

## **FAMILY COURT OF AUSTRALIA**

**HELBIG & ROWE**

*[2015] FamCA 146*

FAMILY LAW – CHILDREN – BEST INTERESTS – UNACCEPTABLE RISK – Where the mother made allegations of abuse by the father to a child of the marriage – Where the mother sought orders for sole parental responsibility, that the children live with her and that the time with the father be supervised – Where the Single Expert did not believe that the abuse on balance is likely to have occurred – Where the Single Expert considered that the mother had inappropriately and repeatedly questioned the children about what she considered to be acts of abuse by the father – Where the children are currently living with the father and were reported to be happy with that arrangement – Where there is a risk of the children losing their relationship with the father if they live with the mother – Orders made that the children live with the father – Orders made that the mother have supervised time for a one year period and gradually increasing unsupervised time thereafter.

*Evidence Act 1995 (Cth) ss 128, 138*

*Family Law Act 1975 (Cth) ss 60CC, 61DA, 121*

*Family Law Rules 2004 (Cth) Rule 1.19*

*Helbig & Rowe [2014] FamCAFC 179*

*M & M (1998) 166 CLR 69*

**APPLICANT:**

Ms Helbig

**RESPONDENT:**

Mr Rowe

**INDEPENDENT CHILDREN'S LAWYER:**

Legal Aid NSW

**INTERVENER**

Secretary, Department of  
Family and Community  
Services (NSW)

**FILE NUMBER:**

PAC 5421 of 2010

**DATE DELIVERED:**

9 March 2015

**PLACE DELIVERED:**

Sydney

**PLACE HEARD:**

Newcastle

**JUDGMENT OF:**

Rees J

**HEARING DATE:**

22 January 2015 to 29  
January 2015

**REPRESENTATION**

**COUNSEL FOR THE APPLICANT:**

Ms Merkin

**SOLICITOR FOR THE APPLICANT:**

N/A

**COUNSEL FOR THE RESPONDENT:**

N/A

**SOLICITOR FOR THE RESPONDENT:**

Mr O’Sullivan

**COUNSEL FOR THE INDEPENDENT  
CHILDREN’S LAWYER:**

N/A

**SOLICITOR FOR THE INDEPENDENT  
CHILDREN’S LAWYER:**

Ms O’Rourke

**COUNSEL FOR THE INTERVENER**

Mr Anderson

**SOLICITOR FOR THE INTERVENER:**

Crown Solicitors Office

## **ORDERS**

### **IT IS ORDERED**

1. That all previous orders are discharged.
2. That X (“X”) born ... 2005 and Y (“Y”) born ... 2008 (“the children”) live with their father, Mr Rowe (“the father”).
3. That the father have sole parental responsibility for the children.
4. That the father inform Ms Helbig (“the mother”) in writing (including by email or text message) as soon as practical of any specialist medical appointments for either of the children with any medical consultant.
5. That the father do all acts and things to ensure that the mother is provided with all reports by any such consultant, and in particular with all reports in relation to each specialist review of X’s diabetes, and to authorise the mother’s individual attendance upon such specialists.
6. That the mother may obtain both oral and written information from the children’s medical specialists and make individual appointments with them to obtain information regarding the children’s medical issues and the father is to ensure that all treating doctors are aware that the mother is so entitled.
7. That the mother be permitted to provide gifts, letters and cards for the children to the father and that the father is to give the same to the children, subject to the father considering that the gift and/or communication is appropriate.
8. That the father authorise the staff of any school attended by the children to provide to the mother copies of all of each of the children’s school reports, merit cards and school photographs.
9. That each parent is to keep the other parent advised in writing of any change of address or telephone contact number no later than 14 days before any proposed change, including the details of their new residential address or new telephone contact number, such notice to be in writing (including by email or text message).
10. That, for a period of one year from the date of these Orders, the children shall spend time with the mother on one (1) occasion each week for at least two (2) hours (or such longer period as is made available by the supervisor), supervised

by PP Family and Counselling Services (“PP”) at a location as agreed between the supervisor and both parents.

11. That subject to the directions of the Manager of PP, the maternal grandparents may attend the children’s time with the mother pursuant to Order 10, at her invitation.
12. That each parent shall:
  - 12.1 Comply with any appointments made by PP for supervised contact/changeovers;
  - 12.2 Comply with all reasonable rules of PP; and
  - 12.3 Comply with all reasonable requests or directions of the staff of PP.
13. That the costs of supervision at PP be paid by the mother.
14. That commencing on the Saturday immediately following the expiration of one year from the date of these Orders, and for a period of three months thereafter, the children shall spend unsupervised time with the mother each week from 9.00 am on Saturday morning until 6.00 pm on Saturday evening. Unless the parents agree on an alternate venue, the father or his nominee shall deliver the children to the mother or her nominee outside the premises of PP at the commencement of the time, and the mother or her nominee shall return the children to the father or his nominee at the same place at the conclusion of the time. The maternal grandparents shall not be present for the changeover.
15. That, subject to Order 17, from the Saturday immediately following the expiration of the period in Order 14, the children shall spend unsupervised time with the mother from 9.00 am on Saturday morning until 6.00 pm on Sunday evening, commencing on that weekend and thereafter each alternate weekend. Unless the parents agree on an alternate venue, the father or his nominee shall deliver the children to the mother or her nominee outside the premises of PP at the commencement of the time, and the mother or her nominee shall return the children to the father or his nominee at the same place at the conclusion of the time. The maternal grandparents shall not be present for the changeover.
16. That, subject to Order 17, from the second weekend following the period in Order 14, the children shall spend unsupervised time with the mother from

Friday afternoon when school finishes until Monday morning when school begins, with the mother or her nominee to collect the children from school and return them to school.

17. That from the commencement of the school holiday period in December 2016 the children shall spend half of the school holidays with the mother and, in the absence of agreement, the first half in even numbered years commencing with the Christmas 2016 school holidays, and the second half in odd numbered years commencing with the holidays at the end of Term 1 in 2017.
18. That the children communicate with their mother by telephone every Wednesday at 6.00 pm, such calls to be facilitated by the father telephoning the mother's landline or mobile telephone number and causing the children to take the telephone call with their mother.
19. That the father is to engage in at least six (6) sessions of counselling with a counsellor as nominated by the Senior Family Consultant at Child Dispute Services of the Newcastle Registry of the Family Court of Australia to assist him to address issues relating to the children.
20. That the parents are each restrained by injunction from denigrating the other parent and/or members of the other parent's family to the children, in the presence and/or hearing of the children or at all; and each parent is to remove the children from the presence of any third party denigrating the other parent and/or members of the other parent's family.
21. That the parents are each to use their best endeavours to ensure that no other person denigrates the other parent and/or members of the other parent's family to the children or in the presence and/or hearing of the children.
22. That the parents are each restrained by injunction from discussing these proceedings with or in the presence of the children and from showing to the children any document connected with these proceedings.
23. That the parents are each restrained by injunction from questioning the children about what occurs in the other parent's care, including but not limited to questioning in relation to possible sexual abuse in the other parent's care.

24. That the father is to facilitate the children meeting with the Manager of Child Dispute Services at the Newcastle Registry of the Family Court of Australia to have the Final Orders explained to them on a date nominated by the aforesaid Manager.
25. That within 14 days, the mother is to pay into the Trust Account of Legal Aid NSW the sum of \$2,640.00 (two thousand six hundred and forty dollars) for payment by Legal Aid NSW to Dr B in respect of the remainder of his fees in relation to his expert witness costs.
26. That within 14 days, the father is to pay into the Trust Account of Legal Aid NSW the sum of \$140.00 (one hundred and forty dollars) for payment by Legal Aid NSW to Dr B in respect of the remainder of his fees in relation to his expert witness costs.
27. That the mother is restrained from disseminating to any person, body or organization any material or document produced for the purpose of any proceedings under the *Family Law Act 1975* (Cth), whether in the Family Court of Australia or in the FCC, including but not limited to any affidavit, report or document produced on subpoena, without the leave of the Court first obtained except for the purpose of obtaining legal advice.
28. That the Intervener records the single expert reports of Dr B, dated 29 September 2014 and 22 January 2015, and the Judgment in these proceedings on its KIDS System.

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

FAMILY COURT OF AUSTRALIA AT

FILE NUMBER: PAC 5421 of 2010

**Ms Helbig**  
Applicant

And

**Mr Rowe**  
Respondent

And

**Secretary, Department of Family and Community Services (NSW)**  
Intervener

### **REASONS FOR JUDGMENT**

1. In expedited parenting proceedings , Ms Helbig (“the mother”) applies for orders that the children X born in 2005 (“X”) and Y (“Y”) born in 2008 (“the children”) live with her, that she have sole parental responsibility and that the children’s time with the father be supervised.
2. Mr Rowe (“the father”) seeks orders that the children live with him, that he have sole parental responsibility and that the mother’s time with the children is supervised for 12 months and, thereafter, that the mother is to have limited unsupervised time.
3. The matter has a long history.
4. The parents separated in January 2009 when X was three and Y was approximately eight weeks old. The mother moved away from the matrimonial home with the children, who lived with her.
5. In August 2009 the father moved to Western Australia.
6. In November 2010 the father made an application in the Federal Circuit Court of Australia (“FCC”) seeking parenting orders. In those proceedings, Dr R (“Dr R”) was appointed as a Single Expert. Dr R, who is a child and family psychiatrist, prepared two reports for the assistance of the Court.
7. The hearing commenced in November 2011 but was not completed.
8. Dr R completed an updated report which was released to the parties on 3 May 2013.

9. The hearing of the matter continued on 13 May 2013 and judgment was reserved on 15 May 2013. On 21 May 2013 the matter was resolved when the parties consented to orders which provided that the parents had equal shared parental responsibility, that the children lived with the mother and that the children were to spend unsupervised time with the father from alternate Fridays until Monday, alternate Thursdays overnight and half the school holidays. The mother was restrained from allowing the maternal grandparents to attend changeover and without admissions the parties were restrained from exposing the children to the parents' naked genitalia, exposing the children to pornography and giving the children alcohol. Also without admission, the parents were to use their best endeavours to ensure that the children were not exposed to masturbation.
10. In the course of those proceedings, the mother flagged a possible intention to relocate with the children to Canberra but the consent orders were reached on the basis that both of the parents would be living in the same area north of Newcastle.
11. The father advertised for a person to be present when the children were in his care and employed Ms G ("Ms G"). Ms G initially came to the father's home when he had the children in his care. They became friends and Ms G and her adult daughter moved into the father's home in late July 2014. She has her own bedroom. Ms G's adult daughter also has a room in the home and her twin teenage sons (Ms G's grandsons) visit.
12. Between the making of the consent orders in May 2013 and 6 January 2014, the children spent time with their father broadly in accordance with the orders of May 2013, the last period being for four days ending on 6 January 2014.
13. Between 6 January 2014 and 6 September 2014 the children spent no time with their father, in circumstances which will be fully explored later in these reasons.
14. On 31 January 2014 the mother filed, in the Family Court of Australia, the application for interim and final orders which is now before the Court for final hearing. Pending final hearing, the mother sought that the consent orders of May 2013 be suspended and restrictions be placed on the children's contact with the father. The mother alleged that the children were at risk in the care of the father.
15. The father denied the mother's allegations and, in his response filed on 27 February 2014, he applied for orders that the children live week about with each parent and in the interim sought to continue his time with the children in accordance with the May 2013 orders.



16. On 30 July 2014 orders were made by the Court for the appointment of a Single Expert, Dr B, a child and family psychiatrist, and the orders specified which documents were to be provided to the expert.
17. Order 13 of the orders made on 30 July 2014, provided for the children to have supervised time with the father once each fortnight for two hours.
18. A dispute arose about the documents which were to be provided to Dr B and that issue came before the Court on 13 August 2014. The Court ordered that various counselling notes of the father's which pre-dated the orders of May 2013 were not to go to Dr B.
19. The mother appealed against the order for supervised time and the order in relation to the documents to go to Dr B. Those appeals were dealt with by the Full Court and judgment was delivered on 17 September 2014. Both appeals were dismissed.
20. On 29 September 2014 Dr B's report was provided to the Court under the heading "Recommendations". Dr B said:

After two family reports it has been unsuccessful in establishing an ongoing relationship with both parents. I believe the only alternative now is for the children to be placed with the father. I recommend that this happen immediately and without notice. The children should remain with the father and there should be not (sic) contact for two weeks by any means. Some telephone contact controlled and supervised could be introduced after a (sic) two weeks. After for a (sic) month without any contact with the mother some supervised contact could be introduced. I understand that this is a radical recommendation, however there is a very high risk that if the children remain in the care of the mother that she is so convincing in her belief system that sexual abuse counselling and allegations are likely to continue to cause damage to the children, and that the children will grow up to believe that they have been abused and that their father is a paedophile and that they've been irreparably harmed. This is likely to damage their self-esteem and also predispose them to personality disturbance and also anxiety and depression and relationship problems as they progress. I believe that now the only chance for a good outcome where the children can maintain a good relationship with both parents is if they are placed with the father.
21. Dr B's report was received by the Court on 8 October 2014 and was released only to the independent children's lawyer ("ICL").
22. An application was made by the ICL, without notice to either of the parties, and on 9 October 2014 the Court made orders that the children live with the father. The children were to be collected from their school by the father, all prior parenting orders were suspended and an order was made that the father have

sole parental responsibility for the children. The orders provided for the children to have contact with the mother broadly in accordance with the recommendations of Dr B.

23. The mother appealed against the making of those orders and judgment in the appeal was delivered on 16 December 2014. The Full Court found substance in the grounds of the mother's appeal in relation to lack of procedural fairness but reluctantly concluded that there was no remedy that could be provided to the mother in the event that the appeal were to succeed, in circumstances where the matter was listed to commence hearing very shortly.
24. The mother's parents sought leave to intervene in the proceedings to seek orders that, if the children were not to live with the mother, they should live with the maternal grandparents. Leave was refused on the basis that the trial would be lengthened unnecessarily but the maternal grandparents were permitted to file affidavits in the mother's case setting out their proposals.
25. The Court was aware that it was also the mother's case that, if the children were not to live with her, they should live with the maternal grandparents.
26. The mother lives with her parents and, until 9 October 2014, the children had also lived in the same house as their maternal grandparents. The mother had no proposal to move out of her parents' home, whether the children lived with her or not. In essence, the proposal of the maternal grandparents would have seen the children remaining in their home in the care of their mother.
27. When the matter commenced on 19 January 2015 the parties were the mother, the father, the ICL and the Secretary of the Department of Family and Community Services (NSW) ("DFCS").
28. The mother sought orders for the children to live with her but, in the alternate, asked the Court to order that the children live with her parents.

### **THE APPLICATION TO DISMISS THE ICL**

29. At the commencement of the proceedings, the mother sought to agitate an Application in a Case seeking orders that the ICL be dismissed and that the matter proceed without the children having an ICL. After hearing submissions from the parties, that application was dismissed and I indicated that reasons would be provided in the substantive judgment. These are the reasons.
30. The mother relied on an affidavit sworn by her on 31 December 2014.
31. It was the mother's position that the ICL should be discharged and that the matter should proceed without the children being independently represented. Counsel for the mother submitted that the ICL had discharged her responsibility by ensuring that evidence had been brought before the Court and therefore she was not required to participate further in the proceedings.

