**FAMILY COURT OF AUSTRALIA**

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| **GREEN & HANN** | **[****2010] FamCA 747** |

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| FAMILY LAW – CHILDREN – Best interests – Independent Children's Lawyer – Parental responsibility – With whom a child lives |

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| **APPLICANT:** | Ms Green |

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| **RESPONDENT:** | Mr Hann |

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| **Independent children’s lawyer:** | Legal Aid Commission of New South Wales |

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| **FILE NUMBER:** | PAC | 3101 |  | of | 2009 |

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| **DATE DELIVERED:** | 25 August 2010 |

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| **PLACE DELIVERED:** | Parramatta |

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| **PLACE HEARD:** | Parramatta |

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| **JUDGMENT OF:** | Cleary J |

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| **HEARING DATE:** | 26, 27 and 28 July 2010 |

REPRESENTATION

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| **COUNSEL FOR THE APPLICANT:** | Mr Weaver |

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| **SOLICITOR FOR THE APPLICANT:** | South West Sydney Legal Centre |

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

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| **SOLICiTOR FOR THE RESPONDENT:** | Watkins Tapsell |

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| **COUNSEL FOR THE INDEPENDENT CHILDREN’S LAWYER:** | Ms Shea |
| **SOLICITOR FOR THE INDEPENDENT CHILDREN’S LAWYER:** | Ms Hafey |

# Orders

1. That all previous parenting orders in relation to the children, C born … January 2001 (“C”) and S born … January 2003 (“S”), together referred to as “the children”, be discharged.
2. That the father have sole parental responsibility for the children.
3. That prior to making a decision in relation to a major long term issue affecting either or both of the children, including but not limited to their education and health, the father shall:-
	1. notify the mother in writing of his proposal and invite her response in writing within a stated period of time: and
	2. take into account the mother’s response provided such response is received within the stated period.
4. That the children live with the father.
5. That the children spend time with the mother as follows:-
	1. on six (6) occasions supervised by the Children’s Contact Service at Interrelate E, such occasions to occur on each alternate Saturday or Sunday for a period of 2 hours, subject to the availability of the Contact Service and following the parties completing a fresh intake process: the first such occasion to be not before Saturday 11 September 2010;
	2. thereafter, unsupervised time on each alternate weekend from 10.00 am Saturday until 4.00 pm on Sunday, with changeover to take place at McDonald’s restaurant at A in the absence of agreement between the parties;
	3. thereafter and commencing on the second weekend of the first term in 2011:
		1. during school terms on each alternate weekend from after school on Friday until the commencement of school on Monday;
		2. for one half of each NSW school holiday periods commencing in the first term holiday in 2011, being the first half in even numbered years and the second half in odd numbered years, conditional upon the mother’s compliance with Order 7 herein;
	4. at all other times as agreed between the parties.
6. That the children have telephone communication with the mother each Tuesday and Thursday at 6.30 pm with the mother to initiate the calls. The first such call not to be before Thursday 9 September 2010.
7. That the children’s time with the mother in accordance with order 5(c)(ii) be conditional upon:-
	1. the mother within three (3) months from the date of these orders attending upon and engaging with a therapist nominated by her from a list of three to be provided by the Independent Children’s Lawyer (which list may include the mother’s current therapist, Ms W) for the purposes of:
		1. managing her stress and anxiety;
		2. addressing issues identified in the two family reports by Mr P, family consultant, including her attitude towards the children’s relationship with their father and management of the children’s behaviour; and
		3. assisting her in accepting and adjusting to the change in the children’s living arrangements;
	2. the mother advising the Independent Children’s Lawyer of the therapist she has chosen to attend; and
	3. the mother providing the father with a written report from the therapist confirming that the mother:
		1. has attended and engaged in therapy sessions as required by the therapist and has demonstrated a commitment to the therapeutic process;
		2. has acknowledged and demonstrated insight into the impact of stress and anxiety on her parenting, and other issues as identified in the family reports;
		3. is satisfactorily addressing the above issues in the course of therapy;
		4. is able to contain her negativity towards the father and is able to demonstrate her support for the children’s new living arrangements.
8. That for the purposes of order 7, the Independent Children’s Lawyer has leave to provide the mother’s therapist with a copy of the family reports by Mr P dated 2 February 2010 and 29 June 2010, together with a sealed copy of these orders.
9. That in the event that the mother fails to comply with order 7, then the children shall spend time with her during school holiday periods on each alternate weekend from 9.00 am Friday until 5.00 pm Monday (continuing the pattern established by order 5(c)(i)).
10. That in the event that Mother’s Day falls on a weekend when the children are otherwise with the father, then the children shall spend time with the mother on the Mother’s Day weekend in lieu of the following weekend which shall be spent with the father.
11. That in the event that Father’s Day falls on a weekend when the children are otherwise with the mother, then the children shall spend time with the father on the Father’s Day weekend in lieu of the following weekend which shall be spent with the mother.
12. That each party keep the other informed at all times of their residential address and contact telephone number(s) and any change in these details.
13. That the father is authorised to enrol the children at a school in the father’s local area and shall advise the mother of the name and location of the school where they are enrolled.
14. That the father is at liberty to allow the children to remain at home with him and not to attend school for the first two (2) weeks after the date of these orders provided the father is available to spend that time with them.
15. That each party be and hereby is authorised to obtain from any school attended by either of the children copies of the children’s school reports, newsletters and school photograph order forms.
16. That the mother be and hereby is restrained from attending at any school at which either of the children is enrolled, except for the purposes of:-
	1. collecting or returning the children in accordance with order 5(c);
	2. attending parent/teacher interviews as initiated by the school;
	3. attending school sports carnivals, school productions, presentations and other functions to which all parents are invited; or
	4. otherwise, with the father’s prior written consent.
17. That the father have leave to provide a sealed copy of these orders to any school attended by either of the children currently or in the future.
18. That each party keep the other informed of any injury, accident, significant illness or hospitalisation affecting either of the children whilst in that party’s care.
19. That each party comply with all directions of the children’s treating medical practitioners and ensure that the children have any prescribed medication when moving into the care of the other parent.
20. That the mother be and hereby is restrained from taking either of the children to any therapist, counsellor, psychologist or psychiatrist (except Dr V) without the prior written consent of the father.
21. That the father shall attend and ensure the attendance of the children with ongoing family therapy with Dr V and continue with that process for so long as Dr V recommends.
22. That pursuant to s.68L the interests of the children continue to be represented by the Independent Children’s Lawyer for a period of six (6) months from the date of these orders.
23. That all parties have leave to relist the proceedings for the implementation of these orders on 7 days notice to the court and each other party.
24. I DIRECT that the Independent Children’s Lawyer contact N Public School and make suitable arrangements for a copy of these orders to be forthwith provided to the school by fax or otherwise.
25. I DIRECT the father to collect the children from N Public School and bring them back to the counselling section of this court today to be seen by the Independent Children’s Lawyer in the presence of the Family Consultant, Mr P, at 3.00 pm today or as soon as Mr P is available.
26. I DIRECT the mother to remain in the precincts of the court until the father and children return to the counselling section. The mother may consult with the Family Consultant if she wishes to do so or she may then leave the court.

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

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| Family Court of Australia at Parramatta |

FILE NUMBER: PAC 3101 of 2009

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| MS GREEN  |

Applicant

And

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| **MR HANN**  |

Respondent

REASONS FOR JUDGMENT

#  BACKGROUND

1. The parties in this matter apparently met when they were very young. Ms Green (“the mother”) told an officer at the H Community Health Centre that they met when she was 12 years old and Mr Hann (“the father”) was 16 years old. They began living together in either 1991 or 1992 and they married in 1993. Effectively, they grew up together.
2. Two children were born of the marriage, C born in January 2001and S born in January 2003 (“the children”).
3. The parties separated on 17 June 2004 when the children were aged about 3 ½ years and 18 months old respectively. The children then lived with their mother and spent regular time with their father, including over night time.
4. On 7 July 2005 consent orders were made providing for the children to live with their mother and have regular time with their father.
5. In June 2006 the father began a relationship with Ms A born in 1968 (“Ms A”). The father and Ms A have not formed a common household. They intend to move in together and marry after the conclusion of these proceedings. Ms A has a son, JA, born in July 1996 (“JA”). JA lives with his mother and spends regular time with his father. There is apparently an amicable relationship between Ms A and her former husband.
6. Contact between the children and their father proceeded without incident until 2009.
7. In 2008 things began to go badly wrong for the children and their relationships with both their parents.
8. In about February 2008 the mother attended N Public School in relation to incidents of “bullying” of C. There followed many occasions on which the mother attended the school to speak to a teacher, the school counsellor or the Principal about the bullying of C. The mother also wrote several letters setting out alleged incidents of bullying and challenging the school’s response. Records from the school strongly suggest that C was untruthful about some incidents.[[1]](#footnote-2)
9. In mid 2008 the mother began a relationship with Mr D. This relationship is continuing. The mother has not lived with Mr D and there is no present intention for that to happen. Mr D has apparently not played a significant role in the care of the children, although he has an affectionate relationship with them.
10. By 2009 the mother was suffering considerable distress. She became preoccupied with what she believed to be the unaddressed bullying of her son. It is apparent from the evidence that she withdrew into herself and wished to protect herself and the children. This withdrawal included a wish to sever the connection between the children and their father.
11. In May 2009 the mother’s doctor, Dr U, prescribed an antidepressant for the mother. Soon after the mother began counselling which is ongoing with Ms W.
12. Significantly, on 11 June 2009 the mother, on her own evidence, asked each of the children how they would feel about not seeing their father anymore. She reported that each of them, in her view, was entirely positive about that prospect.
13. On 15 June 2009 the mother arranged for C to see a paediatrician, Dr L.
14. Nine days later, on 24 June 2009, the mother consulted Dr B to arrange for each of the children to be on a mental health plan. Dr B referred the mother to Ms G for counselling.
15. On 30 June 2009 the mother and the children attended for the first counselling session with Ms G. This was the first of many regular counselling sessions between the mother, the children and Ms G which continued for about eight months.
16. On 6 July 2009 the mother made an application to the Court seeking, amongst other orders, an order for sole parental responsibility and a reduction in time between the children and their father to each alternate Saturday for four hours, on Father’s Day for four hours and at other times to be agreed. At that time there was no reference to supervision.
17. On 21 July 2009 Ms G produced a report which included the assertion by the mother that both children had been suffering a range of symptoms for approximately eighteen months. Ms G purported to make a diagnosis of both of the children of Adjustment Disorder with Anxiety.
18. On 28 July 2009 the father made a request for the counselling of the children by Ms G to cease.
19. On 19 August 2009 the mother was reporting an inability to sleep and heightened anxiety levels.
20. On 30 October 2009 interim orders were made which provided for the father to see the children at the Interrelate Contact Centre at E for two hours once per fortnight and by telephone twice a week and at no other time.
21. On 3 December 2009 the mother was suffering severe sharp head pain and the dosage of her antidepressant was increased.
22. In January 2010 the mother reported herself as follows:-

“not sleeping, her brain is constantly going around and is questioning her sanity”[[2]](#footnote-3)

1. By the time the matter came for hearing in July 2010 the mother was seeking orders for time between the children and their father, building up over almost two years, to an alternate weekend and half school holiday arrangement. The mother’s focus was on what she perceived to be the father’s conduct with the children and there is this passage in the case outline document on behalf of the mother:-

“The significant factor that justifies a change in the existing orders is that in or around May 2009 the mother became aware that the father had been swearing at the children and disciplining the children by yelling at them and hitting them when the children were in his care. This mother’s position is that the father’s behaviour towards the children when they are in his unsupervised care is such that the father intimidates the children and makes them feel very insecure. The mother was not aware that the father’s behaviour would have this effect on the children when she consented to the orders made 7 June 2005.”

1. This passage appears to me to accurately reflect both the fears of the mother and her retrospective view that contact between the children and the father had never been good for them.

# ORDERS SOUGHT

**The Mother**

1. The mother sought the following Orders:-

1. The mother and father are to have equal shared parental responsibility for the children [C] born […] January 2001 and [S] born […] January 2003.

2. That the mother has the responsibility for decisions as to the children’s day to day care welfare and development during periods when they are living with her and the father has that responsibility at all other times whilst they are in his care.

3. The children are to live with the mother.

4. The children are to spend time with the father:

a. each alternate Saturday from 3.00pm to 4.00pm at the [E] Interrelate Family Centre for a period of 6 months;

b. following order 4(a) every alternate Saturday from 10.00am to 2.00pm at [B Park] for a period of 6 months;

c. following order 4(b) every alternate Saturday from 10.00 am to 6.00pm for a period of 3 months;

d. following order 4(c) every alternate Friday after school to Saturday 4pm for 3 months;

e. following order 4(d) every alternate Friday after school to Sunday 2pm for 3 months;

f. thereafter every alternate Friday after school to Sunday 4pm;

g. half school term holidays to commence June 2012 as agreed to between the parties;

h. two weeks during Christmas school holidays to commence 2012 as agreed to between the parties;

i. each alternate Christmas Eve 6.00pm to Christmas Day 6.00pm commencing 2012;

j. each alternate Christmas Day 6.00pm to Boxing Day 6.00pm commencing 2013;

k. each Father’s Day from 10.00am to 4.00pm; and

l. all other times as agreed to between the parties.

5. For the purpose of changeover for order 4(b) the mother will drop the children at the car park at [B] Park at the commencement of the father’s time with the children and collect the children from the same location at the conclusion of the father’s time with the children.

6. For the purpose of changeover for order 4(c) the father is to collect the children from the McDonald’s Restaurant at [O] at the commencement of his time with the children and return the children to the same location at the conclusion of his time with the children.

7. For the purpose of changeover for orders 4(d) and 4(e) the father is to return the children at the McDonald’s Restaurant at [O] at the conclusion of his time with the children.

8. Each party is to ensure the other party is kept informed of:

a. any medical problems or illnesses suffered by the children while in the party’s care;

b. any medication that has been prescribed for the children;

c. any social, school or religious functions which the children is to attend; and

d. any other matter relevant to the children’s welfare.

9. That each party advise the other party and keep the other party advised of their current address and mobile number and advise the other party of any changes to these details within 48 hours of such change occurring by email.

10. That each party refrain from making critical or derogatory remarks in relation to the other parent in the presence or hearing of the children and that each party do all things necessary to ensure that no third party makes critical comments about the other party in the presence or hearing of the children.

11. The father may contact the children on the mother’s mobile telephone only each Wednesday from 6.00pm to 6.30pm.

12. That each party shall be restrained from:

a. using offensive language or engaging in otherwise offensive conduct in the presence or within the hearing of the children;

b. physically disciplining the children in any way;

c. denigrating the other party, or any person with whom a party lives in a domestic relationship, in the presence or within the hearing of the children;

d. contacting the other party by SMS; and

e. contacting the other party or children on a landline telephone number.

**The Father**

1. The father sought the following Orders:-

1. That the Mother’s Application in a Case be dismissed.

4. That the father and the mother have equal shared parental responsibility in consultation with each other for the making of decisions about the long term care, welfare and development of the children, namely, [C] (dob:[…]/01/2001) and [S] (dob: […]/01//2003) (“the children”).

5. That the father and mother consult with each other and come to a joint decision, in writing, in the event that long term issues arise in relation to the children concerning:

 5.1 the children’s education; and

 5.2 the children’s health.

6. That the children live with the father.

7. That the children spend time with the mother as follows:-

 7.1 for a period of 1 month at [E] Contact Centre for 2 hours each Saturday or Sunday depending on the contact centre’s availability;

 7.2 thereafter upon satisfactorily completing supervised time with the children pursuant to clause 7.1 above and subject to [E] Contact Centre providing a satisfactory report in relation to the other’s progression to unsupervised time with the children as follows:

 7.2.1 from 4.00pm each alternate Friday to before school Monday. For the purpose of this Order the father shall deliver the children to McDonalds Restaurant [O] at the commencement of the mother’s time with the children and the mother shall return the children to school before school on Monday; and

 7.2.2 each intervening week for 3 hours one afternoon in the week as agreed between the parties or failing agreement each intervening Wednesday from 3.00pm to 6.00pm. For the purpose of this Order the mother shall collect the children after school and return the children to the father’s care at McDonalds Restaurant [E] at 6.00pm; and

 7.2.3 for one half of all school holidays as follows:

 7.2.3.1 for the first half of school holiday periods which commence in an even numbered year (e.g. 2010, 2012, etc) from 4pm the midpoint day of the school holiday until 4pm on the last day of the school holiday period;

 7.2.3.2 for the second half of school holiday periods which commence in an odd numbered year (e.g. 2011, 2013 etc) from after school on the last day of the school term until 4.00pm on the midpoint day of the school holiday period;

 7.2.4 all further and other times as agreed between the parties.

 7.3 that the mother’s time with the children pursuant to Order 7.2.1 and 7.2.2 above shall be suspended during school holiday periods and instead the mother shall spend time with the children pursuant to Order 7.2.3 above during school holidays;

 7.4 that if Mother’s Day does not already coincide with a weekend the mother is spending with the children then the mother shall spend time with the children on the weekend upon which Mother’s Day falls pursuant to Order 7.2.1 above and the mother’s time with the children the following weekend shall be suspended;

 7.5 that if the mother’s weekend with the children coincides with Father’s Day then the mother’s weekend with the children on Father’s Day weekend shall be suspended and the mother shall spend makeup time with the children the following weekend in lieu thereof;

 7.6 that in the event that the children are not spending time with the father or mother on their birthdays then the party who the children are not spending time shall have telephone contact with the children on each of the children’s birthdays;

 7.7 that the mother has telephone communication with the children each Tuesday and Thursday evening at approximately 6.00pm when the mother shall telephone the children on the father’s mobile and the father shall facilitate such telephone contact between the children and the mother;

 7.8 for the purposes of school holidays unless otherwise provided for in these Orders or unless otherwise agreed between the parties in writing if the mother is spending the first half of the school holidays with the children the mother shall collect the children after school on the last Friday of the school term and the father shall collect the children from McDonalds Restaurant [O] at the conclusion of the mother’s time with the children. If the mother is spending time with the children during the second half of the school holiday period the father shall deliver the children to the mother’s care at McDonalds Restaurant [E] and the mother shall deliver the children to the school on the first Monday of the school term.

 8. That unless otherwise agreed between the parties in writing within twenty one (21) days from the date hereof the parties shall do all acts and things and sign all documents necessary to cause the children to be enrolled at [S] Public School to commence as soon as a position becomes available.

 9. That the parents be restrained from taking the children to any medical service providers without the written consent of both parents medical emergencies accepted.

 10. That the mother is restrained from commencing any further legal proceedings in respect of the children without leave of the Court.

 11. That each parent provide the other with notice within 2 days of any change of residential address, telephone number, mobile number and/or email address/details.

 12. That the parents shall consult with each other and obtain the other parent’s written agreement prior to enrolling/registering the child in any extra-curricular activities which may be scheduled during periods at the children are due to spend time with the other parent pursuant to these Orders.

 13. That the parents notify each other and keep each other informed of any sporting event, school event and/or extra-curricular activity in which either of the children are involved and each parent shall be entitled to attend all such activities regardless of whom the children may from time to time then be spending time.

 14. That each parent do all such things as may be necessary to ensure that each of them receives copies of all school reports, school notices, school photos, school newsletters and the like with particular reference to school functions and/or school activities in which the children are involved including parent and teacher interviews and the like.

 15. That the parents be restrained by way of injunction pursuant to section 68B of the *Family Law Act* from denigrating each other or a partner of either parent in the presence and/or hearing of the children and that they each ensure that no other person denigrates the other parent or a partner of either parent in the presence and/or hearing of the children.

 16. That the parents be restrained by way of injunction pursuant to section 68B of the *Family Law Act* from discussing these proceedings and any aspect of the Family Law matters with the children including but not limited to discussing child support and other matters and each party be restrained by way of injunction from showing the children any Family Court documents, agreements and all documents of whatsoever kind and whatsoever nature relating to Family Law matters between the parties.

 17. That the parties continue to participate in family therapy with Dr [V] for as long as Dr [V] deems it appropriate taking into account the parties financial capacity to engage in family therapy.

 18. The parties agree that these Orders are to be explained to each of the children either by the Independent Children’s Lawyer or by Dr [V].

 19. That the mother pay the father’s cost of and incidental to these proceedings.

**The Independent Children’s Lawyer**

1. The Independent Children’s Lawyer reserved her position until the conclusion of the evidence when she sought the following orders:-

1. That all previous parenting orders in relation to the children, [C], born […] January 2001, and [S] born […] January 2003 be discharged.

2. That the children live with the father.

3. That the father have sole parental responsibility for the children.

4. Prior to making a decision in relation to a major long term issue affecting either of the children (including but not limited to their education and health), the father shall:

 (a) notify the mother in writing of this proposal and invite her response in writing; and

 (b) take into account the mother’s response, provided such response is received within a reasonable time.

5. That the children spend time with the mother as follows:-

 (a) on six occasions supervised by the Children’s Contact Service at Interrelate [E], such occasions to occur on each alternate Saturday or Sunday for a period of 2 hours, subject to the availability of the Contact Service and following the parties completing a fresh intake process;

 (b) thereafter, for a period of 3 months – unsupervised time on each alternate weekend from 10.00 am on Saturday until 4.00 pm on Sunday, with changeover to take place at McDonalds [A] (cnr […]) in the absence of agreement between the parties;

 (c) thereafter:

 (i) during school terms – on each alternate weekend from after school on Friday until the commencement of school on Monday;

 (ii) for one half of each NSW school holiday period, being the first half in even numbered years and the second half in odd numbered years, conditional upon the mother’s compliance with Order 7 herein; and

 (d) at other times as agreed between the parties.

6. That the children have telephone communication with the mother each Tuesday and Thursday at 6.30 pm with the mother to initiate the calls.

7. That the children’s time with the mother in accordance with Order 5(c)(ii) be conditional upon:

 (a) the mother attending upon and engaging with a therapist nominated by her from a list of three to be provided by the Independent Children’s Lawyer for the purposes of:

 (i) managing her stress and anxiety;

 (ii) addressing issues identified in the two Family Reports by [Mr P], Family Consultant, including her attitude towards the children’s relationship with their father and management of the children’s behaviour; and

 (iii) assisting her in accepting and adjusting to the change in the children’s living arrangements;

 (b) the mother providing the father with a written report from the therapist confirming that the mother:

 (i) has attended and engaged in therapy sessions as required by the therapist and has demonstrated a commitment to the therapeutic process;

 (ii) has acknowledged and demonstrated insight into the impact of stress and anxiety on her parenting, and other issues as identified in the Family Reports;

 (iii) has satisfactorily addressed the above issues in the course of therapy;

 (iv) is able to contain her negativity towards the father and has accepted, and is able to demonstrate her support for, the children’s new living arrangements.

8. For the purposes of Order 7, the Independent Children’s Lawyer has leave to provide the mother’s therapist with a copy of the Family Reports by [Mr P] dated 2 February 2010 and 29 June 2010, together with a sealed copy of these Orders.

9. In the event that the mother fails to comply with Order 7, then the children shall spend time with her during school holiday periods on each alternate weekend from 9.00 am Friday until 5.00 pm on Monday (continuing the pattern established by Order 59c)(i)).

10. In the event that Mother’s Day falls on a weekend when the children are otherwise with the father, then the children shall spend time with the mother on the Mothers’ Day weekend in lieu of the following weekend which shall be spend with the father.

11. In the event that Father’s Day falls on a weekend when the children are otherwise with the mother, then the children shall spend time with the father on the Father’s Day weekend in lieu of the following weekend which shall be spend with the mother.

12. That each party be and hereby is restrained from:

 (a) using physical discipline in relation to the children or allowing any other person to use physical discipline in relation to the children;

 (b) denigrating or making derogatory comments about the other party, or any member of the other party’s family or household, to or in the presence or hearing of the children, and each party shall use their best endeavours to ensure that no other person does so;

 (c) discussing these proceedings, or any allegations raised in these proceedings, with either of the children or in their presence or hearing.

13. That each party keep the other informed at all times of their residential address and contact telephone number(s) and any change in these details.

14. That each party be and hereby is authorised to obtain from any school attended by either of the children copies of the children’s school reports, newsletters and school photograph order forms.

15. That the mother be and hereby is restrained from attending at any school at which either of the children is enrolled except for the purposes of:-

 (a) collecting or returning the children in accordance with Order 5(c);

 (b) attending parent/teacher interviews as initiated by the school;

 (c) attending school sports carnivals, school productions, presentations and other functions to which all parents are invited; or

 (d) otherwise, with the father’s prior written consent.

16. That the father have leave to provide a sealed copy of these Orders to any school attended by either of the children currently or in the future.

17. That each party keep the other informed of any injury, accident, significant illness or hospitalisation affecting either of the children whilst in that party’s care.

18. That each party comply with all directions of the children’s treating medical practitioners and ensure that the children have any prescribed medication when moving into the care of the other parent.

19. That the mother be and hereby is restrained from taking either of the children to any therapist, counsellor, psychologist or psychiatrist (except Dr [V]) without the prior written consent of the father.

# THE EVIDENCE

**The Mother**

1. The mother gave her evidence in a way that was flat and without emotion. She said the children’s behaviour was difficult and C was playing up. She said the children knew of her stress and anxiety and accepted that her counsellor, Ms W, had come to the home for appointments at times when the children were present.
2. C is reported to have said:

“If my mother keeps going the way she is going she’s going to have a nervous breakdown and then we will have no choice but to live with dad.”

 In the witness box the mother interpreted that statement as an affectionate statement by C reflecting warm concern for his mother. She showed no sign of appreciating that C may have been concerned about his own future based on his mother’s state of mind.

1. The mother said that she didn’t accept the teacher’s view that C hadn’t been truthful about an incident where he had banged his own head on the desk and later accused another child of hitting him. She accordingly took the matter to the principal. The mother said the principal had become irate with her and indeed became angry and had:

“called [C] a liar in front of me and two secretaries of the school. He badmouthed [C]”

 The mother said the principal apologised to her but repeated that he did not consider that C always told the truth.

1. C’s 2008 school report included the statement:-

 “must realise the value of consistently being truthful”.

1. However, the mother continued to believe that C was a target for bullying and that the school was failing to properly address the situation. She was crossed examined as to why she did not remove C from the school and said that she had wanted to do so but the father had opposed this course.
2. The mother asserts that the father said at that time:-

“If you take him out of that school what happens if it all happens again. Its better the devil you know.”

1. I formed the impressed that the mother was willing to support whatever her son said despite being able to see inconsistencies brought to her attention by others in authority. She was asked in cross examination:

Q: “Did you suggest to Dr [L] (the paediatrician) that [C] was lying or that others thought that he was lying?”

A: “I told Dr [L] that Mr [M] (the principal) wasn’t happy in understanding that all these things happened to [C].”

1. There was an incident on 28 May 2009 where the mother attended the children’s school and became directly involved with another child. Indeed she accused that child of stealing money from her son.
2. There was a second incident where the mother became directly involved in speaking to other children in the playground, friends of her own child, telling them to stay away from particular boys in the playground. The mother denied that she had gestured at a child using a thumb travelling across her neck, however, my impression is that the mother was and continues to be tightly bound to C’s perspective.
3. In answer to a question:

Q: “Is [C’s] behaviour at school concerning?’

A: “No, I wouldn’t say its concerning. It’s upsetting. Those notes [referring to matters in the school files] are all made up by the children who help him [a particular child] verbally attack [C].

1. She also said that the principal suggested that the children involved were from troubled backgrounds and they might be jealous of the mother’s involvement in the school, being there every day, morning and afternoon, as she was. There was no evidence to support this assertion.
2. The mother gave evidence that she had changed her application from sole parental responsibility to equal shared responsibility because:-

 “I don’t want to be the only one making decisions. They are his children too.”

1. There was the sense that the mother has felt overburdened by doing what she perceived to be necessary to protect C as well as attending to all of the other needs of the children.
2. The mother was asked about how she and the father could communicate. She said that she thought by telephone would be how the parties could discuss things. However, she agreed that they did not presently speak on the phone and the explanation for this was that between separation and 2006 the father had rung on her landline and if she was not at home had rung on her mobile to question her about where she was. She had not appreciated this conduct by the father.
3. Further, in May 2009 the mother had contacted the father on the phone and he had been, in her view, abusive. She had hung up and he had repeatedly tried to make contact with her by phone over the next 30 minutes. She apparently then decided against further conversations with the father on the phone.
4. The mother spoke about the father’s strengths as providing them:-

“with necessities, taking them out a lot, he is fond of them, he does love the children, he talks to them, he gives them advice. He used to try to give [C] direction.”

1. She asserted that the parties had had “wonderful communication*”* prior to May 2009. This again appeared to be a reference to the telephone conversation where the parties had had what the mother described as a huge argument.
2. The mother asserts that S had been on the phone with the father on loudspeaker and that she had heard the father’s voice in the background saying to S:-

 “who put those fucking words in your mouth you little bitch”.

 She had then taken the phone, spoken to the father who she says called her a:-

“fucking dog. You’re a fucking bitch”

and that she had hung up.

1. The father subsequently denied this language, however, I had the impression that the parties had an angry abusive conversation and that whatever language the father used caused a negative reaction in the mother that has persisted to date.
2. The mother asserted that in her view the children are presently unsafe in their father’s care and it was for that reason that she wanted them to be supervised and for supervision to then proceed to time in a park so that the children would be “in the public eye”.
3. Interestingly, once these periods of supervised time in a park had passed, the mother said she had no problem with alternate weekends from Friday after school to Monday before school if that is what the father wanted. She also had no problem with time during the off week as long as the children could attend their activities.
4. The mother said that she had always encouraged the children to attend contact by way such words as:-

 “No, this is how it has to be. Go, you don’t have to worry about me. Dad loves you. Go and have a good time.”

 She said that when the children complained to her that their father had “whacked them” for not picking up their toys she had been supportive of their father by saying “well, you have to learn to pick up your toys” and if he had directed verbal abuse at the children she had simply asked what it was they had done to cause the father to be so critical.

1. This is hard to reconcile with the evidence of the mother that although she was seeing Dr L with C throughout 2008 she didn’t tell him that the children were being hit and sworn at by their father. She agreed that she had not told him and her evidence was “I should have”.
2. However, the more likely possibility is that although there were incidents where the children complained of being smacked or shouted at these incidents have simply not seemed significant enough to the mother to mention them to Dr L. The disciplinary methods of the parents are similar.
3. In relation to telephone contact, the mother agreed that the children’s behaviour was appalling. They have been rude, abusive and contemptuous of their father.[[3]](#footnote-4) For instance:

18 August 2009

Father: “Hi buddy, how are you?”

[C]: “Hi motherfucker”

20 August 2009

[C]: “Fuck you arsehole”

23 August 2009

Father: “Hi [S], how are you?”

[S]: “Get off the bloody fucking phone you dag”

8 September 2009

[C]: “Fuck you nigger, fuck you, fuck you, fuck you”

10 September 2009

[S]: “Get off the bloody fucking phone” and hangs up.

The material is replete with further examples.

1. The mother said she did reprimand them for this conduct on the phone. She said further that it didn’t matter what she did, it didn’t seem to bother them.
2. She had on one occasion said:-

“I don’t like you saying that. Dad loves you.”

1. The proposition was put to the mother that whatever she had done it had been utterly ineffective in changing their behaviour and she accepted that proposition.
2. However, the mother did not accept the proposition that C’s language revealed a bad attitude on his part. She was defensive of C and said:-

“There’s anxiety and fear behind that. Emotion has raised him to that point.”

1. I formed the strong impression that the mother had made little or no attempt to discipline the children over their conduct on the phone and that the children had interpreted the mother’s behaviour as permission and encouragement to go further.
2. The same attitude by the mother was revealed by the following incident. In his second report, Mr P made this observation at paragraph 59:

“[C] commenced the observation by boasting happily to his mother ‘I was really rude to Dad’. [The mother’s] reprimand of [C] was both ineffective in that he continued to tell her about what he had said to Ms [A] and his grandmother and unconvincing. [The mother’s] later insistence that [S] apologise to [C] for throwing a ball at him appeared both more convincing and effective.”

1. This incident was raised with the mother. She said she did not consider that C had been boasting and that his statement reflected relief that in a safe setting he had found the courage to tell his father how he really felt.
2. The mother may have been simply defending C by giving this evidence but there is a real possibility that she is so closely aligned with him that she simply rejects the idea that his behaviour is poor and needs correcting. There is a very real risk of C failing to learn to take responsibility for his own actions.
3. Of even more concern is that it does seem likely that the mother doubts the children’s reactions until their statements accord with her own views.
4. In her second Affidavit filed on 20 July 2010 at paragraph 2 the mother says this:

“On 15 May 2010 there was a family therapy between [Dr V], the father, me and the children at 10.15 am. When we arrived [Dr V] was already speaking to the father. She took the children into the meeting with their father alone. After some time [Dr V] came back with the children who took me into a room to discuss the meeting with her. [Dr V] informed me the meeting went well between the children and their father. She told me that both children hugged their Dad and then told him they loved him. I informed [Dr V] I am very happy about that and I hoped this would continue. We organised another meeting for Saturday 22 May 2010. She informed me that the father would be advised about this meeting. As soon as we left I spoke to the children and informed them ‘I am very happy that you were well behaved and [Dr V] told me that you both hugged your Dad and you both told him you loved him’. I told them ‘I think that’s fantastic’. [S] informed me ‘Mum, I felt like I had to do that because he was there but I really didn’t mean it’”. [C] informed me ‘I didn’t mean it and I only said it because I am scared of Dad and I have to act when I am in front of him. When I am on the phone I feel safe to say what is on my mind because I know Dad can’t touch me’. I explained to the children ‘Well if that is how you are feeling you need to start telling [Dr V]’. I immediately phoned [Dr V] and left a detailed message of what the children had told me and if she could return my call as soon as possible.

1. The mother’s oral evidence about the events of 15 May 2010 were that when she had said the words to the children:-

 “I am very happy that you were well behaved ...”

in honesty she had not believed that the children felt happy to see their father nor that they hugged him through spontaneous affection. She thought that the children were pretending. When each child made the statement that he and she did, effectively recanting from what had happened, the mother then believed what the children were saying and her evidence is that she rang, with both children present, leaving a very long message on the voicemail for Dr V and she was crying at that point.

1. In my view, this sent a powerful message to the children that they had made a mistake in spontaneously being affectionate with their father, hugging him and telling him that they loved him and that the only way to rectify the message was to recant and not to behave that way again.
2. In a subsequent conversation that the mother had with Dr V, the doctor said that in her view, the father had been fine with their father in that meeting and she felt that they had shown no reservations.
3. The mother thereafter began to doubt whether Dr V understood the family and the children and subsequently, in June 2010, the counselling process broke down.
4. The mother was asked questions about an incident involving C and another boy. C had grabbed the boy and shaken him around in front of his mother. In the counselling notes C is reported as saying:-

“I did it in front of my Mum. She thinks I am weak and I showed my Mum I am not weak.”

1. When confronted with this incident and asked whether it caused the mother to think differently about C’s behaviour she said no.
2. The Mother’s evidence was that she was at the school in the morning almost every day, sometimes at lunchtime, sometimes in the classroom. She did not seem to consider the possibility that C thought that his mother believed he wouldn’t cope without her.
3. I formed a strong impression that the mother has been an overwhelming presence for C at school and in the playground. I find that incidents of bullying involving C are unlikely to cease until there is a change in the relationship between C and his mother.
4. In her affidavit the mother had, in paragraphs 76 to 87 inclusive, set out matters relating to the subsection “sexual abuse allegations against [the father]”. The central allegation is contained in paragraph 77:

“On the 11 August 2009, [C] was discussing with me all the pornographic material that he saw with his dad, he continued on telling me ‘there was one night where I was sleeping with dad in his bed and it was really late and he told me to turn over and go to sleep, I couldn’t sleep straight away and after a little while I felt the bed shaking and then it stopped, then it started to shake again and it stopped and then it started shaking again so I turned around and looked at dad and that’s when I saw his weener in his hand so I pretended to be asleep and the bed kept shaking’.

 None of these allegations were seriously pursued. Further, the evidence of Ms G was that neither C nor the mother had reported C saying he had seen his father handling his own genitals.

**Mr D (Mother’s partner)**

1. The evidence of Mr D in his affidavit is as follows:-

Para 12: “I have heard the children on the phone with their father recently. When I have been over and their father rings [the mother’s] phone I observe the children taking their phone in a different room and hear the children screaming at their father through the phone. I have heard both children swearing at their father. I have also observed [the mother] encourage the children to speak to their father and ensure they have all the privacy once their father rings. I would sometimes hear [the mother] state to the children after they speak to their father “that is not a nice way to speak to her father”.

 This unchallenged evidence is supportive of the proposition that the mother has been unable or unwilling to curb the children’s behaviour in telephone calls with their father.

1. Mr D was otherwise cross examined briefly.
2. I formed the view that Mr D has a friendly relationship with both children but has made every effort to stay right away from disciplining the children or even speaking to them about the issues arising in the current proceedings.

**Ms G, Counsellor**

1. Ms G initially gave evidence by phone but appeared in person on the morning of the second day of hearing. Her documents were ultimately produced in four bundles. Ms G had apparently not understood the obligation to simply produce what was sought. That is:

“all documents, notes, reports, memos, correspondence and any other relevant document in relation to the children [C] born […] January 2001 and [S] born […] January 2003 from 20 June 2009 to present.”

1. Ms G is a registered psychologist and a member of the Australian Psychological Society. She has been a Consultant Psychologist in Sydney since 2008. She agreed that her work as a psychologist had mainly been in the corporate area until very recently noting, however, that she had been a school counsellor between 1979 and 2002.
2. Ms G saw the children between 30 June 2009 and 27 February 2010 at her practice in Sydney.
3. There were no clear statements by Ms G as to what she was treating the children for other than this: that her objective for treatment was to
	1. listen to their story;
	2. believe them; and
	3. help them work through any anxieties and concerns.
4. On the first occasion that Ms G saw the children she saw the mother and the children together. The children disclosed to her that their father used bad language and that the mother had told her that she had concerns for the children, that the children were unhappy about visiting their father and his bad language, that he smacked them a lot and that whatever they did they thought he didn’t approve of it and that they were anxious.
5. When asked about whether she was concerned about the mother saying those things in front of the children Ms G said she was but she had made some preliminary notes from a phone conversation with the mother before the first meeting. She also said

 “I limited the amount of information the mother was disclosing.”

1. Ms G at no time consulted the father as to his version of events. She took the view that:-

 “it wasn’t my position to judge him, [C], as to whether he was telling the truth. It was my position as his therapist to allow him to ventilate his concerns.”.

1. It seems that Ms G made no attempt to test the reality of what the children were saying with others who might be in a position to know.
2. The question was asked of Ms G by counsel for the father:-

 “What if their story is unbelievable?”

An extreme example was then given of a dragon landing in the playground. Ms G’s answer was that it would be psychologically destructive not to believe children and that it was not her position to validate a story but simply to believe.

1. She was asked these questions:

Q: “Were you told the father denied the improprieties and wanted to be present for the counselling.”

A: “No.”

Q: “Did you think you ought to check on the allegations?”

A: “Yes it occurred to me but I made a decision in the best interests of the children.”

Q: “One issue was the relationship with their father.”

A: “I was the children’s therapist and I was concerned they would see it as a betrayal of trust.”

1. Ms G said that she had seen the children over many months and their allegations were unshaken. It is hardly surprising that the allegations were unshaken when it seemed that the therapy process had largely been an opportunity for the children to repeat critical stories about their father.
2. I asked Ms G whether she had been aware from the commencement of her therapy with the children that she would be ultimately involved in Family Law proceedings between the parents. She said she did.
3. On page 5 of her report, Dr G stated that both children suffered from an adjustment disorder with anxiety. I asked if she had made a diagnosis pursuant to DSM-IV adjustment disorder with anxiety. Ms G said she had. I asked whether she had considered referring the children, in those circumstances, to a psychiatrist and she said no.
4. I asked a further question about the following statement:

“These symptoms have been present for the last 18 months and increased in severity 3 months before the children stopped seeing their father.”

 I asked Ms G whether she had questioned the mother about events in the mother’s household which may have occurred eighteen months prior to the statement to try and understand what had changed. She said she had not.

1. Ms G said that, in her view, there was a range of possibilities for the children’s behaviour but that she had concluded that the principle source was abuse by the father.
2. The Advocate for the Independent Children’s Lawyer, Ms Karen Shea, asked Ms G about a session she had had with S on 12 August 2009. In particular Ms G was asked about the following note she had made in relation to S:

“She is able to talk when her energy is directed to her drawings and said that she is worried about the court making her see her father. [S] is feeling the pressure of speaking to her dad. She is worried about saying “I don’t have to speak to you” in case the court thinks that her mother told her to say that and it makes things worse. In other words they blame her mother.”

 Ms Shea put the proposition that it would be unusual or uncharacteristic for a six year old child to be able to be able to think so analytically. Ms G said that on balance she thought it was more likely that S had thought through that process herself. That is, that this six year old child had worried about the thought of saying to her father “I don’t have to speak to you” in case this statement was subsequently analysed by a Court who would then conclude that her mother had told her to say that. Further, that she held a concern that making the statement “I don’t have to speak to you” would make matters worse. In other words, that the Court would blame her mother. It seems extraordinary that Ms G would assume that the child was capable of this analysis and even more surprising that Ms G did not apparently consider that the mother may have introduced such a fear into the child’s mind.

1. Ms G said she felt the main pressure for the children was being anxious about being separated from their mother. She said she did not know what the father was asking for in the Court proceedings.
2. Again, the Advocate for the Independent Children’s Lawyer raised with Ms G an entry she had made in her notes on 19 January 2010:-

“[C] and [S] sleeping with mum one in bed and one in camp out bed for last four years and that last night first time slept in separate bedrooms one in [C’s] bedroom and [S] in camp out bed.”

 Ms G also notes that the mother was feeling really low not being able to see her counsellor as much. There was apparently some exploration of why both children should have been sleeping in the same room as their mother for the last four years. There is an entry which says:

“[C] says its because dad let them watch scary movies and [S] in past scared dad would take her out of bedroom window.”

 There was apparently no exploration of the mother’s state of mind over the previous four years.

1. As stated earlier in these Reasons, Ms G reported that in relation to the incident which was the subject of a JIRT enquiry involving C and his father, Ms G confirmed that neither the mother nor C himself had said to her that C had seen his father holding his penis in his hand.
2. I find that Ms G undertook therapy of children without a therapeutic goal, made a psychiatric diagnosis without further referral and let the children repeat allegations of abuse by their father without objective testing. In these circumstances I can give the evidence of Ms G little or no weight in assessing the best interests of the children.

**The Father**

1. Just as the mother had been, the father was asked about the Consent Order that had been made in July 2005. The father said he had thought it was good for the children to live with the mother. She wasn’t working at the time and he was.
2. The father specifically denied having threatened the mother although he conceded there had been verbal arguments.
3. He referred to having had help from the ladies at the contact centre in learning to talk to his children more calmly. To choose his words, a little bit more wisely, in case the children could interpret it the wrong way. He said he had had a habit of saying to the children “*Knock it off”*. He had also been in the habit of swearing in their presence although he said not at them.
4. His evidence about assistance in this regard, about learning to be a little bit more calm and understanding and also about ignoring C in order to concentrate on S was convincing.
5. He was thoughtful when he said he thought his son C was out of control because there was no discipline.
6. In answer to the allegation that he had been using steroids, the father conceded that he had in 1997 or 1998, had received no effect from using them, and had ceased taking them after 8 to 10 weeks. This matter was not pursued.
7. In relation to the allegation that he had exposed the children to pornographic material, the father said”-

 “I have never let my children watch pornographic movies.”

 I accept the father’s evidence about that.

1. The father was guarded about the use of language. He acknowledged he may have used a profanity and that swearing was not really a good model.
2. I formed the impression that the father is somebody who has been in the habit of swearing quite fluently and has come to realise that the children have taken him for a model.
3. The father drew a distinction between swearing at the children and swearing but it seems likely that the children didn’t understand that distinction.
4. The evidence of the father about an apology to C was that he said to his son:-

 “sorry that you feel that way”.

This is a reference to C having said:-

 “I hate you for what you have done to me”.

The evidence of the father was that he apologised to C to make peace so that everyone could move forward. He meant it although he did not accept that he had actually done any lasting harm to the children.

1. The father acknowledged in his oral evidence that the children may have been copying his behaviour. He was firm in his evidence about the children:-

“they have never shown me any disrespect in my home”

1. To some extent the father was at a loss to understand why C’s behaviour had become as challenging as it apparently is.
2. Counsel for the mother raised with the father the possibility that C had undiagnosed learning difficulties. The father thought that was a possibility and said in the event that the children lived with him he would address it by starting with the school and going with any plan that they proposed.
3. The proposal was put to the father, although it never became part of the mother’s application, that the children could have shared care week about. The father said week about care could be good for them but was not practical because of his work hours and the travelling for school.
4. When asked what he thought was wrong with the mother’s orders he said words to the effect:-

“If those orders were made it would take two years to get back to normality. By that time I won’t have any relationship with them.”

I consider that that statement represented the father’s fear of losing his relationship with his children and I accept that the fear is well based.

1. When cross examined by the Advocate for the Independent Children’s Lawyer the father put forward a realistic plan:
	1. changing the children’s schools, both for geographic convenience and because he thought they both needed a fresh start; and
	2. having his mother live with him for a year or longer and what the physical arrangements would be for her stay in the household.
2. He seemed to understand that C would be a challenge in adolescence but he denied that he himself would become frustrated, aggressive and explode into rage in response, as was put to him.
3. He accepted that he was untested as a primary carer other than for short periods during school holidays.
4. I asked the father what he thought had brought about the change in the children and the mother, there having been years of working arrangements for care of the children. He said, having listened to all the evidence, he thought that the mother had some depression and anxiety and that he felt quite sad about it. I accept the father’s evidence about his state of mind.
5. The father also said that for the last fourteen months the children’s attitude towards him had changed disgracefully and that:-

“[C’s] attitude at school has got to change.”

In my view this was a realistic appraisal of the situation.

1. The father acknowledged that communication between the parents was a problem but thought that if the children lived with him he would encourage them to have telephone contact with their mother and reassure them that they would see their mother. He felt that a change of residence would mean that the children would no longer be in a negative environment.
2. The father said he thought that the children would feel anger and frustration at first, that they would miss their mum and miss their friends. He also said “children can be resilient”.
3. The father said he would seek as much help as he could get from Dr V who has been undertaking the family counselling, the children’s school counsellor, the father’s own mother and the father’s partner, Ms A. I accepted the father’s evidence that he would be more supportive of the children in future, much more supportive.
4. His plan for the care of the children is that he would drop the children to school, probably most mornings, starting work a little later than he had in the past and that they would either be cared for by his mother or the after school care program each afternoon. He planned to take time off work, two weeks or more as required, to help them to settle in if there was a change of residence.
5. The father spoke affectionately of his partner, Ms A, and Ms A’s son JA. He said C, JA and S had, before all this had happened, had played nicely and that JA had never led C in bad ways, in fact he had been a good role model.
6. When asked whether the father felt angry with the mother he said:-

“No, I’m sad. I think the children need their mother in their life. They have been put through enough.”

1. The father struggled somewhat to identify strengths of the mother but said he thought that she would provide a stable environment and a loving environment for them.
2. The father had contemplated the contact he would seek if the children continued to live with their mother which is as follows:-
	1. each alternate weekend from Friday after school to before school the following Monday;
	2. one mid week contact overnight;
	3. more say in their day to day schooling;
	4. greater shared responsibility;
	5. an active role in the school;
	6. better communication between the parents;
	7. half the school holidays;
	8. make up time for all the time he had missed in recent months. When pressed, the Father said he would have every weekend for the next as months; and
	9. that time with him should commence immediately with no more supervised visits.

This evidence seemed to represent genuine reflection by the father on the future arrangements for the children.

1. In relation to discipline the father said that he had raised his voice when he said “knock if off” to the children, that he sometimes smacked them on the bottom and that he had never had disrespect from the children in the past. However, he said that in the future he wouldn’t smack them because he now saw that that could be misconstrued by the children as deliberately hurting them. His future technique would be to speak to them about things and to remain calm.
2. The father said that he had never really shouted but he did raise his voice to get C’s attention. He would no longer be swearing in front of his children as he had done in the past
3. The father said he had made comments in the past to C such as:-

“stop being silly, stop acting stupid”

 but denied ever having called him a:-

 “stupid little boy”.

 He identified having called C names such as:-

“egg head and goose”

He said he now understood he had to think about the tone he used with the children and the way he spoke to them. I find that the father was at times a loud and commanding presence for the children and that the children may have felt frightened of him when they misbehaved.

1. The father conceded that he had asked S to tell C not to be rude on the phone. When questioned about that he accepted that she had been too young to be given that responsibility and that he was putting her in a difficult position.
2. Ms Shea suggested to the father that there would be problems for the children if they were thought of as the good kid and the bad kid. The father agreed and identified that the problems would be rivalry between them and that C might think that he is “the black sheep”.
3. The father spoke quite movingly of the session in May 2010 in the office of Dr V. He felt the therapy session went well. The children had handed him pictures: his son a picture with the words written on it, “I love you dad”. He described the picture as “him and I holding hands” and the words on the picture were “you and me”. He said the children gave him a hug and that C had said in the presence of both parents:-

“We’re going to McDonalds do you want to come with us?”.

The mother had said yes and Dr V had said:-

“That will be wonderful, you have some talking to do”.

The father then described the family as having walked to the McDonalds, each child taking a parents’ hand.

1. I formed the impression that the father had been genuinely hopeful that there might be an improvement in family relationships at that point.
2. Sadly, the mother’s feelings about that meeting were entirely different. In lengthy paragraphs of her second affidavit sworn 20 July 2010 at paragraphs 9, 10 and 11 the mother clearly felt that she had been pressured and intimidated about reaching an agreement before final hearing.

**The Paternal Grandmother**

1. I have no doubt that the children enjoy a good relationship with their grandmother. Nor do I doubt her evidence when she says that she takes no nonsense from them.
2. Counsel for the mother asked the paternal grandmother to confirm that she had said to C when he told her that his father used to hit his mother and that’s why the marriage had broken up that “well your mother is a liar*”*. The paternal grandmother confirmed that she indeed thought that the mother was a liar.
3. I formed the impression that the paternal grandmother was strongly sympathetic to her son’s situation where he had had limited supervised contact with the children and had been subjected to disrespectful abuse by his children for more than a year. I have little doubt that the paternal grandmother blames the mother for the situation and feels considerable anger and offence about what has occurred. It is not helpful for the children to know that their grandmother has this opinion.
4. The paternal grandmother is willing to read the second family report and participate in family therapy as required. She is also prepared to step back from expressing any opinion about the children’s mother and to leave the disciplining and management of the children to her son and Ms A. It will assist the children if she does so.
5. I have no doubt that the paternal grandmother will be of considerable practicable assistance to the household and that relationships will be restored quickly between the children and their grandmother despite C’s recent impertinence to her at the interviews for the second family report[[4]](#footnote-5):

“[The paternal grandmother] when greeting [C], who had called her ‘Mrs Wobbles’ asked for a kiss. [C] ran away from her. At the end of the session [C] walked out of the room without assisting with packing up or saying goodbye to any of the adults.”

**Ms A**

1. Ms A was an impressive witness. She showed considerable warmth and knowledge in speaking about both children. She referred to the fact that she and the father planned to marry and move in together. I find that she is a person very well known to the children and has been since 2006 and that they understand that she is their father’s partner. Ms A has a good relationship with the children’s paternal grandmother.
2. In the first family report[[5]](#footnote-6) Ms A told the family consultant that she had been in a relationship with the father for approximately four years and that she had known the children and spent time with them for most of that period. She said that the children called her by her first name and that occasionally S had called her “mummy” but this was not something she promoted.
3. Ms A noted that there was no violence in her relationship with the father, that they had argued at times but that this did not involve yelling or screaming. She rejected the possibility of there having been sexual misconduct between the father and the children.
4. In the second family report[[6]](#footnote-7) Mr P observed that S interacted positively with her father, her grandmother and Ms A during the observation session. She was warm in her greetings to Ms A and the grandmother on their entry to the session. S hugged all three adults at the conclusion of the observation.
5. Ms A appropriately acknowledged in cross examination that it would be difficult for the children at first to adjust. She spontaneously agreed that she would participate in any therapy that was required and I note that most significantly, Ms A accompanied the father on every occasion that he has been having supervised visits with the children at the E Centre.
6. Ms A also spoke very positively about the relationship between her son, JA, now aged 14 years, and C and S. She said that during contact visits the children had asked about JA on the last couple of occasions.
7. I have no doubt that Ms A will be warmly supportive of the children and of their relationship with their mother. I find that there would be a positive benefit to the children in being in a household that comprised their father, Ms A, JA and the paternal grandmother.
8. Ms A apparently enjoys a good working relationship with JA’s father and JA has regular weekend and holiday time with him.
9. I consider it most likely that the father will benefit from the advice and assistance Ms A can give him and that the children will be safe and well treated in her care.
10. There is evidence in the notes produced by Interrelate Contact Centre that Ms A, together with the father, remained patient on each contact occasion when there was regularly very challenging behaviour by both the children at the commencement of contact which settled into affectionate contact by the end. I have no doubt that Ms A assisted the father through these difficult visits. For instance, on 24 April 2010 at the commencement of the period of contact the contact worker asked the children if they would come up to the contact room and meet with their father. The children avoided the father’s hugs, avoided eye contact and S said:

“Don’t touch me.:

 She also said “yuk” when the father touched her. Their behaviour was apparently addressed by the contact workers. The children then ran around and did not listen to what was being said to them. They were reminded to use their manners and respect everyone at the centre. I note that while the father was talking to S she poured out the bubble mixture he had brought dumping it on the ground. The father is reported to have said in a calm voice:-

“the bubbles are easier to make when the tube is full.”

S stared at her father and tipped some more out on the ground. S then ran into one of the cottages and locked the door. C screamed out:-

“Let me in so I can get away from him too.”

Soon after the father and Ms A brought out food for the children to eat. C would not give Ms A a drink until she said:-

“Dead please”

which she several times declined to say. The contact workers continued to talk to the children about their manners. During the session the children began at different times to sit on their father’s lap and he is reported as having been encouraging. I note this passage:-

“When [S] tried to join in the game (between [C] and his father) [C] said to her ‘no, you can’t play. Tell her she can’t play dad. I just want it to be you and me’.

Ms A then joined the play and played with S separately so that C could continue to play with the father. Ms A later helped S to do a drawing which said:-

“dad and [Ms A] love [S] and [C]”

C is reported as having given the father and Ms A a goodbye hug. They were smiling by the time they greeted their mother.

1. This is typical of other reported contact periods which started badly and finished well. I find that Ms A is an intuitive and sympathetic person who has genuinely assisted the children during this period of visits in the contact centre and in the past in the home setting.

**Dr V**

1. Dr V gave evidence that she was available to assist the parties wherever the children were living on an ongoing basis and that that could include both parents’ partners and the paternal grandmother.
2. Dr V had felt that on the last session of family therapy that a good rapport had been established. She said that family therapy for at least a further six months for the whole family was required.
3. She was most concerned about C’s behaviour. She said C had a lot of power which a child his age simply couldn’t manage and that approaching adolescence there was a real risk that the parents needed to get on top of things with C right now. There was also a real risk that C would drag S into his own behaviour patterns.
4. Dr V concluded her evidence with a statement that C was in the driving seat. It was a startling image of this nine year old boy whose relationships with the people who matter most to him is so much at risk.

**Mr P, Family Consultant**

1. Mr P made it clear in his second report dated 29 June 2010 that there should be a change of residence for the benefit of the children. I quote as follows[[7]](#footnote-8):

“On the information available to this assessment it appears likely that [C] will experience serious problems in life, including relationship difficulties, academic failure and behaviour difficulties which may ultimately require criminal sanction if his circumstances do not dramatically change. It does not appear that [the mother] has the capacity to affect these changes for [C] and indeed appears to struggle to manage his behaviour or viably use the assistance of professionals to alter the situation for [C]. The issues of maintaining connections, friendships, social and sporting involvements are secondary considerations which will not override the primary issue in this matter.”

And in relation to S:[[8]](#footnote-9)

“The improvements noted above for [S] appear positive, however, she is at risk of having her needs inadequately met in the face of [C’s] difficult behaviour with [the father] and demanding behaviour with [the mother]. There is, however, at this point no indication that separating the children should be considered.”

1. Mr P referred to the fact that he had seen marked changes in the demeanour of the father between the interviews for the two reports and that what stood out was the father’s capacity to act on what he was told. In my view this is in marked contrast to the inability or unwillingness of the mother to challenge her own ideas, to accept any apparent criticism of her son nor to participate in the family therapy process for the benefit of the children.
2. Mr P felt that parenting programmes might increase the skills of each parent and he said that he had recommended participation in parenting programmes with that aim in mind and also in an attempt to create consistency between the households. However, if there was to be a change of residence, the parenting programmes would not be a priority at this time.
3. Mr P said that he found that S’s behaviour was ambivalent but C’s behaviour had deteriorated. He commented on the fact that C had said[[9]](#footnote-10) in relation to his father:-

“you give men like that one chance and once chance only.”

C had gone on to make a series allegations about his father including that his father had smashed his nose in and it was bleeding but his father didn’t care.

1. Mr P noted that C’s affect was not in keeping with the seriousness of any of these statements. I note that there was no medical evidence to support any such allegation.
2. Counsel for the mother cross examined Mr P about the following comment[[10]](#footnote-11) whilst observing the children with the mother:

“[C] commenced the observation by boasting happily to his mother ‘I was really rude to dad’.

 The mother in her evidence said that she did not think C was boasting when he said that and that rather he had been expressing relief at finally having found the courage to tell his father what he really felt. Mr P rejected that interpretation and expressed the opinion that the mother either wilfully did not set limits on her children or lacked the skills to set limits on C’s behaviour. He said that in his view the mother tended not to hold C accountable for any of his behaviour and further she held other children accountable for C’s difficulties. I accept that opinion which accorded with my own observation.

1. Mr P was asked about the incident referred to earlier in this Judgment which took place on 4 August 2009 where C had grabbed a child and started shaking him in order to show his mother, who he said thought he was weak, that he was not weak. Mr P expressed the view that for a child to need to demonstrate violent action to his mother in this way suggested that all was not well in that relationship.
2. Mr P expressed the view that the mother lacked the capacity to promote a relationship with the father. This accords with my observation of the mother that she appeared to hold the view that she was actively protecting the children from the father and not that she was deliberating undermining the relationship.
3. The issue was raised with Mr P of the impact on the mother of a change of residence for the children. The evidence by Mr P about this was most helpful. He said he thought it was a matter for the mother to find a way to understand the decision and to continue with a counsellor to develop coping strategies for the change. If she was able to accommodate the decision that would be of enormous benefit to the children.
4. The evidence from Mr P was that the children would be quite upset for weeks, perhaps months, after a change of residence but that the difficulties from staying where they are effectively outweighed that disruption.
5. Mr P confirmed that it was of some concern that the paternal grandmother considered the mother to be a liar and led to the recommendation by him that the paternal grandmother should be involved in family therapy.
6. Counsel for the mother raised with Mr P the possibility of C having learning difficulties. Appropriately, Mr P wasn’t able to say anything definitive about that, however, what he did say was that if that was to be the case, which it could be, C needed parents who are able to assist him.
7. I came to the conclusion that the Family Consultant considered that there was some risk associated with moving the children’s residence. There was a risk that the father might behave inappropriately or violently in the future just as there was some risk that he might have done so in the past. However, he had been able to demonstrate some capacity for change and a willingness to accept advice. Since it seemed that that the situation can only deteriorate further without change then the risk was worth taking. I accept that assessment.

# THE ISSUES FOR DETERMINATION

1. The issues were:-
	1. whether the children should remain living with their mother or there should be a change of residence;
	2. in the event that there was a change of residence, the amount of time the children should spend with their mother and in what circumstances and in the event that they remained where they were, whether there should be a change to the current arrangement;
	3. the need to address the behaviour of both the children but particularly the behaviour of C;
	4. whether the lack of communication between the parties could be addressed and improved;
	5. whether there was a need to protect the children from psychological harm and, if so, how to go about it.

# RELEVANT LEGAL PRINCIPLES TO BE APPLIED

1. There are competing applications for parenting orders. Section 60CA is as follows:-

In deciding whether to make a particular parenting order in relation to a child a court must regard the best interests of the child as the paramount consideration.

The process of determining what is in a child’s best interest is set out in section 60CC and I consider those matters accordingly.

1. In relation to parental responsibility, both parents initially sought in their respective applications that they have equal shared parental responsibility. Section 61(DA) of the *Family Law Act 1975* is as follows:-

**Presumption of equal shared parental responsibility when making parenting orders**

             (1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

             (2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

                     (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or

                     (b) family violence.

             (3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

1. I consider that in this matter the presumption of equal shared responsibility is rebutted by the evidence of the Family Consultant, the parties themselves and the notes from N Public School which suggests that the mother does not presently have a capacity to meet all of the responsibilities of parenthood. She has been unable to manage the children’s behaviour and has been unable to maintain objectivity to any extent about her children’s behaviour, particular C’s behaviour at school and the behaviour of both children in relation to their father.
2. I note that the mother withdrew permission for C to continue to be seen by the school counsellor because of her dissatisfaction about the level of investigation of incidents. This was at the beginning of the period when the mother became increasingly unable to bring objectivity to the situation developing at school.[[11]](#footnote-12)
3. The children are at very real risk of having disrupted personalities and failing in their own relationships unless there is a change in their circumstances. Accordingly, I consider that the presumption is rebutted by this evidence and I am therefore at large to make orders about parental responsibility.
4. I consider that it is in the best interests of the children for the father to have sole parental responsibility. I find that the father has the capacity to make decisions about long term plans for the children. I further find that his ability to listen to and implement professional advice in this regard will enhance this capacity. However, the mother is a most important person in the children’s lives and it is for that reason the orders I have made allow for the father to formally provide the mother with an opportunity to express a view before the father makes any particular significant decision. Of course, the father may accept or reject any suggestion the mother makes but in my view, given that the mother has been the children’s primary carer to date, the father will be assisted, at least at times, by her contribution in this regard.
5. Both parents are to have input into important decision making and that the father should at all times keep the mother advised of significant events in the children’s lives and consult with her wherever possible before a significant decision is made, such as attendance at high school, certain kinds of medical treatment, religious instruction and so on.

**Section 60CC factors**

1. I am required to consider the factors under section 60CC in determining what is in the children’s best interests.

**s.60CC(2)(a) The benefit to the children of having a meaningful relationship with both of their parents**

1. There is a benefit to the children of having a meaningful relationship with both parents. The children have had a meaningful relationship with both parents from their birth until mid 2009. Relationships need repairing and restoring but are essential to the development of the children.

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

1. The mother’s case is that the children have been subjected to violence by the father, hitting and threats. She also asserts that they have been exposed to physical violence towards her, including a threat by the father to kill her which she believed. I do not consider that there is a need to protect the children from any physical violence from the father. There is evidence of some corporal punishment by both parents, namely smacking and of shouting and swearing in front of the children.
2. It is not part of these proceedings to determine the events that occurred during the course of the marriage. There were court orders in July 2005 made by consent which reflected the fact that both parents had been involved in the care of the children immediately post separation and the orders regularised that situation. Arrangements continued for four years until breaking down in 2009. There is evidence that the mother is affected by issues allegedly arising from the parties’ relationship prior to separating.[[12]](#footnote-13)
3. Both parents in these proceedings confirmed that they had consented to those orders in the belief that they were in the best interests of the children. I do not consider that there is any evidence that the children have come to harm or have been abused by their father as alleged. It is significant that the mother said nothing to Dr L, the Consulting Paediatrician to C, of any allegation of physical abuse of C or S although she had ample opportunity to do so.
4. I do not consider that the children have been subjected to physical or psychological harm from exposure to abuse, neglect or family violence.

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

1. The children have both at various times expressed a view that they do not want to see their father, sometimes forcefully.
2. The children are C aged 9 years and S aged 7 years. The Family Consultant assessed C as not having sufficient maturity to understand the consequences of what he was saying. The children have been given latitude to express negative views by being allowed to swear at, denigrate and mock their father and members of the father’s family without any real consequence imposed by their mother.
3. Both children in a session of family therapy with Dr V in May 2010 freely and spontaneously expressed love and affection for their father when they thought it was safe to do so.
4. I place no weight on the expressed wishes of the children in these circumstances.

**s.60CC(3)(b) The nature of the relationship of the children with:**

**(i) each of their parents; and**

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

1. The children love both of their parents and have a close loving relationship with their father’s partner, Ms A, JA, their paternal grandmother and probably a friendly and affectionate relationship with the mother’s partner, Mr D.

**s.60CC(3)(c) The willingness and ability of each of the children’s parents to facilitate, and encourage, a close and continuing relationship between the children and the other parent**

1. The mother has apparently lost the ability to facilitate and encourage a close continuing relationship between the children and the other parent.
2. During the course of this hearing she repeatedly expressed the view that the children would not be safe in their father’s care, that they were frightened of him and that he had hurt them, hit them, sworn at them, threatened them and that the time that they spend with him should be supervised.
3. The mother in the past, despite the difficulties of being the full time carer of two children aged 3 years and 1 year, as they were at the date of separation, has had the ability to facilitate a relationship with the father but for reasons which may relate to her psychological and mental health has been increasingly unable to do so since 2008.
4. The father has supported the relationship between the children and their mother and there is nothing to suggest that he has been critical of the mother in the presence or hearing of the children. I accept that he amended his application to seek residence only after the professional advice indicated that a change was essential, in the best interests of the children, and that the mother was unable to effect an improvement in the situation.
5. The father was asked whether after more than a year of supervised contact he would be tempted to:-

“give the mother a dose of her own medicine if the children lived with him”.

His response, which I accept was an honest response, was that it would be a very low act on his part to behave that way and he wouldn’t do that to his children.

**S.60CC(3)(d) The likely effect of any changes in the children’s circumstances, including the likely effect on the children of any separation from:**

**a) either of their parents; or**

**b) any other child, or other person (including any grandparent or other relative of the children), with whom they have been living**

1. There will be an immediate disruptive effect from a change of residence. The children will attend a new school. They will move house to live with their father and paternal grandmother. At some stage in the short term future, Ms A and JA will join the household. This will be entirely different to the life they have known to date although all of those people are well known to them.
2. There is likely to be a significant positive impact on a change of school, more for C than for S but it will represent a fresh start and an end to enmities created over the last eighteen months.
3. The children will be most affected by the loss of time that they spend with their mother who has been their full time carer all their life. They will feel this change keenly but with the assistance of their father and the father’s household and ongoing involvement in family therapy, they should restore the relationship with their mother. Hopefully, their mother, despite her personal sadness at no longer being their full time carer, will be able to reassure them, enjoy the time she spends with them and continue to have an important role in their lives growing up.

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

1. The parties both live in suburban Sydney. Both parents drive and have motor vehicles. They are both connected to landlines and mobile phones.
2. There is no geographical or financial reason why communication and time cannot take place.

**s.60CC(3)(f) The capacity of the children’s parents and any other person (including any grandparent or other relative of the children); to provide for the needs of the children, including emotional and intellectual needs**

1. The mother has had a proven capacity to meet the needs of the children, certainly the physical needs, but also the emotional and intellectual needs.
2. More recently, that is since 2008, the mother has been unable to contain the behaviour of C and more recently S, who has been emulating her brother.
3. C is assessed to be failing at school. There have been a great many complaints by the mother about C being bullied at school. There are many reported incidents of conflicts between C and other children, many of which are attributable to C and not to others. The mother rejected any proposition put to her that C was at fault in any school incident. I find that the mother is unable to take an objective view of her son’s behaviour.
4. The mother has been unable to set limits on C and has been unable to assist him to manage his own behaviour in his own interest.
5. The mother has been so focused on C’s difficulties that she has been less available to both children in terms of their day to day needs including the significant matter of the need to have a relationship with their father.
6. The mother’s capacity to meet the children’s needs appears to be presently impaired in a way that it has not been in the past.

**s.60CC(3)(g) The maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the children and of their parents, and any other characteristics of the children that the court thinks are relevant**

1. The children are a 9 year old boy and a 7 year old girl. They appear to be healthy, well developed children with behavioural problems. Both children have slept in their mother’s bedroom at night, one in bed with her and one on a camp stretcher beside the bed, for the past four years. It seems likely that their maturity and independence has been adversely affected by this.

**s.60CC(3)(h) If the children are Aboriginal or Torres Strait Islander:**

**e) the children’s right to enjoy their Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and**

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

1. Not applicable.

**s.60CC(3)(i) The attitude to the children, and to the responsibility of parenthood, demonstrated by each of the children’s parents**

1. Both parents have shown a responsible attitude to their children throughout their lives. The father, certainly in the early years of separation, had been content to leave the decision making to the mother provided she kept him reasonably well informed of the decisions that she was making about school, health and activities. There is some complaint that the decision was made and he was told after the event but the system appeared to be working reasonably well.
2. Recent events have made the father realise that he needs to take a much more active role in the care of the children and in particular their education and the decisions that are made about who they seek assistance from.

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

1. There is no evidence of family violence.

**s.60CC(3)(k) Any family violence order that applies to the children or a member of the children’s family, if:**

**i) the orders is a final order; or**

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

1. There has been no family violence order.

**s.60CC(3)(l) Whether it would be preferable to make the order that would be lease likely to lead to the institution of future proceedings in relation to the children**

1. The mother has made an application to reduce the father’s time and to continue the current interim order which requires supervision. I have found that there is no necessity for supervision of the father. Quite the contrary, there is a necessity for the father to become much more involved in the care of the children and to have them live with him and to assist them in learning techniques and strategies for acceptable behaviour.
2. In the event that both parents work on their ability to communicate and to assist the children there should be no need for the institution of further proceedings.

**s.60CC(3)(m) Any other fact or circumstance that the court thinks is relevant**

1. The material from K Centre[[13]](#footnote-14) indicates that in October 2004 the mother was having some difficulties managing the children. This is entirely understandable given that she had the sole care of two children under the age of four years. At that time the mother told staff at K Centre that she would smack C with her hand and he would laugh at her so she threatened him with the wooden spoon. He would continue yelling at her so she would use the wooden spoon to hit him and also use a belt. She said C’s response would be just to yell back and laugh.
2. The mother said she was constantly yelling and screaming and felt that she was exploding:-

 “I need to walk away so that I don’t violently hit them, not that I would.”

1. The mother was at that time neglecting herself for the sake of the children:-

 “I do lose my appetite when I am tired. I feel I can’t be bothered cooking for myself so I make sure the children are well fed.”

1. The mother made this remark about being admitted to K Centre in relation to the children’s father:-

“He is very happy that I am going to get help as he knows I need it and feels helpless in trying to help me.”.

 This is a strongly positive statement about the relationship between the parties at that time.

1. At the same time the mother reported that she had often been beaten up by her husband and severely bruised, that the father had been physically abusive. She had gone back to him and he had continued to hit her.
2. She would often have negative thoughts about why her marriage failed and why her children didn’t listen to her.
3. She was referred to Dr H for stress and depression.
4. On one occasion the mother was observed to smack C on the bottom, aware that staff were observing, then apologised to staff for doing the same. In relation to this observation on 26 October 2004 the mother described herself as having no control, no patience:-

 “I explode, I shout at them. I don’t want you to think I abuse them*.”*.

1. On 27 October 2004 the mother described her parents as old and frail and accordingly unable to provide assistance. Antidepressants were discussed. She was diagnosed with reactive depression, adjustment disorder and underlying personality issues.
2. Dr J, the Clinical Psychologist, noted that the mother found it difficult to follow through and the importance of setting limits.
3. In my view there are echoes of the mother’s current dilemma in this assessment at K Centre six years ago.
4. Faced with the difficulty with C struggling at school academically and in the playground, she has become overwhelmed, has been unable to set limits and is stressed and anxious. It would be very much in the best interests of the children if the mother was able to seek professional assistance with a suitable psychologist or psychiatrist.

**s.60CC(4a) If the children’s parents have separated, the court must, in applying subsection (4) have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred**

1. The father has been a part of the children’s lives all their life but on a regular basis since separation for six years. He has not fully participated in decisions about major long term issues but when there have been emergencies, such as the injury to C’s leg, the parents have cooperated well. The father has spent time with the children pursuant to orders and has taken them away on holidays. He has persisted with having contact with the children at a contact centre for short periods, despite the very real difficulty of tolerating the behaviour of the children which has deteriorated so badly.
2. The mother had been in the habit of, if not consulting before a decision, at least advising the father of the children’s activities, events at school and matters involving their health. Since 2008 she has increasingly moved away from facilitating time between the children and their father and has become fearful that the children are at risk in the father’s care because of events which she alleges took place during the course of the marriage.
3. There is a logical inconsistency to this given that the children aged 3 ½ and 1 ½ had overnight time with their father post separation and they are now aged 9 and 7. However, I think the mother is feeling so stressed and anxious that she has conflated issues from the marriage with present behavioural problems and come to the conclusion that the best course for the children is to see much less of their father for the reasons set out in this Judgment. I consider that the mother is quite wrong about this.

# CONCLUSION

1. The parties appeared to come close to a resolution of their difficulties in therapy with Dr V in May 2010. However, the mother, after the meeting which led to the family eating together on 25 May 2010, clearly became progressively unhappy. By 18 June 2010 she had a conversation with Dr V as follows[[14]](#footnote-15):-

Mother: “I wasn’t happy about how the father had spoken to me at our last meeting. He made me feel very uncomfortable and unsafe.”

Dr [V]: “I don’t believe [the father] was being aggressive towards you.”

Mother: “with all due respect, [Dr V], the way that [the father] spoke to me wouldn’t make you feel threatened because you didn’t live with all the domestic violence and sexual abuse like I did, and that’s why I feel the way I do.”

 The Mother then says Dr V said “you’re right [Ms Green], you’re right.” Dr V then said:-

“Family therapy wouldn’t work if this is how you’re feeling and I think it’s best to let the courts decide even though it’s not a nice thing to go though.”

1. It seems likely that the difficulties that the Mother was experiencing with C’s behaviour at school in 2008 and 2009 caused her considerable distress and the anxiety for which she was seeing her counsellor, Ms W. I am unable to tell from the evidence how this connected with her feelings about the marriage and events during the course of the marriage but the conversation set out above, drawn from the mother’s evidence, does seem to reflect that unresolved issues from the marriage together with a recurrence of anxiety, if not depression, have caused the mother to become intensely fearful about the children and over protective to the extent of wanting to greatly reduce the time the children spend with their father.
2. The consequence of this is that the children’s behaviour has become increasingly disruptive. They have both been making ever increasingly rude and contemptuous remarks to their father and the father’s family in order to please their mother. They have had to conceal the pleasure they feel in their father’s company and in the company of Ms A and JA and their paternal grandmother for fear of upsetting their mother further.
3. There is no doubt at all that the mother loves the children dearly and has devoted herself to their care from the time each of them was born. However, her inability to manage and discipline them, to contain their behaviour and to promote their relationship with their father and other important members of their family is doing damage which needs to be addressed by the Orders I have made. The mother may be dependent on the children.
4. I have confidence that if the mother receives appropriate assistance and continues to engage in the family therapy process, relationships between the children and each of their parents will improve and in time there may be an improvement in communication between the parents.
5. Accordingly, I have concluded that the issues should be determined as follows:-
	1. there should be a change of residence;
	2. there should be a period of time when there is limited supervised time with the mother to enable them to settle down in the father’s household and to begin to understand all the changes in their lives;
	3. the children’s behaviour, especially C’s, needs ongoing therapeutic intervention. I find that the mother would not facilitate this but the father and his extended family will;
	4. communication between the parties may improve after the mother takes up intensive therapy and the father continues to follow advice;
	5. the children are presently being adversely affected by their mother’s incapacity to set limits and promote healthy relationships. Their personality and development is at risk. A fresh start, including a new school together with expert guidance from Dr V, will assist their development and improve relationships with both parents.

I certify that the preceding two hundred and twenty eight (228) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cleary.

Associate:

Date: 25 August 2010

1. Exhibits “F2” and ICL 11” [↑](#footnote-ref-2)
2. Subpoena “ICL 8” [↑](#footnote-ref-3)
3. Father Affidavit pgs 115-125 [↑](#footnote-ref-4)
4. Family Report 29 June 2010 para 58 [↑](#footnote-ref-5)
5. Family Report 3 February 2010 page 20 [↑](#footnote-ref-6)
6. Family Report 29 June 2010 para 54 [↑](#footnote-ref-7)
7. Family Report 29 June 2010 para 68 [↑](#footnote-ref-8)
8. Family Report 29 June 2010 para 71 [↑](#footnote-ref-9)
9. Family Report 29 June 2010 para 46 [↑](#footnote-ref-10)
10. Family Report 29 June 2010 para 59 [↑](#footnote-ref-11)
11. Exhibit “F-1” [↑](#footnote-ref-12)
12. H Community Health “ICL 8” February 2010 [↑](#footnote-ref-13)
13. Exhibit “ICL 9” [↑](#footnote-ref-14)
14. Mother’s Affidavit sworn 20 July 2010 para 27 [↑](#footnote-ref-15)