’s mother said where the children were.

155 Both parties point to the father’s relationship with [U] as lending support for their respective positions. The father was in a relationship with U between 2000 and

2002. The father was charged with assaulting U and her mother. This has already been referred to.

156 As a result of these assaults U was granted a restraining order against the father. Initially, this was for two years duration and covered both U and the child G. After some negotiation, G was removed from the ambit of the order and the order as it protected U was extended to a five year period.

157 It was pointed out, quite correctly, there was never any action taken against the father for a breach of the order. Counsel for the father argues that the father is a person who would respect a restraining order and that such an order would protect the mother here. This was put to the mother in her cross-examination.

158 The mother denied that the father would or did respect violence restraining orders. She said that early in their relationship on a few occasions he had taken her past the house of U's mother to see if anyone was there. He was not aware where U lived. The mother says the father took her to try and locate U on, at the most, six occasions. She said that the father had painted U in a very bad light. At the time she had thought very little about it. She said he had actually used the word revenge. He had described that when he found out where she lived he would have someone knock on the door to make sure she was there and when she answered, acid would be thrown on her face or she would be kidnapped. She said he actually made enquiries of a private investigator and also of persons he had dealings with in relation to drugs as to where she lived.

159 She said she did not think a violence restraining order would be of any use if the person against whom the order was made wanted to hurt the protected person badly enough. The single expert accepted that if the father is trying to locate the mother it is a matter of concern.

Additional considerations

160 I must now turn to the additional considerations. The additional considerations are not secondary considerations but are matters to be read in conjunction with the primary considerations.

- *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*

161 I have not been provided with any evidence upon which I can rely about the children's views. They are very young and, in any event, I do not consider this to be a factor in my determination in this case.

- *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)*

162 During the time the parties were together, save as I have previously noted, the
children had a good relationship with both their parents. Things changed towards
separation.

163 I find the mother has always been the primary caregiver and primary attachment
figure for these children, although the father also spent a lot of time with them. The
children have a very good relationship with their mother. In the past she has not
always acted in their best interests. However, the children are both close to their
mother. Mr De Rooster said child A had a respectful bond with his mother and
child B had a dependent relationship with her.

164 In terms of the world at large, I find that the father was protective of the children
and cared for them. There is no doubt he loves them. However, I find his relationship
with them became a very controlling one, especially during extended periods of drug
taking. He did not like child A or the mother to have activities outside the home and
placed restrictions on them.

165 Given the father's personality the children's relationship with him has been
marred at times by his propensity to anger and remonstrate in a physical sense. I have
no doubt the children have witnessed at least some of the incidents of road rage
outlined in the judgment. It is not surprising that they would have, at least from time
to time, been very frightened of him. He is physically imposing and, as was aptly
demonstrated in the witness box, can be verbally challenging.

166 I also accept that the children had a good relationship with the paternal
grandparents. Through the paternal grandparents the children were able to experience
some of the European culture the family holds dear. I have no doubt that the paternal
grandparents provided a warm and inviting environment for the children.

167 The children were also close to the maternal grandmother and the mother's
brother, E.

168 In the psychological assessment Mr De Rooster asked child A to draw his
family. He initially drew his sister, himself, his mother, his Uncle E, the maternal
grandmother and his Uncle [N]. He did not draw his father. He later included his
father after being asked to do so by the single expert.

169 At present the children are seeing only their mother. As a result of her
acceptance into the SWPP she and the children have no present relationship with any
of her family. Her continued involvement in the SWPP means she will have no
contact with any of her family or friends.

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

170 The mother is not willing to allow the children to have a relationship with their
father. She is fearful for their safety. She is also afraid for her own life. She sees any
relationship of the children with the father as inevitably leading to the identification of
where she and the children now live. His discovery of her whereabouts, in her mind,

equates to him wreaking revenge on her for the removal of the children from him. I accept this is an emotion she genuinely holds.