32. Counsel for the mother had helpfully prepared a written outline of submissions in relation to the application. In a table commencing on page 4, she outlined 15 separate instances where it was asserted that the actions of the ICL (cumulatively) warranted the discharge of the order for the children to be independently represented.
33. Eight of those complaints referred to the wording of the ICL's case outline and broadly to the assertion that matters in the ICL's outline were either incorrect or omitted relevant information. The case outline document is no more than an outline and is not evidence in the proceedings. I do not propose to have regard to those complaints.
34. Substantial complaints were made by the mother about the case outline document which was prepared by the ICL for the purpose of the hearing which commenced on 19 January 2015, specifically in relation to matters which the mother asserted were not included in the ICL's case outline. The mother asserted that there were four matters which the ICL should have included in her case outline but did not.
35. The third and fourth matters complained of relate to actions taken by the ICL in the proceedings before Judge Foster (as he then was) in the FCC in May 2013. There is no evidence before me that the mother made any application to Judge Foster to discharge the ICL in those proceedings. Those complaints have no relevance to the present application. They relate to completed proceedings which predate these proceedings.
36. The complaints made by the mother in relation to the present proceedings are:
37. *On 23 May 2014 the ICL made an application to the Court for the father to spend supervised time with the children*  
The application made on 23 May 2014 for the father to have supervised time with the children was considered by the Court. Orders were made in accordance with the application.
38. *On 29 May 2014 the ICL asked the mother to stop Y having counselling*  
No application was made to the Court in relation to Y's counselling in May 2014.
39. *In May 2014 the ICL provided the Family Consultant, Ms V, with documents from DFCS which were different from documents provided by the mother*  
It became apparent during the cross-examination of Ms V that she had been materially misled by documents provided to her by the mother, which she had interpreted to mean that DFCS had substantiated the allegation that Y had been sexually abused and that the father had been confirmed to be the perpetrator. The documents which were subsequently provided to Ms V by the ICL provided the correct information that although there were concerns about Y,

DFCS had not confirmed that she had been sexually abused and had not found that the father was the perpetrator. As a result of that new information, Ms V changed her recommendation and recommended that the children should have supervised time with the father. That was an appropriate course for the ICL to have adopted.

40. *When the matter came before the Court on 11 July 2014 the ICL, aware of evidence from the mother that there had been fresh disclosures made by Y, continued to press for the father to spend supervised time with the children*

Ms V had recommended that the children have supervised time with the father in the knowledge that Y had made statements which may have been disclosures of sexual abuse. The fact that further statements had been made by Y, relating to events which predated the supervision, would have been unlikely to lead to a suspension of the supervised time. The mother appealed against the order for supervised time made on 11 July 2014. The circumstances in which that order was made are set out in the judgment of the Full Court delivered on 17 September 2014 at paragraphs 64 to 111. It is not necessary to repeat those matters here. It is sufficient to note that the mother's appeal was dismissed. The complaint that the ICL acted improperly in advocating for supervised time to continue is unfounded.

41. *At an unspecified time, the ICL wrote to DFCS seeking information about correspondence sent to the father*

It appears to be conceded that whatever communication the ICL had on this occasion with DFCS was also provided to the parties. Nothing in this allegation suggests any improper behaviour on behalf of the ICL.

42. *An application was made by the ICL at a directions hearing for leave to inspect a court file in relation to one of the mother's witnesses*

An application was made at a Directions Hearing that the ICL have leave to issue a subpoena to DFCS for the production of its files relating to the children of the mother's witness, Ms M. That application was rejected. The M children were victims of sexual abuse. There was evidence of interaction between the subject children and the M children which was interpreted by the mother as sexualised. The ICL has a duty to ensure that all relevant evidence is before the Court. There was nothing improper in the ICL's application.

43. Having considered the evidence in relation to each complaint, I am not satisfied that any of the actions complained of in the table justifies the discharge of the ICL.

44. Further complaints are set out commencing at paragraph 8 of the submissions.

45. The mother complained that the ICL did not forward to the Single Expert, Dr B, copies of the father's counselling notes which were annexed to an affidavit of the mother.

46. Those notes, which were produced in the May 2013 proceedings in the FCC, were available to the mother in the course of the hearing and were the subject of cross-examination of the father. The contents of the notes were well known to the mother when she consented to orders that the children spend unsupervised time with the father.
47. On 13 August 2013, the Court ordered that those annexures be removed from the document provided to Dr B. The notes had been produced to the Court in answer to a subpoena. The mother was not legally represented and may not have been aware that she was not permitted to use the notes so produced in this way. The ICL was correct in removing the notes from the material sent to Dr B. Subsequently the Court on 13 August 2014 amended the list of documents to be provided to Dr B to remove the notes.
48. The mother complained that the ICL told her that she should destroy the copies of the counselling notes that she held. Ultimately I ordered that the mother surrender to the Court all of the copies of the notes that were in her possession. The use to which the mother put the copies of the notes will be discussed later in these reasons. I do not consider the ICL acted inappropriately in suggesting to the mother that she destroy her copies.
49. The broad thrust of the mother's application was that the ICL had formed a view which was aligned to that of the father. The submissions in relation to this complaint were understandably focused on the ex parte application made by the ICL on 9 October 2014 which resulted in the children being removed from the care of the mother and placed with the father.
50. Whilst the mother was understandably aggrieved by this event, it must be borne in mind that it was not the ICL who made the Order. The ICL made the application, relying on the recommendations of Dr B which are reproduced earlier in these reasons. The Court made the Order.
51. That Order was the subject of an appeal by the mother. In the reasons handed down on 16 December 2014 by the Full Court, there is no criticism of the ICL.
52. In almost every case where the ICL forms a view of the arrangements which it submitted are in the best interests of the children, that view will coincide, wholly or in part, with the position of one of the parties to the proceedings. Where it is necessary for interim applications to be determined, the ICL will be required, where possible, to form a view on the evidence available at the time.
53. There is no evidence that the view of the ICL, expressed in the orders which were sought on her behalf, was formed on any basis other than her consideration of the available evidence.
54. There is no substance in the mother's complaints and for that reason her application was dismissed.

## **THE NOTICE TO ADMIT FACTS**

55. The mother sought to rely on two Notices to Admit Facts. The first was prepared for the proceedings in the FCC and answered by the father. It was dated 30 November 2012. The father's answers, confined to "Yes" (Y) or "No" (N), were added after that date. There were 299 questions. Many were in a form that would not be permitted to be put orally. The mother was not permitted to tender the document but Counsel for the mother cross-examined the father on admissions or denials in the document which were asserted to be inconsistent with his oral evidence.
56. The mother also sought to rely upon a further Notice to Admit Facts which had been forwarded to the father in December 2013. He had not responded to that Notice. I declined to order that the father respond since his cross-examination was about to commence.

### **THE ALLEGATIONS OF UNACCEPTABLE RISK**

57. In order to determine what parenting arrangements are in the best interests of these children, it is necessary firstly to determine whether there exists a need to protect the children from being subject to, or exposed to, abuse or the risk of abuse.
58. The High Court, in *M & M* (1998) 166 CLR 69, laid down the test to be applied in determining allegations of this nature, saying:

...the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child. The Family Court's consideration of the paramount issue which it is enjoined to decide cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegation of sexual abuse.

And:

...the ultimate and paramount issue to be decided in proceedings for custody of, or access to, a child is whether the making of the order sought is in the interests of the welfare of the child. The fact that the proceedings involve an allegation that the child has been sexually abused by the parent who seeks custody or access does not alter the paramount and ultimate issue which the court has to determine, though the court's findings on the disputed allegation of sexual abuse will naturally have an important, perhaps a decisive, impact on the resolution of that issue.

And:

In resolving the wider issue the court must determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted and assess the magnitude of that risk. After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's

welfare. The existence and magnitude of the risk of sexual abuse, as with other risks of harm to the welfare of a child, is a fundamental matter to be taken into account in deciding issues of custody and access. In access cases, the magnitude of the risk may be less if the order in contemplation is supervised access.

59. Thus the task is to determine whether the father poses a risk to the children and, if so, whether that risk is unacceptable.

60. The mother deposed that in mid-2013 after the orders for unsupervised time with the father had been implemented, on one occasion when she was bathing Y, Y took a brush and “tickled herself on the vagina”. The mother deposed that Y said, “This is the porcupine game that [Mr Rowe] showed me you just get a brush and tickle down there.” The mother did not report this incident to the father and did not ask if there was any explanation for Y’s behaviour. Y was four and a half years old.

61. The mother deposed that in September 2013:

[Y] was holding an Elmo toy and giggling. I asked “*Why are you giggling?*” [X] took the toy from [Y], turned it upside down and putting its face over his penis said, “*[Y] was doing this.*” [X] started rubbing the toy across his groin saying “*And she was saying, “Look Elmo has a big mouth ... he’s going to suck my privates.”*” Then [X] said “*...and mum, after dinner one night upstairs, you were having a cuppa with grandma and grandpa and [Y] and I were hiding behind the couch in the bedroom. [Y] said “Let’s show each other our private parts” and “I want to suck your doodle”*”.

62. The mother relied on X’s account of what Y had done. She did not observe what Y did. There is no evidence that Y did or said anything in response to what X said to the mother, although it appears she was present during the entire conversation.

63. The mother deposed that on 27 December 2013:

I was putting the children to bed. We were talking and having foot massages. [Y] snuggled her face into my crotch and (sic) trying to lick me there. I was fully clothed. I moved away and asked “*what are you doing?*” She tried to snuggle in and lick me again. I held her back and said “*don’t put your face in someone’s private parts and lick them, where did you learn that?*” [Y] said “*Dad...[Mr Rowe].*” [Y] continued “*[Mr Rowe], he asked me to rub in his private parts but I said no*”. [Y] also told me “*He said ‘[Y] follow me’ so I followed him .There’s a few stairs to go up the top level. At the very end of the hallway that was his bedroom, then I was in the bedroom and then he went into the bathroom. I needed to go to the toilet. He’s had 4 houses.*”

64. The mother deposed that Y then said:

*"I went up the ladder. Everyone was asleep except me and I climbed down and said "I'm going to do something like sneak out...down to the bottom." She started counting then said "there's 4 big stairs, I have to always use my hands to go up the stairs 'cos there so big. I went looking to find the keys to get outside."*

65. The mother deposed that she recorded some of what Y said. That recording, of only part of the event, was tendered.

66. The mother's version of this conversation was not challenged.

67. Later, on 27 December 2013, the mother caused X to re-enact what X had observed Y doing with the Elmo doll some three months before. Y was present. The mother recorded the event on a video camera. The recording was tendered in evidence, as were transcripts of the recording prepared by the ICL and by the mother. It is clear that X knew he was being recorded.

68. The recording shows X holding the Elmo doll. X said "she was holding *babies* and then she went like this, and then see how his mouth is open". X turned the Elmo doll upside down and said "She said and I let him suck my doodle"

69. The mother asked Y "Is that true? Y?" and Y replied "No".

70. The mother then prompted X, "And then what was happening upstairs when you were...Remember you told me about being upstairs? What was happening up there? Remember?" X said "Um she was behind the couch...I think. She said 'Do you want to show each other um our private parts?' and she also went 'Can I suck your doodle?'"

71. The mother said "She said that to you did she? Really?" and X nodded. The mother then said "Why would she say that?" and Y said "I didn't. All we were doing is..." At this point, the mother interrupted Y and didn't allow her to complete her reply, saying that this was not a game that children would play.

72. The conversation continued. The transcript is set out below:

Mother	"Why did you have my face in your private parts then?"
[Y]	"What did you do?"
Mother	"Well, tell me again"
[Y]	"Are you sending a message to [Mr Rowe]?"
Mother	"No I'm not sending a message but I want to know, you just said that he had asked you to do that to him, is that right?"
[X]	"I didn't ask her to"
[Y]	"No [Mr Rowe] did"
[X]	"What did he ask you to do?"
[Y]	"He asked me to rub in his private parts but I said no and then he..."
[X]	"No he didn't [Y]"
[Y]	"You were there" (with emphasis on 'there')



[X] "I was there the whole time. You were there barely any of the time because you were playing computer games.."

[Y] "You were"...

[X] "The whole time when we were with [Mr Rowe]"

Mother "When was it Y? When did this happen?"

[Y] Silence. "Mm I'm sending a text message"

Mother "You can send a text message later. It's important for you to know that mummy believes you, okay? You're not in trouble"

[Y] "Why don't we send another message to [Ms O]?"

Mother "What would we say to her"

[Y] "Your doggy is really cute..."

[Y] "And we love"

[X] "Who?"

[Y] "how she plays"

Mother "[L] is very cute. If we were..."

[Y] "[X] says 'Get your head out of my bottom'"

Mother "Please don't do that"

[X] "And don't kick me in the face.."

Mother "[Y] come here"

[X] "Stop kicking me in the face.. you deserve..."

Mother "Come here, come here, come here"

[X] "You deserve that"

[Y] [Y] starts to cry.

Mother "It's okay... come here. Now if we were to talk to [Ms O] and you were to tell her what you just told me, what would you tell [Ms O]?"

[Y] "I wouldn't tell her anything"

73. X was adamant that the events that Y described had not occurred.
74. The mother made a notification to DFCS in the early hours of the morning of 30 December 2013. Tendered in evidence was a document which she said was a contemporaneous note of a conversation with a case worker for about 50 minutes commencing at 2.30 am on 30 December 2013.
75. The whole file of the DFCS in relation to the children was tendered in evidence.
76. Under the heading CSO BRIEF DETAILS the record notes:  

Caller is reporting concerns for the children in the care of the father [Mr Rowe]. Caller is concerned that Y is being sexually abused by [Mr Rowe]. Caller states that on Friday night 27/12/13 when caller was putting [Y] to bed, [Y] tried to put her face on caller's genitals and tried to lick caller's crotch. Caller asked [Y] why she was doing this and [Y] said "because daddy asks me to do that to him." Caller states that the children live primarily with caller and have contact with the father.

77. In the mother's notes of that conversation she recorded that she said to the DFCS officer, "She tried to snuggle in again. I said 'you don't put your face in someone's private parts, where did learn that?' She said 'Dad/[Mr Rowe] asked me to do it to him... to rub in his private parts... but I said no... it's rude.'"
78. The mother's account of the conversation in her trial affidavit does not include the allegation that Y said to her "daddy asks me to do that to him." The suggestion contained in the mother's report to the DFCS is that the father had asked Y to lick his genitalia. Those words were not, according to the mother in her affidavit, said by Y to her on 27 December 2013. In the narrative which follows the brief details, the record notes again that the mother said to the DFCS officer that "[Y] said dad [Mr Rowe] asked me to do it to him."
79. The timing of the report to DFCS is relevant because on the afternoon of 30 December 2013 the mother and the father met for a pre-arranged discussion. The mother took notes of the meeting and the notes were tendered in evidence.
80. The father had prepared notes of his own prior to the meeting setting out the matters which he wished to discuss with the mother which were:
- [The mother] wanting to relocate to Canberra.
  - More open and frequent communications about the children
  - Joint decision making regarding children's matters
    - [X's] diabetes management.
    - Full and open disclosure
    - Joint participation (where possible);
  - [Ys] (sic) health and development
    - Full and open disclosure
    - joint reviews.
  - Money matters:- Part offers rejected in preference to handing to CSA [I infer this refers to the Child Support Agency]. OK by me.
  - School extra-curricular activities [P School], [Q School], [U School]?
  - The kids social networks are the kids and should be shared as much as possible.
81. The discussion appears to have proceeded in relation to the matters which the father outlined in his notes. The mother recorded under the heading "Canberra Relocation" the words said by her:

How will visits work when we are in Canberra?

- Kids to visit F [I infer that "F" is a reference to the father]

- F to visit

How often does F want to see the kids when we are in Canberra?

82. The mother recorded that in relation to holiday time, the father “Got exactly the time he wanted in Court”. The father is recorded as saying that he did not know what time he wanted with the children. The mother noted that she said that the father knew full well before he moved to the Town N area that she intended to move in March. The mother also recorded “[Mr Rowe] has no business stopping us moving.”
83. Later in the document the mother noted herself saying that no reasonable objection had been voiced by the father and she further notes, “Offer to visit every four to six weeks to [the father’s town] and [Mr Rowe] can visit in between.”
84. Significantly, the mother did not raise with the father the content of the conversation with Y which had taken place on 27 December 2013 and neither did she inform the father that she had made a notification to DFCS.

## **INTERVIEWS WITH THE CHILDREN**

85. Y was interviewed on 31 December 2014 by the joint investigation response team (“JIRT”) comprising Detective Senior Constable H (“DSC H”) and FACS case worker Ms W (“Ms W”). The interview commenced at 3.41 pm.
86. Y told the JIRT officers that the family used to have a house in Sydney but it was sold and, “our dad, he pushed, he like made us go, he pushed us out of the house...and then he moved in...and he made mum, he made mum pay for the house.” Y said that her mother and father lived in separate houses because they didn’t like each other and she told the JIRT officers, “we’re trying to move to Canberra but we can’t ‘cause he’s stopping us but we’re not.”
87. When Y was asked what she liked about her father, she said that the father let her and X go canoeing and that was really fun. When asked if there was anything that she did not like about her father, she made no reply. In relation to Ms G, Y said that she liked being driven around by Ms G to look at the Christmas lights. When she was asked if there was anything she did not like about Ms G, she made no reply.
88. I infer from the transcript that Y was then shown an outline drawing of a naked girl both from the front and the back. A copy of the drawing was not in evidence. The parts of the body were identified by Y starting with her hair and ending with her feet. In relation to each body part she was asked if anybody had touched that part and in relation to each she said that no-one had touched it.
89. She was then, I infer, shown an outline drawing of a boy, both from the front and the back. The process was repeated and Y denied having ever touched any

of the boy's body parts. When she was asked whether she had touched a big person she said no.

90. At about 4.15 pm, the interviewer resorted to leading questions. DSC H in cross-examination conceded that anything said from that point in the interview had little probative value. He said to Y "Well [Y] someone told me, someone told me that one time when you were at your dad's place, that he asked you to do something to him like on his body. Anything like that ever happen [Y]? Has dad ever asked you to touch any part of his body?" To which Y replied "I said, no."
91. Y then said "So I didn't touch, I walked backwards and then I turned around and then I walked up and then I went up the stairs to my bedroom and went up to my bed." Y was asked "So when did this, tell me when that happened [Y], when did dad ask you to touch him." She made no reply.
92. She was asked "What part, like if, on this picture here what part of, what part of dad's body did dad want you to touch?" (I note that the suggestion that the father wanted Y to touch him came from the interviewer and not from Y) Y replied "I don't know."
93. Y was asked "Was it his hair?" and she said no. She was asked "Was it somewhere else?" And she replied "I don't know where." She was asked "What did he say to you [Y]?" and she replied "I don't know." The interviewer then said Y "It's really important that we talk today because you've come all this way to talk to me [Ms W], it's a long way wasn't it, to come down here and talk to us so can you think really hard and see if you can remember what he said to you? Can you remember?" Y made no reply. She was then directed to the picture of the boy and asked "So see our picture of the boy, did dad, did he say he wanted you to touch the front part of him or the back part of him?" Y did not reply.
94. Y was then asked "So that day that we're talking about, was it daytime or night time [Y]?" And she replied "Day time." She was asked whether it was in the morning or the afternoon and said that it was in the afternoon. When asked "How do you know it was the afternoon?" She said "I don't know." The interviewer said to Y "So it was you and dad, is that right?" And Y replied "[X] and [Ms G] were still asleep." Y said "I got up before [Mr Rowe] 'cause I tried, I was hiding but he woke up and he found me, then he brought me down, then I, and when it was, when it was in the middle of the day I started to play on the computer."
95. Y was asked a series of questions to try and ascertain when the incident had occurred. She variously said that it had occurred before Christmas, before her birthday in November, in winter time and in spring time. The interviewer then said "And you said that you backed away from dad, is that right?" And Y made no reply. She was then asked "Why did you back away from dad, what made

you want to move away from him.” And she replied “‘Cause I didn’t, ‘cause I didn’t want to do it.” She was asked “Didn’t want to do it, yeah, what didn’t you want to do [Y]?” And she answered “Touching there”. She was then asked to use the interviewer’s pen and draw on the picture of the male figure where her father wanted him to touch and she replied “I don’t know where, I don’t remember”.

96. The interviewer then said to Y “So when you say you didn’t want to touch him there what do you mean? What if you use my pen and you draw on our picture of our little man here, if you use my pen, you draw on the picture where your dad wanted him to touch you?” And she replied “I don’t know where, I don’t remember.” Y was then asked by the interviewer whether she was asked to touch his hands and the transcript notes her reply as “Mmm.” Y was asked to draw on the picture and again asked where her father wanted her to touch him. And she replied “I don’t know where he wanted me to touch him.” The interviewer said “You know?” And she replied “I don’t”. The interviewer then said to Y “You don’t know. So what made you walk away from him if you didn’t, when he asked you to touch him?” And Y replied “I walked back... ‘cause otherwise mum would have been cranky.”
97. The interview continued. At question 399 Y is asked “When you said you walked away from dad and you went up the stairs and you hid in the cupboard, how did you feel when you hid in the cupboard? Were you happy or sad or something else?” And she answered happy. The interviewer repeated the word happy and Y said “I wasn’t happy that he wanted me to touch him there.” And again Y was asked where she had been asked to touch him.
98. When Y was asked to draw on the picture where her father wanted her to touch him she said “His hands.” I note that was the suggestion that had been made to her earlier in the interview. She also said on the tip and his hair. The interviewer said “On the end of his finger” and Y said “and his nails were really sharp.” She also said “And he tricked me and then he made like stabbed me.”
99. The interviewer then asked “Did he want you to touch him anywhere else?” And Y replied “No. Only on his hands.” She then explained that her father was doing something with his hands. She said that he was carrying firewood to make a fire. The interview continued and at about 4.28 pm the interviewer said to Y “So this day when dad wanted you to touch him and ran up the stairs and you hid in the cupboard, you said that dad was carrying some firewood in his hands, did dad have clothes on, or no clothes or something else?” Y said “He had clothes on, he had a shirt, actually he had pants but no shirt on.” Y told the interviewer that X was present. She also said that X went and hid in the cupboard with her. When asked “So why did you both go and hide in the cupboard?” Y said “‘Cause he wanted us both to touch him.”

100. She was asked "What did he say when he said he wanted you to touch him? And she replied "I don't know." The interviewer said "Can you think really hard for me, it is very important [Y]." And Y said "That's all that he did." The interviewer then said "[Ms W who was taking notes] wants me to ask you [Y], how did you know that dad wanted you to touch him?" And Y replied "I don't know." Pressed about how she knew that the father wanted her to touch him she said "I don't remember". When asked what her father had done to make her think he wanted her to touch him she said "I don't know." And when asked whether X was present she said she wasn't sure.
101. Undeterred, the interviewer then said to Y "So can you show me where he wanted you to touch him with my pen?" And Y answered "On my hands." She was asked "Did he want you to touch anywhere else on his body?" and she made no reply. The interviewer said "Whereabouts, here you go, you take my pen." And Y said "On the hair". When asked how she knew the father wanted her to touch him on the hair, she replied "I don't know. And the face." Asked whereabouts on his face she said "All around his face." The interviewer said "All around his face so how did you know he wanted you to touch him all over his face? Did he say something or did he do something?" Y answered "He did something." When asked what he did, Y said "I don't know."
102. Y then asked when the interview was going to end and was told "Soon, nearly finished, you're doing a good job for me." The interviewer then said to Y "I really need you to think really hard [Y]" and she agreed. And the interviewer said "Is there anywhere else on that picture that you can see where dad wanted you to touch him?" and Y replied "Belly button." Asked "What made you think he wanted you to touch him on the belly button?" Y replied "I don't know." Asked "Did he do anything or say anything that made you think that he wanted you to touch him on the belly button?" Y made no reply.
103. The interviewer then asked "So was there anywhere else on his body that he wanted you to touch him?" And Y made no reply. I infer however, that she drew a circle on the diagram because the interviewer then said "so where did you draw that circle?" and Y said "here." The interviewer said "What's that part of his body?" And Y said "His private part." When the interviewer said "So what made you think he wanted you to touch him on the private part?" Y made no reply. The interviewer said "Did he say something?" Y said "He did something". Asked "what did he do?" Y said "I don't know."
104. Y went on to say that at the time she had her swimming costume on because they were going out in a canoe and she said, in answer to the question "has dad ever asked you to do that before?" that this had never happened before.
105. The interviewer said to Y "So someone told me the other day that you said that when you were talking to mum and you put your face down in mum's lap and mum asked you, Why did you do that, and you said 'Cause daddy asked me to

do it. Has daddy ever asked you to do something like that?” And Y did not reply. The interviewer again asked “Has daddy ever asked you to do anything like that Y?” And again Y did not reply. The interviewer said “Is that a yes or a no?” and Y said “no”.

106. The interview continued. Y was asked “And was [X] with you when dad wanted you to touch him there or was he somewhere else?” And she replied “He was with me.” Asked “Did dad ask [X] to touch him anywhere” and Y said “Yes”. Y went on to say in response to a series of questions, 12 in all, that the father had asked X to touch him on his feet, his knees, his private parts, his bellybutton, his “boobies”, his ears, his eyes, his mouth, his hair, his face, his hands and his arms.
107. The interview continued. Y was asked whether or not she was ever asked to keep a secret and said she had not. The interviewer said “Even after this happened?” Y made no audible reply and the interviewer said “No. O.K. All right” and Y again asked how much longer the interview would last.
108. When asked “Have you only told me the truth today?” Y made no audible reply. The interviewer asked “So everything you’ve told me today really happened?” And again she made no audible reply. The interviewer said “What does that mean?” and Y said “Yes”. The interview concluded at 4.40 pm having commenced at 3.41 pm.
109. Because of Y’s statements that X was present the JIRT team requested that X be interviewed and that interview took place on 2 January 2014. Again the interview was conducted by DSC H.
110. When X was asked what he liked about his father, X replied “I like him because, ‘cause he doesn’t get angry very often. And he also lets me do basically whatever I want except tackling [Y].”
111. When asked whether there was anything he did not like about his father, X said there was nothing he didn’t like. When asked whether there was anything he didn’t like when he was at his father’s home, X said “I get headaches a lot when I am at his house,” and that he didn’t like being at his father’s house when it was windy because the beach was really rough.
112. X was asked “Now remember how I was talking to Y the other day, she was telling me about something that happened when you guys were visiting dad’s place.” And X replied “When we were, when were just with [Ms G]?” The interviewer said “No, no, when dad was at home. And [Y] told me something that, that she didn’t like, dad wanted to do something she didn’t want to do. Do you remember anything like that happen [X]?” And X said “I don’t remember.”
113. The interviewer then said:

Don’t remember, all right and she told me that, that, that she was in the room where the computer, dad’s got some computers, she was in the room

where the computers were and dad was in the room and so was [Y] and dad wanted [Y] to touch, to touch him somewhere on his body. Do you remember anything like that happening? No? All right. And she told me that when, when this happened dad had a pair of, had a pair of swimmers on, a pair of blue swimmers with some stripes down the side. Do you, do you remember that? Do you know, have you seen dad wearing those swimmers?

And X replied "No".

114. The interviewer asked X:

So she told me that, that, that your dad wanted, wanted [Y] to touch him somewhere on his body that she didn't want to touch him and that she, she left the room because she didn't want to do that and then she went and hid in the cupboard and you've hid in the cupboard with her, with a torch. Do you remember that happening? No?

And X said "I don't remember that."

115. X was asked whether he ever played hide and seek at his father's house and he replied that when two other children are over they play hide and seek all the time. When asked where they normally hid, X described a number of hiding places including "this cupboard thingy", "top of the bunk bed" and "inside boxes". X also said that Y usually hides in the same spot, which is on the top bunk. X said that sometimes when Y is playing hide and seek, she hides in the wardrobes or the cupboards.

116. The interviewer said "Sometimes so but, but this time she's talking about is, is after she left the room and you left the room with her, she went upstairs and she hid in the cupboard, you both hid in the cupboard at the same time. Do you remember any, do you remember anything like that happening?" And X replied no. The interviewer then said "No? And she said you had a torch. Remember anything, anything like that?" and X said no. X described having a torch and using the torch when they went camping and using a torch to go koala spotting.

117. The interviewer again asked X "So going back to what Y was telling me the other day, does, have you ever had, seen anything like that happen when you've been at dad's place?" And X said no.

118. Asked "Has dad ever asked you to touch him on his body anywhere, [X]?" X said no. The interviewer said "No? Never? All right. Has, has [Y] ever spoken to you about, about dada wanting him to touch her, wanting her to touch him I should say?" and X said no. The interviewer asked "Has she ever said anything to you like that? Has she ever said anything to you about things that she doesn't like doing?" And X replied no.



119. X was asked about the incident when Y was playing with the Elmo doll. The mother had brought the Elmo doll to the interview. X told the interviewer what had happened in substantially the same terms as he had told the mother.
120. X told the interviewer that he was looking forward to going to his father's house that day.
121. After X demonstrated what Y had done with the Elmo doll, the interviewer said "Simon just wants me to ask you, have, has [Y] ever said anything to you about, she, that she's seen someone do that, do things like that?" X replied no. He was asked "Have you ever seen anyone do something like that, like people doing that?" And he replied no. He was asked "Or has, has [Y] talked about anyone wanting her to do that for them, to them" and X replied no. He was asked "Has anything like that happened to you, [X]?" and X replied no.
122. As a result of the interviews with Y and X, DSC H concluded there was insufficient evidence to proceed with any criminal prosecution or to apply for an Apprehended Domestic Violence Order.
123. The children were in the care of the father from 2 January 2014 until 6 January 2014.