171 The police officer puts the position of the Commissioner of Police in relation to the children spending time with their father:

34. Access visits between the applicant and the children are not consistent with witness protection methodology as they would:
- a. pose an unacceptable risk to the safety of the respondent, and potentially also to the children;
 - b. jeopardise the operational integrity of the SWPP for these witnesses and others;
 - c. lead to ‘avenues of inquiry’ for the applicant to locate the respondent;
 - d. place the children in a situation where they may be put under pressure by the applicant to disclose information
 - e. allow the children to disclose information inadvertently.
 - f. renew previous psychological stresses to the respondent and the children [sic]

172 This, quite independently of her own fears, does impact on the mother’s practical ability to foster a relationship between the father and the children.

173 The father has a lifestyle that assumes the mother of his children or the females of the family will provide the primary care for the children. He has the role of the financial provider and protector. To that extent, I consider he would acknowledge the mother’s position in the children’s lives and promote their relationship with her.

174 Superimposed on this, however, is the issue of the mother’s safety and thus the impact on the children of harm being done to their mother.

- *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*

175 The evidence about the children’s current circumstances is scant. In this case the changes the Court would normally consider here have already taken place. In summary, the Court is aware the children have changed physical location and they are ostensibly progressing well. This evidence comes from the mother and the police.

176 The single expert reports the children are doing well. His report of 8 July 2011 speaks well of their physical and emotional state. He had seen them in April 2011. At that time the children had not seen their father for almost six months.

177 Any change to these circumstances, although unknown, will have the effect of compromising the mother's continuing acceptance into the SWPP. This will impact on her greatly. She does not want to return to living in close proximity to the father. In fact, she wants her location to be withheld from him permanently.

178 Although the mother plays down any present impact on the children of not being with their father, there can be no doubt that the children are likely to experience some long-term emotional difficulties as a result of the complete removal of their father from their lives without, at the very least, adequate or appropriate explanation and support. When questioned about this, the mother indicated that she would seek some assistance when the time was right. At the moment she has explained to child A they are simply on a holiday. Given he is attending school and has been for over a year, the explanation of simply being on holiday is possibly ringing a little hollow. This is an issue that needs to be addressed with professional guidance.

179 The mother says the children have not asked about their father or questioned in any great detail why they are living where they now do. There are a number of explanations for their lack of enquiry and it would be inappropriate to speculate that it is consistent only with them not missing their father.

180 The mother and child A continue to undergo psychological counselling in their new location.

181 If there were any changes to where the children now live, I accept it would have a devastating impact on their mother, at the very least from an emotional point of view.

- *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*

182 As the mother's location is unknown, it is purely speculative to consider any cost or difficulty associated with travel between their respective locations. The difficulty comes from the nature of the SWPP in its aim to protect the mother, the children and the integrity of the programme itself.

183 I accept that seeing the children, whether under supervision or not, is likely to lead to a discovery of the mother's location. Children of this young age are likely, inadvertently or unconsciously, to give information that identifies their location. This makes communication, whether direct or indirect, a real issue.

184 The father has proposed a Skype facility utilising a delayed transmission device. This gives an ability to effectively stop any transmission which may contain compromising information. I am not persuaded this is a viable proposition. It is likely to require close monitoring by the user of the Skype facility at the mother's end. Given the nature of the SWPP this may involve members of the WPU or other police. This is not the best environment for the children to communicate with their father. Given the father's attitude that the police are corrupt and they deliberately target him, it is unlikely that any exchange will be of benefit to the children.

185 The expense and difficulty of implementing such an arrangement is likely to
outweigh any marginal benefit that may flow.

186 If there is to be any communication, in my view, it is to be by correspondence
which is facilitated either by the Independent Children's Lawyer or some other
suitable third party. This will involve minimal expense, albeit some practical
difficulty. It is a method by which the lines of communication will be kept open
between the children and their father. It will enable them to know their father is
interested in them and does wish to maintain a relationship which the children can take
up or not as they please at a later stage when they have reached maturity.

- *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

187 Mr De Rooster reports that both parents can provide for a consistent home
environment and can meet the children's needs of shelter, food and clothing. They
have the capacity to ensure that the children develop physically and participate in
sport. He says both parents have the capacity to meet the children's medical needs
when required.