#### **DOCUMENTS PROVIDED TO DFCS BY THE MOTHER**

124. The mother provided DFCS with an edited selection of the evidence that had been available in the proceedings before the FCC in 2013. Relevantly, she provided a copy of the notes of counselling undertaken by the father in 2008 and 2009 when he was referred to a psychologist, Mr A, for counselling in relation to major depression and marital difficulties. The notes extensively detailed conversations with the father about his use of pornography and masturbation. Significantly, she did not give DFCS a copy of the report of Mr A which said, inter alia:

I saw no evidence of a paraphilia, pathological sex addiction, nor any other dysfunction of sexual behaviour.

Mr A reported that he was not aware of any factors that would suggest a risk to the children in his care and that the father had a mature and responsible attitude to the care and nurturing of the children.

125. The mother also gave DFCS copies of notes produced on subpoena by her counsellor, Ms J. The father had participated in some sessions with Ms J during the period when he was consulting Mr A. She gave DFCS a copy of an affidavit sworn by her on 12 December 2010 setting out her concerns about the father's sexualised behaviours during the marriage and a copy of the Notice to Admit Facts to which reference was made earlier in these reasons.
126. She provided the Notice of Abuse that she had completed in December 2010 which asserted "The father has demonstrated and disclosed to the mother and

health professionals an increasing sexual obsession and sexualised behaviour in relation to the children X and Y between 2008 and 2010”.

127. The mother gave DFCS one page from Dr R’s second report with her handwritten comments but did not provide Dr R’s conclusions.
128. She did not tell DFCS that in May 2013 she had consented to orders whereby the children would spend unsupervised time with their father after consideration of Dr R’s two reports and after the father had been cross-examined in the proceedings.
129. The file of DFCS records that on 5 January 2014 a report was completed, noting the material provided by the mother and stating “Although there is (sic) numerous references to n/f “sex addiction” and preoccupation with sex and masturbation, as well as infidelity there is no information which supports that [the father] has caused sexual harm to [Y]”.

#### **THE INCIDENT ON 12 JANUARY 2014**

130. On 12 January 2014 the mother and the children were visited by the mother’s friend, Ms M, and her children. In the course of playing together, the M children reported to their mother that “[Y] is doing rude stuff”. The mother asked Y “Are you [Y]?” but Y did not answer. The mother said “Well stop it please [Y]” and the children continued to play.
131. Ms M deposed that when she and her children were on their way home, her son complained that Y had “said she would stick her fingers in my bum. She stuck her fingers in my bum she tried to pull my pants down but I didn’t let her. Then she grabbed my dick with her other hand”.
132. Ms M’s daughter told her mother “she kept doing it when we went out on the balcony. Y kept chasing us around and saying “I’m going to stick my fingers up your bum”. Ms M deposed that her daughter said “She did it to me too mum” and demonstrated the way Y had held her hand with four fingers out and her thumb tucked in.
133. Ms M made a report to DFCS.
134. Ms G, in oral evidence, reported a recent conversation with Y about this incident. Y told Ms G that she and X and the M children were playing upstairs and the boys were running around. Y said that she asked them to stop and grabbed them around the waist and that she got into trouble.
135. None of the adults who gave evidence saw what happened.

#### **14 JANUARY 2014**

136. The mother deposed that on 14 January 2014 she was with Y at the beach. The mother said to Y “I’m proud you said no to [Mr Rowe] asking you to touch him. [Detective H] wants to help. Can you remember any more?” Y said “It

was dark mummy” The mother asked “did someone say something nasty would happen if you told?” Y nodded.

137. The mother reported the conversation to DFCS. The records produced by DFCS say:

[The mother] asked [Y] if she was OK. [The mother] asked her if it has something to do with her conversation with (Detective H). [The mother] stated that [Y] half nodded and said “I don’t remember anymore”. She said “it was dark when it happened”. [The mother] stated that [Y] went quiet and buried her face in her lap. She said “I don’t remember anymore”. [The mother] asked her “have you been told not to talk or something nasty would happen to you if you did?” [The mother] said that [Y] nodded.

138. The mother in her affidavit omitted to say that on two occasions in that conversation, Y told her that she didn’t remember anymore. There is no explanation for the discrepancy in the mother’s version of the event in her affidavit and the version recorded by DFCS.
139. The maternal grandparents each depose to a conversation with Y in January 2014 when, in the presence of the maternal grandmother and X, Y said “Grandpa, [Mr Rowe] did something really wrong”. He asked “What was that [Y]?” and she said “He asked me to rub in his private parts”. The maternal grandfather said “and what did you do” and Y said “I said “no”.
140. On 25 January 2014 the mother notified the father by text message that there would be no further contact between him and the children.
141. On 28 January 2014 the father filed a contravention application. On 31 January 2014 the mother filed an application seeking interim and final parenting orders.

## **COUNSELLING WITH MELISSA C**

142. DFCS recommended to the mother that Y have counselling with Ms Z of the Child and Family Health Team of the AA Local Health Service. The mother declined to use the services of Ms Z and instead arranged for Y to be counselled by Ms C (“Ms C”), a psychologist in private practice. Ms C’s children attend the same school as Y and X. Ms C’s child is in Y’s class. The father was not told that Y was to see Ms C. Ms C commenced her sessions with Y on 24 February 2014.
143. Ms C’s notes were in evidence. In her first session, Y played with the dad doll and the child doll. Ms C noted that “The Dad character was very positive and appropriate”.
144. On 11 April 2014, in her sixth counselling session, Y told Ms C that her father had asked her to touch him on his private parts. Ms C’s notes do not record the conversation in direct speech. Ms C asked Y if this happened one time or more than one time and records that Y stated “more than one time. Lots of times.”

The notes record that Y was asked where this happened and told Ms C that it occurred in the father's bedroom and that X was not present. Ms C made a report to DFCS. Ms C advised DFCS that she considered the risk of harm to Y to be considerable, should she be forced to see her father.

145. In her affidavit, Ms C deposed:

[Y] continued to make reference to the “yucky thing” or the “rude thing” that “[Mr Rowe]” had done in subsequent sessions, but was not more specific or detailed in her descriptions.

146. The notes of the session on 31 May 2014 suggest that the session concentrated on protective behaviours. There is no reference in the notes of that session to the “yucky thing”, the “rude thing” or “[Mr Rowe]”.

147. Similarly the notes of the sessions on 21 June 2014, 19 July 2014 and 23 August 2014 contain no such references.

148. On 7 August 2014 the notes record that Y “didn’t think about the “rude thing” with [Mr Rowe] when she was in the shower.”

149. On 13 September 2014 the notes record “No discussion around [Mr Rowe] or S.A.” which I infer to be a reference to sexual abuse.

150. Ms C sent an email to DFCS on 6 June 2014 in which she said:

I have been given your details by [the mother] in regards to my client [Y]. I was concerned that the report I made to the DoCS helpline in response to my mandatory reporting duties was closed just 4 days later, with the reason that “the matter had already been investigated” being cited.

I was of course aware that a similar piece of information had been reported previously, however I was always led to believe that new or similar pieces of information, particularly when provided by a new reporter would be married up with prior pieces of reported information so that the department might gain a more complete picture of the potential risk of harm to a child. This is particularly pertinent in this case, given that the matter is currently going through the Family Court, and the outcome may be that the person associated with the risk of harm (i.e. the father) may indeed be granted unsupervised access to the child.

I am extremely concerned for this child, and feel it would be a gross injustice if crucial and relevant evidence for the family law matter was omitted.

Are you able to please explain what the process has been here, and whether there is any possibility of the matter being looked at again?

## **CHILDREN AND PARENTS ISSUES ASSESSMENT**

151. Ms V, a Family Consultant in the Newcastle Registry of the Family Court Australia, conducted interviews and prepared a Children and Parents Issues Assessment on 6 May 2014. She noted that key issues for the report included the allegations of sexual abuse perpetrated by the father and allegations that the father has a predilection for pornography and has a preoccupation with excessive sexual behaviour.
152. At the time Ms V saw the children they had not spent any time with their father since January 2014. X told Ms V that he “sort of” missed his father and would like to see him again. X said that his father had done nothing to hurt him but that he had heard from his mother “about the stuff what he’s done to other people”. When asked if he knew who the other people were X said “No. I just know it’s not safe”. X said he had fun with his father and would not mind visiting his father without Y. (It is notable that X’s statements about his father not being safe contrast with his statements made in the JIRT interview on 2 January 2014).
153. Y told Ms V that it is not safe at Dad’s because “he did something not right”. Ms V explored the safety issues and Y told her about a trampoline and a dangerous tree. Y did not express any concern about her father bathing or showering her.
154. Ms V reported:

[Y] then said “My dad done something wrong. Really wrong. Really rude”. [Y] would not venture any further and the issue was not pursued. [Y] was asked who she told about the “really rude thing happening” and she said the mother and the maternal grandparents.
155. In her oral evidence, Ms V said that, from the information she was given by the mother, she understood that DFCS had both substantiated that Y had been sexually abused and that the father was the perpetrator. It was on that basis that she recommended that the children spend no time with the father. Ms V gave evidence that when the correct position was made clear to her, that is, that the allegation that Y had been sexually abused by her father had not been substantiated, Ms V reviewed her recommendation and proposed that the father have supervised time with the children.

## **FURTHER INTERVIEW OF Y BY DFCS**

156. The DFCS file records a notification, presumably by the mother, on 3 June 2014. The file records:

...on Friday night [Y] initiated conversation and she started saying how she and [X] ([Y’s] brother) could go to [the father’s] and they could play two player Minecraft. [Y] then said “It is OK, if [the father] asks me to do something, I will just tell him no”. The reporter then spoke to [Y] and

explained how they needed to make sure that [Y] was safe at all times. X said that he didn't want to go to [the father's] and said he wanted to stay with his mother.

On the same night [Y] also made the following disclosure, "One day when [X] was playing on the computer, [the father] took me to the bedroom and he pulled his pants down and his undies too and he made me look at him. At that point I did this ([Y] looked up at the ceiling and was looking behind her head) and he kept turning my head and making me look. I tried to get away but he caught me by the ankle and made me look again." [Y] then went 'dazey' for a while. The reporter asked [Y], "Did he make you touch him?" and [Y] replied, "Yes".

157. On 3 June 2014 the mother sent an email to DFCS in which she said, inter alia:

Last Friday [Y] volunteered further information to me. [Y] said while [X] was playing on the computer and her father's current girlfriend was "out shopping", that her father had made her touch him and kept turning her head to face him with his pants down. She said he grabbed her by the ankles when she tried to get away. I reported this to FACs.

The mother was anxious to ensure that JIRT received both that information and Ms C's notification to DFCS on 6 June 2014.

158. The maternal grandfather deposed that on 14 June 2014 Y told him that her father walks around without clothes, and that her father told Y that she and X could too, but Y said that they don't like to.
159. On 16 June 2014 the mother was told by DFCS that the case had been allocated to a new case worker, Ms D ("Ms D"), and that Y would be interviewed again. The mother was anxious that Ms C should accompany Y in the interview and asked Ms C to contact DFCS. DFCS decided that involvement of Ms C in the interview might provide bias and declined to allow her to be present.
160. The mother continued to press for Ms C to be present.

#### **INTERVIEW WITH MS D ON 20 JUNE 2014**

161. Ms D interviewed Y on 20 June 2014. Ms W was present to take notes.
162. Ms D asked Y about her father and Y said "We both see [Mr Rowe] – if only one of us did we wouldn't be safe." Asked why, Y said "He's not nice. He does rude things he's not supposed to. He done it to me and [X]."
163. Y was asked about the things she both liked and disliked at her mother's home and her father's home and she did not identify anything at her father's home that she disliked except for when he got angry and smacked her on the bottom.
164. Ms D then asked Y "You told me before sometimes dad does rude things. Can you tell me about them?" And Y said "I forgot already."

165. Y was then asked whether there were things that happened in dad's house that made her worried and she did not reply.
166. She was asked "What are the rude things daddy sometimes does?" and she did not reply. She was then asked "Can you tell me where does it happen? At his house or somewhere else?" And Y said "At his house. He's probably not in jail. It's a bit too rude."
167. Ms D said "You're allowed to say. You won't be in trouble." And Y said "He um, pulls his pants and undies down and tried to show me." Ms D said "Where?" Y said "In my bedroom." Ms D said "Then what happened?" And Y said "Can I use your bedroom and you, so he did that rude thing – he pulled down undies. He tried to show me." When asked what happened then, Y said "I was looking at his face and I said I'm not doing it. He said I have to or I'll tell the police you're doing the wrong thing in telling a lie. I turned my head and he turned it back then I turned it the other way and he turned it back." Ms D said "Then what happened?" And Y said "He called the police."
168. Y was asked to draw a picture of the house where these incidents occurred with her father and to indicate on the drawing where her father was standing. Y said "He was climbing up the ladder [I infer of the bunk bed] so he could get me. I was thinking of jumping down."
169. Ms D asked Y where her father was when he pulled down his pants and undies and Y pointed to the top bunk. Y then said that her father was wearing "only undies" and that he had no pants on because he "chucked them away". Y said that when her father pulled his undies down she tried to escape but "he got my ankle". Y said that she tried to run and get down the ladder. She said that she almost fell off but her father pulled her up and said "listen to me or you will get a big smack". Ms D asked what happened next. Y said "He pulled his pants down".
170. Ms D asked Y whether anybody had told her to tell someone about the "rude thing" that her father did and Y said "Mum said to tell only you".
171. Ms D asked Y whether her father had touched her and Y said no. When asked where her father's hands were, Y waved her hands around in the air and said "up in the air and going like this".
172. She was asked whether her father had touched her in the shower and she said no. She said that he had talked about "private parts" and when asked what he said she said "Really rude things that I can't even say". Ms D said that Y could say the words and Y said "Shit and crap and fuck".
173. Y was asked to tell Ms D what her father said and she said she had forgotten already.
174. She was asked what it was that her father wanted her to do and she said she didn't remember.

175. Ms D asked Y “What did [the father] want you to do on the bed?” and Y replied “Really rude thing.” Asked what happened Y said “Pulled pants and undies down.” Asked whether her father had made her do anything Y said “Two things. He pulled pants and undies down and tried to get in the shower and he brung me with him. Had to go to bed after I finished colouring in. Went back home the next day.”
176. Y was asked to draw on the picture where she was on the bed and whether she was lying, sitting or standing and Y said “sitting”.
177. Asked about her father Y said “Laughing haha you can’t get away. Then he brung me in and did the rude things in (sic) shower”. Ms D said “Rude things?” And Y said “Showed me his body and what they do”. Ms D asked “What did they do” and Y said “I don’t remember. Showed me his private parts, belly. He put me in my swimmers ‘cause he didn’t wanna see my parts. He always sees my parts in the shower.”
178. Y was asked whether her father had done any other rude things and she said no. She told Ms D that her mother doesn’t like her father and her father doesn’t like her mother.
179. Y was asked if she had ever told anybody else about the rude thing that the father did and she said that she had not told her mother or Ms C or X.
180. She was asked whether there was anything that the father did that she didn’t like and she said no.
181. She was asked whether there was anything her father did that made her frightened and she said no. She was asked whether or not her father had told her to keep a secret and Y replied “He has with [X]. Gave him wine and he has diabetes. Grandpa saw.”
182. It is not contested that that piece of information is not something that Y could have observed herself.
183. On 23 June 2014 Ms D met with the mother to discuss the interview with Y and to tell the mother that there was no clear disclosure from Y of sexual abuse by the father. The mother was told that:
- [Y] was unable to give details around what had actually happened and give a sequence of events though she was able to describe other things in detail. [Y] also expressed that she was not concerned for her father, she did not feel unsafe, would like to live with him, they did not have secrets and [Y] could not recall any other time this had happened.
184. The file note records that the mother was told that there was a need to look for alternate explanations to Y’s descriptions as well as to do full assessment of the risks associated with both households.



185. On 23 June 2014 Ms D completed a document entitled “SDM Safety Assessment Decision Report”. At paragraph 11 of that report, Ms D states:

There is no current information to suggest that [the mother’s] functioning or physical condition may impede her ability to care for [Y]. Community Services has noted that [the mother’s] response to Community Services and JIRT investigations into alleged sexual abuse of [Y] by her natural father [named] has caused concerns about her emotional and psychological state, as well as the psychological effects of [the mother’s] behaviour on [Y].

JIRT initially interviewed [Y] in December 2013 and was unable to substantiate harm to [Y]. Since this time [the mother] has acted to collect her own ‘evidence’ from [Y] and older sibling [X], including home recorded interviews with [Y] as well as numerous self reported discussions with [Y] centring on the ‘rude things’ [the father] does. Despite providing CS with these recordings, [the mother] maintains that she never speaks negatively of [the father] and never brings up any questioning about sexual abuse with [Y], which does not seem to be the case. [The mother] presented as being certain that abuse had occurred and it was a matter of time before the child felt comfortable enough (sic) to tell everything and [the mother] has engaged a psychologist to counsel [Y] for sexual abuse. [The mother] feels she knows the ‘truth’ but others are not listening or cannot see what is in front of them. As a result of [the mother’s] behaviour during the past year, [Y] has come to understand that she is ‘unsafe’ in [the father’s] care and he does ‘rude things’, though she cannot give details about what “rude things” happened. It appears that during interview [Y] may not be recounting events, but could likely be repeating information given to her in leading questions. When asked if she felt worried or scared of [the father] or [the father] did anything rude at another time [Y’s] clear response was ‘no’. [Y] was asked where she would like to live and she said with Dad.

186. The maternal grandfather deposed that on 9 July 2014 Y said to him “I don’t want to go to [Mr Rowe]’s” and when asked why, Y said “You know. He made me look in his private parts”. On 14 July 2014 the maternal grandfather made a notification to DFCS.

### **SUPERVISED TIME**

187. On 30 July 2014, after a hearing, orders were made for the appointment of Dr B as a Single Expert and for the children to spend time with their father for two hours each fortnight supervised by PP Family and Counselling Services (“PP”).
188. The father attempted to arrange a supervised visit at PP on 9 August 2014. PP produced all of the text message communication in relation to arranging the

sessions with the children. On 22 August 2014 the father was told that PP had tried to contact the mother but she did not return their calls. On 23 August 2014 there is a reference to the mother completing the intake interview the following week and the father did not see the children that day. No time could be arranged for 30 August. The children first spent time with their father at PP on 6 September 2014, nine months after their last contact with him.

## **THE RECORDING OF INTERVIEWS WITH DR B**

189. Dr B conducted interviews on 14 August 2014. The mother insisted that she have Ms M present as a support person during her interview. Ms M insisted that she be present while the children spoke to Dr B and while he saw the children with their father.
190. In the course of cross-examination of Ms M, it emerged that Ms M had recorded the interviews conducted by Dr B with the children, with the father and the children and with the mother, on her mobile phone and had used those recordings to prepare her affidavit.
191. Rule 1.19 of the Family Law Rules 2004 (Cth) prohibits recording by any means of proceedings in the Family Court of Australia including, by virtue of rule 1.19(1)(e), any attendance with a single expert. Rule 1.19(3) provides that a person who commits an offence by contravening the prohibition on recording is subject to a penalty.
192. Ms M was given a certificate pursuant to the provisions of section 128 of the *Evidence Act 1995* (Cth) ("*Evidence Act*") in relation to the commission of the offence.
193. Counsel for the mother argued that the illegally obtained evidence should be admitted and relied upon, pursuant the provisions of section 138 of the *Evidence Act*. The matters which the Court must take into account when exercising a discretion to exclude improperly or illegally obtained evidence are set out in section 138(3).

### **EVIDENCE ACT 1995 - SECT 138**

#### **Discretion to exclude improperly or illegally obtained evidence**

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

194. Counsel for the mother argued that the best interests of the children were the dominant consideration and that the best interests of the children required that the evidence be admitted. I do not accept that submission.
195. The mother disputed the accuracy of some of Dr B's record of the interviews with her. In support of that argument she has included in her affidavit her evidence of the conversations which took place between herself and Dr B. Similarly, the maternal grandfather deposed that he prepared notes after his

interview with Dr B and has included in his affidavit his version of their conversation. Evidence in that form, both from the mother and from the maternal grandfather, is appropriate. (Unfortunately, none of the alleged inaccuracies was put to Dr B).

196. There is no suggestion that Ms M informed Dr B, the father, the mother or the children that she was recording the interview process. In his oral evidence, Dr B said he was unaware that the interviews were being recorded.
197. The mother in her oral evidence said that she learned after the event that Ms M had recorded the interviews but was not aware of it at the time.
198. The Judges of the Family Court of Australia, in the exercise of their rule making power, have determined that there should be a complete prohibition on the recording of family law proceedings and specifically that there should be a complete prohibition upon the recording of any attendance with a single expert for the purpose of the proceedings.
199. That determination was made in the full knowledge and understanding that what occurs in interviews with Court appointed experts may be the subject of dispute and that the evidence of the views of the expert, and thus of what was said in the interviews, is of great importance in parenting proceedings.
200. The purpose of the rule is to prevent the very mischief that has occurred here.
201. It was not submitted that anything in the character of these proceedings was so unusual or extraordinary as to warrant any flouting of the rule.
202. Ms M was ordered to produce the device on which she made the recording and to delete the recording in the presence of the Court. She gave evidence on oath that there was no copy of the recording.
203. The portions of her affidavit which were based on the recording were struck out.

### **DOES THE FATHER POSE AN UNACCEPTABLE RISK TO THE CHILDREN?**

204. The task of assessing unacceptable risk, where a parent has made an allegation of risk of abuse, is one which must be approached on the basis of the evidence.
205. There is no place in the assessment process for assumption, belief or instinct.
206. The assessment must be based on evidence given by those experts qualified to give evidence of the effect of the interview process, (whether the interview was conducted by the mother or some other person); the manner in which children of the relevant ages respond to that process and the way in which what children say and do should be interpreted.
207. It is the mother's case that both of the children are at risk of sexual abuse in the care of the father.

208. Although her case was not clearly articulated, I infer from the cross-examination on her behalf and from the submissions that her case had three elements:
- Firstly, the father had problematic behaviours in relation to his masturbation and viewing pornography.
  - Secondly, the father was a liar and therefore his denials that he had behaved inappropriately towards the children would not be accepted.
  - Thirdly, that the children had, in the process of the interviews with JIRT, with the mother and with Ms D, made disclosures that should be accepted as establishing unacceptable risk to them in the care of the father.
209. As to the first proposition, in her trial affidavit the mother said:
- The problem is not that [the father] masturbates and looks at porn but that he lacks boundaries with the children.
- And:
- I am of the belief that there is no prospect of [the father] being able to control his sexual urges in front of the children.
210. The father freely admitted masturbating regularly and that he watched adult pornography online. He admitted that he had engaged in both actions during the marriage and that he continued to do so.
211. The mother's case appeared to be that because the father masturbated and watched pornography, he was likely to pose a risk to the children. It was not the mother's case that the pornography involved images of children.
212. That proposition was not put to Dr B who said in his report that the mother was convinced that the father had sexual deviant problems because he openly admitted to masturbating and watching pornography. Dr B reported:
- There was also discussion about pornography and masturbation which the mother seemed to consider as being deviant. I believe that the mother was sexually naïve and did not have a clear concept of normal human masculine sexuality in that masturbation and viewing pornography as activities themselves did not equate to a sexual deviation or danger.
213. A similar view had been expressed by Mr A in his report dated 23 August 2010 where he said:
- It should be noted that, the pornography use, while a source of tension in the marriage, and regarded as morally wrong from his and his wife's perspective as evangelical Christians, was not atypical with reference to

wider society. There was no evidence that he was accessing any illegal material or material which was outside of popular use.

214. There is no evidence before me that there is any causal link between masturbation, watching pornography and child sexual abuse.
215. As to the second proposition, the mother relied heavily on counselling notes produced on subpoena by Mr A relating to counselling sessions in 2008 and 2009.
216. Mr A recorded in his notes that the father told him that he had always been a liar; that he had lied to his parents about going to the pub during school hours and his use of marijuana; that he had lied about shoplifting as a teenager and that he would lie to the mother about viewing pornography.
217. Mr A's notes record that the father "Feels he's a compulsive liar".
218. The father freely admitted in cross-examination that he had said those things to Mr A in the context of therapy. He said that he was depressed and desperate to restore the marriage and felt that he was responsible for its failure. He said that he wanted a total cleansing and that he put every little sin on the table in counselling.
219. The father was cross-examined about alleged lies.
220. Counsel for the mother asked the father about a passage in the report of Dr B where he is reported as saying that he had an erection when he was in the bath with X during the marriage. The father gave evidence that Dr B's record of what had been said was incorrect. He said he did not feel it necessary to correct the record because he had been extensively cross examined about this incident in the 2013 proceedings and did not consider the incident was relevant to the present proceedings. I do not consider that this passage of cross-examination demonstrates that the father lied on oath.
221. The father conceded in some instances in cross-examination that his recall of an incident was inaccurate, however there is a distinction to be drawn between that concession and establishing that a person knowingly has told a deliberate falsehood in order to give the Court an incorrect impression.
222. As Ms C said in her oral evidence, the memory of adults, as well as the memory of children, is malleable and capable of distortion by intervening events.
223. Caution must be taken in distinguishing whether a person has deliberately told a lie or whether that person had given an inaccurate version of an event, based on an inaccurate recollection.
224. Even if a witness has been found to have deliberately lied, that fact does not establish the contrary proposition.

225. I do not accept the proposition that, because the father told Mr A in counselling, in the circumstances described, that he had lied and felt he was a compulsive liar, it necessarily follows that he has lied under oath when he denies having behaved inappropriately towards the children.
226. I have set out the evidence in relation to the interviews with the children at length earlier in these reasons.
227. In order to assess how their statements should be interpreted it is necessary to consider the evidence of Dr B.
228. In so far as it was submitted by Counsel for the mother that I should, in watching the video recordings of the JIRT interviews and the interview between the children and the mother, draw my own conclusions of the significance to be placed on what the children said, based on their appearance and demeanour, I specifically reject that submission.
229. The assessment and interpretation of the children's interviews is a matter for expert evidence and Dr B is the person with the demonstrated expertise to conduct that assessment.

#### **THE EVIDENCE OF DR B**

230. Dr B was the court appointed expert. He is a specialist child, family and adult psychiatrist with over 25 years' experience working as a psychiatrist in clinical and forensic capacities. In addition to his clinical work he has extensive experience in preparing reports for civil matters and for the Family Court of Australia.
231. In cross-examination by Counsel for the mother, Dr B gave evidence that he has expertise in relation to the cognitive development of children, attachment disorders, autistic disorders, youth depression, behavioural disorders, anxiety disorders, psychosomatic disorders, post-traumatic stress disorders, developmental disability, parenting capacity insofar as that is an issue that is relevant to child and adolescent and family psychiatrists, mental illness in parents, learning disorders, family therapy, the effects of sexual abuse and perinatal psychiatry.
232. Dr B gave evidence that in preparing his report he was providing his expertise as a psychiatrist and mental health expert; and his expertise in understanding child development and the interaction between children and adults in the context of litigation and family law problems between parents and how children can be influenced by that.
233. In the context of interviewing children about allegations of sexual abuse, Dr B gave evidence that his expertise was in understanding child development, emotional development of children, cognitive development, the ability of children to understand processes and the ability of children to understand the responses to adults and interaction with adults.

234. Dr B, in answer to questions by Counsel for the mother, said that he regarded himself as having a lot of experience in understanding sexual abuse and the effects of sexual abuse on children.
235. Dr B gave evidence that he was familiar with the interview procedure adopted by the police and had a lot of exposure to literature about interviewing children in the context of sexual abuse.
236. Dr B said that most of his experience was in relation to dealing with and treating children who have been sexually abused and have undergone treatment. He has dealt with the psychological impact of sexual abuse in his clinical work. Dr B has also had experience in looking at sexual abuse allegations in the context of family law proceedings.
237. I accept that Dr B's expertise has been demonstrated for the purpose of these proceedings.
238. Dr B viewed the recordings of the JIRT interviews with Y and X and the video recording made by the mother of X with the Elmo doll and the subsequent conversations by the mother with X and Y. He also had available to him the material which it had been agreed was relevant to the issue.
239. After Dr B's report had been completed and before he gave his oral evidence he was provided with the material which had been filed in the proceedings after the date of his report.
240. It was Dr B's opinion that the mother had embarked upon a process of interrogation and misunderstanding of how children report facts and beliefs to parents.
241. He said that children under the age of seven, like Y, respond to fear of disappointing or fear of punishment as the guide for what answers to give to interrogation from an adult. Children between eight and 12 respond to what they believe are the facts about what is the truth, which is what X attempted to do with his mother.
242. Dr B said that it is not until a child reaches the age of 13 years or older that the child can understand intention about telling the truth. With repeated multiple questioning and interview, this can often lead to spurious disclosure. Dr B believed that this was demonstrated in the police interview and in the repeated questioning of the mother.
243. Dr B said that young children often masturbate and that masturbation is a normal part of human sexuality even in children. He said that often parents do not understand that young children do masturbate and then parents become alarmed because they think that this may be abnormal behaviour for children.



244. Dr B said that many years of research into human sexuality indicates that masturbation is a normal part of human sexual experience and that it is also normal for children to behave in self stimulatory ways.
245. In relation to the incident reported by the mother where Y, in the bath, referred to the “porcupine game”, Dr B said that it was possible that Y’s behaviour could be interpreted as sexualised behaviour and it was also possible that her behaviour was normal playfulness for a five year old child.
246. In relation to the incident where X demonstrated, on the video recording, Y’s behaviour with the Elmo doll, Dr B commented:
- The attempted disclosure interview by the mother seemed chaotic and highly inappropriate. It is worth noting the children of the age of five are in a preoperational or magical stage of thinking. In terms of understanding lying and what’s correct, children of this age respond to punishment. Therefore the correct answer for a five-year-old when being elicited from a parent or adult, will be whatever the child thinks will avoid punishment, [Y]. An older child such as [X], at the age of eight or nine, the correct answer is how children of that age understand lying. It is worth noting that when [Y] was giving responses, that [X] was correcting her and making statements that what she was saying and reporting during the joint interview with the child and the mother, that what [Y] was saying was incorrect. It was quite clear from the interviews with [X] that he tried to correct his mother and denied that [Y] had made certain statements, or that there had been any sexual contact.
247. In his oral evidence, in response to questions about the demonstration with the Elmo doll, Dr B said that his interpretation of the incident was that [X] was trying to find a way of reporting to the mother something he felt she would be pleased about and that he wanted to provide information to the mother that he knew the mother would want.
248. Dr B questioned the fact that X even went to the mother with the Elmo doll story. He said that children play with dolls all the time and do all sorts of things and sexual play is not uncommon in children. Playing games with regard to genitals and being curious is quite common; it is part of the normal repertoire of children’s behaviour. So for X to actually go and report the incident to the mother indicated to Dr B that X was aware that the mother had a level of concern about these issues and that he was perhaps trying to assist her or provide some support to her.
249. Dr B said “I think the whole Elmo story has been taken to such an extreme that it has created enormous problems in these children’s lives. It could have been dealt with in a very matter of fact way by a mother who understood that children have sexual play and at times may need to be redirected.”

250. Dr B did not accept the premise that Y's activity with the doll was indicating oral sex. Dr B was not convinced that the Elmo doll incident was necessarily what the mother concluded it to be. Significantly, Y was not asked what she was doing with the Elmo doll.
251. In relation to the video recording of the interview between the mother and the children, Dr B was strongly critical. He said that it was not appropriate for a mother to conduct a disclosure interview with her own children and that the whole construct of the video was flawed.
252. Dr B had "major problems" with the questioning and the inappropriateness of the whole situation and the weight which has been consequently put upon what the children said. He expressed the view that the original purpose of the mother was totally flawed.
253. Dr B said that he was not convinced that what was demonstrated with the Elmo doll was sexualised play on the part of Y and referred to the necessity to understand what Y's intention was with the Elmo doll. Even if there was sexualised play with the Elmo doll, Dr B said that to assume the children were sexually abused by the father as a consequence is an enormous leap in logic.
254. Dr B said the mother has based her fears and anxieties on events going back into the marriage and the real issue is whether or not those anxieties are based on a valid premise in the first place. He went on to say that for the mother there was no clear reference point of objectivity. He expressed the view that the mother had sought help and had become involved with reference points that were unhelpful for her, which confirmed her anxieties and escalated her belief system. This developed into what he described as an illusion of validity in relation to her belief that the children had been sexually abused.
255. Specifically, in relation to the incident with the Elmo doll, Dr B said that it is quite common for children to be involved in sexual type play with other children and with toys and dolls and parents have to manage those situations. He said that some form of sexuality in children's play is not uncommon and is part of normal curiosity and growth.
256. Dr B specifically said in relation to questions in relation to the Elmo doll incident:

One of the problems here is the series of questioning and what this all means and it is very difficult to know, first of all, what [X] observed about what [Y] had done and said and then what [X] reported to his mother and then what his mother then questioned X about and then [Y] about to then be able to be clear about how much of what transpired was accurate. That five year old children are normally playing in a fantasy world. So what the child was doing in a fantasy world may not have been sexualised at all. It might have been what [X] had thought was sexual. So I think there are a

whole range of questions. And to presume that this was a sign that sexual abuse was occurring seems to be a quantum leap.

257. In relation to the mother's evidence of the conversation and events which occurred on 27 December 2013, Dr B said that the mother's response in saying to Y "Where did you learn that?" appeared to be highly inappropriate. He said that the question was leading because it contained the suggestion that Y's behaviour was learned behaviour. He also said that there was no logical connection between the actions of Y and Y's saying that the father asked her to rub his private parts. The subsequent description by Y of what she did, did not, to Dr B, make any logical sense.

258. When asked to comment about the mother's interpretation of Y's actions on that occasion, Dr B said that he believed that the mother's interpretation was flawed, that she already had a heightened fear of sexual abuse and that her interpretation of the children's behaviour was already pre-determined.

259. Dr B said:

Children of that age and that height have their faces and their heads at the parent's genital region, so to cuddle a parent is naturally going to look like the child is putting their head into a parent's genital region. The mother interpreted that as the child trying to lick her vagina, which seemed to be an extraordinary interpretation.

260. It was put to Dr B that the mother said to Y "What are you doing? Don't put your face in someone's privates and lick them. Where did you learn that?" Dr B said:

Well that's a highly inappropriate question to ask a child. That's a presumption of sexual behaviour which wasn't – wasn't necessarily true – that their five year old child, who is putting – doing that behaviour may have a totally different explanation for why she's doing that, even if the mother did feel the child's tongue. It doesn't necessarily mean that – so an adult doing that is obviously – would be highly suggestive of sexual behaviour, but a five year old who is in a fantasy world and playful may have a totally innocent explanation for that behaviour.

261. Dr B said that the question which the mother asked was leading because it implied that somebody had taught Y that behaviour. He went so far as to say that the question was not only leading but misleading.

262. Asked whether the question was in fact open ended, Dr B said:

We also need to look at the process that has been going on for some period of time and one of the things that I did try to highlight is the multiple questions and multiple interrogations that occur with children over a period

of time and that children learn over a period of time. And if you ask a child, you know, ‘where did you learn that?’ then often children learn from the process of questioning that there is an understanding about where ... something is likely to have been learned from so it could well be that the mother had already indicated to the child just through previous sessions of questioning the child that if you learn something bad, you learn it from your father, so there could be something implied already in the question. That’s why it’s a leading question.

263. Dr B said that questioning what a child has experienced about their father previously has a very powerful effect on children in determining how they are likely to answer questions.

264. Dr B was highly critical of the progress of the JIRT interview with Y.

265. In response to questions about the interview process, Dr B said:

I think we have to look at the context of the whole interrogation of this child. This child had had an hour interrogation. There were four hundred questions. She had repeatedly said no. That she had never been forced to touch her father in a bad way. She has repeatedly said that she hadn’t – there hadn’t been any untoward interactions between her and her father. And that the interviewer repeatedly brought back pictures and then repeatedly went through the different parts of the body, ‘did he touch you there?’, there were a lot of implications that the police officer had ... a preconceived idea and it wasn’t clear what this was... that the child had touched the father or understood some intention of touching the father.

266. Dr B said that it was not clear in the context of the whole interview what Y was talking about and whether she had really agreed that she had sexually touched the father or that the father wanted her to touch him in the genital region. He said that that particular passage of the interview was absolutely unreliable and the whole interview was flawed.

267. Dr B said:

This child had repeatedly denied that there had been any untoward interactions throughout the interview. And the interviewer didn’t accept that and he repeatedly came back to showing the child pictures of bodies and pointing to different parts of the body trying to illicit answers from the child until eventually, I think the child is exhausted after an hour and said ‘yes’ ... I thought the whole interview was very disappointing and not of the level that I would normally ... have witnessed of JIRT interviews.

268. Dr B said that the manner in which Y was interviewed was very suggestive. He went on to say that the questioning was repeated and determined questioning

that eventually got an answer from Y so that the interview could then come to a close.

269. Dr B referred to Y's repeated denials that she had touched her father. Dr B said:

One has to be very circumspect about interpreting particularly young children and the process of interviewing and manipulating children or suggesting to children, all those things can lead to enormous problems for courts and families in being able to understand what may or may not have happened to a child.

270. It was Dr B's evidence that suggestibility, multiple questioning and interviewer bias all have a large impact, particularly on young children. Dr B referred to a number of instances of suggestive questioning and repeated questioning by the interviewer. (In this regard I note that it was DSC H who first suggested to Y that her father wanted her to touch him).

271. Dr B said that even when Y was asked about touching her father, it was not clear to him whether it was being suggested that this was some sort of sexual touching or whether it was merely playful.

272. It was Dr B's opinion that the interview was not reliable and had been derailed.

273. He said:

I'm not actually saying that in this interview the child didn't eventually say that she believed the father did want her to touch him. I just have serious doubts about what that really means in the context of a five year old understanding the intention of whether a father wants him to touch her in a sexual way and our interpretation of this.

274. Asked whether there was any reason not to believe Y, Dr B said "Well apart from the fact that she had been interrogated by the mother previously, she had had an extensive interview with the policeman, and the responses were, I think, at best ambiguous at the start, and there was continued questioning."

275. Dr B expressed the view that there is no substantial evidence that Y had been sexually abused. He said that, on the basis of the evidence of which he was aware, the conclusion by the mother that the children had been sexually abused, or were about to be sexually abused by the father, did not make logical sense.

276. In relation to the incident reported involving the M children, Dr B said at worst Y's behaviour was misbehaviour or playfulness and that he would be loath to place too much weight on what had happened.

277. In relation to the interview which was conducted by Ms D, Dr B said that there was certainly a belief by Y that something wrong had happened but that there was no real clear indication as to what Y thought the wrong thing was. He did not consider that anything that Y said in that interview was a matter for major concern.

278. In his report Dr B expressed his views in relation to the sexual abuse allegations:

I formed the view that there was intense need for control, so very strong feelings of sexual inhibition and suspiciousness, the development of an illusion of validity about the sexual behaviour of the children is confirmation that sexual abuse has occurred, that sexual interest and frustration also indicates that the mother believed that the father was likely to sexually abuse the children. The mother embarked upon a process of interrogation and misunderstanding of how children report facts and beliefs to parents. Children under the age of seven like [Y] respond to fear of disappointing or fear of punishment as the guide for what answers to give to interrogation from an adult. Children between eight and twelve respond to what they believe are the facts about what is the truth which is what [X] attempted to do with his mother. It is not until he (sic) age of 13 or older that children can understand intention about telling the truth. With repeated multiple questioning and interviewer bias, this can often lead to spurious disclosure. This was demonstrated I believe in the police interview, and has also been demonstrated I believe by the repeated questioning of the mother.

279. Dr B did not believe that on balance sexual abuse is likely to have occurred.
280. Ms C, the psychologist who was the witness in the mother's case, expressed a different view. In a report dated 12 May 2014 which was annexed to her affidavit, Ms C said "In my professional opinion, [Y] presents as a child who has experienced trauma in relation to her father, and as a child who has experienced some form of sexual assault."
281. Ms C's affidavit and report were considered by Dr B. Dr B commented that the mother had provided Ms C with her opinion about the events involving the children in their initial interview. That was confirmed by Ms C who also agreed that she had been provided with a number of documents by the mother.
282. Dr B agreed with the proposition made by Ms C that, given the number of times that Y had been interviewed in recent years, it was not possible to ascertain what had happened to her. However, in her oral evidence, Ms C said that the trauma seemed to be associated with the father and that she thought Y's presentation was consistent with some sort of sexual abuse.
283. Ms C, whilst acknowledging difficulties in the interview process that had been undertaken with Y, was not prepared to concede that Y's initial disclosures to JIRT may have been unreliable.
284. Ms C had read the report of Dr B at the time when she gave her oral evidence but said that it did not affect her opinion.
285. In her oral evidence, Ms C said that she was not aware that the mother had consented to the children spending unsupervised time with the father and that

she did not consider that she would have been assisted by obtaining any history from the father.

286. She did not accept that she was a friend of the mother although it was pointed out to her that Y referred to her in the interview with Ms D as “mum’s friend”.
287. She agreed that she had copies of documents provided by the mother, including an affidavit of the mother, but was not provided with any documents from the father.
288. Ms C said that she was aware that the father had admitted in court documents that he had masturbated in front of a child.
289. She was clearly not aware of the father’s evidence in that regard. The father denied that he had made such an admission but said that on occasions when X was in his care, but asleep, he had masturbated. The father pointed out that adults have sexual intercourse when children are in their care, typically at night when children are asleep.
290. Ms C had read the counselling notes of Ms J and Mr A and was aware of the suggestion that the father was sex addicted and pornography addicted.
291. It was suggested to Ms C, on behalf of the ICL, that Ms C had become an advocate for the mother in that she had made a notification to DFCS, telephoned DFCS to ask why her notification had not been followed up, corresponded with DFCS and proposed herself as an appropriate person to sit in on the interview by Ms D with Y on 20 June 2014. Ms C accepted that she was not permitted to sit in with Y on that interview because DFCS did not regard her as neutral person. She said she accepted that decision. She did not accept that she had become an advocate for the mother.
292. In so far as Ms C’s opinion does not coincide with that of Dr B, I prefer the evidence of Dr B.
293. He is a child and family psychiatrist with over 25 years’ experience. She is a psychologist with 12 years’ experience.
294. I do not accept that the association of Ms C with the mother; through the children’s schooling, the fact that her daughter was in the same class as Y, the fact that Y referred to Ms C as her mother’s friend, and the advocacy on behalf of Y and the mother to DFCS, demonstrate that Ms C approached this matter objectively.
295. By contrast Dr B was an independent expert appointed by the Court.
296. Dr B had access to all relevant information and clearly Ms C did not.
297. In those circumstances I prefer Dr B’s evidence to that of Ms C.
298. It was not clear from the submissions on behalf of the mother what evidence was said to establish that there was any risk posed to X from the father. I was

not taken to any evidence in the period between the consent orders in May 2013 and the trial which suggested any risk. I assume that it is the mother's case that if the father poses an unacceptable risk to Y, then he must pose an unacceptable risk to all children including X.

299. That is a proposition which was not put to Dr B.
300. However, having regard to the conclusions I have reached on the basis of the evidence of Dr B, I am not required to resolve that issue and could not do so on the evidence before me.
301. I find that there is no unacceptable risk to the children in the care of the father.

### **WHAT PARENTING ORDERS SHOULD BE MADE?**

302. In determining the arrangements which best meet the children's interests, having determined the issue of their possible exposure to risk of abuse, I am required to consider, pursuant to 60CC of the Act, both the benefit to the children of having a meaningful relationship with both of their parents and the need to protect them, relevantly, from psychological harm.
303. That the children would benefit from having a meaningful relationship with both of their parents was not in dispute, subject, in the mother's case, to the need for supervision.

### **THE CHILDREN'S VIEWS**

304. The children were interviewed by Ms V on 6 May 2014. Ms V reported:
- [X] was of the view that he "sort of" misses the father and would like to see him again. He said the father had done nothing to hurt him, but heard from the mother "about the stuff he's done to other people." When asked if he knew who the 'other people' are he said "No. I just know it's not safe."
305. X told Ms V that he felt safe and comfortable at this mother's home but not so much at his father's home. He said that he had fun when he visits his father and would not mind if he visited his father without Y. X told Ms V that Y also has fun at the father's house, but that when she returns home she "hits and kicks people. She screams at us". X said he was unsure why Y behaved like that. X told Ms V that he would like to see his father again.
306. Y was asked why she hadn't seen her father for some time and told Ms V that "It's not safe at dad's." Ms V commented that Y was very unsettled and resistant to talking about the alleged safety issues at her father's home but that she referred to some of the safety issues being that the father had a trampoline with no safety net and that he has a dangerous tree. Y did not express any concerns to Ms V about her father bathing or showering her but told Ms V "My dad done something wrong. Really wrong. Really rude." Ms V did not pursue that comment.



307. Y was interviewed by Ms D on 20 June 2014. Another officer, Ms W, was present for the interview and took notes. Ms D was not available for cross-examination in the proceedings due to illness but Ms W was cross-examined. In the course of the interview, sadly, Y said “Mummy told me she doesn’t like daddy. Daddy told me he hates mummy.” Y was then asked “Where do you like living?” and replied “Probably dad’s.” Ms W in cross-examination recalled Y’s statement and rejected the suggestion that the statement was made with a rising inflection to indicate that Y was asking a question. It was Ms W’s recollection that Y simply made that statement.
308. The children were interviewed by Dr B on 14 August 2014 for the purpose of the preparation of the report dated 29 September 2014. Y told Dr B that she enjoyed spending time with her father and was very happy to see him. When Dr B observed the children in the presence of their father he notes that the children were thrilled to see their father. He observed that they ran up to him and embraced him and cuddled him. The children told their father that they would like to attend an upcoming family wedding with him.
309. After the change in the children’s living arrangements by virtue of the orders of 9 October 2014, the ICL arranged, with the consent of the father who had sole parental responsibility for the children, for the children to be interviewed by Ms E, who is a social worker employed with the Legal Aid Commission of New South Wales.
310. The ICL did not seek leave of the Court to have the children interviewed. By the time the ICL sought leave to rely on Ms E’s report, the interviews had been completed and the mischief to the children of repeated interviews had been done. The ICL advanced no reason for failure to ask Dr B to conduct interviews with the children to update his report, which was the appropriate course to take. However, refusing to allow the ICL to rely on Ms E’s report could not cure the mischief that had already been done and it was allowed into evidence. Mr E was cross-examined.
311. In her oral evidence, Ms E was clear that the report which she prepared was not in the nature of an assessment but merely a report of what the children had told her. Ms E interviewed each of the children separately.
312. When Ms E spoke with X, he acknowledged that he was aware that she would be preparing a report which would be seen by his parents and the Court. Ms E in her report says:
- As [X] continued to draw his family tree he told me that he started living with his father two months ago, describing this move as “*good*”. He went on to tell me that there was nothing wrong at home and that nothing makes him sad about living with his father. [X] said that before he went to live with his father he was living with his mother, saying “*it was good, I had fun and that’s about it*”. [X] told me that when he lived with his mother he

had *“sleep overs with dad and then we had day visits and we started living with dad.”* When asked if he would change his living arrangements he said, *“I don’t really care that much.”* He then stopped drawing and appeared to be thinking about his answer, he then said, *“No, I really care but if I had a choice I would choose to live with dad”.*

313. Ms E drew an outline of a hand which she called X’s “safety hand”. X identified his mother followed by his father then his maternal grandfather. X told Ms E, “I chose mum first not because there is something wrong with dad, it’s just that I’m more used to mum and have spent more time with mum. If I stayed with dad, for say another five years he would be number one.”
314. Asked to draw an island and then tell Ms E who would live on the island, X choose his best friend and identified his father as the next person to come and live on the island followed by his mother.
315. When asked to name three wishes, one of X’s wishes was that a genie would give him wishes. X suggested that the genie could make things better between his mother and father saying “I could get him to rewind the past, we would stay the same but mum and dad would not be fighting.”
316. X told Ms E that he was looking forward to starting school at F School in 2015, that he had no problem about changing schools and already knew some children that went to F School. X said that making new friends would not be an issue for him as he finds it easy to make and keep friends.
317. When asked specifically where he would like to live X said “Living on the moon would be a great idea.” He then said “It’s hard to choose, I want to stay with dad but it would be OK to go back to mum. I’m happy for the judge to decide”. Ms E said he then stopped and thought about what he had said and told her “It’s good with dad. I do want to stay with dad but I want to see mum.”
318. X expressed some dissatisfaction with the current supervised regime of time with his mother describing the supervision as “creepy”. X suggested it would be good to have a planned activity with his mother and suggested that contact could start with a day visit and then build up to overnight visits. X said that he would prefer to have less telephone contact with his mother as he finds it boring. He would prefer to have telephone contact only on the weekends when he doesn’t see her.
319. Y was also told that her parents and the Court would have access to the information which she gave Ms E and she indicated that she understood. When Y spoke about the changes to her living arrangements she told Ms E that she had been living with her father for about ten weeks and said “It’s good”. Y told Ms E that it was “good living with mum but not as good living with dad. Even if I have to go to bed early.”

320. Y said she wouldn't mind living with mum sometimes and that she would prefer to live with her father but have sleepovers with her mother. After further conversation Ms E reported Y said "It is hard. I have no idea what I want." Y then stopped and thought about what she had said and then told Ms E that she would prefer to stay with her father but visit her mother every day.
321. Ms E was not cross-examined about the apparent inconsistency between what Y is reported to have said in Paragraphs 319 and 320. It may be that there is a typographical error and that Y said firstly that living with mum was not as good as living with dad. In the absence of evidence, I cannot speculate.
322. Ms E reported that Y accepted that the daily visits would not be possible and said that she would be happy to see her mother on weekends. Y told Ms E that if she went back to live with her mother she would still like to visit and live at her father's place on weekends. Y said that if she lived with her mother it was important that she continue to see her father and that she would like to see him on weekends and stay overnight.
323. When Y was asked who she would take with her to her island she said that the father would live with her but the mother would live next door.
324. In relation to schooling, Y told Ms E that she had attended P School but would start school next year at F School. She said she had no friends at school and would play with X. There was further conversation between Y and Ms E about starting a new school and Y said it was a new opportunity to make friends.
325. Ms E noted that X was very clear in saying "I love mum and dad but I think I would like to stay with dad."
326. The children had a further interview with Dr B on 22 January 2015 so that the court expert could provide an updated report in relation to their wishes since the change in their living arrangements. Dr B was not provided with any information other than that the children's place of residence had changed.
327. Dr B asked X what it was like being with his father and X said "It's been good. I like it. I can watch television. I hadn't seen much of dad. We've been doing fun things." Asked about Ms G, X said that he liked spending time with her. They go shopping together and they like talking. X was asked if he had any worries and he told Dr B that he had no worries about being with his father or Ms G. X said "I'm happy. It's going well." Dr B said of his interview with X:
- He didn't seem to express any concern about the change. However he said "*it's a bit strange I didn't expect it. But it's been really fun to see dad.*" I asked why did he think it was fun to see dad. [X] said "*because mum and dad had a fight. Mum said he did bad things but he didn't.*"
328. Dr B asked X if there had been any bad things that had happened with his dad and X said "No". X was asked if there were any bad things that had happened

with Ms G and he said “No”. When asked how X felt things were going now, X said “It’s going good.”

329. X was asked about his wishes and said he wished for “mum and dad to stop fighting. A million dollars and unlimited wishes.” When Dr B asked X what would be the best thing to happen, X couldn’t think of anything. When asked if he had any problems he said he didn’t like being forced to eat vegetables.
330. X said the best thing would be that the mother and the father would stop fighting. When Dr B asked X what would happen if they didn’t stop fighting, X said “It would just be the same.”
331. Asked whether he would like to see more of his mother X replied in the affirmative and said “I’d like to see her every Wednesday and every second weekend like we did with dad.” X was asked if he had any other worries and he said that he did not and that he was happy with what was happening in his life at the current time.
332. In relation to Y, Dr B commented that she seemed happy and relaxed and undeterred by the tumultuous events that had occurred in her life over the recent months. Asked about her father, Y said “Good. I get on okay. No, good. We’re reading Charlotte’s Web together.” Asked about Ms G, Y said that she gets on very well with her.
333. Dr B asked Y what she thought about the Judge’s decision that she should live with her father and Y said “Nothing really. Mostly good.” Asked if anything bad had happened or if she was worried, Y said “No”. In relation to her mother Y said that “I want to be at mum’s house and visit mum and spend half the holidays.” Dr B commented in relation to Y

[Y] appears to be a happy relaxed girl who is surprisingly lacking in stress considering the enormous problems that have been occurring in her life. She also clearly seemed happy living with her father. She also had a sense of wanting to spend some time with her mother and wanting to be able to stay over at her mother’s and she also mentioned spending half the school holidays.

334. It is unlikely that the children had been made aware of the mother’s alternate proposal that they live in the care of their maternal grandparents. They did not express any views in relation to their grandparents either to Ms E or to Dr B.

## **THE NATURE OF THE CHILDREN’S RELATIONSHIPS**

335. It was not the subject of dispute that the children have other than a close loving and nurturing relationship with their mother.
336. Similarly, it was not the subject of dispute that having lived with the maternal grandparents since 2009, the children have a close and loving relationship with their grandparents.

337. Based on his observations, Dr B formed the view that the father has maintained a close relationship with both of the children. This would seem to be evidenced by the fact that they have transitioned well into his care, pursuant to the orders of October 2014.
338. Dr B stated in his supplementary report of 22 January 2015 that “Despite the enormous animosity in these children’s lives they were both delightful children and seemingly not enormously adversely affected by the upheaval.” Dr B rightly observed that this was a matter for which both parents should be credited. He commented that since being placed with their father both children appear to be progressing well, both cognitively and emotionally, and both appear to have a good relationship with each other.
339. Dr B says that the children described a good relationship with their father’s friend Ms G and with her daughter K.
340. The mother was critical of Ms G’s behaviour and her attitude to the children. No doubt, Ms G’s manner of speaking to the children and her manner of disciplining them does not accord with the mother’s standards. However the children appear to like Ms G and she is not a significant person in their lives. She is a friend of the father and has a room in his house. She may or may not be a permanent resident in the household.
341. The significant relationship for the children in their father’s household is their relationship with him.

#### **THE EXTENT TO WHICH EACH OF THE PARENTS HAS PARTICIPATED IN THE CHILDREN’S LIVES**

342. From the time the parties separated until October 2014, the mother was the primary carer for the children. Since separation the father spent time with the children by arrangement with the mother until about August 2009. That time was largely implemented by the father spending time with the children at the mother’s home although there is no doubt that he was able to take the children on outings and to the beach in the course of those visits.
343. From August 2009 until May 2013 the father’s time with the children was supervised.
344. From August 2009, when the father moved to Western Australia, until he returned to New South Wales in about November 2011, the father did not take an active role in the children’s lives.
345. The mother has been responsible for the financial support of the children with the active and important support of her parents.
346. There is no doubt that the father’s failure to participate actively in the children’s lives from August 2009 until November 2011 is a matter for which he should be criticised.

347. Between the time of the parents' separation in 2009 until the children were moved to the father's home in October 2014, the maternal grandparents have provided both material and emotional support to the children. They have allowed the mother to live in their home with the children. They assisted the mother in caring for the children when she has needed their help. They have assisted driving the children to school and collecting them, have been involved with their activities both outside and inside the home.
348. I accept the evidence of the maternal grandparents that they have been part of the children's lives and have nurtured them closely for the last six years.

### **THE LIKELY EFFECT OF ANY CHANGES IN THE CHILDREN'S CIRCUMSTANCES**

349. In October 2014, pursuant to orders of the Court, the children moved to live with their father. The reports of Ms E and Dr B demonstrate that the children have settled well in the care of their father.
350. One of the consequences of the children remaining in the father's care is that he would seek to change their school from the school they currently attend, being P School, to the state primary school which is very close to the father's current place of residence.
351. Although the father gave evidence that the state school is more convenient since it is within walking distance of his home, his primary reason for wishing to change the children's school is what he perceives to be the partisan attitude of the staff at P School and their support of the mother.
352. The father's attitude is not unreasonable.
353. The mother herself, both in her affidavit evidence and in her oral evidence, confirmed that she is fixed in her belief that the father is a danger to the children. The mother gave evidence that she had talked to Mr A, the head of the junior school at P School, about her belief that the children were at risk of sexual harm from the father. She had given Mr A a copy of the orders and told him that the children's time with their father had previously been supervised.
354. On 10 October 2014, a letter was received by the Family Court of Australia, addressed to the presiding judge. The letter was signed by; Mr I who is described as "Captain QANTAS Airways", Dr BB who is the principal of P School, Mr A and Ms I (the wife of Mr I), who is the personal assistant to Mr A. The letter was intercepted by the Registrar and returned to Mr I, copies being provided to each of the parties to the proceedings. The Registrar explained that the letter had not been provided to the Judge but also brought to the attention of the writers pursuant to the provisions of section 121 of the Act.
355. The letter came into evidence in relation to the issue of the children's continuing attendance at P School. The letter commences:

We write to you on a matter of great urgency. The recent decision by the Court to award custody of the children in the [Helbig V Rowe] custody case to their father has caused great consternation and shock amongst the local community and we cannot even begin to understand what perjury has led to this determination.

356. The letter goes on to speak glowingly of the mother and the maternal grandparents. The letter continues:

[Y], 6, is finally emerging from the tragedy of the separation, never really having been involved with her father from the time she was born. We see her developing into a fine young woman under the support of the college, her mother and grandparents. We also see the fear in her eyes when she is forced to go on an access visit with her father and understand that she is unable to sleep alone in her own bed on returning to the family home; preferring instead the comfort and security of her mother's arms. There has been an ongoing but unsubstantiated suspicion that her father may have interfered with her at some time.

357. In relation to X the letter says:

[X] is a gentleman and an active young man preferring the outdoors and time with his [maternal] grandfather. He is well balanced and polite and a testament to his mother's care. He is also burdened with Type 1 Diabetes that requires constant attention. His father is aware of this condition and the treatment required but does not seem to grasp the seriousness of not carefully monitoring the child's insulin level. We fear that permanent damage or even death is a very real possibility while he is under the care of the father.

358. The letter concludes:

We understand that legal argument has caused the Court to arrive at this verdict, however, as leaders of the local community we feel that we are morally obligated to bring to your attention that we quite strongly believe that any decision involving permanent care by the father is not in the best interests of the children. We implore you to reconsider the verdict before we read about another tragedy in the daily newspaper.

359. Mr A swore an affidavit in the mother's case and was cross-examined. Mr A did not teach either X or Y in 2014.
360. Insofar as Mr A had concerns about X and Y after they passed into the care of their father, he did not communicate those concerns to the father.
361. Mr A gave evidence that he thought the sending of the letter to the presiding Judge was appropriate and he thought the sentiments expressed in the letter were appropriate.

362. Mr A agreed that he had signed the children's second semester school reports, that their grades had improved and that the teachers of both of the children were glowing in their assessment of the children's progress.
363. Mr A, who holds the qualification of Diploma of Teaching, told the Court that he was qualified to make an assessment of the children's psychological state. I do not accept that to be so.
364. In cross-examination by Counsel for DFCS, Mr A agreed that the school should be a safe haven for the children but he did not agree with the proposition that because he and other staff had become involved in the conflict between the parents by writing the letter to the Court the school was no longer a safe haven. I do not agree.
365. The father gave evidence that he was very offended by the letter which was sent to the Court and he decided to remove the children in consequence of reading the letter. The father said that he was made to feel like an outcast at the school and that he believed that the community of P School was hostile to him.
366. It was the father's evidence that he sought assistance from Y's class teacher, Mr CC, over an issue where Y said she was being bullied by another child and that he, the father, felt that Mr CC was dismissive of his complaint.
367. Having regard to the contents of the letter, and the fact that it is signed by both the principal and the head of the junior school, the father's attitude is objectively reasonable.
368. The father, in addition, gave evidence that he could not afford to continue to pay the school fees at P School. The father has clearly discussed with the children the prospect of moving schools and according to the evidence of Ms E and Dr B that is not a prospect which causes any alarm to the children.
369. The likely effect of moving the children back to live with their mother or with the maternal grandparents is discussed in the consideration of the capacity of the parents and maternal grandparents later in these reasons.

#### **PRACTICAL DIFFICULTIES AND EXPENSE**

370. The parents live in close proximity to one another and there is no reason why the children could not move freely between the homes of each of their parents and of their maternal grandparents.

#### **THE CAPACITY OF THE PARENTS AND THE MATERNAL GRANDPARENTS TO PROVIDE FOR THE NEEDS OF THE CHILDREN AND THE ATTITUDE TO THE RESPONSIBILITIES OF PARENTHOOD DEMONSTRATED BY THEM**

371. X suffers from Type I Diabetes and until October 2014 the mother was primarily responsible for the management of the diabetes in close association with X's medical practitioners.



372. Although both the mother and the school were critical of the father's attention to X's diabetes, a letter from Prof DD, who is X's paediatric endocrinologist, reporting on a consultation with X on 12 January 2015 with his father documents a change to the routine of X's care and comments upon his pleasing results. I am satisfied that X's father is attentive and competent to care for X's diabetes.
373. Each of the parents and the maternal grandparents is capable of providing for the physical and intellectual needs of the children.
374. It was the issue of the capacity of each of the parents to ensure that the children maintained a relationship with the other which seemed to be uppermost in Dr B's concerns. In his report he said:

Should the children stay with their mother, I believe that the relationship with the father, which is still a very positive one, will be lost and break down and they will never have any contact with him again. This is going to be very unfortunate because I believe that he is a very important part of their life. He has a great deal to contribute to them and this would be an enormous loss for them. Such a loss is likely to impact on their sense of security and self-esteem with such loss. This would then predispose them to later mental health problems such as depression, anxiety and undermine their confidence in forming relationships.

Should the children be placed with the father I believe that they would develop well in his care. I believe that he is a capable caring parent who could provide for them. I also believe that he would support a relationship between the children and the mother.

375. Dr B goes on to say:

There is a huge dilemma here because there were two previous reports by [Dr R] that the children should see the father. The mother has taken control and through her own belief system based upon her questioning techniques and her illusion of validity has now created a situation where the children are reporting sexual abuse and getting sexual abuse counselling. This has now compounded the problem and there is a belief system amongst the children that the father is abusive, and yet the evidence to support this in my mind is false.

376. There is no doubt that, by the time that unsupervised time with the father and the children commenced in May 2013, Y was well aware that, in the view of the mother, the father was not a safe person.
377. The father gave evidence, in response to questions on behalf of the ICL, that from the first visits in May 2013 Y routinely told him that the mother said he was not allowed to shower her, dress her or toilet her. He said that on almost every visit Y would repeat what her mother had said but would then often ask

him to help her either in showering or dressing. He said words to the effect “She says the words then calls me if she needs help”.

378. The father said he was careful to instruct Y to wash herself when she showered but that Y often asked him to help her with her towel.
379. In contrast to X’s statements about his father in December 2013 and to JIRT in January 2014, by the time X was interviewed by Ms V in May 2014, he believed that he knew that his father was not safe, although he could not tell Ms V why that was so.
380. It was Dr B’s evidence that for the best interests of the children, and in order for them to have a long term relationship with both of their parents, it is necessary that they live with their father. In his oral evidence Dr B said that the term which he used, “illusion of validity”, could otherwise be described as a single unfounded belief or a ‘folie’. He said that it was his opinion that the mother, over years, has developed her own beliefs about the father being a sexual deviant and having tendencies to sexual abuse and that she has chosen people around her who share her views, such as Ms M.
381. Certainly in relation to Ms M she appeared to have a very fixed view that the father was responsible for purporting to sexual abuse. Dr B reported that “[Ms M] told me she thought that (sic) would be inappropriate if I saw the father and the child. [Ms M] said ‘you shouldn’t see somebody who has abused a child’”
382. Dr B went so far as to recommend in his report that the mother have a guardian ad litem so that she would have the benefit of some objective input into her thinking.
383. The mother in cross-examination on behalf of the ICL said that she understood that her capacity to facilitate the relationship between the children and their father was an issue and said that she had gone out of her way to facilitate the relationship. She agreed that she has steadfastly rejected any proposal for unsupervised time with the father until May 2013. She said that if the Court ordered unsupervised time for the children with the father she would struggle, but that she understood that she would need to follow the orders.
384. The mother saw no need to have any assistance from a therapist in relation to the issues before the Court. She was not prepared to consider the recommendation of DFCS that she at least put her mind to alternative explanations for the manner in which the children were behaving. She did not resile from the statements which are referred to in paragraph 209 of these reasons.
385. Nothing in either the affidavit evidence of the mother’s parents or in their oral evidence suggested that their attitude was any different from that of the mother.
386. Whilst the maternal grandfather said in oral evidence that he would have no option but to accept the findings of the Court, there was nothing in his oral

evidence that suggested that he was likely to change his belief that the children were at risk in the care of their father.

387. In relation to Dr B's opinion, the maternal grandfather expressed the view that the opinion was unacceptable and flawed. Similarly in relation to Dr R's opinions he referred to her having made classic, factual and logical inaccuracies.
388. The maternal grandfather conceded that he shared the mother's view in relation to the father's danger to the children. In his oral evidence the maternal grandfather used the term "we" to embrace his wife and the mother and it appears that there is nothing in the evidence to suggest they are not of one mind in relation to this matter.
389. The maternal grandfather gave evidence of a conversation which took place in November 2014 when he and the maternal grandmother attended the same church as X's teacher, Ms EE. When the maternal grandparents asked Ms EE how X was going, she told them that he was happy and well and enjoying being back at school. Ms EE noted that conversation in the school records.
390. By contrast, when the maternal grandmother was cross-examined about the conversation with Ms EE, she reported that Ms EE had seemed quite perturbed that X was not his usual self and was not as happy as he had been. She reported that Ms EE had said that X's diabetes was not being properly attended to by the father.
391. Dr B reported that in the interviews the maternal grandfather said that it was his view and that of the maternal grandmother that the father shouldn't see the children. The maternal grandmother conceded that she heard that remark.
392. Asked about the future for the children, the maternal grandmother said that she would probably have gone along with supervised time for the father but would not agree to unsupervised time in the circumstances. She did not agree with Dr B's conclusions and rejected his opinions in relation to the risk to the children.
393. The maternal grandmother said that if the children spent unsupervised time with the father it was likely that he would harm either or both of them. She said that, as she sat in the witness box, it was her belief that the children were both at risk.
394. When the maternal grandmother was asked what she would do if the Court found that the father did not pose an unacceptable risk to the children, she said that she could not answer that question, she would have to know what is happening and what the children may be saying now.
395. The maternal grandmother said that she held the view that the father posed a risk to the children ever since the episode when the father and X had been in the bath together when X was a very little boy.

396. In relation to the maternal grandmother, Dr B in his report said:

[The maternal grandfather] said that he was very concerned about the father. [The mother] had explained to them about certain behaviours. *“I tried to join the dots. In January 2010 his father masturbated. [The mother] was beside herself. She went to write things down she was so upset.”* Then [the maternal grandmother] explained that she was at the start when the first disclosure happened. *“[X] started to talk about his father. He started to say that his father used to do things in the bath. I asked him to stop and then I handed over to [the mother].”* [The maternal grandmother] indicated before [X] had said anything substantial that she knew he was making a disclosure of sexual abuse. This seemed extraordinary to me unless there had been a previous adult expectation of this occurring. She said that he was making a disclosure and in order to get the full disclosure she called [the mother] in. Therefore [the maternal grandmother] was part of the disclosure process and she seemed to have a prescience that [X] was disclosing sexual abuse, and this is why she got [the mother] to do the disclosure interview.

397. The event to which Dr B refers took place before the parents separated.

398. In relation to the maternal grandparents, Dr B reported they were concerned about grooming of the children. They were concerned that the behaviour that had happened was grooming. There hadn't actually been sexual abuse at this point, but they were convinced grooming was going to lead to sexual abuse.

399. There is no distinction to be drawn between the attitude of the mother towards the father and the attitude of the maternal grandparents.

400. There is no distinction between the capacity of the mother to give objective consideration to the expert evidence about the allegations of inappropriate behaviour by the father and that of her parents.

401. There could be no suggestion that, in the care of the maternal grandparents, the children's relationship with their father would be more likely to be fostered than would be the case in the care of the mother.

402. The concerns expressed by Dr B under the heading “Possible Outcomes” at page 45 of his initial report as to the likelihood that the children's relationship with their father would be lost if they remain in the care of their mother apply equally to the care of the maternal grandparents.

403. Nothing in the evidence of the mother or the maternal grandparents suggested that Dr B's analysis of the risk to the children of losing their relationship with their father was flawed and I accept his evidence as to the risk posed to the children if they live with their mother or, by analogy, with the maternal grandparents.

404. The orders which the father seeks would have the effect that, after a period of supervision which is recommended by Dr B, the children would have unsupervised time with the father. I was not taken to anything in the evidence which suggested that the father would not promote the children's relationship with their mother.

## **CONCLUSION**

405. Having regard to the matters which I have considered above, I accept the recommendation of Dr B at pages 46 to 47 of his initial report that the only alternative is for the children to be placed with their father and initially, have weekly supervised time with their mother. There is no reason for the time to be curtailed to two hours if PP can provide more time.

## **CHILDREN'S TIME WITH THE MOTHER AND MATERNAL GRANDPARENTS**

406. The ICL sought orders which would limit the time the children spent with the mother (and at her invitation with the maternal grandparents) to supervised time until such time as the mother completed a course of counselling for the purpose of her changing her views about the allegations of abuse. It is implicit in the orders sought by the ICL that, if the mother's views remain unchanged, her time with the children should remain supervised.
407. The orders sought by DFCS were less restricted and proposed an immediate introduction of unsupervised time for the children with the mother each alternate weekend from after school on Friday until the commencement of school on Monday.
408. The father sought orders in similar terms to those sought by the ICL, being that the progression from supervised to unsupervised time for the children with the mother was dependent upon her changing her views about the allegations of abuse.
409. The mother was quite adamant in her evidence that she did not intend to seek any assistance from a counsellor to modify her views. There is no evidence that forcing the mother to engage in a course of counselling that she strongly resists is likely to have a positive effect for her or for the children.
410. In all likelihood, a regime such as that proposed by the father and the ICL would lead to the children's time with their mother being supervised indefinitely.
411. Ms E reported that X finds the supervision of time with his mother "creepy". Dr B reported that both children want a regime of time with their mother which is more like that which they once had with their father, that is on weekends and during each week.

412. The purpose of supervision is to ensure that the children's sense of safety and security in the care of their father is not challenged by any conscious or unconscious actions of the mother and the maternal grandparents.
413. It is important that the children have the opportunity to consolidate their relationship with their father as their carer and to ensure that the relationship is not undermined by any unconscious negativity. I do not expect that the mother would consciously act in a way that she believed was detrimental to the children but her fixed views are such that she may allow the children to be reminded that, in her view, their father is not a safe person, as she has done in the past.
414. Dr B said in his January 2015 report:
- I'm hopeful now that if the children can continue residing with the father and that the contact can be gradually re-introduced in an unsupervised way and increased that this may eventually result in a good outcome where the children can reside with one parent and be well cared for and have healthy contact with the other parent and enjoy a close relationship with both parents.
415. The ideal scenario described by Dr B will not be achieved by imposing ongoing and indefinite supervision. The children's relationship with and time with their mother needs to be normalised as soon as possible, consistent with the need for them to consolidate their relationship with and placement with their father.
416. To that end, the children's time with their mother will be supervised for a period of one year from the date of these orders and thereafter will be increased until they are spending alternate weekends and half school holidays with their mother.

#### **PARENTAL RESPONSIBILITY**

417. Each parent seeks an order for sole parental responsibility in her or his favour.
418. The parenting relationship is so acrimonious that there is no possibility of their being able to communicate and share any decision making in relation to the children. Already there is a dispute about what school the children will attend. In these circumstances, I find that the presumption of equal shared parental responsibility pursuant to s61DA of the Act has been rebutted.
419. Since neither party proposed that parental responsibility should be shared, I propose that the parent who has the primary responsibility for the day to day care of the children should have sole parental responsibility.

#### **MOTHER'S CONTRIBUTION TO THE COSTS OF THE SINGLE EXPERT**

420. The ICL sought an order that the parties contribute to the costs of the Single Expert in the following terms:

By 11 February 2015, the mother is to pay into the Trust Account of Legal Aid NSW the sum of **\$2,640.00** (two thousand six hundred and forty dollars) for payment by Legal Aid NSW to [Dr B] in respect of the remainder of his fees in relation to his expert witness costs.

By 11 February 2015, the father is to pay into the Trust Account of Legal Aid NSW the sum of **\$140.00** (one hundred and forty dollars) for payment by Legal Aid NSW to [Dr B] in respect of the remainder of his fees in relation to his expert witness costs.

- 421. The father consented to the orders proposed. The mother did not.
- 422. The orders made 30 July 2014 appointing the Single Expert provided for each party to pay half of the costs. It does not appear from the judgement of the Full Court handed down on 17 September 2014 that the mother appealed against that order.
- 423. On behalf of the mother it was submitted that because she did not agree with Dr B's recommendations and was highly critical of his report, she should not have to contribute to the costs of the single expert.
- 424. It was not submitted that there was any financial reason she could not contribute.
- 425. I do not consider that the fact that a Single Expert's report is unfavourable is sufficient reason to excuse a party from contribution in circumstances where the order making provision for the joint payment of costs was not appealed and the time for appeal has long passed.

### **THE MOTHER'S USE OF MATERIAL PRODUCED ON SUBPOENA**

- 426. Earlier in these reasons I have set out in some detail the manner in which material which was produced on subpoena in the 2013 proceedings was copied and distributed by the mother.
- 427. Of my own motion, I foreshadowed the making of an order restraining the mother from disseminating any material produced in the course of these or earlier proceedings and invited Counsel to address me if that course of action was opposed. No such submissions were made.
- 428. I directed the mother to produce to the Court all copies in her possession of the material which had been copied from documents produced on subpoena and those copies were produced and have been placed with the court file.
- 429. The Orders will restrain the mother from disseminating any material, without the leave of the Court first obtained, except for the purpose of obtaining legal advice.

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**I certify that the preceding four hundred and twenty-nine (429) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Rees delivered on 9 March 2015.**

Associate:

Date: 9 March 2015