188 He further says both parents are intelligent and will stimulate the children and
can provide for their intellectual development.

189 He does pinpoint that the father is limited in providing for some of the children's
emotional needs. In this respect he points to the father's relationship with the mother,
his criminal record and domestic violence history.

190 Mr De Rooster says the father provides a strong traditional male oriented role
model. He said he is assertive and protective. He also implied the father treated
women in a demeaning fashion. This latter view was more in accord with the view
formed by the Court. The father could be aggressive and dominant towards women.

191 His assessment of the mother's capacity is perhaps reflected in the present
presentation of the children as well adjusted behaviourally and emotionally at school
and at home. The single expert points to the fact she has protected the children by
leaving a stressful relationship and she has assisted the children to adjust and deal with
the effects and consequences of the changes. She is presently a full-time homemaker
and is fully committed to parenting the children. She is protective, supportive and
emotionally warm and healthy.

192 Although he is critical of the lifestyle she led during the relationship, including
excessive swearing, the placing of photographs of the children on Facebook with a
hand gun and dressed in a balaclava, he reports "these are of no major concern".

193 Whilst there is ample evidence that the mother has made significant changes to
her lifestyle, albeit in an extremely radical fashion, there is little to suggest the features

of the father's lifestyle already mentioned in this judgment have changed to any extent.

194 Some of the attitudes, behaviours and beliefs of the father point to an inappropriate role model for children. I accept that he can be loving and caring. There is a basic need, however, to live within the mores and to accept the general values of society rather than to continually confront them. I consider his attitude may create barriers for the children's overall welfare and development in the future if they continue to be exposed to it.

195 Whilst not denying the father does have, especially with the assistance of his family, capacity to parent the children, overall, I am satisfied the mother is far more suited and insightful of the future needs of these children.

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

196 The mother has shown considerable lapses in judgment in the past. Her age and immaturity have played a part in this. However, she has made changes which reflect a responsible attitude to the long-term welfare of these children insofar as they have been removed from an environment that was not conducive to their wellbeing.

197 I find a dichotomy in the father's attitude to these children. Whilst he is protective and caring on one level, another area of his life reflects an attitude of violence and control. This undermines the positive attributes of parenthood he clearly holds.

- *any family violence involving the child or a member of the child's family*

198 Where relevant this has been discussed earlier in the judgment.

199 In deciding who is to be included as a witness in the SWPP the Commissioner of Police must have regard to the nature of the perceived danger to the witness (s 8(f) of the WP Act.). This has played a part in the threat assessment of the WPU.

200 I accept this is also a relevant matter for this Court. Any danger to the mother will impact on her ability to parent fully.

- *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*

201 In considering whether a witness should be included in the SWPP the Commissioner must have regard to whether there are viable alternative methods of protecting the witness (s 8(e) of the WP Act). There is no doubt that relocation and re-identification is an enormous step to take by both the WPU and the witness sought to be protected. It has far reaching financial and emotional implications. It is not a step to be taken lightly.

202 There has been no application by the mother for any restraining order. She was
very quickly taken into the SWPP after separation. The police officer said a violence
restraining order offered little protection in this case.

203 The mother said that historically the father's attitude about restraining orders is
that a piece of paper will not stop a bullet.

- *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*

204 It is pure speculation to try and fathom what order is least likely to lead to the
institution of further proceedings. I have already noted the father's great love for his
children. This is juxtaposed against his disenchantment and suspicion about the law
enforcement and legal systems generally.

205 I accept counsel for the father's submissions that on this occasion the father has
made the relevant application to see his children. The conduct of his case was more
than appropriate. Whether he is likely to continue through this forum is another
matter.

Discussion

206 Simply stated, the issue for the Court is whether child A and child B should see
their father and, if so, how. I have set out the many and varied matters that impact on
this question.

207 A curtailment of the children's relationship with their father is an option of last
resort. It is an outcome the Court does not wish to impose. It runs counter to the
general aims of the Act.

208 At the beginning of these reasons I set out the objects of Part VII of the Act.
Federal Parliament has given recognition to the proposition contained in the *United
Nations Convention on the Rights of the Child*, signed 22 August 1990, ATS 1990
No. 4 (entered into force 2 September 1990) that children have a right to know and be
cared for by both their parents and have a right of contact on a regular basis with both
of their parents.

209 In the circumstances of this case it is necessary to consider whether there are
benefits to the children in having a meaningful relationship with their father. It would
be an unusual case where there are not at least some benefits flowing to children from
having a good relationship with both parents. However, there is no presumption that
every child benefits from a relationship with their parents.

210 It is necessary to critically analyse whether any benefits there may be are
outweighed by other factors.

211 The mother has a very real fear the father will kill her or, at least, cause her harm
if he knows her whereabouts. I have no doubt that this fear is genuinely held. I accept
it is a present fear and it is also likely to endure.

212 The mother's expression of fear in this regard was the only occasion upon which she showed much emotion in giving her evidence.

213 If the likelihood of the father locating her is increased, then her anxiety is also likely to increase. Although she is a diligent and resilient parent, I find it will be difficult for her to carry out her role as primary caregiver in the best possible fashion. Her behaviour when under stress at the end of the marriage supports this.

214 The mother also has a concern that the children will be harmed. I accept the father has made threats against the children and has also made threats to harm himself.

215 Mr De Rooster said it is an open question as to what the father is capable of. This is somewhat in contrast to his evidence that he sees the father as a low to moderate risk of harm to the mother and of no risk to the children.

216 In the mother's affidavit sworn 27 April 2011 after dealing with matters leading up to the separation she says:

33. On Monday 6 September 2010 [the father] hadn't slept for a week as he had been using amphetamines and was in a very bad and irritable state. We came home from shopping late in the afternoon and he started to abuse me in the kitchen. He told child A to "fuck off out of the kitchen you stupid little cunt". I told [the father] to stop speaking to child A like that. He then lost his temper, saying that I turned the children against him and it was all my fault. I went into child A's bedroom with the kids but he followed me in and demanded that I come out and talk to him in our bedroom. I knew he wanted me to go into our bedroom as it had a lock on the door. I went out into the lounge room and child A followed me. [The father] started saying that I was a dumb slut and that I have fucked up his head. Child A said, "I want to kill you dad, mum, I want to kill my dad." I then went into child B's bedroom. [The father] kept telling me to get into the main bedroom "or I'm going to blow this place up". I left child B in her bed and went into the main bedroom. As soon as I walked into the room, he locked the door and told me to shut my mouth and sit on the bed as there is going to be a bit of a bang. He had his fist clenched in my face and I was very scared, as I had not seen that look in his eyes before. He threatened to hit me saying, "once I've hit you there is no going back, you will be dead". He then went and cut the car hoses on my car, revved up the motor and the car motor blew up. He then started threatening to blow the house up while the children and I were locked inside. I rang triple 0 but before the police could assist he had a friend [D] pick him up and take him away.

217 The mother said on previous occasions she had left the home with the children by jumping over the back fence and hiding before going to her mother. I accept that at separation the father was threatening in a manner not previously experienced by the mother. The interaction on Monday 6 September 2010 was followed by the incident

on 9 September 2010 already described and where the father threatened to kill the mother.

218 The single expert describes the interaction of 9 September 2010 as situational only. The father describes it as a spur of the moment occurrence. Having heard all the evidence about the relationship between these parties I do not accept it was simply situational. I accept there had been incidents of violence in the past with the mother leaving the father in extreme circumstances. However, at separation there was an element in the father's anger that had not been present on previous occasions.

219 The mother attributes the father's anger and behaviour to the consumption of amphetamines over a period of time. The father says he has not taken any drugs since separation, although at the same time he denies the drug use attributed to him by the mother. His abstinence from drugs post-separation is likely to result from police interest in his activities, not so much in relation to his personal consumption, but in relation to the sale and supply of drugs to others. As a matter of self protection, the father would need to abstain from having anything to do with drugs whatsoever. I am not satisfied there will be long-term abstinence.

220 The mother's fear is fuelled, understandably in the Court's view, by a number of other factors. I accept her evidence that the father did try and locate U. He was not successful in achieving this and the Court cannot speculate what may well have happened if he had located her. The mere fact of trying to find her in the face of a restraining order is of concern. I have no doubt that U was in hiding or, at least, doing everything she could to avoid having contact with the father. The unfortunate death of their child is likely to have ended the dynamics between U and the father.

221 The Court also takes into account that in October 2010 a specialist section of the WPU assessed the father as being a serious risk of harm to the mother. The father was assessed as being a certain risk of harm to the mother and that the harm or threat of harm against the mother would occur without external intervention. That threat assessment has not changed. The report of the single expert was not provided to the WPU. Neither the father nor his family were interviewed.

222 The police officer said the assessment of threat was not based on what was in the best interests of the children. The assessment was to ascertain the level of threat to the mother.

223 The Court does pay attention to this assessment and the WPU. It is to be taken seriously. However, there is also now all the evidence heard at trial to inform the Court of what is likely to promote the best interests of the children.

224 Whilst the report of the single expert is in favour of a relationship between the father and the children being maintained, this is predicated on a "parenting plan" being implemented. Mr De Rooster moved away from his position in cross-examination to a certain extent. In any event, the Court itself considers the father to present a risk to the children that outweighs the benefits of them seeing him in the manner suggested by the single expert.

225 One of the difficulties here is that given there once existed a good relationship between the father and the children there is the emotional risk to them if they are deprived of that relationship with him. The relationship was halted by the father's behaviour. The counter veiling consideration to the once good relationship is what I consider to be a physical risk to the mother and possibly the children if their whereabouts are known. A lesser consideration is the risk to those administering the Witness Protection Scheme if the whereabouts of the mother and children becomes available to the father or any persons who are likely to do the mother, child A and child B, or those charged with protecting them any harm.

- Parental responsibility

226 The single expert reports the severity of the conflict between the parties can be described as high. He details the reasons for this as follows:

- The father feels he has lost his family, wife and children;
- The father feels the mother caused the marriage breakdown and feels angry towards her;
- The mother feels the father engaged in verbal and physical abuse towards her and denigrated the children;
- The father is threatening and behaves in a threatening manner to the mother; and
- The mother believes the father abused illicit substances and has a short temper.

227 I am satisfied there should be an order that the mother has sole parental responsibility for all aspects of the long-term welfare of these children. This includes making decisions about their upbringing and their associations. I am not satisfied there is any capacity for discussion, negotiation or common ground between these parties. The fact of the Witness Protection Scheme coupled with the dynamics between these parties makes equal decision making an impossibility. I am satisfied the mother will make decisions that are in the best interests of the children.

- Time spent

228 Whilst I do not intend to make any orders for communication or time spent between the father and the children as contemplated by him in his application, I am satisfied that there should be some link left between them and this will be reflected in the orders I make.

229 Although, if the father avails himself of the orders, there may be some anxiety for the mother I consider that it is important for the children's long-term welfare to know their father loves them.

230 I have provided for the Independent Children's Lawyer, or his nominee, to vet the letters or cards as he is finely attuned to what is in the best interests of the children. The role of the police serves another purpose and that relates to the integrity of the Witness Protection Scheme and the mother's position.

231 The communications are simply a means to remain in touch and should not include cash amounts.

Orders

- 1 The children **Child A** born ... and **Child B** born ... (“the children”) live with the mother.
- 2 The mother have sole parental responsibility for the children.
- 3 The father communicate with the children as follows:
 - (a) by way of cards on the occasions of Christmas, Easter and each of the children’s birthdays;
 - (b) by way of a letter on one occasion in each six month period with the first six month period to be in the first half of 2012.
- 4 Any communication referred to in paragraph 3 is to be sent to the Independent Children’s Lawyer for consideration or to such other person as is nominated by the current Independent Children’s Lawyer.
- 5 The Independent Children’s Lawyer or his nominee is to then provide the correspondence to the Witness Protection Unit for consideration and, if appropriate, provision to the mother and children.
- 6 The proceedings otherwise be dismissed.

I certify that the preceding [231] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate