

FAMILY COURT OF AUSTRALIA

WANG & DENNISON

[2009] FamCA 206

FAMILY LAW – CHILD ABUSE – finding of no unacceptable risk – credit findings against mother – false allegations amounting in emotional abuse of child – interim orders made for parents and children to undergo counselling with a view that children recommence spending time with father

FAMILY LAW – CHILDREN – with whom a child lives and spends time with – interim orders – where not in the child's best interests to make final parenting orders due to lack of information regarding the child's emotional needs – interim orders made for the two children to continue living with the mother and for the parents and children to undergo counselling with a view that children recommence spending time with the father – final parenting orders pending expert evidence regarding the emotional needs of the children

FAMILY LAW – CHILDREN – with whom a child spends time with – where child abuse allegations have been made – whether child should spend time with siblings who are related to the father or otherwise aligned with the father – finding that child should spend time with siblings

FAMILY LAW – CHILDREN – family violence – where children exposed to inappropriate degree of family violence – finding that family violence instigated by the mother

Children, Youth and Families Act 2005 (Vic)

Crimes (Family Violence) Act 1987 (Vic)

Evidence Act 1995 (Cth) s 22; Division 12A Part VII

Family Law Act 1975 (Cth) ss 4, 60B(b), 60B(1), 60B(2), 60CC, 60CC(2)(a), 60CC(3), 60CC(4), 60CC(4A), 60CD(2)(b), 62B, 65DAA(3), 65DAA(4), 66CC(2)(b), 62G(2), 65DA(2), 65L, 68LA, 68F(2) (*repealed*)

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

Family Law Rules 2004 (Cth) r 15.10(2); r 16.07(2)

H & W (1995) FLC 92-598

Hemiro & Sinla [2009] FamCA 181

R & R: Children's Wishes (2000) FLC 93-000

Wang & Dennison [2007] FamCA 234

APPLICANT:

Ms Wang

RESPONDENT:

Mr Dennison

INDEPENDENT CHILDREN'S LAWYER: Septimus Jones & Lee

FILE NUMBER: MLF 2835 of 2004

DATE DELIVERED: 20 March 2009

PLACE DELIVERED: Melbourne

PLACE HEARD: Melbourne

JUDGMENT OF: Bennett J

HEARING DATE: 18-22 February;
7 and 18-19 March;
5-9, 12-15 and 26-30 May;
18-19 June;
21-25 and 28-31 July;
11 August 2008;
March 20 2009

REPRESENTATION

COUNSEL FOR THE APPLICANT: Ms D Wiener

SOLICITOR FOR THE APPLICANT: Perry Weston

THE RESPONDENT: In Person

COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER: Ms M Glaister

SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER: Septimus Jones & Lee

ORDERS

1. That the husband and the wife do all acts and things necessary to have the family accepted into a post orders program as recommended by the supervising family consultant with a view to the girls, the eldest daughter S born ... February 1998

and the youngest daughter N born ... March 2000 being reunited with their father and their siblings J, E and Ms L as soon as practicable.

2. That I adjourn this matter before me to 16 July 2009 at 10.00 am for further hearing.
3. That pursuant to section 65L of the *Family Law Act 1975*, the Manager of Child Dispute Services for the Family Court of Australia at Melbourne, at the request of either party to the proceeding, nominate a family consultant to supervise compliance by the parties with the parenting order made on 20 March 2009 ("the Order") and to render to either party such assistance as is reasonably requested by him/her in relation to compliance with, and the carrying out of, the Order, such supervisory counselling to operate between now and the final hearing specified in paragraph 1 and to be reportable AND IT IS REQUESTED that as soon as possible the family consultant explain the operation of this Order to the children in terms likely to be understood by them.
4. That until further order the children live with the wife.
5. That pending the adjourned date the children spend time and communicate with the husband as directed by the counsellor at Centacare in X, or such other agency, as is recommended by the s 65L family consultant.
6. That the issue of specific parenting orders entitling the children to live or spend time with the husband be reserved to the adjourned date.
7. That by not later than 10 July 2009 the independent children's lawyer publish to the parties and provide to my Associate and the supervising family consultant her preliminary view of what orders ought to be made on the adjourned date.
8. That the supervising family consultant ensure that Centacare in X, or such other agency as the family is accepted into, has a copy of my reasons for judgment.
9. That until further order the wife keep the husband informed of the progress of S' enrolment at an appropriate secondary school in 2010.
10. That until further order the husband and wife each be entitled to attend school events to which parents are normally invited to attend, such as school concerts and sports days but neither parent shall attend upon the children during class time or school breaks unless in the event of an emergency.
11. That the husband and the wife be entitled to receive school newsletters, school reports and notices at their own expense, if any.
12. That until further order the wife keep the husband advised of the name and address of the children's treating medical practitioner and any change thereto and she advise the husband in writing of any hospital admission in relation to the children.
13. That until further order the wife keep the husband advised of any illness of the children, or either of them, requiring ongoing medical treatment.

14. That until further order the husband keep the wife advised of any medical treatment given to the children during periods of time the children are in his care.
15. That until further order the husband and the wife by themselves, their servants and agents each be and are hereby restrained from showing the children any documents relied upon in these proceedings or from talking to the children about the contents of documents in these proceedings or in the criminal proceedings concluded in the County Court in 2007, or allowing anyone else to do so save for in the course of treatment of the children and then only at the direction, or under the supervision, of a counsellor or therapist or treating professional.
16. That the husband and the wife by themselves, their servants and agents each be and are hereby restrained from abusing, insulting, belittling, rebuking or otherwise denigrating the other to or in the presence or hearing of the children, or either of them, and from permitting any other person to do so in the presence or hearing of the said children, or either of them.
17. That the parents do all acts and things necessary to ensure that Centacare, or other, counselling includes the children's siblings J, E and Ms L, the extent of such involvement to be at the discretion of the counsellor appointed to conduct the counselling or therapy.
18. That the s 65L family consultant be at liberty to consult with the counsellor appointed to the family at Centacare to advise the Court as to the progress of and compliance with the counselling provided by Centacare.
19. That the independent children's lawyer provide a copy of this Order and my reasons to:-
 - a) The proper officer of the Department of Human Services;
 - b) The Principal of H School, in C;
 - c) Senior Constable T of Victoria Police;
 - d) Ms L, J and E; and
 - e) The Principal of P School, and Ms R, teacher.
20. That, for the avoidance of doubt, IT IS REQUESTED that the order appointing the Independent Children's Lawyer continue in full force and effect.
21. That pursuant to Rule 19.50 of the Family Law Rules this matter reasonably required the attendance of Counsel.
22. That until further order all exhibits tendered in these proceedings remain with the Court file.
23. That the Subpoenaed Documents Clerk of this Registry retain any documents produced on subpoenae.

24. That pursuant to Sections 65DA(2) and 62B the particulars and the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and those particulars are included in these orders.

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

FAMILY COURT OF AUSTRALIA AT MELBOURNE

FILE NUMBER: MLF 2835 of 2004

MS WANG

Applicant

And

MR DENNISON

Respondent

And

INDEPENDENT CHILDREN'S LAWYER

REASONS FOR JUDGMENT

Introduction

1. These proceedings concern the children S born in February 1998 and N born in March 2000. The matter was heard by me over 26 days from 22 February 2008 to 11 August 2008.
2. The competing applications relate to who the daughters are to live with and what time and under what circumstances the girls should see the parent with whom they do not primarily reside. At this point in time, the girls are completely estranged from the father. They have not spent time with him since July and August 2005, when S was 7 years old and N was 5 years old.
3. The relationship between the parents has been defined by conflict and mutual allegations of domestic violence and the mother's allegations that the father has sexually abused S. I will make findings in relation to the mother's allegations. However, my conclusion as to the balance of the case is that the family dynamics are too complex for me to make anything other than interim orders at this stage.
4. In very short compass, there were a number of separations and reconciliations between the mother and the father with the final separation occurring on 8

November 2004. Shortly prior to separation, orders¹ were made by consent that the children would spend time with the father each Wednesday from 5.00pm to 6.00pm and on alternate weekends from 5.00pm Friday to 2.00pm Sunday and from 10.30am to 12.30pm on Sunday in the other week. There was provision for the children to spend half the school holidays with the father and for the father to attend the children's school. Post separation, the children spent time with the father in accordance with the orders of October 2004.

5. Difficulties arose with implementation of the orders in early 2005 and the father brought contravention proceedings against the mother. On 28 October 2005, the mother filed an application to suspend the father's time and communication with the girls and also filed a Notice of Risk of Child Abuse in which she alleged the following:
 1. The children have complained of being repeatedly hit by the father during contact visits and have been returned from contact badly bruised.
 2. The child [S] has complained of the father pinching her, pulling her hair, strangling her and refusing to leave her alone during contact periods.
 3. The child [S] has complained of the father touching her all over and touching her private parts in the bath during contact periods.
6. The father's entitlement to spend time with the children was suspended on 30 November 2005 by order of the Federal Magistrates Court and the proceedings were transferred into this Court. Subsequently, the father was charged with various criminal offences.
7. This matter was accepted into the Magellan list of cases on 3 February 2006. It is a judicially managed list of cases involving allegations of sexual and serious physical abuse of children.
8. On 28 February 2007, the father was committed for trial on numerous criminal charges including:
 - one count of intentionally causing injury;
 - six counts of reckless injury;
 - one count of assault with a weapon;
 - eight counts of unlawful assault;
 - one count of incest by a parent;

¹ Order of 7 October 2004 which was in the terms of minutes signed by the parties and dated 13 September 2004 being parenting orders and orders for a final alteration of property interests.

- one count of indecent act on a child under 16;
 - two counts of intentionally threaten serious injury;
 - one count of threat to kill; and,
 - one count of reckless conduct endangering a serious injury.
9. On 28 February 2007, the husband entered into conditions of bail which precluded him having any contact with witnesses for the prosecution, including S, N and the mother, otherwise than by order of the Family Court. On 2 March 2007, this matter came before me and the father sought orders to spend time with the children each alternate weekend to accord with his previous entitlement pursuant to the orders made on 7 October 2004. I dismissed that application and my reasons for doing so appear at *Wang & Dennison* [2007] FamCA 234. I ordered that the matter be re listed promptly upon conclusion of the criminal proceedings.
 10. The father had been charged with 18 counts² including one of incest in relation to S. Ultimately, the father faced trial on 12 charges³ including, in relation to S, the count of incest and a lesser charge of indecent act with a child under 16. Both offences were alleged to have occurred on 8 November 2004. The date of the alleged offences is significant because, in the current proceedings, the facts relevant to the alleged sexual abuse by the father of S are alleged by the mother to have occurred in July 2005, whereas the charges laid against the father are based on the same circumstances having occurred on 8 November 2004.
 11. The father's criminal trial was conducted in the County Court at Melbourne in late 2007 and ran for some nine court days. The mother and both girls were cross examined. Early in the hearing I was informed by the independent children's lawyer that the presiding judge was of the view that there was insufficient evidence to put to a jury in respect of some charges and directed that the jury acquit the father on those charges. Otherwise, the jury returned a not guilty verdict on the charges left to them.
 12. Apart from a brief exposure of the girls to the father in the course of preparing a family report in November 2007, S and N have not spent time with the father or had communication from him pursuant to any parenting order since 2005. The father has had no weekend or overnight time with S or N since 10 July 2005. There were three visits which the father made to the school with the cooperation of the school principal. The first was on 5 August 2008 in the company of Ms L. There was another visit on 11 August 2005 by the father alone and the final visit was when the father was entitled to access the girls at

² Exhibit "ICL22" is the Charge and Summons dated 1 June 2006 in which the 18 charges are detailed

³ Exhibit "ICL20" is a Records Report by the Office of Public Prosecutions Victoria which details the 12 counts

school pursuant to paragraph 6 of the Order made on 7 October 2004 which provided that the father be permitted to visit the children at school and kindergarten at any time and talk to the teachers regarding the progress of the children. The third and final visit was estimated by the father in submission to have been on or about 23 August 2005 but certainly by end of August 2005.

13. Since the parties filed their applications, the *Family Law Act 1975* (Cth) ("the Act") has been significantly amended by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) ("the amendments"), the provisions of which came into operation on 1 July 2006. Certain procedural elements of the amending legislation, which provide for a less adversarial mode of trial, do not apply to this case as it was commenced before 1 July 2006.

The Independent Children's Lawyer

14. Pursuant to an order made on 17 October 2005, Ms Nicola Watts, solicitor, was appointed as the independent children's lawyer for S and N within the meaning of Division 10 of Part VII of the Act. As such, her role is to form an independent view, based on the available evidence, of what is in the best interests of each of the girls and then act in these proceedings in accordance with what she believes those best interests to be.⁴ Ms Watts is not a legal representative retained by the girls and she is not bound by any instructions from the girls.⁵ The role of the independent children's lawyer is to deal impartially with the parties, ensure that any views expressed by S and/or N are fully put before the court, to analyse documentary, expert evidence and reports and to distil from that evidence significant matters for the purpose of properly drawing them to the court's attention. The independent children's lawyer is also under a specific duty to take steps to minimise for the child the trauma associated with proceedings⁶ and to facilitate an agreed resolution of matters at issue in the proceedings to the extent that it is in the best interests of the child to do so.⁷
15. At this trial, Ms Watts retained Ms M Glaister, of counsel, to appear on her behalf. Ms Glaister was provided with an instructor for a significant portion of the trial notwithstanding that there was no funding for same. The independent children's lawyer has, through her counsel, done all that could be asked of her and all that an independent children's lawyer could be expected to do both in preparation of the matter for trial and at trial. In my judgment, S and N have been well served by the independent children's lawyer.

⁴ s 68LA(2) *Family Law Act 1975* (Cth).

⁵ s 68LA(4) *Family Law Act 1975* (Cth).

⁶ s 68LA(5)(d) *Family Law Act 1975* (Cth).

⁷ s 68LA(5)(e) *Family Law Act 1975* (Cth).

The mother's proposal

16. On the first day of the hearing, the mother's position was that neither of the girls ought to spend any time with or communicate with the father. In particular, the mother submitted that there was an unacceptable risk of the children being sexually abused by the father if they were to spend unsupervised time with him in the future and that it was inappropriate for supervised time to be ordered on an ongoing basis.
17. On the sixth day of the hearing,⁸ a significant concession was made by the mother. It was that there was insufficient evidence for the court to be satisfied that there was an unacceptable risk of sexual abuse being perpetrated by the father against either or both of the girls into the future. The mother sought orders that S and N live with her and "the parties and the children attend upon such family therapy counsellor as [is] nominated by the independent children's lawyer for the purposes of assessing whether reintroduction of the children to the [father] is possible and, if so, under what conditions and whether same is in their best interests."⁹ Otherwise, the mother sought an adjournment of the matter back into the Magellan Directions list for management.
18. At the conclusion of the trial, the applicant mother sought the following orders:-
 - a) That the mother have sole parental responsibility for the children;
 - b) That the children live with the mother;
 - c) That the children spend time and communicate with the father as directed by the counsellor at Centacare [in X] (or such other agency as is recommended by the s 65L counsellor) for four months from the date of judgment.
 - d) Thereafter, that the children spend time with the father, excluding overnight time:
 - i) On alternate weekends;
 - ii) For one half of school term holidays, being 7 consecutive days; and,
 - iii) For two non-consecutive weeks during the Christmas holiday period.
 - e) That each party take the children to their extracurricular activities, including to Chinese school on Saturday mornings;

⁸ 7 March 2008

⁹ See mother's minute of proposed orders being Exhibit "M3"

- f) That the father be restrained from washing the children or being present whilst either of the children bathe;
 - g) That the parties be restrained from discussing these proceedings, the prior criminal proceedings concluded in the County Court in 2007 and all associated allegations.¹⁰
19. In the closing address, the mother's case was that given the conflict between the parties, shared parental responsibility would not be practicable.¹¹ However, if the court were to find sole parental responsibility in the mother's favour to be inappropriate, an order for shared parental responsibility should be made.¹²
20. Counsel for the mother suggested that vis-à-vis schooling, an order could be made that each of the parties liaise with the school in relation to secondary school enrolment, where a school representative acts as an intermediary between the parties.¹³
21. On 20 March 2009 I provided the mother with an opportunity to be heard in relation to making only interim orders at this stage. Counsel for the mother indicated no opposition.

The father's proposal

22. At the commencement of the case, the respondent father sought that the girls live with him and have limited time with the mother on the basis that they had been emotionally abused by the mother, required to lie and to continue to lie about him and to make false allegations of abuse against him.
23. At the conclusion of the trial, the respondent father sought the following orders:-
- a) That the father and mother have shared parental responsibility for the children;
 - b) That the children reside with the father and the father have day to day care for the welfare of the children;
 - c) That the wife spend time with the children:
 - i) On alternate weekends;
 - ii) For one half of school holiday periods;
 - iii) On special occasions;
 - iv) By telephone for a maximum of 10 minutes each day.

¹⁰ Transcript of proceedings, 11 August 2008, pg 72-80.

¹¹ Transcript of proceedings, 11 August 2008, pg 72.

¹² Transcript of proceedings, 11 August 2008, pg 74.

¹³ Transcript of proceedings, 11 August 2008, pg 73.

- d) That there is to be a preliminary period, lasting for six weeks from the date of judgment, wherein the children continue to live with the mother but spend time with the father for four hours every Sunday for two weeks; and thereafter, from Friday to Sunday for four weeks (including overnight time).
 - e) That the wife be psychiatrically assessed and 'treated for depression extreme anger and other related mental problems.'¹⁴
 - f) That the father be permitted to take the children to visit family in India.
 - g) That if the court does not make these orders, that the consent orders of October 2004 be reinstated.
 - h) That if the court does not make orders for the father to spend any time with the children, that orders be made for the children to spend time with their siblings.¹⁵
24. On 20 March 2009 I provided the father with an opportunity to be heard in relation to making only interim orders at this stage. Counsel for the father indicated no opposition.
25. In his closing address, the father specified that he wished to be notified of any scholarship applied for by S.¹⁶ In addition, he requested an order to allow him to travel with the children to India, and conceded that the children should equally be able to travel with the mother to China for the purpose of visiting relatives.¹⁷

The proposal of the independent children's lawyer

26. The independent children's lawyer made the first closing address¹⁸ which detailed her proposed orders. She was followed by the respondent father and then the applicant mother¹⁹ whose orders sought are outlined above as their respective proposals.
27. In her closing address, the independent children's lawyer submitted that the children have a primary bond with the mother and as such would be 'very distressed to be removed from [the mother's] care at this point in time.'²⁰
28. On 20 March 2009 I provided the independent children's lawyer with an opportunity to be heard in relation to making only interim orders at this stage. Counsel for the independent children's lawyer indicated no opposition.

¹⁴ Father's amended response, dated 22 January 2008, Part F Item 24, para 9.

¹⁵ Father's amended response, dated 22 January 2008, Part F Item 24.

¹⁶ Transcript of proceedings, 11 August 2008, pg 48.

¹⁷ Transcript of proceedings, 11 August 2008, pg 45-47.

¹⁸ r16.07(2) FLR 2004

¹⁹ r16.07(3) FLR 2004

²⁰ Transcript of proceedings 11 August 2008, pg 23.

29. The independent children's lawyer sought orders,²¹ the effect of which would be:-
- a) That the mother and father have shared parental responsibility for the children;
 - b) That the children live with the wife;
 - c) That the children spend time and communicate with the father as directed by the counsellor at Centacare [in X] (or such other agency as is recommended by the s 65L counsellor) for two months from the date of judgment, and thereafter:
 - i) On alternate weekends;
 - ii) Overnight time one evening on alternate weeks;
 - iii) For one half of school holiday periods;
 - iv) On special occasions; and,
 - v) By telephone at all reasonable times.
 - d) That the order stating that the children live with the mother be conditional upon her continuing to permit the children to spend time with their father;
 - e) That the father and mother attend Centacare [in X] for the purpose of attending family therapy as directed by the director of that agency;
 - f) That the father be responsible for ensuring that the children's siblings, [J], [E] and [Ms L], also attend counselling, at the discretion of the counsellor appointed;
 - g) That the wife enrol [S] in an appropriate secondary school in 2010, to be chosen from the [M School] or a secondary school which provides a scholarship for the child.
 - h) That the parties be restrained from discussing the allegations in the proceedings.
30. In her closing address, the independent children's lawyer submitted that changeover should initially occur at the children's school or at a public place. She also suggested an order be made for a communication book to facilitate communication between the parents regarding the children's extracurricular activities, but warned against extracurricular activities being scheduled by the mother to interfere with the father's time with the children.²²

²¹ Exhibit 'ICL 25', dated 11 August 2008

²² Transcript of proceedings 11 August 2008, pg 24.

Evidence

31. The applicant wife relied upon the following affidavitory evidence:-
- The affidavit sworn by her on 11 January 2008;
 - The affidavit of Ms H (the wife's friend) sworn on 18 January 2008.
32. There was no application for the mother to adduce *viva voce* evidence and she did not do so. Apart from her affidavits, cross examination and some re-examination, documents significant to the mother's evidence included the following documents which I shall describe here because I shall make reference to them a number of times in these reasons:-

- The mother's yellow diary.²³ The mother gave evidence that she started keeping the diary on 3 October 2004 and used it to collect evidence relevant to the father's conduct *vis a vis* family law or family violence proceedings. She testified that entries were written on the date attributed to them, at the latest, within one or two days thereafter. She said that she usually wrote at night. Sometimes the entries detail her thoughts and feelings rather than record events. However, insofar as she records events, she testified that she had done so as accurately as possible. Importantly, the mother's evidence was that where there is no entry for a day nothing significant occurred on that day. At paragraph 34 of the mother's statement to police made on 2 September 2005, she refers to the diary as follows²⁴:-

I kept a diary of everything that happened. It is handwritten by me in Chinese. My diary starts from 3 October 2004 when he started threatening me. I put in diary (*sic*) when he threaten me and hit kids. Yesterday is the last date in my diary, 1st September 2005.

- The mother's statement to Victoria Police dated 2 September 2005.²⁵ It comprises 34 paragraphs and 10 pages. The mother's statement details abuse to herself and to the children from 2001 to August 2005. It was commenced on 3 August 2005 and worked on further on 17 August 2005 and completed on 2 September 2005. The time spent each day was approximately two hours. It was prepared by Senior Constable T of the Melbourne Sexual Offences and Child Abuse Unit with the assistance of an interpreter. The same interpreter was engaged for each of the three sessions. The interpreter, Ms Q, acknowledges on page 11:

I interpreted the taking of the statement form [the mother]. When the statement was completed, I read the statement to her in Mandarin and explained the acknowledgement and jurat at the end

²³ Exhibit "ICL19"

²⁵ Exhibit "F4"

of the statement, which details the consequences of perjury. Here she stated that it was a correct account of what occurred and understood the reason the acknowledgement and jurat is placed at the bottom of the statement.

S/C T gave evidence on 28 July 2008 and confirmed that the interpreter had performed the tasks acknowledged by her.

- c) The mother's affidavit sworn on 30 August 2005 in support of her then application to suspend the father's time with the children.

33. The respondent husband relied upon the following affidavitory evidence:-

- a) The affidavit by him which was filed on 9 January 2008. This was filed with an incomplete jurat clause and was sworn to by him at the commencement of the trial as being true and correct;
- b) The affidavit of Mr V sworn 12 May 2005. He was not required for cross-examination;
- c) The affidavit of Mr K (the husband's friend) affirmed 9 January 2008. He was not required for cross-examination;
- d) The affidavit of J sworn or affirmed 3 February 2007;
- e) The affidavit of E sworn on 23 January 2007;
- f) The affidavit of Mr SC affirmed 22 December 2006. He was not required for cross-examination;
- g) The affidavit of Mr JR sworn on 11 February 2007. He was not required for cross-examination;
- h) The affidavit of Ms L sworn on 19 December 2007. She was not required for cross-examination.

The father's affidavit comprises 31 closely typed pages of narrative and 77 pages of unnumbered annexure. For ease of reference and after consultation with the parties, I numbered the annexure pages in red pen in the top right hand corner and each party copied those numbers. In these reasons, reference to the father's affidavit is by those page numbers.

34. The independent children's lawyer tendered the following reports:-

- a) Confidential court report prepared by the Department of Human Services dated 17 March 2006;
- b) Further confidential report prepared by the Department of Human Services dated 16 May 2006;

- c) The affidavit of Mr RM sworn 9 August 2001, to which his report dated 23 July 2001 was annexed²⁶;
- d) Psychological report of Ms G from A Hospital in relation to the child S dated 30 March 2001²⁷.

None of the authors were required for cross examination and they stood as accurate historical documents.

- 35. As part of the court's preparation of this matter for trial a family report was obtained pursuant to section 62G(2) of the Act and prepared by family consultant, Ms Y. That report is dated 22 November 2007 and was received into evidence. Ms Y was cross examined extensively on 30 and 31 July 2008.
- 36. All parties relied on various exhibits which were tendered. Some exhibits were affidavits or documents from earlier proceedings.
- 37. Finally, a number of documents were tendered, by consent of all parties. The following are documents to which I will refer frequently:-
 - a) A book of relevant extracts from files produced by the Department of Human Services (DHS), which was tendered as Exhibit "C1". It was agreed that these documents were admissible as business records. The records were augmented during the trial by further documents²⁸ and information under oath in respect of which I granted leave pursuant to Parts 4.4 and 4.5 of the *Children, Youth and Families Act 2005* (Vic);
 - b) A calendar of the years 2004 to 2006, as Exhibit "C3". This was used to ascertain on what days of the week certain historical dates fell.
 - c) The transcript of the father's criminal proceedings in the County Court, as Exhibit "ICL6". The entire transcript was handed up but only specific pages were permitted to be tendered by reference being made to them;
 - d) VATE tapes of the children taken by Victoria Police on 19 September 2005²⁹ and transcripts thereof. The transcripts are extracted from the police brief in the criminal proceedings. Pages 156 to 188 of the brief is the transcript of S' VATE³⁰ and pages 189 to 217 of the brief is the transcript of N's VATE³¹
 - e) A translation of the mother's yellow diary prepared by Victoria Police for the criminal trial³². This document was not tendered as an accurate translation but merely as a guide or indicator of the contents of the

²⁶ Exhibit "ICL3"

²⁷ Exhibit "ICL4"

²⁸ Exhibit "ICL 12" which were incorporated as pages 55A and 59 into Exhibit "C1"

²⁹ Exhibit "ICL14"

³⁰ Exhibit "M1"

³¹ Exhibit "M2"

³² Exhibit "F17"

mother's actual diary. On numerous occasions, the mother was queried about the accuracy of her evidence about what she had recorded in her diary. For instance, she purported to read out an entry but, it transpired on questioning, that she had omitted her reference to the father as a "stinky man"³³. In such instances, the conflict or inaccuracy was resolved by reference to evidence of the interpreter in court.

38. Before leaving this discussion of the evidence, I should mention that all parties adopted a very common sense approach to evidence being adduced. There were no significant arguments about admissibility. Cross examination was relaxed to allow, if not encourage, complete responses. The parties are to be commended in this regard because it gave a greater flow and continuity to the evidence than would have been likely, particularly with the father representing himself and the mother frequently being non responsive. This attitude of the parties permitted the trial to proceed very fairly and as expeditiously as possible. There were significant documents tendered as business records and there was cooperation in relation to interposing witnesses where it was fair to do so. As already indicated, this was a matter to which the procedural aspects of Division 12A of Part VII of the Act, including the non-application of parts of the *Evidence Act 1995*, apply.

Findings of fact

39. There are a great many facts in issue in these proceedings. This is not a case concentrated on one or two instances of sexual abuse. The mother puts in issue the father's behaviour for all of the cohabitation in Australia and alleges that not long after her arrival in Australia the father began to assault her and treat her cruelly. It is her case that this continued after separation. She alleges that the father kicked and punched and pinched both N and S from an early age and tried on occasions to strangle them. It is alleged that the bruising to S' throat was so deep that it bled. She alleges that at some point in the 10 days preceding 10 July 2005, the father inserted two fingers into S' vagina whilst she was bathing and otherwise scrutinised her bathing to an extent that made S feel uncomfortable. The father denies each and every allegation of the mother. The father alleges that the mother has been overbearing to the girls and will not permit the girls to have a meaningful relationship with him.
40. The result is that there are very many allegations of fact on which it is open to me to make findings.
41. As far as the father is concerned, he alleges that the mother has fabricated the allegations of violence and sexual abuse and that she will not permit the girls to have a meaningful relationship with him.

³³ the mother under cross examination on 15 May 2008 in relation to her diary entry for 29 November 2004

42. I will say more about the assessment of evidence in sexual abuse cases, such as this, later on. Where I make statements of fact, they are findings of fact.

Credit & impression of witnesses

The mother

43. The mother gave evidence over 20 days.³⁴ All of the mother's evidence was given through a Mandarin interpreter. The court was fortunate to retain the services of two particularly skilled interpreters, Mr U and Ms HG, through whom the mother's evidence flowed as well as possible. The interpreter retained by the court on 20 March 2008 was so inadequate that it was necessary to cut short the hearing after 25 minutes and require another interpreter to attend the next day. In all there were five interpreters.
44. To say that the mother's evidence flowed as well as possible is not saying much. This trial demonstrates the difficulty which can arise in cases in which a party's evidence is filtered through an interpreter. The immediacy of the question was lost as was most of the intonation in the mother's reply. It was apparent that the mother had some understanding of the question when stated in English. It appeared that the extra time afforded the mother whilst the question was translated into Mandarin was, unfortunately, utilised by her to try to guess the direction in which the questioner was heading rather than in formulating a responsive answer. The upshot was that the mother gave unresponsive answers which prolonged her evidence enormously.
45. The mother was not particularly expressive in a non-verbal sense. A portion of my time was spent observing the mother in the witness box assessing her demeanour and searching for the nuances in her evidence which, in my experience, are readily accessible in evidence delivered in a language in which one is fluent, but which were lacking in the mother's evidence. The mother was not wholly inscrutable. There were some matters which were evident from the mother's evidence and demeanour in the witness box. In her delivery and responses under oath, I observed her to have an utter contempt for, and loathing of, the father, a complete denial of their union having been good for anything and a heartfelt conviction that the girls would not benefit, and will only be damaged by, having anything to do with the father.
46. It was a low point when the father cross examined the mother as English is not his first language either and he was unable to frame questions appropriately. I had no alternative but to require from him a topic and a direction and to frame the question for him. Sometimes, he was less than satisfied with my skills. Although the father could not frame questions adequately, his organisation and topics for cross examination were most

³⁴ Exhibit "C6" is a record of the times during which the wife gave evidence.

impressive. He was thoroughly prepared without there being an appearance of obsessiveness.

47. Returning though to the mother's presentation, I estimate that, when the mother gave evidence on a good day, the trial proceeded 3 times more slowly than it would have if the mother had given responsive answers in the first place. In general, the mother's failure to answer questions directly, coupled with the interpretation of the questions and answers, resulted, in my estimation, in the mother's evidence being adduced five to six times more slowly than would have been the case if she been responsive in the first place. It was a phenomenal waste of court time. However, I did not consider that it was consistent with the court's overarching duty to the welfare of the children to simply record the mother as having answered unresponsively. More often than not, I permitted the cross examiner to press for a response. Had I done otherwise, I would be determining the matter based largely on a lack of evidence from the mother rather than a consideration of evidence she was capable of giving when pressed.
48. Having watched and listened to the mother give evidence and having given in her favour every allowance for the strain which she must have been under by virtue of proceedings being conducted in a language which is not her native language, I find that much of her evidence, both oral and in affidavit form, was misleading, inaccurate, exaggerated and, quite frequently, untruthful. I am unable to say whether the mother's unsatisfactory presentation as a witness was attributable to dishonesty on her part, impaired mental or psychological functioning, or because the mother could simply not be bothered to give sensible or responsive answers lest the questioner feel encouraged to continue.
49. The mother was an unsatisfactory and unreliable witness on matters of truth.

Michael Weston (the mother's solicitor)

50. The mother's solicitor was called to give evidence. Prior to him doing so, the mother waived privilege in respect of the present proceedings. He was treated as a witness of the court. By consent of all parties, his evidence was interposed on 9 May 2008, when the mother's cross examination was incomplete.
51. The mother's evidence had been that S made a statement to her on 10 July 2005 indicative of S having been sexually assaulted by the father whilst in the bath at some stage over the preceding ten days of holiday time. One purpose for calling Mr Weston to give evidence was to ascertain what opportunities there had been for the mother to instruct Mr Weston about her allegations of sexual abuse against the father. On 2 August 2005 a letter was written by Mr

Weston to the father³⁵ alleging physical assault by him on the children, but nothing of a sexual nature. The mother could not remember whether she consulted Mr Weston between 10 July 2005 and 2 August 2005 but she said, if she had, she would have told him about the statement which was indicative to her of sexual abuse having occurred.

52. Mr Weston's evidence was that he first acted for the mother in 2001 when she was in a women's refuge and some orders were obtained. The mother consulted him again in April 2005 about child support and complaints about the father not returning the children on time or feeding them appropriately. In the meantime, the mother had obtained a further set of orders and it was in respect of those that she consulted Mr Weston. Mr Weston said that he always saw the mother with an interpreter. Early on the interpreter was one Ms VA of the Immigrant Women's Domestic Violence Service³⁶ and after Ms VA ceased to be available, around February 2006, interpreters were hired through On Call Interpreters and Translators Agency. Of the mother's need for an interpreter, Mr Weston said:-

Well, there's no communication with my client - at this stage [June 2005], ma'am, can I say I'm not speaking to my client directly at any time. I'm speaking to [Ms VA], who is the IWDVS worker. My understanding certainly of my client at that stage was that whilst she understood English reasonably well and written English reasonably well, she had a great difficulty in expressing English. Therefore all my communications with her were through [Ms VA]. When she came to see me, [Ms VA] was always with her.

What had made you think that she could read English reasonably well?

---Your Honour, that's only my recollection of the situation. Certainly I know that even now if I speak to my client she will follow - she will appear to follow. You know, she will go to answer me a lot of the time. But then often I find she has misunderstood what I've said, which is why it's absolutely essential to have an interpreter, because whereas she may think she understands what's being said to her, she doesn't.

Okay?---That has been a difficulty all the way through with her.

I include that extract because Mr Weston's experience of the mother coincides with my own experience of the mother. In the trial, the mother appeared to me often to respond to the question which she understood had been asked in English and without her having much regard for the question as it was interpreted to her in Mandarin.

³⁵ Exhibit "F24"

³⁶ In these proceedings, Ms VA was frequently referred to as "[...]"

53. On 7 June 2005, Ms VA wrote to Mr Weston saying that child support payments had started and that:

[t]he older one of her two daughters has nightmares frequently after contact. Our client said she has bruises on the kids after contact; believes she needs to vary her Family Court order. Do you think there's grounds to vary it?

Mr Weston said that he responded on 16 June, indicating that it would depend very much on how the bruises were caused and if the bruises were caused in the course of simple children's play, there would be insufficient grounds to vary the parenting orders.

54. On 22 June 2005, Ms VA emailed Mr Weston saying:

I spoke to the client last Friday. She said her ex hit the children to [cause] bruises. I talked to [S], the older kid, who said her dad hit her almost every time at contact, and hit the younger daughter but not so often. I asked the client to go and see a doctor as quickly as possible. Please let me know what to do next.

Mr Weston said that he wrote back to Ms VA on 29 June 2005, saying matters were in the mother's hands as to what she wants to do and:

[i]f she genuinely believes the husband is assaulting the children then she should take steps to protect the children by ceasing the contact. Alternatively she could propose that contact be supervised, but then problems would arise as to who was an appropriate supervisor.

55. On 12 July 2005, at 6.20 p.m., Mr Weston received an email from Ms VA which read:

Thanks for the letter. I have talked to the older one of the two girls and she said she doesn't want to see her father 100 per cent for sure, but she was unsure about her younger sister's opinion on it. This older one said her father insisted bathing her bum, though she didn't like it. Based on that?? do you think our client can cease contact before supervisor is arranged?

56. On my calculation, 12 July 2005 was two days after the girls had returned from spending 10 days school holiday time with the father and S had asked the mother whether 'there were parts of her body that her father should not touch.'³⁷

57. On 25 July 2005, Ms VA informed Mr Weston that the police were investigating the father, that the mother had denied the father any time with the girls on the weekend of 22 July 2005 but that she was concerned about what she should do in relation to the father's entitlement to time after school

³⁷ Mother's affidavit sworn 18 January 2008, paragraph 24.

on Wednesday and the police had interviewed the children at school but had not yet spoken to any teachers.

58. Mr Weston saw the mother and Ms VA in conference, for 1 hour, on 29 July 2005. This was 19 days after the children had returned home from spending 10 days with the father. He gave evidence about the matters discussed (and not discussed) in the following terms:-

MR WESTON: [...] In essence she says she wants to stop contact, children don't want to go. "Kids don't want to go because they are scared of him. They say he hits them a lot. He won't go away."

HER HONOUR: How fulsome are your notes in relation to, "He won't go away"?---Yes, well, your Honour, specifically it says, "He hits the kids' heads, arm and legs. He pinches the kids. Kids are scared of him. He shouts at them. He pulls their hair. He accuses the kids of being evil and the devil. They don't want to go, and he leaves bruises where he pinches them. She has taken some photos on 10 July. No contact last weekend, 22-23 July."

What mention of sexual abuse if any is there in - - -?---None. Absolutely none in that meeting, your Honour.

[...]

HER HONOUR: Is there anything which indicates to you that you had reference during that conference to the email of 6.20 pm on 12 July?---No, your Honour. I suspect I probably - that email talks about "washing her bum". There's no indication that I asked specifically about that. Everything in here speaks more of physical abuse of the children - hitting, punching, pinching.

Now, you say that you have had at that stage some experience with [Ms VA]?---Yes, your Honour. I'd worked with her for a number of years, yes.

HER HONOUR: Yes. Using your professional judgment of her, can you say how likely it is that she would have participated in the conference without raising allegations of sexual abuse if the allegations were then to her mind still current? Do you know what I'm getting at?---Yes, your Honour. I have no doubt that if she had thought that at that time sexual abuse had been occurring, there's no doubt she would have raised it.

What do you base that on?---Well, the IWDVS are specifically involved with women who are victims of violence, and sexual abuse often goes hand in hand with it. Certainly from experience previously, they're more likely to mention something than not, if I might say, your Honour. Sometimes I've found with some of these domestic violence services they in fact tend to overblow things rather than understate them. Therefore I would have thought that if there was anything that they felt was important or serious, they would have certainly raised it.

So was that your experience also of [Ms VA], rather than just domestic - because she was the - - -?---Not specifically, your Honour. I think just simply in terms of those sort of services, they do tend to - I find myself more often saying, "Look, that's really not relevant," rather than saying, "Well, why didn't you mention that?"

Okay?---It may have been remiss of me, I can't say I specifically mentioned that thing. It would seem to me the allegation there or the allegation in the statement is that "he washes her bum". I'd have to say if that was put to me I would probably say, "Well, so what? If he's bathing his child, there's probably nothing in that." It may well be [Ms VA] said, "Fine," but I can't say that. I don't specifically remember, it's too long ago. But of itself it certainly doesn't seem to me even now as being an allegation of sexual abuse.

HER HONOUR: Right. How likely do you think it is, or can you say at all, whether [Ms VA] may have raised the "bathing her bum and she did not like it" at the conference on 29 July and you disregarded it or - without making a note of it?---I haven't made a note of it at all, so I suspect it's more likely it wasn't raised.

59. Mr Weston then wrote the letter dated 2 August 2005³⁸ to the father, complaining of various matters but not mentioning any sexual impropriety on the part of the father.
60. On 8 August 2005, Mr Weston received an email from Ms VA spelling out the involvement of, and multiple attendances on the mother by, the Sexual Offences Child and Adolescent Unit of Victoria Police (SOCAU). His evidence was that, at that point, he realised the matter had developed past his initial instructions but he took no action pending receipt of a grant of assistance from Victoria Legal Aid.
61. Mr Weston was contacted by the mother's friend, Ms H, on 23 August 2005 and by Ms VA on 25 August 2005 with complaints that the principal of H School had permitted the father to see the girls at school. Apropos of varying an order that specified that the father was entitled to see the girls at school, Mr Weston saw the mother and Ms VA in conference on 30 August 2005. Mr Weston's evidence was that:-

It was at this stage that I perhaps got more I suppose of the full story. This was the first time I think that we'd actually sat down and gone into what had happened in the interim with the police investigations. I seem to have taken down here, your Honour, not a timetable to be exact but it seems to be - obviously I was going to prepare an affidavit.

62. Mr Weston referred to 30 August 2005 as being 'the first time I had any indication that there was sexual abuse involved.' I accept that evidence as to

³⁸ Exhibit "F24"

Mr Weston's state of mind. However, there is sufficient mention in his file to corroborate that, as at 12 July 2005, the mother had told Ms VA that S had told the mother that she was not comfortable with how the father was bathing her, that is, 'washing her bum.' There was no cross examination of Mr Weston directed to explaining why the mother neglected to mention the sexual abuse allegation to Mr Weston on 29 July 2005.

63. Mr Weston gave some evidence about the mother having a propensity to become confused. For instance, on 17 February 2006, the mother spoke to Mr Weston, without an interpreter, and 'said that she had a lot of questions to ask ... and didn't understand what was happening.' He saw the mother in conference with an interpreter on 22 February 2006 and 'explained where the matter was at.' Mr Weston gave evidence that:-

[on] 15 March [2006] [Ms H] rings me on behalf of [the mother], saying [the mother] was confused as to when her case was listed again. Your Honour, can I say this is a constant theme. My client gets very confused - very, very confused. I'm probably telling your Honour nothing - but gets very, very confused about what's going on, dates, times. Even up to this point, your Honour, it's a theme that runs all the time - ..."

64. Mr Weston also gave evidence about his use of interpreters and the difficulty he had in getting instructions from the mother at times. He said:-

HER HONOUR: Now can I just ask you something about your impression of your client. Did ... you [have] concerns about her ability to understand advice or give instructions?---

MR WESTON: No, not to give instructions, your Honour. What we have had throughout this matter is difficulties with consistency of interpretation. That has been a real problem for me. When we had [Ms VA], at least I was talking to the same person all the time about the same things. What I've struck in the matter consistently is I can see my client with one interpreter and take some instructions, then see her two months later with another interpreter and it's as though the first interview didn't happen. It's something - completely different interpretations. I have spoken with some of the interpreters about it. What they have said to me is one of the problems with Mandarin Chinese is a lot of the English words just - there are no Mandarin words for them. In a lot of cases the Mandarin interpreter has to actually give their version of what's being said. I think in a lot of cases this confuses my client. I have found quite often that she will say one thing to me in one interview and the next time I'll say, "Well, you told me that last time," and she will say, "No, I didn't, I didn't say that," particularly with the trial affidavit for instance. I think I spent at least three hours with her I think on 15 January with an interpreter, going through it, and yet three days later after I'd drafted it, when she came back to sign it, it should have only taken half an hour to read through it with the interpreter and sign it, it actually took another three hours because much of it was changed. I think - I suppose my impression is I don't think my client is - and I hope you won't

mind me saying this - I don't think she's terribly well educated. I think she has trouble with a lot of the concepts, and I think the interpreters often have trouble getting her to understand the concepts. That's my impression. But I've never had any doubt about her actually giving me instructions. She has always - I mean, if I didn't think she understood, I wouldn't take the instructions from her. But I've got no doubt she has understood, but I just think at times there has been a lot of confusion.

Well, if I can take you to the instance that you spoke of - you did refer to it but without reference to a date - you would see your client and she would give you instructions, then two months later you would see her with another interpreter and she would deny having given you the instructions - -?--- Well, it's not so much deny having given me. I would say something to her - and look, off the top of my head I can't think of a specific example, your Honour, but it might be a difference of interpretation of something. I would indicate that, you know, "You'd seen this particular person four times," and she would say, "Well, no, I've only seen them twice." I'd say, "But hang on, here you told me four times last time." "No, I didn't."

HER HONOUR: That's unlikely to be an interpreter's problem, isn't it?--- Well, I think at the time when we've tried to nut it out, it would seem that that's how it appeared to be; that it was a problem somewhere in the translation between what I'm being told - or what I'm asking and how it's being interpreted to her and then she would come back. Again I can't give a specific instance to your Honour but I can recall during the course of the matter on a number of occasions having difficulty with having been given an instruction or something and then find later on that in fact when it's a different interpreter it's something different. It's a difference in - not a huge difference, but there are slight differences there all the way through.

65. I accept Mr Weston's assessment of the mother. I regard his evidence as corroborative of the mother's assertion that she had difficulty with some interpreters retained by Mr Weston for the purpose of conferring with her. However, I am also satisfied on the basis of Mr Weston's evidence, that he was cognizant of the problem and likely to be more vigilant in relation to ambiguous instructions than he might otherwise have been.
66. A further reason that Mr Weston was required to give evidence was that, some 10 or 11 days into her evidence and cross examination, the mother testified that her affidavits sworn 30 August 2005 and 18 January 2008, which had been prepared by and witnessed in front of Mr Weston, had not been translated to her. The affidavit sworn 18 January 2008 is the principal affidavit upon which the mother relied in the present case and a document in respect of which the father had demonstrated a number of inconsistencies and inaccuracies on the mother's part. Relevantly, the mother's evidence was³⁹:-

³⁹ 9 May 2008

HER HONOUR: When you went to see Mr Weston on 30 August 2005 you signed this document which is filed on 10 October 2005 as an affidavit by you. Have a look at it, please. Did you have that statement interpreted to you?

INTERPRETER: Anyway, if my solicitor ask me to sign, I sign my name. I trust my solicitor. If he ask me to sign, he must have reason for me to do so. Therefore I signed my name.

HER HONOUR: Can you say how many times you have signed something without having had it interpreted to you in Mandarin?

INTERPRETER: I remember there was only once, there was an interpreter interpreted the document to me. That was for the County Court case, my affidavit for the County Court case. I cannot remember whether it was County Court or for this court. There was only once the interpreter interpreted to me the document but halfway through, because the solicitor was in a hurry to go to the court, so I told the interpreter, "Okay, don't worry, I'll just sign it because I trust my solicitor." I thought I occupied too much of his time and he was in a hurry go to the court, and also I trusted him so I said, "Okay, I'll just sign it." I don't think that - I think I trust my solicitor because I entrusted him to do things for me. In some other occasions there might be interpreter present but it was always the case they ask me to sign my name, I just signed. I didn't really - as for any other occasions, whether there was interpreter present I cannot remember. Some interpreters are very lazy, they don't interpret things to me, and also not interpret to me correct.

HER HONOUR: On 18 January 2008 you signed this document and it has an interpreter's clause attached to it.

INTERPRETER: This is the document I was talking about. At the time the solicitor was in a hurry to get to court and the interpreter was becoming impatient because it's a thick document. So halfway through I said, "That's okay, I'll sign my name."

HER HONOUR: Do you remember the interpreter?

INTERPRETER: No.

HER HONOUR: She did not make an impression on you?

INTERPRETER: Yes, I have the impression; an old lady.

HER HONOUR: Was she an older Chinese lady or an older Australian lady?

INTERPRETER: Looks like coming from [Z], China. That's southern part of China, [Z]. I didn't talk to her too much.

HER HONOUR: But she did interpret some part of the affidavit to you.

INTERPRETER: Yes, a few pages. I occupied too much of my solicitor's time and I thought he was in a rush so I said, "Well, I'll just sign it."

HER HONOUR: When you signed documents either in August 05 or that document, apart from reading them over - forget about having them translated from Mandarin. Did anyone sit with you and read them out to you in English?

[...]

INTERPRETER: No.

HER HONOUR: So you really had no idea what was in the document?

INTERPRETER: I don't know.

HER HONOUR: So you don't know whether you had any idea what's in the documents or you didn't know what was in the documents?

INTERPRETER: I'm not quite clear about what's written there.

HER HONOUR: Well, how are you clear at all about what is written there?

INTERPRETER: What do you mean, how?

HER HONOUR: Well, you say you're not quite clear, which indicates to me that you have some idea what's there but not a complete idea. I don't know how you have any idea. So how do you have any idea?

INTERPRETER: At the time when the interpreter was interpreting to me about that document I know a little bit, but now I can't remember.

HER HONOUR: Well, you've said that some interpreters are lazy. Was she a lazy interpreter?

INTERPRETER: She is not too bad but she is - she interpreted without much strength, like physical strength.

HER HONOUR: You say some interpreters interpret for you incorrectly.

INTERPRETER: Of course.

HER HONOUR: Why do you say - - -

INTERPRETER: Do you think all the interpreters interpret correctly? These are in English. I don't believe the interpreters interpreted everything to me.

[...]

HER HONOUR: Okay. What made you believe that the interpreters were not interpreting properly?

INTERPRETER: As for this document, as you know, it's a very thick document. Even though we didn't finish that document, but what I can say is the interpreter didn't interpret word for word; just gave me some rough idea.

HER HONOUR: On what do you form that belief?

INTERPRETER: She read a sentence and then said a few words to me, so that's how I know.

HER HONOUR: Does anyone have any questions arising out of that before we interpose Mr Weston's evidence - only about how documents are sworn or what she instructed them?

MS GLAISTER: I've just got one, your Honour.

<CROSS-EXAMINATION BY MS GLAISTER

MS GLAISTER: Do you remember at the very beginning of this court case when you went into the witness box and your barrister was talking to the judge?

INTERPRETER: Yes, I remember that.

MS GLAISTER: I just have a note that she showed you an affidavit - I've got the date 18 January 08, which I presume is - - - [the] affidavit of 18/1/08, and she asked you if it was true and correct, and my note of your answer was that you said it was correct. My question for you is how did you know it was correct if you hadn't had it all interpreted for you before you signed it?

INTERPRETER: At that time was I showed the affidavit?

MS GLAISTER: Yes, you were.

INTERPRETER: What I mean is when I answered that question my feeling is if the solicitor prepared this document for me it must be correct.

67. Mr Weston gave evidence about the preparation of the affidavit sworn 18 January 2008 and the interpretation of it to the mother. His account was significantly different to that of the mother, to the point of contradicting her, so I will set it out in detail:-

MR WESTON: Okay, 11 January there's a note from my secretary - this is 11 January 08, "Telephoned client and made an appointment for next

Tuesday. The client asks for a female interpreter if possible. Telephoned On Call Interpreters and booked [a female], and interpreter, for our client at 2 pm for two hours. Requested a female interpreter if one is available." I've then got fairly substantial [set of notes] from 15 January - two and a half hours. Probably what I would've done, what I would normally do, your Honour, I would probably have her previous affidavit out. Would probably go through that, make any alterations or any additions, whatever was required and then take further notes as to any stuff, new stuff. Then I would have - because it was pretty substantial - would've organised for her to come back three days later after I'd actually got it typed. Normally if it's a short affidavit I'll do it on the spot to save two appointments but this one was quite substantial. At this stage I think we've already received [the husband's] material. Yes, on 11 January I've sent the client out all of the husband's affidavits but in particular - he seems to have served two, one dated 3 January and one on 8 January so it's possible.

HER HONOUR: How would she have been able to digest those before the 15th?---I've got no idea, your Honour. I think the 11th possibly would've been our first day back at work I suspect. [The husband] probably brought them in on that day. [...]

At this point, Mr Weston read out a summary the instructions he had committed to note form.

HER HONOUR: So was the interpreter there for two and a half hours?--- Yes [...] - just bear with me, your Honour. 15 January, your Honour, I've got the invoice from On Call Interpreters here. It says, "Booked duration 120 minutes. Actual duration, 165 minutes."

Right?---So in fact it was more than two and a half hours. Again, I think, your Honour, that's because it was a fairly slow and labourious process.

So you did the affidavit?---So I took notes. I would've also written - what I would've had as a copy of the previous affidavit which I would've made notes on and written as well but unfortunately, your Honour, I don't have it. I probably haven't kept it.

MR WESTON: ---16 January, your Honour, I ring On Call, I thought it was very important that I have the same interpreter back, who was a woman named [Ms W] who was very good. So we managed to get her back.

Do you remember what she looked like? Approximately how old?

---Your Honour, not really, your Honour. She wasn't young.

Right, and was she Chinese or European?---I'm pretty sure she was Chinese but she was very well spoken. She wasn't - she spoke perfect English.

Yes?---Some of the Chinese interpreters actually don't speak particularly good English. She spoke perfect English. I've got a note here from 18 - I've got an account there from the same interpreter from 18 January which says again, "Booked duration, 120 minutes. Actual duration, 180." So we had another three hours. I've got a couple of notes. I don't have a lot of notes with respect to the second one, probably as I say, we would have been working off the draft that I had dictated. But we've got notes about [Ms L] in China. We think we clarified the issue that this [...] she was talking about in fact was someone she knew. We talked about the potential of subpoenaing [Ms C] or [Ms R] from [P School]. Whether Mr [DP] should be subpoenaed. I explained the rolling list and how all that worked. I do remember that was a very trying three hours.

HER HONOUR: Why do you?? remember it as being trying?---I think, your Honour, because we ended up changing quite a bit of stuff that I'd originally dictated. It was almost once the client actually saw it in black and white and we actually went through it fairly carefully, and they did go through it very carefully.

How much of it did they go through?---I went through it word for word, your Honour.

How do you know?---Because I was in there for most of the time they did it. Went through it word for word, line for line. That's why there was constantly changes being made. What would happen is they'd mark the changes, they'd go through four or five pages, mark the changes, I'd take them away and dictate the changes, come back and they'd have done the next five pages. I'm 99 per cent sure, your Honour, that at the end they went through it again from start to finish. I do distinctly recall I was quite impressed by that interpreter and I thought she was one of the better we've had.

[...]

HER HONOUR: Did you indicate to [the mother] or to the interpreter that it was taking too long and that too much of your time was being taken up?--
-I don't think so, your Honour. I don't think I'd do that.

Perhaps not expressly, but what about impliedly?---No, I don't think so, your Honour. Look, it is always difficult doing affidavits for a client with an interpreter, it's hard work, it's very hard work. I've always found it to be very hard. But I've acted for a lot of people that English is not the first language. But no, I don't think so, I mean, it was a matter that something had to be done and I was going in and out of the room. Once it was actually - we had the changes and they were going back through it, I was actually going out of the room and doing other work at times. So I wasn't sitting there for the entire three hours. I was probably there for an hour and a half of it, two hours of it perhaps. I was coming out to actually dictate any

changes they wanted and going back in, leaving it with them to read further. So I was actually getting some other work done.

Do you think it would've been reasonable for her to feel rushed or - - -?---I have no doubt she probably felt under some pressure, yes.

It is under the pressure of time or under the pressure of being required to settle on the final version? As best I recollect being a solicitor there's two sorts of pressure?---Yes, I don't know that I could, your Honour. I mean, it was - we had to have it filed that day. It had to be done.

What time was this?---I think it was 9 o'clock in the morning, your Honour. The one on the 15th was in the afternoon. He we are, your Honour. It was 9.30 till 12.30.

So when do people leave from your office to file things?---It would've been in the afternoon I suspect, your Honour. I don't recall how we filed it.

It was filed on the - - -?---24th.

Do you have your 2008 diary there?---No, your Honour, I haven't.

Did you say to them that you had to go to court?---I don't recall saying that, your Honour. It would be unlikely I'd be going to court on Friday afternoon. I may have been going to lunch, that could be more likely.

No, I'd like to think that courts operate on Friday afternoons too, sometimes they don't?---Your Honour, it would be a matter though, if I was in court it would've been in the morning. Not much is listed specifically on a Friday afternoon, it would usually be only a conciliation conference perhaps. But I may have had an appointment outside the office that I had to go to. I don't specifically remember it being in a rush. I mean, three hours is a long time to be settling an affidavit.

Doing the best you can in recalling what amendments were made, did there appear to be amendments to all pages?---There were a lot, your Honour. There was a lot of additional stuff that she hadn't mentioned on the 15th. Again I recall she agreed what I'd drafted and then they'd come back with, "But there's this, this, this, as well. No, that's not quite right." That sort of thing. So there were a lot of amendments. There was a lot of additional stuff. A few things that I'd misinterpreted from what they'd said.

Was there any consciousness in you that the first seven pages were really long and laborious but gee whiz, they flicked through the last six or seven?---No, your Honour. That's certainly not my recollection of it. I've no doubt that she was - I think we were all pretty tired and flustered by the end of it. As I say, three hours is a long time to be going on something like that.

It seems to me there's two sorts of pressure though. There's pressure of having to - - -?---I hear what you say, your Honour. I just don't think -

from my memory there was certainly no time constraint. I mean, it could've taken another hour. I may be wrong on that but I don't believe there was any time constraint. I know certainly when I organised the interpreter I certainly hadn't anticipated it would take three hours, because we'd only booked her for two. It may have been the interpreter had a problem, but then in the past with interpreters what they generally do is they just say, "Look, I've got to go" and that's it. That didn't happen here. The interpreter stayed to the end. But, no, I don't recall her being under any pressure. Certainly it was a difficult three hours. I would certainly concede that.

Can you comment on the accuracy of this description which was given by [the mother] this morning that only once when seeing you or swearing anything did she ever have an interpreter? In relation to the trial affidavit, the one on 18 January, she recalls the interpreter as being old, looking like she comes from the southern part of China. She said that half way through the affidavit she was told that or formed the impression that you were in a hurry and had to get to court and she said to the interpreter that she would just sign it without reading it because she trusted no?---No, that's - - -

But she in fact had no real idea what was in the document?---Your Honour, three hours with the interpreter there all the time. Went through every line, line by line, yes, many changes, certainly. Many changes, but I'm 99 per cent certain she read through the whole document again at the end. I'm almost certain that's what happened but they were reading through it constantly, that's how I do it. You basically, go through the first few pages, make the changes, give them to me, keep going with the rest but you get back the changes then read it again with the changes in it until you're perfectly happy with it.

Can you look at the affidavit of 18 January?---Yes.

Can you go the interpreter's clause?---Yes, your Honour.

Does it say that she has previously sworn that she'll interpret the document accurately?---No, your Honour.

Okay?---That's the one - the one we use is - no.

Did you take an oath from the interpreter that she would - - -?---No, your Honour, I normally don't. I normally don't do that, perhaps I should, but I normally don't.

68. Rule 15.10(2) of the *Family Law Rules 2004* (Cth) provides that, where a deponent does not have an adequate command of English, a translation of the affidavit and oath must be read or given in writing to the deponent in a language that the deponent understands and the translator must certify that the affidavit has been translated. Section 22 of the *Evidence Act 1995* (Cth) provides that an interpreter must take an oath or make an affirmation, to the

effect that they 'will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability,' before acting as an interpreter in a proceeding. I am satisfied that the interpretation of the mother's affidavit to her on 2 February 2008 was 'in a proceeding'. I am also satisfied, on the evidence of Mr Weston, that the execution by the mother of the documents which were filed as her affidavits in these proceedings fails to comply with applicable law, in particular, the *Evidence Act 1995* (Cth).

69. The effect is that the documents relied upon by the mother are not affidavits. They are contemporaneous notes by Mr Weston of the mother's instructions to him, the contents of which were the subject of very thorough cross examination and the mother's answers were direct evidence. For ease of reference, I will refer to the documents as 'affidavits.'
70. Mr Weston gave his evidence openly and was not defensive. I accept his evidence as truthful and accurate. Where his evidence conflicts with the evidence of the mother, I prefer his account to hers. It follows that I reject the mother's evidence that she did not really know what was in her affidavit of evidence in chief sworn 18 January 2008 because it was not appropriately interpreted to her. Furthermore, I find that she gave that evidence to that effect (extracted above) dishonestly and in order to avoid adverse credit findings arising out of the very many times during the trial that her affidavitary evidence was demonstrated to be false or inaccurate.
71. Mr Weston's evidence is also supportive of the proposition that the mother did not mention the alleged statements of S (indicative of sexual abuse) because they had not been made as the mother contends or at all.

Ms H (the mother's friend)

72. Ms H swore two affidavits for the mother. She is a significant witness because she alleges that S told her in November 2004 that the father had scratched her face with a key and that in July 2005 the father had inserted two fingers into her vagina whilst she was bathing. Ms H is described by the police informant in the criminal charges against the father as a 'constant presence' and, on Ms H's own evidence, she was extensively involved with the mother and the mother's accommodation and child provision needs from late 2004 onwards.
73. The first affidavit of Ms H was sworn on 30 August 2005 and the second was sworn on 18 January 2008. However, the mother relied only on the affidavit sworn on 18 January 2008. Both affidavits were prepared and witnessed by the mother's solicitor, Michael Weston. Mr Weston gave evidence, which I accept, that the first affidavit (sworn on 30 August 2005) was not filed in the Federal Magistrates Court until 10 October 2005 because he was waiting for a grant of legal assistance to file the mother's application to suspend the father's

time with the children and there was an intervening period of leave by him from his practice.

74. Ms H was positioned to be somewhat of an ornament to the wife's case, but that was not what transpired.
75. According to her affidavit, Ms H is a nurse who had children attending H School in C where the children S and N were students. She had regular contact with the mother and children. Ms H was the person to whom, in July 2005, S made an initial statement indicative of sexual abuse of her by the father upon which Ms H acted by contemporaneously making a notification to Department of Human Services. S then allegedly made a further complaint to Ms H in late 2005, which was indicative of further sexual abuse of her by the father.
76. Having watched and listened to her give evidence⁴⁰ and having perused the documents relevant to her involvement, I find Ms H to be a well intentioned but unreliable witness upon whose evidence as to statements, observations and behaviours indicative of sexual abuse I can place no weight.
77. Omitting formal and irrelevant parts, in Ms H's affidavit sworn 18 January 2008 she deposes as follows:-

2. I have known the Applicant and her two children for more than four years. Our children attended kindergarten together and attended school together at [H] School in [C] together for the last four years.

3. I have regular contact with [S] and [N] whom I have collected from school or kindergarten and who are regularly at my home with the Applicant socially.

4. In July of 2005 I was in the process of running a bath for my children and the Applicant's children were at my home. [S] became quite distressed and reluctant to get into the bath. She told me that no one else could get into the bath with she and her sister and that "people hurt you in the bath". I thought this was quite odd. I then asked [S] what this was all about. She told me that her Father touches her in the bath, that he touches her all over and in her private places and that he won't stop. She was very distressed and I was extremely concerned. [S] is very intelligent and well spoken and I had no doubt what she was telling me was true. I made an immediate notification to the Department of Human Services on 22 July 2005.

5. Both [N] and [S] have repeatedly told me subsequently that they are scared of their Father and do not want to go to contact with him.

6. Shortly after [the mother] stopped contact by the Father to the girls in late 2005, [S] again told me that she was scared to get into a bath

⁴⁰ Ms H gave evidence and was cross examined on 28 and 29 May 2008.

because of her Father touching her all over and refusing to stop. She was very upset. When I became aware shortly thereafter that the Father had been visiting the children's school I became concerned and spoke to [S]'s teacher [Ms O]. She told me that [S] had disclosed to her that she had been assaulted by her Father in the bath in like terms to what [S] had told me. I suggested she should make a notification to DHS. I am aware that she did not do so. When I subsequently spoke to her about this she stated to me that she had discussed the matter with her Principal Mr [DP] and that he had advised her that it was not necessary to make a notification. I was quite horrified but as I was aware that the Department of Human Services and the police were already involved in the matter, I did not need to take those matters further.

7. I have no doubt that [N] and [S] have been subjected to abuse by their Father during contact periods and are at risk if contact were to continue or resume. I support the Application of the Applicant.

8. From my frequent contact with [the mother] and her daughters, I have observed that [the mother] is an excellent mother and very attentive to her daughter's needs. [S] and [N] are always well groomed and cared for and are very happy and content.

9. [N] and [S] when I see them continue to indicate a fear of their father and of any contact with him.

78. Her earlier affidavit, sworn 30 August 2005, is in the same format, some paragraphs being identical but some being quite different. The most significant difference is to paragraph four in which the first sentence reads as follows:-

“4. In **November of last year** I was in the process of running a bath for my children and the Applicant's children who were at my home.” (emphasis added)

Instead of the final sentence the following two sentences have been added:-

“I made an immediate notification to the Department of Human Services. I hear(sic) nothing further from the Department in relation to same.”

79. Paragraph six of the earlier affidavit finishes with Ms H's suggestion to Ms O to 'make a notification to DHS.' Paragraph eight does not appear.

80. When Ms H's two affidavits are compared, it becomes apparent that in August 2005 she deposed that S made the relevant statement to her in November 2004. However, in her affidavit sworn on 18 January 2008, she deposed that the same event took place in July 2005 and, by reference to her notification to DHS, necessarily on or prior to Friday 22 July 2005. In evidence in chief, Ms H said that the reference to November 2004 in her first affidavit was incorrect and that it should have read July 2005. She said that she had been under a lot

of pressure on the day she signed the first affidavit. Namely, she was required to be at work and '[it] was a week I had a breast lump that had to be investigated; I had two sisters who died of breast cancer. I probably just overlooked the date.'

81. In cross examination, the father put to Ms H that she had also told Victoria Police that S had made statements indicative of sexual abuse in November 2004 and that she had been challenged about the accuracy of the November date during conversations at his committal hearing in February 2007. The father's contention is that no statements could have been made to Ms H in November 2004 because the children were in his care, living at B and that S was not collected by the mother until 29 November 2004. Ms H denied having that conversation with police at the committal hearing or that she changed her evidence to refer July 2005 as the date of S' statement.
82. Senior Constable T gave evidence⁴¹ to the effect that the first statement made by S to her which was indicative of sexual abuse perpetrated by the father was during the VATE interview on 19 September 2005 and, immediately thereafter, she tried to fix a date to the incident described by S during which the father had put his forefinger and index finger into her vagina. SC T recalled Ms H being present with the mother when she was calculating dates by reference to school holidays or time spent by the children in the father's care. She fixed upon 8 November 2004. SC T doubted that Ms H told her then, or at all, that S had disclosed that abuse to her in November or December 2004 because, SC T testified, that would have made Ms H a 'first complaint witness' from whom a sworn statement would have been required and no such statement was ever prepared let alone obtained.
83. SC T's evidence is consistent with Ms H's denial that she informed the police that S had stated 'people hurt you in the bath' in November 2004. However, it also points to the fact that the mother placed the statement at November 2004 and did so at the premises of SOCAU whilst in the presence of Ms H. SC T testified that, in conversation, she frequently relied upon Ms H's apparent ability to explain what the mother was saying, which, she opined, was likely to be more reliable than her own interpretation because the mother was familiar with Ms H and vice versa.
84. In relation to the second affidavit, in which Ms H had deposed to having 'made an immediate notification to the Department of Human Services on 22 July 2005,' Ms H said in her evidence in chief that she did speak to someone from DHS on 22 July 2005 but 'from memory the notification was after that date, the following week.'
85. Also in relation to the second affidavit, in paragraph six she had sworn that S had made further statements to her indicative of the father sexually abusing S

⁴¹ 25 and 28 July 2008

in the bath 'after the mother stopped contact by the father to the girls in late 2005.' Ms H stated that she meant July or August 2005 rather than 'late 2005.'

86. Ms H gave evidence that in around November 2004, she had visited the mother's home at C and, whilst there, S told her that the father had scratched her face with a set of keys. Ms H was unable to recall the conversation other than to say that she may have been alone with S at the time and that it would have been a quiet conversation because '[S] quietly gives you information.' Ms H said, on oath, that she had accepted the child's statement to be true and inferred from the fact that there was no visible scar that the scratch must have been inflicted some weeks earlier or, if more recent, had been superficial.
87. Ms H testified that 'I don't recall the specifics of the conversation because there was so much happening in that house at the time. She was left with a school uniform and no clothes for the next day.' Earlier she had described the mother's living conditions as follows:

their house was barren. They had no clothes, they had no - very minimal furniture, a mattress on the floor, no food in the cupboards and a group of friends and myself, we had helped [the mother] restock the house and get them some clothing and a few things like that to help set them up.

It became apparent that Ms H thought that the father was responsible for S being left with nothing to wear but the H school uniform she stood up in. Ms H conceded that she may have formed a different impression had she known that the mother had removed S from school without notice to the father and had not requested or sought to get any of S' clothes from the father's home. Ms H agreed that the mother spoke to her about the incident and was very upset about the father having scratched S' face with a set of keys.

88. On the second day of Ms H's cross examination by the father,⁴² Ms H testified that S may have told her about the scratch to her face on a day other than the November day on which Ms H said she had been at the mother's home in C and S had been without any clothes other than her uniform. The father characterised Ms H's evidence as changing her story. I am satisfied that there is some merit in that observation.
89. The father sought to clarify with Ms H that she had first heard the allegation that the father had scratched S' face with a key from S rather than from the mother. There was the following interchange between the witness and myself:-

HER HONOUR: No. Please let the witness talk. When the child said, "He scratched me on the face with keys," was that the first time you'd heard that?---I think so.

⁴² 29 May 2008

Did the wife subsequently say it - - -?---Afterwards.

Afterwards?--- Yes.

HER HONOUR: So you have a distinct recollection of the wife saying it at some stage and you think it was probably afterwards?--- Yes.

HER HONOUR: At that point, did you say, "Well, there was no mark on her face," or, "When did this happen," or, "Was it an accident"?---I think I probably would have asked, I probably would have stated, being an emergency nurse, "Well, it can't have been deep because there's no scar."

[...]

HER HONOUR: [...] Do you remember having a discussion with her about whether it was accidental?---No, the implication was, when I was told, that it wasn't accidental.

HER HONOUR: How was it implied by this child who would have been at this point seven?---I don't remember how S told me that, like, how it came out, whether it came out from a spontaneous conversation or not.

HER HONOUR: What other sort of conversation would it come out?--- Well, I don't know whether there was a conversation about other things that were going on in the house and it prompted something.

HER HONOUR: How did you get the impression that this was a purposeful assault, a purposeful act, and intentionally inflicted injury?---By the nature of the statement. People don't scratch people's faces usually by accident with keys.

HER HONOUR: Can you tell me on what you base the opinion that people don't normally scratch someone with keys by accident? Was that an injury with which people regularly presented at emergency at some hospital where you worked?---No, that's certainly not an injury that you would see often, and a scratch wouldn't be something that someone came generally to ED for.

HER HONOUR: How is it that you think that if somebody inflicts a scratch on the face with a key to another person that it isn't accidental? It seems to me there's an equal chance of it being accidental as intentional?--- Yes.

HER HONOUR: So why would you think it's not accidental?---By the way the story was told.

HER HONOUR: How was it told?---I cannot remember the exact words but it was told as something that had happened to her that was a negative rather than - she felt was either a punishment or something as opposed to an accident. That was my understanding at the time.

HER HONOUR: Did you ask her, "Are you sure it wasn't accidental"?---I don't know if I did.

HER HONOUR: It might have been a good thing to ask, mightn't it, with the benefit of hindsight?---Yes.

HER HONOUR: Because children, once they're hurt in some way, might not consider whether it's an accident or intentional. All they know is that they've been hurt. But it can make a world of difference to their perception to say, "Yes, but it wasn't something that he meant to do." The microphone doesn't pick up you nodding your head. You need to say either yes or no?--
-So I'm saying yes or no to that - that would have been a good thing to have said - - -

Do you think it would have been a good thing to have sorted out with the child at the time?---Yes.

HER HONOUR: When you spoke to the mother about it, which you think was probably after the child had raised it, did you speak to the mother about whether it was accidental or intentional?---I think the mother was under the impression it was intentional.

HER HONOUR: Why was that?---Because she was so angry about it.

HER HONOUR: Did you raise with her whether it was accidental or intentional?---Not that I remember.

HER HONOUR: Was it the case you just assumed it was intentional and that was it?---Yes, because of the way the information was delivered to me, yes.

90. The father also put to Ms H the contents of a file note produced by DHS⁴³ as a second notification received on 26 November 2004 at 5.26 p.m. Based on the following interchange with Ms H, I am satisfied that she was the notifier in the second notification:

[THE FATHER]: Yes, and also you said [...] that you made contact with the Department of Human Services and notified about - you notified the Department of Human Services (indistinct) that time, right?---I spoke to a woman I think who was called [Ms P].

[THE FATHER]: Yes. So you agree that you made a phone call and spoke to [Ms P] during that time?---Yes.

[THE FATHER]: Could that be on 26 November 2004?---It could have been.

[THE FATHER]: Yes, and that day you have called that lady. Is it a lady?

⁴³ Exhibit "C1" page 59A, para 9.9

[...]

[THE FATHER]: I'll read it out for you. Do you remember saying this to her? "The mother was quite upset when she reported that the father had tried to strangle her and that he had a key and scratched his daughter's face"?---Yes, I remember [the mother] saying things like that.

[THE FATHER]: Yes, but also you remember according to them about this scratching his daughter's face?---Yes.

[THE FATHER]: So according to you, you made a phone call after [S] has spoken to you? ---Yes.

Ms H was also given an opportunity to read the file note.

91. There is a dispute between the parties, which is not significant, about whether the mother collected S from P School in B and took her back into her care on 29 November or 6 December 2004. However, it is not contended by anyone that S was in the care of the mother as at 26 November 2004. The father sought to cross examine Ms H in this regard. However, as was often the case during the hearing, the father was prone to put answers rather than questions to the witness, I intervened and there was the following exchange:-

[THE FATHER]: So it is quite clear that [S] had no contact with you definitely at least until 29 November 2004. So you already knew about this incident and you have been running around and doing things totally believing what - - -

MS GLAISTER: If you can just calm down a bit. You can put to her that her evidence can't be right because - - -

HER HONOUR: (to the witness) Can you look at the record, please, of a telephone call at 5.30 on 26 November 2004. [...] If you read page 55A down the bottom. Yes, have you read 55A and 59?---Yes.

HER HONOUR: So does that refresh your memory at all?---Yes.

HER HONOUR: Do you think that you had a conversation with [Ms P] on 26 November 2004 at 5.26?---Yes.

HER HONOUR: Is that conversation accurately described by her at page 59A?---Yes.

HER HONOUR: So had you had any earlier conversation with the department at the time of making that call?---Not that I'm aware of, no.

HER HONOUR: It does say that the mother was quite upset when she reported that the father had tried to strangle her and that he had gotten a key and scratched his daughter's face?---Yes.

HER HONOUR: It does not say that the child has complained to you?---
No.

HER HONOUR: Or that you have seen the child?---No.

HER HONOUR: If the evidence in these proceedings is that [S] went back into the care of the mother on either 29 November or 7 December [...] so that when you did see [S], not only had you already heard a version from the mother, you had accepted the mother's version?---Yes.

HER HONOUR: And you had taken the fairly serious step of reporting it to the Department of Human Services thereby acting on it?---Yes, the nature of the story I felt was enough for somebody to investigate. The burden of proof isn't upon the person who reports. It's not for me to say how much of all of this is true. It's to let somebody know what you have been told or observed and the department who is skilled in that area to investigate it.

HER HONOUR: It's also for you however to give evidence as accurately as you can?---Yes.

HER HONOUR: It appears that you did hear about this and accept the story and have acted on it before you heard anything from the child, and that your earlier recollection which was that it was more likely than not after the child made the statement to you, that you discussed it with the mother is wrong?---Yes.

92. I do not regard the evidence of Ms H in relation to S' statement about having been scratched by the father as a reliable account of the statement alleged to have been made. I do not regard Ms H's evidence as corroborative of any part of the mother's case in relation to S being scratched to the face with a key. Ms H's evidence in this regard demonstrates that she is prepared to make assumptions without much, if any, enquiry or analytical thought and then act upon those assumptions in serious respects such as involving protective services.
93. Moving on to the events of July 2005, Ms H confirmed that the incident described at paragraph 4 of both affidavits took place on 22 July 2005 because it was on a Friday and the day prior to her son's birthday party at School on 23 July 2005. She testified that the mother said 'I don't want them to go with that man' and had asked if she and the girls could go to her home so as to avoid the father collecting the children to spend time with them in accordance with the then extant orders. Ms H accepted that the mother wanted to protect the children and agreed to attend H School and collect the girls (and probably her own children) prior to the end of the school day.
94. Ms H described her reaction to S' statement as follows:-

I said, "Why don't you want to have a bath? That's okay. You don't have to", and she said, "Well, people can hurt you in the bath." Which I thought was alarming, and I remember reassuring her that no-one would hurt her here in our house. That she didn't have to have a bath, and was there anything else that she would like to tell me. That I was a nurse. I've heard lots of things from people. That I would believe her if she had anything else to tell me.

What did she say?---At that time I can't remember exactly what else she said. Whether it was then she told me that [the father] had been bathing her, or whether that was a bit later, but my main focus was to make her feel comfortable in our house, and for her to understand that I would listen.

[...]

HER HONOUR: Had [the mother] ever raised anything like this with you, prior to [S] making the statement?---No.

You're absolutely sure?---Yes.

Had she asked you to talk to [S] - - -?---Not at that stage.

- - - about anything like this?---No.

95. And further:-

I was horrified. It did set off alarm bells. I spoke to my husband [...] I think I would have spoken to [the mother] first, and I said to [the mother] at the time that I would need to report this. This was something that was reportable and needed investigating by the professionals.

What did she say?---Yes.

Well, did she say anything other than "Yes"? Did she appear shocked, surprised, worried?---Yes. Concerned, worried. How you would expect a mother to feel.

Did she look surprised?---It seemed like it was new news to her.

What makes you think that it seemed like it was new news?---I don't know. Well, it's pretty hard to look back on someone in four years, and imagine what expressions meant something, so - she had the look of a mother who was upset and concerned. It wasn't something - it wasn't like a normal conversation. It was the sort of conversation of information that a mother didn't want to hear, really. Would rather not know.

Okay, but can you tell me why you formed the view that she seemed like she hadn't heard it before, or that it was new news?---I suppose because I hadn't - I'm only guessing - I suppose it's because she hadn't said anything to me about bathing incidents.

Is it the case you don't remember her then saying anything to you about something that had happened previously?---I knew she had concerns. She was concerned enough about something that was going on for her not to let [the father] pick the kids up.

But had she articulated what those concerns were?---Not that I could understand.

Not even with the benefit of hindsight standing in the children's room?---I understood something wasn't right. Otherwise the children wouldn't have been picked up from school. On the whole - - -

She had asked you to do something out of the ordinary?---Yes, to pick the children up from school so their father couldn't pick them up. Yes, it is extraordinary. But I didn't know what the specific concerns were.

96. Ms H gave evidence that subsequently she could not recall whether S had named the father as the person who could hurt her in the bath or whether it was merely an assumption on her part. In the event, she testified that she regarded the father as the perpetrator. She also said that the mother had left her home to go and collect photographs or something and was not present in the home when S made the alleged statement.
97. Under cross examination, the father challenged Ms H about anything having occurred at her home on 22 July 2005. He had read to Ms H the extract from the mother's diary for 22 July 2005, which was in evidence, and which read as follows:-

INTERPRETER: 22 July 2005, Friday. Today I went to [Ms H]'s place because tomorrow is her son's birthday, therefore today I asked her to help me. When I went to [Ms H]'s place, it is [..] already 10.30 but I cannot remember what time because at that time I didn't have a watch with me - I didn't wear a watch. It's roughly around 11.30 to 12.00. I received a secret phone call. It's the same as yesterday. She asked me to take all the documents to her place and then decide whether to make another appointment for [S]. I've already agreed to her on Monday I will take all the things to them. Hope they can pay a bit more attention to this matter and also I've already asked her whether today I should not allow the children to see [the father] - or to go to [the father]'s place. But she said she cannot make that decision. Also told me to ask my solicitor but I told her up till now I must stand up, protect my daughter. It doesn't matter whether I'm going to breach this order or not. But she told me, "That's up to you." She cannot say anything any more. Afternoon, 3.30. I pick up children, went to ballet school straightaway. It's like running away from disaster because today I decided I will not allow [the father] to take away the children. At the same time, the children are not willing to go to [the father]'s place. Roughly around 5.40, [the father] kept ringing my mobile phone number but I told him, "I'm sorry, I must protect my daughter. I'm not going to say anything any more." Therefore [the father] shouted at me

on the phone and very nasty word. I hang up the phone. Then [the father] kept ringing my mobile and I said the same thing to him. I told [the father], "I'm sorry, I need to protect my daughter." Then I stopped answering my mobile, but I know if it keeps going like this, it was getting worse to me - my situation will be getting worse.

HER HONOUR: I think by way of clarification and because it's not too long, if Madam Interpreter reads out the next day so you know that there's nothing else that happened on the 22nd. The 23 July?

INTERPRETER: Yes, 23 July 2005, Saturday. Today, early in the morning, we were [...] running from difficulty. [which has become] normal to our family. So today plus yesterday, running from difficulty, we've run out of energy. But in the future, I don't know what to do so I have to make decisions day by day. We really hope they can save my children because I really feel pity for them.

98. Ms H was unable to explain why the mother's diary entry was so at odds with her evidence about the events of 22 July 2005. She speculated that she might have mixed up the Fridays, however, it is common ground as between the parties to these proceedings that the only weekend in July 2005 that the father was entitled to collect the girls from school on Friday and spend time with them for the weekend was the weekend commencing 22 July 2005.

99. The father also put to Ms H the contents of a file note from the DHS file for 26 July 2005 which refers to a protective worker, Ms AN, receiving a call from Ms H on that day and that:-

[Ms H] confirmed date that [S] had made statement of 'people hurt in the bath' as the first week of December. This correlates to previous notification that was made and investigated.⁴⁴

Ms H's response was that she would have made a telephone call to DHS on 26 July 2005 but that the worker recorded the conversation incorrectly and that any reference by her to November or December 2004 pertained to her initial notification about the father having scratched S' face with a key and not to any notification of possible sexual abuse.

100. The father also put to Ms H that a file note by DHS indicates that she spoke to Ms AN, protective worker, at 1.16 p.m. on 22 July 2005, which he correctly pointed out was prior to S making any statement to her. The relevant note reads:-

22/07/2005 1.16 PM R/p/c to [Ms H]

Entered by: [Ms AN]

⁴⁴ Exhibit "C1", page 51, par 9.1

DETAILS OF CONTACT

[Ms H] advised that she left message for writer as she has concerns about [S]. [Ms H] advised that last year [S] refused to be bathed at school and stated to [Ms H] that “people can hurt you in the bath”.

[Ms H] advised that she and another parent from the school had assisted the mother to relocate last year when she had left her husband due to domestic violence.

[Ms H] stated that she is concerned that the principal would not give an accurate depiction of what is happening to these children, and described him as socially inept. [Ms H] claimed that she told him about the statement that [S] had made last year and he had told her not to notify to child protection. Principal also did not advise the children’s teachers of the domestic violence and had allowed the father to collect the children from school whilst this was occurring.

[Ms H] stated that [the mother] is concerned about sending the children to access this weekend and father usually picks them up from school. Pw advised that child protection and the police have advised [the mother] to call her solicitor about this given there are current access conditions through FLC.

[Ms H] stated the mother appears worried about what might happen and [S] is refusing to go with her father today.

SAFETY STATEMENTS & DECISIONS

Concerns raised by school nurse re children going on access with their father today. [Ms H] has spoken with mother and advised her to speak with solicitor.⁴⁵

101. Ms H said that she could not account for how accurately DHS take notes and she denied ever having said that S refused to be bathed at school. She said she may have mixed up the dates. That is, that the incident which she had referred to in her evidence as having occurred on 22 July 2005, may have in fact occurred on some other date. When it was explained to Ms H that 22 July was the only feasible date having regard to the operation of the then extant parenting orders, she had no further explanation.
102. I cannot reconcile Ms H’s account with the business records produced by DHS. If I accept that Ms H did not hear the statement ‘people hurt you in the bath’ until she collected S from school on a time after S had spent the weekend with her father, and Ms H had offered the child a bath, the conversation with Ms AN of DHS was a discussion about a statement which

⁴⁵ Exhibit “C1”, page 50, par 9.11

was yet to be made. I conclude that Ms H's evidence on this point is unreliable.

103. Under cross examination of Ms H by the independent children's lawyer,⁴⁶ Ms H was referred to a letter which she had written to DHS about the present case.⁴⁷ Relevantly to the telephone call with Ms AN, Ms H wrote:-

[...] The initial report of this matter [by DHS], which was provided to the Family Court on March 17th 2006 did not explicitly include references to information that I had provided to the Department of Human Services. I assume that the omission of this information was a considered decision, but on the chance that this information was not available to the person writing that report, I now submit this information, which, to the best of my knowledge, is an accurate reflection of the information that I provided to DHS.

The recollection of this information is supported, in part, by notes made in my diary.

I am an Emergency Department nurse with 18 years experience. I have had practical and theoretical exposure to the issues regarding the reporting of incidents concerning potential child abuse. I should note however that it was not in a professional capacity that I came by the information contained in this letter. Rather, I became aware of this information via social contact between [the mother], [N], [S] and me.

On July 22nd 2005, I had a telephone discussion with Ms AN of the DHS.

In that discussion I informed Ms [AN] that earlier in the month of July 2005 I had received relevant information from [S]. This information was provided when [S] exhibited unusual behaviour when she was about to take a bath at my home while I was caring for her. This behaviour was exhibited in the absence of her mother.

As I was instructing [S] to get undressed to take the bath, she became distressed and claimed that 'people hurt you in the bath at night'. She appeared frightened. I subsequently allowed [S] to bathe by herself. On July 22nd 2005, I notified [Ms AN] of the DHS of this incident.

104. Ms H agreed that she would have tried to be as precise as possible in her letter to DHS. As to whether she may have had access to her detailed written notes, there was the following interchange⁴⁸:-

MS GLAISTER: I think her Honour asked you some questions about whether or not you had your notes available when you wrote this letter?---
Yes.

⁴⁶ 29 May 2008.

⁴⁷ the witness identified an accurate copy of the letter at Exhibit "C1", pages 13-14

⁴⁸ 29 May 2008

I think you said you did. Is that right?---No.

HER HONOUR: No, I think her response was, "I don't think so. I would have put in dates otherwise."

MS GLAISTER: You wouldn't have moved house when you wrote this letter, would you?---No.

So you would have had the documents available to you, wouldn't you?

---Somewhere, yes.

If you were sitting down to write an important letter to the Department of Human Services, filling them in or making sure that you properly conveyed information you had previously given to them, wouldn't you get that book out and check it, and use that as a reference point to the starting point of your letter?---Yes.

So do you think it's likely you did that?---I don't know whether I had them then or not.

It makes sense to do that, doesn't it?---Yes, it does, and I don't know whether I was just going off my diary.

[...]

MS GLAISTER: The lost book had in it material that you had written down so that you could accurately convey the things that [S] was saying to you?---Yes.

You presumably had in mind that there was going to be litigation and that you needed to keep this record so that your involvement in the litigation would be accurately recorded?---Yes.

You knew it was important to get the exact words the child used?---Yes.

So presumably the book contained notes that were made relatively contemporaneously with the statements the child made to you?---Yes.

They would have accurately recorded the exact words the child used. That's right?---Yes.

This was a document which you say to her Honour was lost in the move when you moved from [C] to [V]. That's right?---Mm'hm.

That prior to giving evidence you looked for the document but were unable to find it. That's right?---Mm'hm.

So we can assume from that, can we not, that on the date that you wrote this letter, which was 23 May 2006, that book would have been in your

house in [C] somewhere where you could have accessed it?---I don't know whether I had it. I don't know when I lost the book.

And you don't remember, when you sat down to write a letter to the Department of Human Services to make sure they had your story clear, whether you used those contemporaneous documents or not?---Yes.

105. As to the date on which S made the alleged statement, Ms H's letter to DHS is inconsistent with both her affidavits and with her oral evidence.
106. Given all of the inconsistencies in Ms H's evidence, it is not reasonably open to me to accept her evidence in relation to the events of 22 July 2005 or that those events occurred on an unspecified date other than on 22 July 2005.
107. In relation to the subsequent statement by S, referred to in paragraph five of Ms H's affidavit, she testified that:-

I always said to her if there was anything else she wanted to tell me I would be here. She knew where I lived, she could always tell me, I was a trusting adult. There was a night, I think there was a night somewhere in between, where [S] told me that [...] [the father], she referred to, started washing her in the bath, that she was a big girl now, that she didn't need washing in the bath, why did he need to now start washing her in the bath.

Is that as specific as she got about anything?---No. He started to wash her private parts. [...]I think she used "private parts". She didn't have names for them. She said it made her feel disgusting.

[...]Disgusting and dirty. Later on a Monday night I went over to her house. [The mother] had called me that [S] wanted to talk some more. [S] and I were in her lounge room by ourselves and she sat down and she talked through a bit more. She said that he used his finger in her private part and that it hurt.

HER HONOUR: Was that the precise words she used?---I think "private part" was the right - she didn't use a word like vagina or labia. She had a lot of trouble telling the story.

What do you mean by a lot of trouble?---She was quiet, there were long pauses there. She seemed upset. She said that she didn't like talking about it.

So why didn't you tell her she didn't have to?---I did.

What happened?---I said, "You tell me what you want and what you don't want to tell me you don't have to tell me." I think at the time that would have been in August and I said - - -

Have you made any notes in your diary about going there and what date it was?---Yes. In my diary that was 22 August and at that stage I was under

the impression they had stopped contact with the father, and the father had come to the school on several occasions and been in the principal's office with the children.

[...] [I said] "People shouldn't hurt you"?---Yes. "You're safe in this house. You can tell me anything. I'm a nurse, I've heard lots of things that have happened to people. It's not their fault. If something horrible happens to somebody it doesn't mean they're the bad person."

108. In cross examination by the father, Ms H elaborated as follows on what she had been told by S in July and August 2005 :-

That [S] was being bathed inappropriately. She was a girl of - now of eight years old. She was used to having a bath by herself and [S] said that you started bathing her again in her private places and you hurt her. You inserted a finger into her - - -[...] I think that was probably the last bit she told me about it. It was - I thought [S] had a lot of trouble talking about this. She was very embarrassed about it. She said, "It makes me feel dirty," so I never pushed her to tell me anything. I was then - - -

[...]

[THE FATHER]: do you realise that probably her mother pushed her to tell you things?---I can't comment on that.

[THE FATHER]: But have you realised - - -?---I can only comment on what [S] told me.

[THE FATHER]: Yes, I'm asking you what [S] told you exactly, on which - what time she told you about inserting a finger. When did she tell you this?---It was some time after the baths. There's certain days that she saw me. The last time she told me anything was on the - in August because she still felt that she was being visited at school. She was very distressed.

So the last time she told you in August. When was it?

MS GLAISTER: The 22nd.

[THE FATHER]: 22 August?---You know, and she was worried that you were still going to come to school.

[THE FATHER]: But my question was when did she tell you about inserting the finger?---I can't give you a definite - - -

HER HONOUR: [...]Are you unable to say when?---Which specific date, yes.

But it was before 22 August?---Yes.

[THE FATHER]: But some time between 22 July and 22 August, was it?

HER HONOUR: Yes, that was the witness's evidence before lunch; it hasn't changed.

[THE FATHER]: Okay, then why didn't you - why there is nowhere the information that [S] told you about inserting the finger?---Because at that time - - - [..]

Okay, but why didn't you ever mention in your complaint that [S] told me inserting the finger in anywhere? You made a few phone calls to Department of Human Services, you had two affidavits written here. You haven't written that [S] told you inserting the finger?---Because there was a police investigation going. That was their job to investigate what was happening.

109. If the statement by S was made as is alleged by Ms H, I find it inexplicable that Ms H would have omitted such a significant event from her first affidavit sworn on 30 August 2005. I accept that the first affidavit was sworn when Ms H was under pressure of work commitments and in the shadow of grave fears about her own health. However, the alleged statement by S indicating digital penetration occurred less than two weeks prior to Ms H swearing the affidavit and it is a most unlikely matter to omit. Neither is there any mention of digital penetration in Ms H's second affidavit sworn on 18 January 2005. As indicated, the court heard evidence from the mother's solicitor, Mr Weston. He had no record of Ms H informing him of S's statement to the effect that the father had digitally penetrated her.
110. Ms H gave evidence that she took detailed notes inclusive of dates separately from her everyday diary, but that she no longer knows the whereabouts of the notes. I note that she has moved houses since the events of 2005, and I accept Ms H's evidence that she has misplaced detailed notes. However, having heard her evidence and cross examination I do not regard her evidence, either in affidavit form or *viva voce*, as being reliable or accurate. As will become apparent later in these reasons, Ms H's version of S' statement 'people hurt you in the bath' is also inconsistent with any of the mother's evidence as to the initial statement made by S upon which she founds her allegation of sexual abuse against the father, not only as to date but as to location and content.
111. I conclude that Ms H has made assumptions hastily and then acted upon them. Apart from the assumptions that I have referred to above, in cross examination of Ms H by Ms Glaister for the independent children's lawyer, Ms H conceded that she accepted at face value what the mother told her about domestic violence perpetrated by the father. The interchange was as follows:-

MS GLAISTER: It would be fair to say, would it not, that from early 2004 when you came to know [the mother] you became aware pretty early on

that she was - you considered her to be a victim of domestic violence. Is that correct?---Not until the end of 2004.

But you considered that [the father] was the sort of man who would physically-assault a small child?---After I'd heard the stories. I hadn't ever met [the father].

That's right. But what you thought of him?---Yes, had come from things that [the mother] had said, yes.

Without having met him, it would be fair to say that you formed a very unfavourable view of him?---Yes.

[...]You thought he was the sort of person who would assault a small child?---From their stories, yes.

And the sort of person who would perpetrate sexual abuse on a child?---When I heard those stories, yes.

And you believed that he had assaulted [the mother]?---I don't know how much of - [the mother] told me that, yes, so - - -

Well, you had never met him?---Yes, so I just took it on - - -

You must have thought he was a pretty bad guy?---Yes.⁴⁹

112. The father urged me to find that Ms H was malicious and dishonest and had set out to 'frame him' as a child abuser without any foundation and in order to advance the mother's position in some respect. I decline to make that finding. I am satisfied that Ms H was careless and irresponsible in giving her evidence. However, I cannot attribute to her mala fides. It is more likely than not that she was kindly disposed to the mother, she perceived the mother as someone less fortunate than herself and construed it as her civil and moral duty to assist the mother. She became somewhat of a benefactor to and protector of the mother within the community of the early Learning Centre and H School. From that position she overreached her responsibilities and did so in a patronising manner. In my assessment, Ms H's affection for S and N, a commitment that she should help people less fortunate than herself and the difficulty in communicating freely with the mother due to the difference in language, were factors which I am satisfied contributed in a real way to the deficiencies in Ms H's evidence.
113. In summary, however well intentioned Ms H may have been, having heard her evidence tested in cross examination, I find that it was based on certain assumptions which she had formed uncritically and imprudently and which were not sustainable. She was unable to give a consistent or reliable account

⁴⁹ 29 May 2008

of the events to which her evidence relates and that is why I do not accept her evidence.

The father

114. This was a very long trial, during which I had the opportunity to observe the father unfiltered by legal representation. In relation to his evidence, both in affidavit and the witness box, I find him to be a truthful witness.
115. As a self represented litigant, he conducted his case skilfully.
116. By his evidence, he impressed me as being intelligent, sensitive and principled. He has conducted himself with laudable forbearance in the face of persistent, unfounded and most unsavoury allegations stemming from the mother's determination to have her way at whatever cost to the children or the father.

Ms R (S' teacher for Grade 1 in 2004 at P School, B)⁵⁰

117. S was moved to P School, from H School in C, on about 7 October 2004 when the mother and girls went to live with the father at B. S was removed from P School by the mother on or about 29 November 2004, without notice to the father. Ms R taught S for 7 or 8 weeks, in Grade 1, at P School.
118. Ms R gave evidence about the involvement of each parent whilst S was her student and about S' departure. Ms R made a statement to Victoria Police on 18 June 2007, a copy of which is annexed to the father's affidavit. She adopted the statement as true and correct. She also read the statement of her principal, Ms C, as produced by Victoria Police and dated 17 August 2007 and did not disagree with the contents. Ms R was a witness in the father's criminal trial.
119. Ms R's evidence was that S was a robust young girl who fitted well into her class. She observed the father to act appropriately with S and that S regarded the father with affection. Ms R's own experience of the father included his unscheduled visits to her classroom after S had been taken from the school and approaching Ms R once after church. Ms R acknowledged that the father's approaches to Ms R at school and direct to the class room were annoying. She regarded the mother as a 'pushy parent' whose interaction with S was appropriate with the exception of the last two visits by the mother to the school.
120. I will recite some of Ms R's evidence, particularly the events of 29 November 2004, when I deal with the relevant history. It is sufficient to say here that there was a significant conflict between Ms R's evidence about what

⁵⁰ Ms R gave evidence and was cross examined on 19 June 2008.

happened on 29 November 2004 and the evidence which the mother gave in that respect.⁵¹

121. Ms R had a prickly demeanour. She appeared aggravated at being required to attend court to give evidence. However, having heard what she had to say, my impression was that her aggravation was not based on personal convenience but because her involvement with S, albeit brief and nearly four years ago, had impacted upon her personally and in such a way that to this day she harbours a deep concern for, and sadness about, S. Most likely, Ms R's somewhat curt and remote manner was a defensive posture. She has been a teacher for more than 20 years. Ms R kept a dossier of copious notes on her home computer of her involvement with S until late 2007 and did so 'because I had never experienced anything like [S]' removal from school that day.' On the day of her departure, S left behind her pencil case, hat and book and Ms R kept those belongings for 2 years which she admitted was unusual. The retention of belongings and recording of her observations about S and the family is consistent with an ongoing concern held by Ms R about S, disquiet that more could not have been done for the child and a hope that, one day, she may be able to return the belongings to S in person, see the child and demonstrate that she had not forgotten their association. In spite of her off putting manner, I found Ms R to be an impressive witness whose evidence I accept as balanced, truthful and accurate.
122. Where there is a conflict in the evidence of Ms R and the mother, I accept the evidence of Ms R.

E (the father's youngest son)⁵²

123. E is the youngest son of the father's first marriage. He was 21 years old at the time of the trial and in the third year of an undergraduate at University. In response to my question, he said that his average grade was a distinction. He swore an affidavit on 23 January 2007 and was required for cross examination on behalf of the mother and the independent children's lawyer.
124. The father had earlier made application for E to give his evidence in the mother's absence or at least without her being present in the same room. I declined that application for reasons which I gave at the time. E tried, unsuccessfully, to cover his discomfort at giving evidence with bravado, nonchalance and, at times, a disregarding attitude. He was ill at ease, nervous and sad. His presentation was consistent with him being a well mannered young man who is deeply aggrieved by the way he was treated as a child and who is still feeling vulnerable. Overall, he was an impressive young man.

⁵¹ On 5 May 2008, the police statement of Ms R was put to the mother who stated that Ms R was wrong in her description of events and that this did not happen.

⁵² E gave evidence and was cross examined on 23 July 2008

125. He deposed to an unhappy childhood as far as his exposure to the mother was concerned, that he was made to feel unwelcome in his father's home, that the mother would yell and scream constantly and disrupt affectionate interaction between the girls and his brother, the father and himself. On affidavit he deposed, inter alia, that:-

I have witnessed [the mother] attacking my father with chopstick, knife, smashing plates, screaming and slamming doors. I was very upset and had nightmares and problems at schools. [....] Even now I hate to think about it. [...] [The mother] abused us and took away at least four years of my happiness...

126. The mother alleged⁵³ that when E was about eight years old (approx.....), the father 'slapped [E]'s face so hard that [E]'s head bumped into the side of the wall and the boy urinated himself on the carpet.' E denied that this incident occurred. He also denied that, at the direction of the father or otherwise, he helped tie up the mother.

127. I accept E's evidence in preference to the evidence of the mother.

J (the father's oldest son)⁵⁴

128. J is 23 years old. He was eight years old when his mother and the father separated. Two years after the separation, J and his brother E lived with the father whilst their mother was overseas for three months. The mother in these proceedings arrived in Australia about halfway through the period in which the boys were living with their father. J said that initially he 'got on well' with the mother. At first there was a language barrier but J said his experience was that the mother 'could speak [English] well.'
129. J's evidence was that after S' birth and the pressure of running the family business, the father's home 'was not a good place to be.' He recalled continual arguments, the most dramatic of which was when the mother attacked the father in the take-away shop and scratched his face with chop sticks or her finger nails. J said that he was fourteen years old at the time of the assault. He identified photographs depicting the father's injuries.⁵⁵ He confirmed that the father went to the police station to ask the police to counsel the mother rather than to have her charged or risk having her deported.
130. J denied the allegations about binding the mother in the back of the take-away shop.
131. J gave evidence that his youngest sisters are reserved in the presence of the mother. He described the girls as not showing affection to the father whilst the mother was present and acting disrespectfully toward him but changing or

⁵³ Police statement Exhibit "F4", para 7

⁵⁴ J gave evidence and was cross examined on 23 July 2008

⁵⁵ These two photos are annexed to the father's affidavit sworn 8 January 2008, pages 34-35.

retracting their comments when the mother had gone. J has a sound relationship with the mother's eldest daughter, Ms L.

132. J gave his evidence calmly, respectfully and modestly. He is an impressive young man. I accept his evidence.

Ms L (the mother's oldest daughter)⁵⁶

133. I refused the father's application to have Ms L give evidence otherwise than in the presence of the mother. Ms L was required for cross examination by the mother and the independent children's lawyer. She attended Court on the 30th day of the trial⁵⁷ and was a witness for about three and three quarter hours. My assessment is that she found the experience to be excruciating but that she was an honest witness.
134. Ms L's evidence was that she met the father and family members immediately upon her arrival in Australia on 25 November 2002 and that she went to live at D.
135. In mid-2003 Ms L changed her family name from that of her father to the mother's family name of '[Wang]'. She said that she was 'not happy about doing so because my father is not dead.' She explained that it was disrespectful to her father for her to do so, particularly in the absence of him having done anything wrong and still being alive, but that she 'did so for my Mum's sake.'
136. As best Ms L understands her early childhood experiences, she lived with the mother and her father in a mining town in rural China until she was two years old. Between the ages two to four and a half years she lived with her father in his ancestral home. At four and a half years of age she returned to the mining town to live with her paternal grandparents where she remained until she was fifteen years old. Her paternal grandfather died in 1999, the pension income reduced dramatically and her grandmother was unable to support her. Ms L moved back to her ancestral home and completed the equivalent of Year Nine. She lived with her father and worked in a clothing shop.
137. Under cross examination, Ms L said that the mother has never told her why she left Ms L at such a young age. Ms L confirmed that it would have been a great shame to be an unwed mother but added that the mother and her father were married. Ms L said that the mother had claimed that she was not able to contact her when she was living with her paternal grandparents. Ms L commented that they lived in the same house all of the time and it was the same house at which the mother had visited her once.

⁵⁶ Ms L gave evidence and was cross examined on 24 July 2008

138. Consistent with the evidence of the mother, Ms L described that in 2001 she was working in a shop and was approached by the mother's sister in law who recognised Ms L as the mother's daughter based on their physical resemblance. Ms L was able to telephone the mother and very shortly after that the mother arranged to go to China to meet Ms L and arrange for her to come to Australia. Subsequently, Ms L stayed with members of the mother's family and she eventually arrived in Melbourne in November 2002. She considers herself very fortunate to have been able to establish a home in Australia.
139. Ms L gave evidence that before she arrived in Australia the mother 'gave me a good impression of [the father] and how he was organising everything.' But 'after I arrived, the mother complained that [the father] was not earning enough money and objected to him staying at home to care for the children.'
140. Ms L described arguments between the mother and the father over money. Ms L confirmed that the mother had signed the agreement concluded between the mother and the father on 4 October 2004.⁵⁸ She described how the mother had visited her at work on 8 November 2004 and told her that she was leaving. The mother did not tell Ms L where she was going to live nor did she invite Ms L to accompany her. Ms L's evidence was that she felt utterly abandoned by the mother. Ms L is clearly grateful to the father for providing her with a home but the fact that the mother has repudiated their relationship represents a great sadness to Ms L.
141. Ms L gave evidence to the effect that the mother had never asked her to live with her and the girls but that she could not live with the mother again. This is due to the mother's shouting and yelling during the two of the years that they did live under the one roof. Nonetheless, Ms L had tried to spare the mother's feelings in a touching and thoughtful letter.⁵⁹
142. Ms L agreed that the mother wanted a good education for the girls and provided them with ballet and Chinese lessons. However, from Ms L's perspective, the girls would be better off with the father and she is more than happy, in fact she is eager, to assist him in their care. She described the mother as being 'depressed', shouting, yelling and screaming. Ms L said that she had observed the mother hit the girls including with a stick.
143. Ms L denied ever smacking or pinching her young sisters. She maintains that she was always on hand to bathe them and that, far from feeling uncomfortable when naked in the presence of the father, the girls would gleefully run around the lounge room naked after their bath. Ms L watched the VATE tapes of the girls in Court, and she is adamant that nothing in the nature of what is alleged occurred.

⁵⁸ This agreement is annexed to the father's affidavit sworn 8 January 2008, pages 61 to 63.

⁵⁹ Exhibit "F29"

144. Ms L denied being in a sexual or romantic or couple relationship with the father. I have no doubt that is correct. The mother's allegation in that regard is calculated and dreadful. It demonstrates that there are no boundaries to what she will do or say to debase the father. It also demonstrates her disregard for Ms L which, in the circumstances of this case, is illuminative of the mother's parenting capacity and a matter to which I will have regard pursuant to s 60CC(3)(f) of the Act. That said, my impression of Ms L is that she is still hopeful of having a positive relationship with the mother.
145. I found Ms L to be a truthful witness whose evidence I accept over that of the mother to the extent of any conflict. I am also satisfied that she has an enormous amount to offer the girls by way of guidance, affection and a sense of security.

Mr DP (Principal, H School)⁶⁰

146. Mr DP was a classroom teacher from 1981 to 2002 and has been the Principal of H School since 2002.
147. Mr DP gave evidence that the girls appear to be secure in the mother's care. 'She looks after them brilliantly. Fantastic. Interact normally with mother. Never observed them to be in fear of her.' He described the girls as achieving well academically and being 'well adjusted happy children. Gorgeous.'
148. Mr DP said that he facilitated three of four visits by the father with the girls at school. The father telephoned first and made arrangements. He described S as being reluctant to see the father and said of N 'she gave nothing.' He said that the visits were supervised by him. 'The girls were never left alone, I was in view or if I attended to a phone call it was only for 2 or 3 minutes.' Clearly, that is not supervision in the sense commonly employed in this Court.
149. Mr DP gave evidence that he had been informed by the school secretary that the mother had attended the office and asked to change the girls' family name from '[Dennison]' to '[Wang]' and did so in the presence of one or both of the girls. The mother's evidence in this regard was that she merely asked for details of the procedure to change the girls' names rather than making a direct request which she expected would be acted upon. I do not think that much turns on the conflict in the evidence. It was inappropriate for the mother to be contemplating a change in the girls' family name in the presence of the children.
150. Mr DP gave evidence of S having asked for a referral to attend counselling which he gave but the mother did not follow up.
151. There were unambiguous criticisms of the mother's friend, Ms H, throughout Mr DP's evidence. In particular, he referred to her as having been 'interfering'

⁶⁰ Mr DP gave evidence and was cross examined on 25 July 2008

but it is clear that his view of Ms H is more negative. I was left with the distinct impression that the conflictual relationship between Ms H and Mr DP is unlikely to have served the mother or the girls well.

152. Mr DP was present when the police interviewed both girls at school on 21 July 2005. He concurred with the view expressed by SC T that S' statements were not reflective of her own experience but rather the result of some encouragement from the mother for the child to make allegations against the father.
153. Finally, his evidence was that arrangements should have been underway in 2008 for S' attendance at a secondary school in 2010. However, to his knowledge they were not. The school does not offer any special assistance to parents who may, by reason of language or disability, not be as well placed as others to arrange placements for their children. In any event, H School promotes a Catholic education so it has no particular arrangements with other schools.

Relevant history

154. The applicant mother is 45 years of age having been born in China in February 1964. She arrived in Australia in 1997. She not employed outside the home. She resides at C with the children, S and N.
155. The respondent father is 54 years of age having been born in India in October 1954. At the time of the trial, he was employed casually as a tradesman and living at B which is a 3 bedroom rented house. The other occupant is the wife's daughter, Ms L. It is a huge disappointment to the mother that her eldest daughter has remained living with the father. It is construed by the mother as a complete repudiation of their relationship which has only existed on an interpersonal basis since 2002 when the mother and father arranged for Ms L to migrate from China. I accept that the father has been in and out of work and that this hearing has seriously limited his ability to retain employment.
156. The mother and father were introduced in 1995. They exchanged photos. They married in China in September 1996 after having corresponded for approximately 12 months. In response to a question by counsel for the independent children's lawyer, the father denied that his marriage to the mother was an arranged marriage. He said he married for love. In subsequent evidence, it transpired that his first marriage had been an arranged marriage. I did not hear evidence on when that marriage ended but it is apparent from the evidence of the father and the children of that union, J and E, that the father and his first wife have managed to parent very effectively, beneficially and cooperatively notwithstanding the breakdown of the marriage. E and J reside with their mother and step father.

157. The wife arrived in Australia in 1997 by which time she was seven months pregnant with the parties' eldest daughter S. The couple resided in the father's flat in the south eastern suburbs which he owned subject to a mortgage. E and J resided with them as the mother's arrival coincided with their own mother travelling overseas for about three months. In the wife's statement to police⁶¹, she alleges that they 'lived in a one bedroom flat with no furniture. I don't know why there wasn't any furniture. There was just one bed.'⁶²
158. Under cross examination and upon photographs being shown to her depicting other furniture in the home, the mother conceded there was other furniture but that it was not to her liking or of an appropriate standard. In the scheme of this case, the mother's inaccurate evidence about what furniture the couple had in 1997 would not be worth mentioning but for the fact that this complaint of the mother, which I find to be ill founded, was the first complaint of many she had about the extent to which the father provided for her. From the arrival of the wife in Australia, she complained consistently about lack of money and about the father paying child support for or giving money to E and J. I am satisfied that the family were usually short of money and unhappy about it. However, the mother's attitude to the father was blaming and condemning to an extent that I find cannot be justified on the evidence. As I will mention later, the parties' numerous separations were initiated by the mother and usually based on conflicts over money.
159. The parties' first child, S, was born in February 1998. At the time of the trial, she was at H School in C where she was making very good progress.
160. On 10 April 1999 the family, comprising the parents, S, and occasionally E and J, moved from the father's home in the south eastern suburbs into the family business which they had bought and operated in the south eastern suburb of W. Under cross examination, the mother alleged that when S was about 18 months old (est. July 1999), the father assaulted herself and S. She described sitting with S on her lap, trying to feed her rice which S would not swallow and that S was crying. She said that the father snatched S away from her and 'threw the child to the floor.' S was then taken by ambulance to the Royal Children's Hospital where she was an inpatient for two or three days. Under cross examination, the mother admitted that the child lay senselessly on the floor, eyes rolled back and turning blue. She agreed that S was diagnosed as having suffered a febrile convulsion and that the father's intervention in laying S on the floor, unblocking her airways and bringing her around by applying cold water to her face is likely to have saved her life. Happily, it appears that S has grown out of that condition. She had only two further attacks and none since she turned five years old. I asked the mother

⁶¹ Exhibit "F4"

⁶² Paragraph 1 of Exhibit "F4"

why she was critical of the father given the child's subsequent diagnosis, to which she responded:-

I criticise him for snatching the child from me and putting her on the floor. He did not know what condition she was suffering from. He should not have snatched the child away from me. I intended for the child to swallow the rice, it was only when she fainted he knew [.....] He abused me by asking me to stop crying and making a noise. She was on my lap with the bowl of rice. She was crying. I was feeding her, saying "you should swallow". He said that she is too old to feed her and then snatched her and put her on the ground. He did the right thing but he did not know [at the time]. I accept that he did the right thing instinctively but so he should have because he is her father.

161. The mother's evidence demonstrates her ungracious attitude to the father. Even in hindsight, she expresses umbrage at having S removed from her lap. In my assessment, the mother's interpretation of this event is like many others warped by self interest which diverted her from concern for the child at the time and now renders her unable to have proper regard for the father's actions. Whilst this is an historical event, occurring about ten years ago, it was included by the mother in her various complaints about the father given in evidence in the present proceedings. It is a telling cameo in the context of the mother's historic attitude to the father, relevant to matters under s 60CC(3)(c),(f) and (i), which I will discuss later.
162. In July 1999 the father's employment as a tradesman was terminated and he worked in the family business along with the mother.
163. In March 2000 N was born after a full term pregnancy. The father alleged that in the early stages of her pregnancy, the mother sought out a medical practitioner to terminate the pregnancy. I am satisfied that is correct. I do not regard it as relevant to any consideration in this proceeding other than for the fact that the mother initially denied, on oath, having done so, whereas I am satisfied that she did.
164. In May 2000, the parents sold the business and moved to temporary accommodation in the south east area. S was about 27 months old and N was about 6 or 7 weeks old. The family sustained a significant loss on the sale of the business. The father alleges that the mother had been syphoning off takings from the business and that, with the benefit of hindsight the business may have been more viable than he was led to believe. The mother denies surreptitiously taking money out of the business. I am unable to make any finding in this regard over and above the fact that on the completion of the sale of the business the family was in a poor financial position.
165. On 7 September 2000, the family moved to inner city Melbourne to operate a take-away shop which the father had purchased with borrowed funds and other monies which he alleges, but the mother denies, were accumulated

takings from the family business enterprise. The family residence was behind and above the shop.

166. At the trial it was alleged by the father that a week prior to 31 December 2000 the mother threatened him with a large fishing knife and cut the telephone cords to the home. When asked to specify the date, the father referred to paragraph 15 of his affidavit sworn 8 January 2008 and his affidavit for interlocutory proceedings on 4 March 2001. In the later affidavit he refers to that event occurring on 16 September 2000 but says that he may have been mistaken about the date. In response to the interlocutory affidavit the mother raises an allegation of being threatened with a knife.
167. It is alleged by the father that on 31 December 2000 the mother attacked him with chopsticks and her finger nails in the presence of their children and E and J. The father went to the police station and made a complaint to the police not, he said, from the point of view of having the mother charged but to request the police to tell the mother that what she had done was illegal and unacceptable. The mother denies that she injured the father and says that she saw him cut his face with a razor blade and then wrongly blame her for his injuries. Having heard the evidence of each of them, I prefer the evidence of the father over the mother. There is an incident report by Victoria Police which is corroborative of the father's version of events,⁶³ as is the mother's evidence that the father took her to the police station where she was spoken to. E and J each deposed to this event, in a general way, in their affidavits. J deposed in affidavit and in the witness box to having taken photographs of the father's injuries which are annexed to the father's affidavit.⁶⁴ Their evidence was not shaken in cross examination.
168. The father alleges that after the involvement of the police in December 2000, the mother started to take her anger out on N who was not yet one year old. He deposes that the mother hit N to upset him and that the mother 'was constantly terrorizing every body in the house.'⁶⁵ The mother denied that this was the case. I am unable to make any finding of fact in relation to the mother hitting N. However, I am satisfied, on the evidence of E and J and the father, that life in the business was fraught and unpleasant and that this atmosphere had much to do with the mother screaming and yelling. There is also the sworn statement of a neighbour, Mr GK, annexed to the father's affidavit, which corroborates the father's allegation that the mother was regularly screaming, shouting and banging doors.⁶⁶
169. The first separation between the mother and the father occurred in early February 2001 when the mother left the take-away shop, taking the girls with

⁶³ Father's affidavit sworn 8 January 2008, page 36

⁶⁴ Father's affidavit sworn 8 January 2008, pages 34 and 35

⁶⁵ Father's affidavit sworn 8 January 2008, paragraph 13

⁶⁶ Father's affidavit sworn 8 January 2008, page 39

her and entered a women's refuge. The mother deposes in her affidavit to staff at S' kindergarten noticing injuries inflicted on her by the father and enlisting support for her from domestic violence services. A letter from the Co-ordinator of Child Care Services of the local Council, dated 1 March 2001, and annexed to the father's affidavit⁶⁷ states that on Friday 2 February 2001, the mother informed the staff at the children's Child Care Centre of her injuries and complained that the father had been hitting her. In the mother's affidavit sworn 14 March 2001 she alleged that the father had been violent to S and herself prior to separation on 5 February 2001. She deposed:-

I say that the applicant husband has a long history of violent behaviour towards me and over the last 18 months, towards our daughter, [S]. I have been badly beaten on a number of occasions as well as threatened with a knife. On the day following separation I attended at the offices of Dr [I], who noted the bruises and scratches to my body as a result of the applicant husband's assault on me. At that time, Dr [I] also examined [S] and although he found no physical signs of assault, [S] told him very clearly what her father had done to her. Annexed hereto and marked "A" is a copy of a letter from Dr [I] detailing my injuries and also confirming his observations in relation to [S].

[S] has been assaulted by the applicant husband a number of times, usually by being hit around the head or body or being grabbed violently by him. The applicant husband would become enraged whenever [S] cried or was noisy and would usually react by slapping her to the face or body. If I attempted to intervene, I would be hit as well. The workers at the child care centre which [S] visits have seen her bruises to her body. Shortly after separation, however, these matters were brought to the attention of the Department of Human Services ("the Department"), who investigated my allegations against the applicant husband. The Department have advised me that I have taken appropriate action in protecting the children and that as a result, they have no protection concerns currently. They have, however, indicated that they would require any contact by the applicant husband to [S] to be supervised.

170. The mother was cross examined at length about her general allegations that the father slapped and hit S and herself leaving marks and bruises. Under cross examination, the mother provided further detail to that provided in her affidavit of 14 March 2001. She testified that on the weekend commencing 2 February 2001, the father hit her and then placed S upstairs in their residence. Then, she said, he directed his two sons to restrain the mother with rope and to beat her with a stick. This is alleged to have occurred at the back of the take-away shop. She gave evidence that E and J held her down and the father tied her up with rope. She gave evidence that E and J refused to beat her with a stick as directed by the father or at all but that she was beaten by the father.

⁶⁷ Father's affidavit sworn 8 January 2008, page 40

At this time there were apparently three workers in the take-away shop and customers going in and out but, the mother said, they could not hear her crying and did not come to her assistance. When asked why she did not flee and get help immediately, she said that once she was untied, she 'sat breathless on the sofa continuously crying and the more I thought of my fate the less I liked it. I thought that if I continued life like this, I would be finished. I sat there for a long time (20 minutes) and then went to look after the children who were crying.'

171. The mother was cross examined about why she did not report the assault to the police. She testified that she had no English skills at that time. She gave evidence about walking in the area of the take-away shop on the preceding Wednesday or Thursday thinking that she would report the father's assaults, looking for a police station but not knowing how to locate one. She gave evidence that she met a tall thin Italian lady, aged in her sixties, of whom she enquired where a police station was located. The mother said that the Italian lady told her 'in a very friendly way that family is family, that my situation was not serious and that matters would only get worse if I reported anything to the police' or words to that effect. Then she went home.
172. I do not accept the mother's evidence in this regard. I find it is implausible for a number of reasons. The mother's evidence was that she had no ability to communicate in English, to look up a telephone book or to ask a customer in the take-away shop. She said 'I had never come into contact with people, I did not have any friends'. By this time, she had been in Australia for three and a half years, she had worked alone serving in the business for some of the time, given birth to two children in the Australian public hospital system and was able to converse with staff at S' kindergarten. The mother subsequently agreed that she had been spoken to by police the preceding December when the father alleged that she had scratched him with her fingernails and chopsticks. Moreover, she had allegedly communicated with the Italian lady whilst she did not speak Italian and the lady did not speak Mandarin. I do not accept that the mother could not have found a police station if she had wanted to. The mother gave her evidence in a perfunctory way, generally rather than specifically. This evidence was adduced in cross examination by the father on the second day of the mother's evidence⁶⁸ but only two or so hours into the mother's cross examination as a whole. This was the first real challenge to her habit of making general statements in the witness box. In my assessment, the mother could not substantiate her evidence. Notwithstanding that she had been interviewed by police in 2005, given evidence and been cross examined extensively in the criminal proceedings in the County Court (where she was criticised for being a non-responsive witness), at the trial before me, the

⁶⁸ 19 February 2008

mother gave evidence carelessly and very frequently her version of events did not withstand cross examination.

173. I also do not accept the mother's account of being held down by E and J whilst tied up by the father and beaten. On my calculation, E would have been 13 years old and J would have been 15 years old. The cross examination of E on this topic was no more than cursory and his denial, as well as that of J, was not successfully challenged. E and J denied the allegation on oath and did so in a convincing and seemingly genuine manner. Having heard and observed the mother and other witnesses give evidence of her allegations in this respect, noting that the mother did not make these complaints elsewhere such as when seeking medical attention, applying for an intervention (domestic violence) order shortly thereafter or in her statement to police in September 2005, I conclude that the mother's evidence about the assaults which she alleges occurred immediately prior to 2 February 2001 have no foundation in fact. I am satisfied that the mother fabricated her evidence insofar as it relates to the Italian lady and the assault on her by E and J.
174. The father alleged that the mother attacked him on that weekend prior to 2 February 2001 and that he held her away from himself to avoid her assaulting him. He gave evidence that he had advised customers in the shop that the facial injuries sustained on 31 December 2000 were cat scratches. Under cross examination by the wife, the husband said that he may have bruised the wife's arm but that anything else was self inflicted.
175. On 7 February 2001, the mother was examined by Dr I who noted that she alleged that the father had punched her on the right side of the face, over the jaw and above the ear. He noted two bruises, each of one inch diameter, on her right forearm and upper arm, some tenderness of the lower jaw bone on the right side of her face and three superficial scratches on her right cheek. The doctor also noted that 'I was asked to examine [S]. When the child entered the consulting room she stated that her dad had grabbed her and punched her. There was however no evidence on the child of any injuries.'⁶⁹
176. DHS received its first notification in relation to the family during this period. The case was open from 7 February 2001 to 19 March 2001. DHS records that:-

...[The mother] had entered a refuge to escape family violence perpetrated by [the father], and physical abuse to the children, in particular [S]. It was alleged that [S] had disclosed that [the father] had grabbed and pinched her and that she had pointed to the side of her neck. It was also reported that [the father] had shaken [S].

⁶⁹ Father's affidavit sworn 8 January 2008, page 45

There was also information that the children would be exposed to serious family violence, and that [the father] would threaten to punch the children if they left the room.

DHS investigated the allegations as raised in the notification and assessed that there was no further role. [The mother] and [the father] were separated, [the mother] was not intending to reunite with [the father], [the mother] was supported by refuge staff and [S] was attending counselling. It was recommended at this point in time that [the mother] seek Family Court Orders and that until a Court Assessment occur [the father]'s contact with the children be supervised.

The case was substantiated and closed at an initial investigation phase of involvement in the family.⁷⁰

177. On 2 March 2001, the parties obtained mutual intervention orders against each other under the *Crimes (Family Violence) Act 1987* (Vic). The mother was the first to apply. The mother's application alleged that the father had punched her face, head shoulders and arms and that the father 'has also assaulted one of the children [S]. On this occasion the [mother] tried to stop the [father] and in turn was assaulted herself.'⁷¹
178. The mother was cross examined as to why she did not mention all of the assaults, including being held to the ground by J and E, tied up and beaten by the father, in her application for an intervention order or when she saw Dr I. Her response was that she had used simple terms and did not go into detail because she did not want the father or his sons to go to gaol.
179. I do not accept the mother's explanation. I am satisfied that the mother did not refer to E and J as having held her down and beaten her because it did not occur.
180. After a short time in shared accommodation provided by a domestic violence service, the mother and the girls obtained housing commission accommodation at C in March 2001. During all of the parties' reconciliations and separations, the mother has retained this rental accommodation under a lease in her name. It is where she and S and N currently reside.
181. Unbeknownst to the father, the mother took S to a psychologist, Ms G, at A Hospital on 5 and 27 March 2001. Ms G published a psychological report dated 30 March 2001.⁷² In the report, the history is recorded as follows:-

Mother and children were removed to a refuge on Tuesday 29th January 2001 following a notification to Department of Human Services regarding marks on [S'] body consistent with severe pinching.

⁷⁰ Exhibit "C1" pages 4 and 5 under "Patterns and History of Harm"

⁷¹ Father's affidavit sworn 8 January 2008, page 41

⁷² Exhibit "ICL4"

[The mother] related that she had been in Australia approximately three years. She married her husband after meeting him when he was on a visit to China. He has been married twice previously. She stated that she had no family in Australia. Her closest relative is her brother in China.

According to the mother, the father was often very angry with [S] and would regularly pinch her till she bled. This was usually around her neck and her face. He also punched her and chased her through the house. [The mother] became distressed recounting the sight of her daughter's bleeding face. She reported that she felt very sad, wanting to protect her daughter but felt powerless to stop the abuse. [The mother] related that she was also physically assaulted by the husband on numerous occasions with the children witnessing these incidents. She described feeling suicidal at times while living in this situation but could not leave the children to the fate of being cared for by their father. Also, she was not aware of support services from which to gain assistance. [S'] commencement at kindergarten was the catalyst which led to D.H.S. involvement.

182. The history recorded is somewhat at odds with the evidence. Separation was on 5 February 2001 and there were no marks noted by Dr I upon examining S two days later on 7 February 2001. Still there was no mention of the mother complaining of being held to the ground by J and E, tied up and beaten by the father.

183. Ms G sets out the following conclusion:-

[S], now three years one month presents with characteristic Post Traumatic Stress Disorder. She exhibits hypervigilance and hyperarousal. Her play is repetitive, destructive and unstructured. She has made a clear disclosure regarding physical abuse by the father. She has also described witnessing assaults on her mother by the father.

[S] has experienced ongoing trauma and more recently significant changes in her environment, moving to an unfamiliar house with new faces and also a new kindergarten. While her difficulties are not externalised and she appears quiet and compliant, her presentation indicates a need for therapy on a regular basis for a short to medium period of time.

Contact is being sought by the father through the Family Court. [S'] play and behaviour demonstrates that she is able to and is currently processing the traumatic experiences she has been exposed to. It is advisable that no contact with her father occur for a short time in order for her to continue this process.

It is recommended that any contact with the father be preceded by meetings between the father and the daughter with a therapist present where [the father] is able to tell [S] that his behaviour is unacceptable and will not occur again. [The father] may require treatment to understand the seriousness of his actions and change his behaviour. Future contact will

require very clear limits and supervision to ensure that [S] feels secure and is not exposed to retraumatisation by feeling intimidated, threatened and powerless.

184. There was no evidence of anyone having acted on the recommendations of Ms G.
185. On 14 May 2001 holding orders were made, by consent, in the Federal Magistrates Court at Melbourne by Chief Federal Magistrate Bryant (as she then was) which provided that the girls live with the mother and until further order the father spend time with the girls each Sunday from 12 noon to 3.00 p.m. under the supervision of Mr SC, with changeovers to be effected at a McDonalds' Family Restaurant. Certain chattels were to be collected by the mother, a family report was to be prepared by Mr RM by 17 July 2001 and the matter was adjourned to 31 July 2001.
186. In June 2001 the family was assessed by Mr RM, psychologist. He saw the children and the father on 21 June 2001 and the mother with an interpreter on 29 June 2001. On 19 July 2001 he interviewed Ms VA of the Immigrant Women's Domestic Violence Service. The report was published on 23 July 2001 and is in evidence before me.⁷³ It was accepted as an accurate historical document. In my view, the report offers a valuable snap shot in time of the dynamics of this family. Mr RM was not required for cross examination. I accept his expert opinion evidence as a correct and helpful assessment of the family as at mid-2001.
187. Mr RM detailed the personal history of each parent. His description of the father included:-

[The father] presented as an intense 46 year old Indian-born man who related in a tense and agitated manner. His thinking appeared to be normal however his speech, which is rapid and pressured, made references to his financial and physical victimisation by [the mother].

[The father] acknowledged that [the mother] was the girl's primary parent and although he did not disparage her parental skills he argued that [S] had been brainwashed to accuse him of pinching her. He stated [S] 'has a psychological problem because she knows the mother hates me'. This, he admitted, had been exacerbated by his immersion in business prior to the separation. Although he denied having pinched [S] he confessed that he had, at times, smacked her on the bottom.

Although the writer is of course unable to prove or disprove the allegations of child maltreatment levelled by [the mother] against her husband [the father] himself presented as an aggrieved man who appeared desperate to set the record straight, as it were. The writer was interested to note that he did not portray [the mother] as an inadequate parent from whom the

⁷³ Exhibit "ICL3"

children needed to be rescued, nor a parent against whom his application for contact was being used vengefully. To that extent the writer deduced that his application was unlikely to be serving an agenda other than a genuine desire for contact.

188. Mr RM's impressions of the father accord with my own impressions which were formed over the entirety of the final hearing.

189. Mr RM's description of the mother included the following:-

[The mother] presented as an attractive 38 year old Chinese woman who communicated through an interpreter. In interview with the writer she gave no indication of wishing to vary her application however her caseworker from the Immigrant Women's Domestic Violence Service, Ms VA, advised the writer that [the mother] felt [the father] had treated the children well recently, as a result of which she was prepared to offer him unsupervised contact but not overnight.

[The mother] was born in [southern], China, to a family of eight siblings. Her parents both died when she was young therefore she was raised by her elder brothers. While working as a sales manager in Beijing a friend told her about [the father] in Australia and they started to write to one another. After eight months of corresponding they married in 1996. The writer's attempts to understand the factors that impelled [the mother] to marry an individual of vastly different background suggested that she was primarily motivated by personal factors rather than an attraction to [the father]. Although she perceived him to be 'a good man, reliable' she was worried about her age and the diminishing prospect of becoming married. However it seems her brothers were sceptical, particularly as [the father] had little money. Nevertheless she accompanied her new husband to Australia and enjoyed the first eighteen months, until the birth of their first child.

Following [S'] birth [the mother] began to resent the attention and favouritism that she felt he was lavishing on [J] and [E]. She formed the view that he 'beat and ill-treated' [S] and that the child learned to suppress her emotions. Although the words 'beat' and 'ill treat' may have been the interpreters, when the writer asked her for examples she merely replied that [S] 'sensed' her father disliked her. She also claimed that [S] had strange marks on her neck and scratches on her chest, and that despite intending to notify the police she was unable to locate the police station. When the writer asked whether she had personally witnessed any abuse she replied that she had observed [the father] twist and pull [S'] ear.

[The mother]'s allegations occur against the background of a deeply acrimonious separation. She felt aggrieved that [the father] had failed to listen to her advice prior to selling the flat and [business], especially as he lacked business acumen, and had sold them too cheaply. She also objected to his frugality and complained that he refused to buy the children their medication. She recalled 'I was boiling and very angry, and I told him I'd get the money, so he got a knife and blocked my way'. She added, 'I was

very frightened and tried to call the police but he cut the phone wire". However, she did not, at least from the writer's perspective, appear to cast him as a violent man despite the knife wielding incident and another example of having been pushed by him while pregnant. Rather, the prevailing affect seemed to be bitterness at his financial ineptitude.

Comment

[The mother]'s account highlighted the circularity that seemed to beset the spousal relationship. Her feelings of envy toward [the father]'s boys led her to feel sceptical that he would share his money with her. He in turn reacted by perceiving her as greedy and dishonest, and adopted an increasingly authoritarian stance both in business and family life. This confirmed her view of him as chauvinistic and may have contaminated her opinion of him as a father. Hence their reactions and counter reactions over time crystallised negative views of each other, which may not have a basis in reality.

190. I find Mr RM's impressions and observations to be perceptive. It is not a surprise to me that the mother did not give the appearance of regarding the father as a violent or physically abusive man because I have significant doubt that the father was violent to the mother or the children. Mr RM's observation about the importance of money in the parents' relationship is an observation which accords with my own.
191. Mr RM made the following comments about the children:-

[N]

[N] presented as a small 15 month old girl who was well dressed with blue bows in her hair. She walked reasonably confidently, ambled from side to side, and grasped objects that captured her interest. She seemed quite clingy with her mother, but not inappropriately so given the strange surroundings, and interacted with her father when the opportunity presented itself both smiling at him and pursuing him. Her behaviour was consistent with a child of her age in the sense that she is starting to feel more independent and expanding her awareness of the world through exploration and increased social relatedness.

[S]

[S] presented as an attractive 3-year old girl whose ability to separate from her mother and engage with the writer suggested an essentially secure child. She sat at a small table and proceeded to draw, alternately making direct eye contact with the writer and responding to his questions. She was alert and interested in the environment in the room. Her drawing had a repetitive, obsessive quality as she produced page after page in rapid succession of the same design of a fish.

Without prompting [S] stated “my mum want fight. She no like him”. Unsure of what she meant the writer asked her whether *she* likes him. [S] smiled, shook her head and said “no”. Continuing, she stated, “My dad punch me, sometimes pinch me”. She then went on to reveal that she had witnessed her parent’s fights, and stated, “he hit mum, so she scratch him”. When asked to indicate where, exactly, her father had punched and pinched her [S] put a clenched fist to her head and pointed to her right shoulder and neck.

As stated [S]’ drawing seemed repetitive and mechanical. Almost all were fish. She produced many in rapid succession, suggesting perhaps an attempt to deal with anxiety. In contrast, however, during other forms of play she was unable to immerse herself in the activity and behave in a concerted, constructive fashion. For example, she constructed a house of blocks, attempted to piece together a train set and sat at the dolls house for a considerable period of time. During play she would glance at the writer and smile and generally seemed free of inhibiting anxiety.

Comment

[S] conveyed the impression that she had experienced trauma in the past and was continuing to process it however had “worked it through” or mastered it to a large extent. The obvious question is whether the trauma was caused by her father and whether her disclosure can be taken at face value. The writer’s impression was that whilst she may harbour some legitimate fear toward her father, particularly as he himself confessed to having smacked her, her attitude to him has also probably been influenced by the mother. The evidence for this stems from three sources. First, [S]’ unsolicited remark made almost at the start of the interview, which suggested priming. Second, the absence of congruent affect while asserting her dislike of him. Finally an absurd rationalisation for disliking him, namely that although he shows her affection “sometimes I not like kisses”.

192. I regard it as more likely than not that the mother required S to adopt her allegations of physical abuse by the father and to report them to various professionals, who, the wife perceived, might be of assistance to her. Mr RM’s description of S’ unsolicited but early complaint to him of being punched and pinched by the father resonates with Dr I’s description of S, being ‘when the child entered the consulting room she stated her dad had grabbed her and punched her.’
193. Mr RM’s conclusion and recommendation were expressed as follows:-

Conclusion

[The father] and [the mother] clearly had a difficult marriage, almost at the outset, and it is difficult to ascertain the extent to which [the mother]’s allegations of abusive behaviour by [the father] are influenced by her emerging negatively polarised perception of him or, if the allegations are

true, the extent to which the knife wielding incident and the alleged pinching of [S'] neck was atypical behaviour in the context of an unsatisfactory marriage exacerbated by business failures.

Whilst [S'] stated aversion to [the father] and her repetitive drawing activity suggested that she had been traumatised in some way it would be simplistic to assume that this is unequivocally a response to her father's abuse. The spousal relationship was conflictual, perhaps violent at times, and this in itself may have affected [S'] emotional health. Her anger with [the father] may be the result of identification with her mother, anger over the disintegration of the family itself or a defence against her own feelings of powerlessness.

The impression conveyed during the observation was of a warm and affectionate relationship between [the father] and both girls. Although [S] did not warm to him immediately she relaxed quickly and appeared to enjoy the interaction. Accordingly the writer would suggest that unsupervised, overnight contact is appropriate for [S] however some regression may be expected. For example bedwetting may recur, there may be sleeping and eating disturbances and so on. However once uncertainties diminish she will probably adjust within three to six months.

[N] on the other hand, is unlikely to benefit from overnight sleeping contact as sleeping away from her primary home, away from her mother may be frightening for a 15 month old child. However day contact will help her maintain and enlarge the relationship with her father.

194. As indicated, I regard Mr RM's observations as incisive and I accept his opinion evidence as a correct and helpful assessment of the family as at mid-2001. I will discuss his observations and conclusions further in the context of the evidence of the family consultant, Ms Y, who prepared the family report for the present proceeding. In the meantime, however, I should make mention of some of the mother's evidence in relation to Mr RM's assessment process.
195. The mother was cross examined by the father as to why she did not mention to Ms G, psychologist, the various and numerous occasions of domestic violence including the event which precipitated the separation (which was being held down by her step sons and beaten by the father). Her response was that she refrained from mentioning particulars of abuse 'because the implications for [the father] would be worse. I did not want [the father] to go to gaol.' I do not accept that evidence. It is more likely than not that the mother was as resentful and contemptuous of the father in 2001 as I observed her to be at the trial.
196. On the second day of the hearing, the mother was cross examined as to why she did not tell Mr RM, who she saw in the capacity of a family report writer,

about particulars of the domestic violence.⁷⁴ She said that she did not understand the role of the family consultant and that she had previously kept the particulars of the abuse secret thought that she would continue to do so. She said that she had made a mistake in not providing details of abuse or a description of particular incidents and that, she believes, that if she had provided a comprehensive history:

then the court could have made a different decision and [the father] could be in gaol. After all we had been husband and wife. I knew I had to tell the truth but I still loved him. I did not see any need to be harsh – if I could keep a secret, I would. However, harsh [the father] had been to me, he was after all the father of the children. If he went to gaol, there would be no future for the children.

When pressed as to the accuracy of what history she did give Mr RM, the mother said ‘I can’t remember anything at all about what I said’ or words to that effect.

197. On the fourth day of the hearing, the mother was again taken to the history recorded by Mr RM (extracted at paragraph 189 above) and asked, if the abuse that she now claims occurred had, in fact, occurred, how she could omit details from any truthful account.⁷⁵ Her response centred on Mr RM’s demeanour and carried with it the unspoken implication that it was Mr RM’s fault that she did not provide a comprehensive account. The gist of the mother’s response was:-

I said what I was supposed to say. When I first went to see the psychologist [Mr RM] I felt that he was unfriendly. He looked at me in a very odd way. As soon as I went in, I asked him not to frighten the children. I did not understand why he regarded me in a cold state. I was in a short skirt and a blue overcoat. The way he looked at me struck terror into me and I just thought to myself, I don’t know why he would be looking at me that way.

After the report was released:-

The social worker went through [the report] with me – at least the first two pages. It was disorganised and I cried. They said, “don’t worry if you look after your children”.....

198. In connection with the mother’s recollection of the assessment by Mr RM, she volunteered that she suspected that Mr RM and the father ‘thought that I got pregnant with [S] before I came here.’ This appeared to be the mother’s rationalisation as to why Mr RM looked upon her unfavourably and made recommendations which she considered harsh and unjustifiable. Apropos the father, she testified that ‘two months after [S] was born, he began mistreating

⁷⁴ 19 February 2008

⁷⁵ 21 February 2008

her. He would grip her by the neck. We had quarrels about the child.’ When asked if the father had ever said anything to her indicating that he doubted the paternity of S, she said ‘I don’t know if he did because he spoke English and I could not understand him but in his behaviour he was very rough with the child. [...] He continued to be rough and cruel, from the time she was 2 months old to when we separated on 5 February 2001. Every day. He never stop.’ The mother’s attribution of suspicions to the father and Mr RM are, on the evidence, without foundation. The fact that she raises them seems to me to indicate a lack of self confidence and a means of justifying to herself an unfavourable assessment. The mother’s reference to Mr RM looking at her ‘in a very odd way’ is, I find, likely to reflect the mother’s dislike of being scrutinised. She made similar comments to me, of me, whilst she was in the witness box.

199. On 31 July 2001, orders were made in the Federal Magistrates Court by consent which provide for the father to have contact with S on a graduated basis to increase to alternate weekend overnight contact and to have contact with N from 10:00am to 5:00pm on alternate Sundays; changeover to be effected at the mother’s residence; and, the matter to be listed for final hearing on 12 December 2001. The mother was represented by Perry Weston, her current lawyer. The orders were consistent with the parties, and importantly, the mother accepted the recommendations in Mr RM’s report.
200. On 10 September 2001 the parties attended a Family Mediation Centre.
201. On 7 September 2001 the father vacated the family home/take-away shop in inner city Melbourne and, he asserts, by 11 September 2001, he had moved into the mother’s housing commission accommodation at C. The mother asserts reconciliation somewhat later; however, nothing turns on the conflict in evidence.
202. In September 2001, the mother told the father about her daughter Ms L who had remained in China. This was in the fourth year of their union and the mother had never confided in the father that she had had a child in China in 1984 or had ever been married or partnered. Notwithstanding this, the father’s evidence was that for some time prior he had an inkling of Ms L’s existence. He said once the mother had shown him a photograph of a young Chinese girl and inferred that she was her daughter but then retracted it and said that the little girl was someone else’s child. Then, when in the early stages of her pregnancy with N, the mother bemoaned the fact ‘that I only have girls.’
203. By all accounts, the father was happy, if not eager, to assist the mother to bring Ms L to Australia to live. He gave evidence, which I accept, that he was motivated at least in part by the thought that some odd behaviour by the mother may be attributable to her having grieved for the child she left behind

and he thought the mother's attitudes may be ameliorated if she were reunited with Ms L. I will discuss the mother's reunification with Ms L in greater detail later, in the context of parental responsibilities and capacity of each of the parents. In the meantime, I am satisfied that upon learning about Ms L, the father set about making necessary enquiries and applications in relation to Ms L including arranging for the mother to travel to China to meet her and to continue to gather material from that end necessary for the application. The mother's application was stalled when the Australian Visa Office in Shanghai discovered 'substantial differences' between the history provided by the mother and what the department ascertained as a result of its investigations.⁷⁶ The mother had misrepresented to the authorities that Ms L's father had abandoned them and also said she had no choice but to leave Ms L with 'an elderly couple' when, it appears, it was the mother who left the family and the elderly couple were Ms L's paternal grandparents. The mother also referred to Ms L's father as a criminal, for what reason I do not know.

204. On 5 December 2001, the father suffered a work accident and injured his left hand. He continued to be paid an income by way of workers' compensation under the WorkCover system for which the relevant insurer was QBE Mercantile Mutual. On 12 December 2001, the father underwent surgery on his left hand. He returned to live at the mother's housing commission home at C.
205. On 20 February 2002 the father was evicted from the residence in C. It is agreed that this occurred at the behest of the wife but otherwise the circumstances are contentious.
206. It is common ground that on the afternoon of 20 February 2002, the police were called to the home in response to a neighbour having called them to report commotion in the family home. The mother alleges that the father had beat S in the morning 'for drinking carrot juice' and then, in the afternoon whilst S slept, the husband approached the wife who was washing dishes, pulled her around by the hair and bashed her head against the wall whereupon the wife said she yelled and the neighbour called the police. The father denies any violence by him to S or to the wife. He says that he advised the mother that his WorkCover payments would be cut by 40% whereupon she became abusive and began to shout loudly that he leave the home saying 'get out, get out.'
207. The scene was attended by Victoria Police and officers of Ministry of Housing. The wife gave evidence that she complained of the husband's assault to both the police and a Ministry of Housing officer named Ms F. The

⁷⁶ Letter dated 28 February 2002 from Australian Government Family Migration section to mother's immigration agent, annexed to father's affidavit sworn 8 January 2008, page 105.

husband denied that S was in the house at the time of the commotion and gave evidence that she was at child care.

208. Like many allegations by the wife against the father, there is some common ground but then starkly contradictory versions of what happened and why. The father says that the mother was furious that his income was going to be reduced and demanded that he leave. The mother says that the father beat S and then her, and that he was evicted because of that violence. She said that money played no part in her wanting the father to leave. The different versions cannot be reconciled. One of the parties is giving evidence which is false. Having heard evidence from the father and the mother, I accept the father's evidence in this instance. I do so largely because of the following evidence which was adduced, which tends to corroborate that the father's version is correct and that the mother's is false:-

- a) The father annexed to his affidavit a copy of a letter from QBE Mercantile Mutual Ltd, dated 18 February 2002, in which he is advised that 'your weekly payments of compensation will be calculated at 60% of your pre-injury average weekly earnings from 7 March 2002... This will result in your weekly payments being reduced from \$609.00 to \$385.00.'⁷⁷ I accept that in the ordinary course of the post, a letter sent from central Melbourne to C would have arrived in C by 20 February 2002;
- b) The father annexed to his affidavit a copy of a file note produced on subpoena by Ministry of Housing in which events of the afternoon are described in detail but no mention is made of the wife alleging violence by the husband to herself or to S;⁷⁸
- c) An incident report of Victoria Police was produced which describes the police members as attending the C property for an unrelated incident and, goes on, 'heard loud verbal domestic spoke to parties. Verba; domestic only relating to finances. Ministry of Housing Officer preset also. Ascertained [the father] unauthorised ... and requested [him] to leave. [The mother] states she does not want him there. Future meeting between Ministry of Housing and [the father] planned. Nil immediate concerns re – AFM [the wife]. Nil physical assaulted disclosed.'⁷⁹
- d) The notes from Ministry of Housing referred to above⁸⁰ refer to the Ministry of Housing workers, including one whose given name is Ms F, offering 'to take [the mother] to the kinder to pick up the children and to return her home. Her children appeared to be both neat/tidy and happy

⁷⁷ Husband's affidavit sworn 8 January 2008, page 48

⁷⁸ Husband's affidavit sworn 8 January 2008, page 49 and 50

⁷⁹ Exhibit "F6"

⁸⁰ Husband's affidavit sworn 8 January 2008, page 49 and 50

children.’ The mother insisted that S had been in the home. She gave evidence that S did not attend Kindergarten after 2001. Through the assistance of the Magellan Registrar, a subpoena was issued to the child care centre. Subsequently documents were produced which indicated that on 20 February 2002, both children had been signed in to child care by the mother at 8.50 a.m. and signed out by the mother at 4.20 p.m.⁸¹ The mother was shown the records pertaining to S (Exhibit ‘F20’) and N (Exhibit ‘F21’). She said that she could not remember signing the girls in and out of the centre. I am satisfied that S was enrolled at the centre and was not in the home during the incident on 20 February 2002. The wife identified the signature for signing N in and out on 20 February 2002 as her own, but would not agree that the signatures for S were hers although she did identify her signature on some other days for both N and S. I do not find that the mother gave false evidence about not being responsible for signing S in and out of the centre on 20 February 2002. It is entirely feasible that someone could have completed it on her behalf some or even most of the time. However, in relation to the conflict in the evidence of the father and the mother, I accept that the father’s evidence is correct and that the mother’s evidence is incorrect.

209. The father’s evidence is that after being evicted from the C property he remained homeless for ten days. He found alternative rental accommodation, being a one bedroom flat in the inner city. Eventually, the father spent time with the girls regularly and frequently in accordance with the Order made in July 2001 as well as on extra occasions. Having heard the evidence of each party, I am satisfied that the father took every opportunity available to him to do things with the girls and that it suited the mother to have his assistance.
210. Insofar as the parents attempted reconciliation during this period, they did so having regard to the needs of the children and the father’s determination to be involved in their day to day care. The result was that, whilst the parties reconciled their living arrangements, there was no reconciliation of the tension and differences which had lead to so much discord. Reconciliation of the marriage was the price which the father was prepared to pay for being able to parent S and N and the price which the mother was prepared to pay for the financial and non-financial support of the father in the home and for her reunification with her daughter, Ms L, including but not limited to bringing Ms L to Australia to live.
211. On 4 June 2002 orders were made in the Federal Magistrates Court striking out the proceedings on account of their being no appearance by the father or mother. The parties had earlier had a final hearing date vacated on the basis

⁸¹ Exhibits ‘F20’ and ‘F21’

that they were attempting reconciliation. Nicola Watts appeared as the independent children's lawyer and did not oppose the proceedings being taken out of the active list of cases maintained by the Federal Magistrates Court.

212. On 15 August 2002, the mother travelled to China to see Ms L and arrange for her migration to Australia. She returned on 8 September 2002 during which time the girls, then aged four years and two years respectively, were cared for by the father. The father utilised regular child care facilities for the girls but for this time was their sole parental carer. It is most unlikely that the mother would have kept the girls, then aged four and two respectively, in the sole care of the father if he had beaten S and herself as she alleges.
213. On 7 October 2002 the parties signed a lease on the D property and the father moved in. The mother and girls remained for the time being at the C property.
214. On 25 November 2002, the mother's daughter Ms L arrived in Australia to reside permanently. The mother's evidence was that she and the girls did not move into the D property until January 2003 and that they stayed there for only two months before returning to the C property. The father's case is that the mother and the young girls moved in before Ms L's arrival in Australia and that, when Ms L arrived, she joined the rest of the family at D. I prefer the father's version over the mother's version. The mother conceded that the purpose of renting the home at D was to provide Ms L with facilities superior to those at the C property. The mother said that she did not tell Ms L that the D property was rented. The conflict of evidence is not significant in the overall case. The mother's evidence that she only lived at the D property for two months is more likely than not to be based on her inability to retain the C property on the favourable terms offered to her by the Office of Housing if she was out of occupation for longer than approximately two months or else two months was the maximum period for which the fact that she was out of occupation could go undetected.
215. In late 2002, the father returned to work.
216. In May 2003, the mother, Ms L and S and N left the D property and moved to the C property. In May 2004 the father made a notification to DHS about the mother's care of the children. This is the second notification to DHS and is summarised in the records as follows⁸²:-

DHS received a notification in regards to concerns that the children would be yelled and screamed at by [the mother]. It was alleged that [the mother] does not talk nicely to the children and that she does not tell them that she loves them. There was also an allegation that the mother has hit the children in the past, however no further details were provided. The notifier also alleged that [the father] was not the perpetrator of prior allegations of abuse, rather he was the victim.

⁸² Exhibit "C1" page 5 under "Patterns and History of Harm"

DHS assessed the information and assessed that there is insufficient information to suggest that there was a significant risk of harm to the children. DHS closed the case as insufficient information.

217. The father remained in the D property until the lease ran out on 5 October 2003 and then he moved to shared accommodation in the south east area.
218. On 13 September 2004 the mother and father signed minutes of consent orders which were made as orders on 7 or 10 October 2004 in the Family Court which provide for the parties to have joint parental responsibility, the children to live with the mother, the father to spend time with the children each Wednesday from 5:00pm to 6:00pm and on alternate weekends from 5:00pm Friday to 2:00pm Sunday and for two hours on the other Sunday additionally, for one half of the school holiday periods and for the father to be permitted to attend the children's school. There were also Orders affecting a final alteration of property interests. This is the current parenting order which stands suspended. The mother deposed⁸³ to not fully understanding what she was signing when she executed the minutes of consent orders and 'I did not seek legal advice at the time and now regret that I did not do so.' In cross examination, she admitted to having received legal advice. She also admitted that the lawyer commented that the minutes provided for more time to be spent by the father with the girls than is usual and that the lawyer urged her not to sign the document. She signed nonetheless.
219. In October 2004 the father obtained three bedroom rental accommodation at B. The mother, S, N and Ms L joined the father to reside at B from approximately 7 October 2004. The father and Ms L still lived there at the time of the trial. The mother deposed to being 'forced' to reconcile and to sign the lease for the B property. Her affidavit evidence was:-
- On October 3 2004 the Respondent came to my home demanding that I agree to rent with him a 3 bedroom house in [B]. He had been thrown out of his previous lodgings and needed me to make an application. He threatened me putting his hands around my neck and told me that he could strangle me and I would be a vegetable for life, while he would only do 3 years in jail. I was terrified and agreed to his demands to again reconcile.⁸⁴
220. As indicated, the husband's evidence was to the contrary. The husband relied on the corroborative evidence of the landlord of the B property who deposed⁸⁵ that the family, including the wife and children, first inspected the B property on 25 September 2004 and that he witnessed the parents signing the lease agreement on 5 October 2004. The husband also relied on the evidence of

⁸³ Wife's affidavit sworn 18 January 2008, paragraph 21

⁸⁴ Wife's affidavit sworn 18 January 2008, paragraph 20

⁸⁵ Affidavit of Mr V sworn/affirmed 15 May 2008

one Mr JR,⁸⁶ furniture removalist, who deposed to having moved the furniture from the C property to the B property on 7 October 2004 under the direction and organisation of the wife. The father's witnesses were not required for cross examination. Their evidence was not challenged. I do not accept the wife's allegations of being assaulted and forced to sign a lease.

221. The father alleges, and the mother denies, that on 4 October 2004 they signed an agreement. A copy of the document is annexed to the father's affidavit.⁸⁷ The agreement is expressed in English as well as in Mandarin. It reads as follows:-

We both agree to live together for the sake of the children.

We both agree that [the mother] took the children and left the family home on 5th of February 2001.

We got back together on 7th September 2001. Husband moved in to [the C property]. On 6th March 2002 wife asked the husband to move out of the house.

Again we both agreed to live together. Rented a house at [D] and together moved in on 24th November 2002.

On 26th May 2003 wife moved out of the house with the children and went back to [the C property].

The husband and all the children ([Ms L, S and N]) want to live together. So the wife agrees to rent a house and to live together with the following:

1. We both agree not to fight in the house and to avoid shouting.
2. Wife will look after all the financial matter. She will have all the Centrelink payments and will receive two hundred dollars from the husband every week. Husband will keep rest of the money (about \$70) for the car expenses and if any thing left for pocket money.
3. Wife will be responsible for paying the rent; all bills; groceries; school fees; clothes etc.
4. If wife gets a job she wants to keep all money for herself to save. Husband agree.
- 4a. Wife agree not to ask for the share of husband's personal injury compensation.
5. If the income of husband increases enough to look after the family, wife wants husband to pay for all expenses and she wants all the

⁸⁶ Affidavit of Mr JR sworn 11 February 2007

⁸⁷ Husband's affidavit sworn 8 January 2008, pages 61 to 63

money she is earning and all the Centrelink payments for her to save. Husband will agree to this condition only if he has enough wages to do that. If not the wife must continue as agreed in term no. 2 and term no. 3.

6. We both agree to go to the Centrelink by 15th September and tell them that we are going to live together by 15th November.
7. Wife agree to give up the [C property] as soon as we move to the rented house and put husband's name in to the commission house wait list.
8. We both agree to see a marriage counsellor as soon as possible for a long term counselling. We both want to save this difficult marriage and give a happy life for the children.

222. The mother denies having signed the document. She agreed that in the criminal proceedings before the County Court that she identified the document as one signed by her and the husband but, in the current proceedings, said that she was mistaken. Her evidence is that the signature which appears to be hers is not hers.

223. Ms L gave evidence that the document was written in Mandarin as well as English so that the mother could not subsequently recant on the terms of the agreement or say that she did not understand the terms expressed in English. Ms L's evidence was that the agreement was negotiated for some time and that she had been involved in the negotiations. I accept the evidence of Ms L and the father over the evidence of the mother. I am satisfied that the mother's identification of the document, on oath, in the County Court, was accurate. The wife's evidence in the County Court was:-

MR THOMPSON: It's an agreement signed by you, isn't it? Just look at the last page?---Yes, I agree, but he actually was in breach of this agreement.

HIS HONOUR; Good. We've established it's signed by [the mother].

MR THOMPSON: You agree. Okay.

HIS HONOUR: Yes. Take it back. If you look at the top of the second page, it says – and it's in English and Mandarin – “the husband and all the children, [Ms L, S and N], want to live together. So the wife agrees to rent a house and live together with the following conditions.” Correct?--
- Yes.

You have a history of shouting at [the husband], don't you? --- It's because he was assaulting me. That's why I was shouting. If I was assaulted still I was not allowed to shout?

“the wife will look after the financial matters. She will have all the Centrelink payments and will receive \$200 from the husband every week. The husband will keep the rest of the money, about \$70, for car expenses and, if anything left, for pocket money.” That’s the conditions that you made him sign, isn’t it? – Although he signed, he didn’t abide by this agreement. We moved there less than one week and then he started to assault again.

224. Before me, the mother gave evidence that on the evening of the day that she had given the above evidence in the County Court, she realised that the document which she had identified was, in fact, a document which she had never seen before and that, insofar as it appeared to have been signed by her, the signature was a forgery.
225. In cross examination⁸⁸ the mother said that she had only been taken by the barrister to the last page of the document and that she was ‘put under pressure by the judge’ to say that she executed the agreement. I do not accept that evidence. I am satisfied that the wife signed the document. I am not in a position to say whether the wife knowingly gave false evidence or has embraced make belief to the point where she now genuinely believes that she did not sign the document. Either way, I am satisfied that the terms of the agreement represented a compromise on the part of both parents and accurately set out what both parents represented to the other (and to Ms L) would be the order of life as a family. I am not satisfied that the wife’s allegations against the husband about violence and assaults by him or her at the B property have any basis in fact.
226. On 7 or 10 October 2004 the minutes which the parties had signed on 13 September 2004⁸⁹ were made as orders.
227. On 8 November 2004 the parents finally separated. The mother left the B residence without notice to the father or S, N or Ms L. Some time later in the day, the mother approached Ms L at Ms L’s place of work and advised that she was leaving but did not say where she was going nor invite Ms L to go with her. Ms L gave evidence, which I accept, that she felt utterly abandoned by her mother for a second time. The children remained in the care of the father. I accept that it is most likely that the mother was motivated to leave at this point in time because the rent for the B property had fallen due, the agreement which I am satisfied that the mother signed on 4 October 2004 obliged her to pay the rent for the property and she was not prepared to pay the rent. The result was that Ms L knew that the mother had not kept to the terms of the agreement. That may go some way to explaining why the mother left without inviting Ms L to accompany her.

⁸⁸ 19 March 2008

⁸⁹ discussed at paragraph 174 above

228. Ms L and the father gave evidence that, on the evening of the mother's departure, the father explained to the children that they would not be separated from him or each other and that they would continue to live at the B property. I do not understand how the father could have responsibly given that assurance to the children, including Ms L, given the provisions of the order made on 7 or 10 November 2004. Nonetheless, he gave it.
229. On leaving the B property, the mother moved back to the Office of Housing accommodation at C. Her furniture remained at the B property. There is no evidence of the mother having made a request of the father for some or all of the household furniture to be returned to, or made available, to her.
230. On 18 November 2004 the mother removed N from the Early Learning Centre ("ELC") and thereafter N resided with the mother. On that day the director of ELC and Ms H made a third notification to the Department of Human Services ("DHS"). A record of the notification appears in the documents produced by DHS as follows:-

DETAILS OF NOTIFICATION

- The mother came to see the kindergarten teacher at the beginning of the week.
- The mother advised that the father came into the house and threw her up against the wall and put his hands around her throat roughly and that this was done in front of the children.
- The father said for her not to move and that he was taking the children and the furniture.
- There are FLC orders in place whereby the mother is supposed to have full responsibility of the children and the father is to have contact each Wednesday evening, each alternate weekend and each other Friday – Sunday and telephone contact by agreement.
- The mother was terribly distressed with having no furniture.
- The children now live with their father in [B].
- The mother's oldest daughter who is 20 lives with her de facto father.
- It appears that the children have been exposed to the father's violence but that it was not directed at them.
- All of this has only come to their attention this week.
- The father attended today and he now reports that the mother has been abusing the children.

- The father said that every time that the mother bathes them and brushes their hair they cry.
- There is a long history of the mother living in and out of the relationship and running off to refuges and changing the children's schools.
- It seems like a very fragmented relationship with the father and mother and the father believes the mother to have a psychiatric issues.
- They feel that it is an unsafe situation for the children in both the father and mother's care at the moment.
- They will be speaking to the mother tomorrow and will explain to her about informing the FLC of the orders in place given that DHS do not become involved with the custody/care arrangements of children.⁹⁰

231. Case records of DHS detail a summary of the third notification of 18 November 2004 and the response of DHS:-

DHS received a notification in regards to concerns that [the father] had attended [the mother]'s house and had thrown her against the wall and put his hands around her throat. The children were present when this occurred. It was reported that [the father] had attended the home to remove the children from [the mother's] care and also to remove the furniture from the house. There were also allegations raised that [the mother] had been abusing the children and that she also had psychiatric issues.

In regards to the psychiatric issues, it was alleged that [the mother] was depressed to the point that she would cry and state that she would kill herself. [The mother] was alleged to not be attending doctors for any treatment. There were also concerns that [the mother] had given [N] too much medication and that [N] had to be rushed to hospital. It was reported that [N] was residing in [the father]'s care and [S] was in [the mother]'s care. DHS conducted an investigation at an intake stage. DHS contacted the [...] Early Learning Centre where both the children attended at one time or another. They never identified any concerns regarding the safety of the children and also advised that they had never had any concerns about [the mother]'s presentation. The children were reported to be comfortable in the presence of [the mother] and that there had been no change in [N]'s behaviour. It was also reported that [the mother] had reported to the Learning centre that she was not concerned about the safety of [N] in the care of [the father] as the past violence had been directed at her, not the children.

⁹⁰ Exhibit "C1" pages 55A and 56

DHS received a second notification on the 26th November 2005 with concerns that the father had been violent to the children in the past and that during the above incident of family violence [the father] had a key and scratched his daughter's face.

[The father] was spoken to about the notification concerns and he denied the allegations of family violence and informed that [the mother] was violent to him.

DHS assessed the concerns and assessed that there was no further role for child protection as the children were in the care of [the mother] by Family Court Order, and [the mother] and [the father] were no longer in a relationship.⁹¹

232. I am satisfied that Ms H thought that she was advising DHS accurately about the mother's allegations. However, the allegations are manifestly false. There was no assault by the father of the mother in front of the children, the mother left the father and the children and the household furniture was at B because the wife had taken it there and, upon her departure, left it. The seventh dot point is the earliest reference of which I am aware to the mother's allegation that Ms L and the father are involved in a sexual relationship (which I also find to be without any foundation in fact).
233. The father's evidence is that on 21 November 2004 S sustained an accidental injury to her cheek when it was scraped with a key. She went to school the next day. The mother's case is that the injury was intentionally inflicted. The mother was not present. The father was and he gave evidence. I accept that the injury was accidental and that it was minor. Insofar as the mother relies on the fact that S stated to Ms H that the injury was intentional, I do not accept Ms H's evidence in that regard for reasons which I have given above.
234. On or about 22 November 2004, the mother went to S' school. Ms R, S' class teacher, had an opportunity to witness from a distance a visit by the mother to S. Her impression was that S was not comfortable in the mother's presence, that 'something was not right' about the mother's demeanour. Ms R's statement to police contains the following account:-

The mother [...] didn't seem to be around except for her visiting the classroom and giving [S] her lunch. Another time, [the mother] visited the school and spoke to [S] outside on the brick flower bed. It was during class time. I sensed that something wasn't right just because of the mother's demeanour. I think that even maybe another teacher or adult had passed the mother and daughter and said to me that I had better check on them. I walked past them to see if [S] was okay. I couldn't eavesdrop on the conversation as it was not my business to. I walked past them to the office block, pretending I needed something and then I walked past them. [The

⁹¹ Exhibit "C1" pg 5.

mother] appeared very intense and was close to [S] hunched over. When [S] left her mother, she came back into the classroom very upset. [S] didn't tell me what had happened. I cannot specifically recall the other visits.

235. On 26 November 2004 DHS received a further notification⁹² which included that the mother 'has nothing in her family home as the father took all of the furniture' and that the 'mother has a mattress on the floor as the father has taken everything [and] the mother also does not have clothes for her daughter.' Finally, that the 'mother was quite upset when she reported that the father had tried to strangle her and that he had gotten a key and scratched his daughter's face.'
236. On 29 November 2004 the mother attended P School, in B and removed S from school. Ms R described the removal of the child to Victoria Police, and she adopted that description in her evidence before me, as follows:-

It was not long after this incident when [the mother] visited [S] at school that [Ms C], the principal informed me that [S] was going to be removed from the school but she didn't know when. In the next couple of days I went to a shop and bought a little gift bear which is what I tend to do for children leaving the school. I also bought a card for the children in the class to write in however [S] left the school so suddenly that I didn't even have the card signed by the children. On the day that [S] was leaving I handed her the gift bear in the shop bag. She was eager to unwrap the bear which was gift wrapped. She clung onto the bear. Then she asked about the phone number on the shop bag and asked whether it was my phone number. I said "No, that's not my phone number but you can ring me at school".

[Ms C] came to my classroom and said to [S] that there is someone to see you in my office. Ms [C] does this very sweetly and encouragingly. [S] said "Is it my daddy?" [Ms C] said "No, it's mum". [S] was then reluctant. [S] said "I don't want to see her". [Ms C] took [S] from the class room. [S] didn't hang back and she went quite willingly. Then a little while later I was called on the intercom to come to the office. So I came to the office. I came in the Principals' door and [the mother] flung herself at me hugging and crying. It was not what I expected. She had not been like that towards me before. [S] was on the carpet crying and seemed very reserved and quiet. [The mother] kept saying it was terrible and this was very bad. I thought they were forced tears. I didn't really make sense of it. No one really said what was happening except that they were leaving. The crying was still going on with [the mother] and [S] was still crying on the floor. I asked [S] to come over here so I could attempt to reassure her. [S] came willingly even though she was crying and upset. The mother continued to talk over us as we were speaking. She was oblivious to the sadness that the child was exhibiting.

⁹² Exhibit "C1" page 59A.

Then we went over to the classroom to get [S'] things. [The mother] stayed with [Ms C] in the office. That's when I asked [S] if she wanted to take her books and her belongings from the desk. She took her own bag and the bear but not her school gear, hat and textas and books. So we returned to the office and [S] was still crying quietly and then the four of us walked out to the school gate and I said to [S] that she would be happy to see [...] your friend? She said no [...] is the teacher. I assumed that was her teacher at her other school. Then they left the school, I believe it was mid morning.

We had to hang around till the afternoon to inform [the father] that [S] had already been picked up by [the mother]. No one had told him. He came to the classroom because [S] was not amongst the children to be picked up. We met [the father] in the junior school area. [Ms C] told him that [S] had been taken by Mum that morning.

He took it quite well as though he had been expecting it. I think that must have been the first time he spoke at length and I found it difficult to understand him. He spoke of that he didn't want to make trouble for the mother by telling all the facts of her alleged abuses in the way she has behaved to him by bankrupting him in the business purchase and lying about his behaviour. He said that she is a deeply sad and troubled person who has trouble relating to her children.

237. The mother denied that she was histrionic and insensitive to S' needs. I do not accept the mother's evidence in this regard. S had no opportunity to farewell the father or Ms L or her school friends for that matter.
238. I am confident, that the mother's removal of S in this way would have significantly undermined S' confidence in the father who, it must be remembered, had previously assured her that all the children would remain together. This removal, following as it did, on N's removal, is likely to have had a devastating impact on any sense of security that S had in relation to the father and/or Ms L. I am satisfied that, in S' perception, the mother became omnipotent and that S was completely isolated from her father. With the benefit of hindsight I regard this as a turning point for S. It is very likely that, at this point, S correctly perceived that none of the father, her school, her teachers or older sister could prevent the mother from removing her. The foundation of S and N's perception of themselves as members of the father's household were destroyed.
239. By virtue of the mother's removal of the children and the father's passive acceptance of it, the father would have lost any integrity which S had previously associated with him. It is commonly understood that where conflict between households is great (as it certainly was in this case) a child like S would be unable to integrate the competing realities required by the situation. I do not regard this turning point as involving a conscious or deliberate decision on S' part. It is a matter of psychological survival that a child will become

aligned with one household in order to survive within that environment. I am unable to identify the parent to whom S would have been most securely attached or bonded at this stage. I am satisfied, however, that S had no choice but to align herself completely with the mother. Had she failed to do so she would have been left without any parent, at least, in an emotional sense.

240. S was just approaching seven years of age. However, for abandonment had become a recurrent theme and a stark reality for her. The mother had left all three children in the father's care and had done so without explanation in the preceding year when she left the B property and returned to the C property. Then, the mother had removed N from crèche but left S with the father. Subsequently, the mother removed S and left Ms L with the father. I have no doubt that Ms L's influence on the girls has been entirely positive. However, even at six years of age, it is likely that S would have pondered how the mother had left Ms L in China many years previously and had only recently been reunited with her.
241. After the removal of the girls back to the care of the mother, the father and Ms L spent time with the girls in accordance with the Order made in October 2004. That is, each Wednesday from 5:00pm to 6:00pm, on alternate weekends from 5:00pm Friday to 2:00pm Sunday, for two hours on the other Sunday and for one half of the school holiday periods. The Order also entitled the father to attend the children's school, which he did on a few occasions. The father's evidence is that the girls were defiant in the sight or hearing of the mother but settled when away from the mother's environment. The mother's evidence, and the complaints set out in her diary, was that the girls did not enjoy spending time with the father and Ms L, that they were underfed, beaten, tired and bitten by insects. There is no corroborative evidence to support this. I do not accept the mother's allegations in this regard.
242. The father alleges that on 2 February 2005, the mother commenced to refuse to comply with the orders that he spend time with the children. The mother alleges that, on the same day, the father tried to run her over with his car between H School and her home and then verbally abused and threatened her. She alleges that he said to her: '[t]his time letting you go but I never keep away from you and I will kill you.' The father denies the incident in its entirety.
243. On 18 February 2005 the father was served with the mother's interim intervention order for which she had applied on 15 February 2005. On 22 February 2005, *Crimes (Family Violence) Act 1987* (Vic) proceedings were listed at the Melbourne Magistrates' Court and the mother's application was dismissed. There was an agreement between the parents that the time between the father and the children would recommence. To the extent that I need to be satisfied of the existence or non existence of domestic violence

(relevant as it is under s 66CC(2)(b) and s 66CC(3)(j) and (k)), I do not accept the wife's allegations. I do not accept that the father tried to run the mother down in a car or that he threatened her. However, in the context of the mother's capacity to parent, I have regard to her perceptions of the alleged incident.

244. The mother described her application for an intervention order and the outcome in the following terms to Victoria Police:-

On the 15th February 2005, I applied for a second intervention order against [the father]. The hearing was on the 22nd February 2005. I didn't get the intervention order. They need proof. I couldn't provide evidence. He tried to hit me with the car. It was about me not the children. He threatened me and said he would never keep away from me and that he would kill me. He intended to kill me with his car but there was no evidence he tried to do this. On the 2nd February 2005, on a Wednesday, the heavy rain day, he drove his car past by me very closely. Lucky I ran fast out of the way. Because he failed to kill me and he sorry for his failure, he used the opportunity when he came to pick up the kids to threaten me again. On the 3rd of February I told the police and they told me to get an intervention order. I didn't get the intervention order because my solicitor didn't defend me very well. She took over the case the day before the hearing, so she didn't know my case and didn't really defend, did nothing. I had intervention order against [the father] and he said he had an intervention order against me. I never see that order. Maybe when the Magistrate heard the two sides of the story, maybe that's why didn't get the intervention order. At hearing, [the father] told many lies and I raised my voice and Magistrate told me my voice very loud, maybe that's why I didn't get intervention order.⁹³

245. In the mother's yellow diary, which she deposed was written contemporaneously to the events, she wrote:-

22/02/05 Tuesday:

Today I come home from court without obtaining an intervention order. I felt upset and miserable. I couldn't understand why I lost in the argument and why I couldn't get the order. What a stinky and rotten bastard. I don't know how to beat him. I thought about running away to avoid him. I really want to take my girls to China and never come back again. I felt lonely and had enough of insult and misery in this foreign land. I had no choice but to seek protection from court. But I failed. Will I finally end up dying in this bastard's hands. This bastard attempted to kill me many times. What is his next move to finish me off? It is terrible. [The father] did not give me any peace around 6.00 He rang in a very loud and aggressive way, 'See I always win and you are always under my feet. You know what I will do to you.' I was shaking all over with anger and screamed back that 'you are a

⁹³ Exhibit "F4", mother's statement to police dated 2 September 2005, paragraph 27

monster, go to hell, you deserve to go under 18 layers of purgatory and etc.’ of course all in Chinese. He couldn’t understand.⁹⁴

246. Having heard the mother’s evidence, which was given extensively, I am not persuaded of the truth of her allegations about the father’s abuse or trying to run her over with a car. The sentiments expressed by her on 22 February 2005, extracted in the preceding paragraph, may be indicative of the mother believing what she wrote. It is not for me to understand or explain the mother’s behaviour. It is sufficient that I am satisfied as to how she behaved and to assess the impact on the children of that behaviour. Here, the mother made allegations of which I have no doubt the children were made aware, and the allegations were false. It is deleterious to the children to manufacture allegations for some ulterior purpose. The mother represented to the children that the law will not afford her the protection she needs. More importantly, she undermined the girls’ relationship with the father. On 27 February 2005, the mother referred to the father in her diary as ‘three times worse than the most poisonous snake.’⁹⁵ On 2 March 2005, the mother referred to the father as a ‘devil’, ‘evil’ and a ‘ghost’.
247. The mother’s complaints about the father’s care of the girls and the girls’ disinclination to spend time with the father and Ms L continued. On 13 March 2005, the mother wrote that the girls came home ‘dirty, tired and messy. I hurried to wash their hair. One child told me that they didn’t have breakfast. Sametime, N said living over there, nobody helped them wash their hair or bathe them.’⁹⁶
248. On 26 May 2005 DHS received a notification in relation to the family. This was the fourth notification. A DHS summary of involvement reads as follows:-

DHS received a notification in regards to concerns that the children presented with bruises after their weekend contact with [the father]. [The father] never gave any explanations for these injuries. The children had presented with bruising to their thighs, however the bruises were unable to be described and they were not medically assessed. There were also concerns that when the children were with [the father] they were not fed adequately. DHS contacted the girl’s school and were informed that there were no concerns regarding the children’s presentation, and that they appear to be well cared for.

DHS assessed the concerns and given the allegations were vague in that there were no description of the bruises. That there was no information to suggest that the bruises were non-accidental, DHS closed their

⁹⁴ Exhibit F17 Diary Translation page 6

⁹⁵ Mother’s translation of her diary in evidence given on 15 May 2008

⁹⁶ Mother’s translation of her diary in evidence given on 15 May 2008

involvement. The school agreed to continue to monitor should any concerns arise in the future.⁹⁷

249. The DHS file which had been reopened on 26 May 2005 and closed on 7 July 2005.
250. On the June/July school holidays 2005, the father was entitled to spend time with the children. He kept the girls for the half of the school holidays to which he was entitled and then purported to add on his alternate weekend. The result was that the girls were with the father and Ms L for ten out of the fourteen nights of the holidays. It is clear that the mother was extremely resentful of this. The children adopted their mother's sense of grievance at being over held. The father says that no one raised an objection with him at the time. He says that he had the children telephone their mother every night including the last four nights and that the mother never once asked for the children to be returned. I accept that evidence. That said, the father was not entitled to keep the children for the extra days.
251. I also accept that the reason that the mother did not ask for the immediate return of the girls was that she was not prepared to converse with the father for any reason. The girls were returned to the mother on 10 July 2005. This was the last occasion on which they have spent overnight time with the father.
252. At paragraph 24 of her affidavit sworn on 18 January 2008, the mother deposed that when the girls were returned to her from spending holiday time with the father on 10 July 2004, S was distressed and:-
- [S] told me of her fears for the safety of herself and her sister if forced to go to her Father's again. I asked her what was wrong and initially she was reluctant to tell me. She did ask me were there parts of her body that her Father should not touch. I asked her to tell me what happened but she seemed reluctant. I asked her if she would talk to someone else and [S] agreed to talk to our friend [Ms H] whom [S] knows well and trusts. [S] subsequently told [Ms H] that when she and her sister are put in the bath by their Father that he "touches her all over and touches her in her private parts". [S] said she was scared to go back and pleaded with me to not send her. I decided at that point to stop contact for the protection of my children and to make Application to suspend the existing contact Orders.
253. When the mother gave evidence⁹⁸ under cross examination by the father, she provided further detail:-

[THE FATHER]: Now, my first question is can you explain exactly what did [S] say on that day to you?

⁹⁷ Exhibit "C1" page 6 under "Patterns and History of Harm"

⁹⁸ 7 May 2008, which was the 10th day of the trial.

INTERPRETER: As soon as [S] came into the house she started crying and she cried for quite awhile. She did cry for a long period of time and without stopping and I asked her, "Why do you cry?" At that time I thought I let her cry until she finish. Then suddenly she asked me whether the female body is a secret body.

[...]

INTERPRETER: I said, "Of course when a female goes to toilet or have a shower or bath you should close the door. You've got to keep it secret." Later on I got a bit nervous because I thought, "Why did she ask this kind of question?" I was a bit worried. At that time she didn't say much. She only told me a little bit about in the bath and to be - being touched. I said to her, "If you are unwilling to tell me the whole thing you can find someone who you can trust and the - you don't want me to worry too much, you can find someone to trust."

[...]

[THE FATHER]: After that [S] came and asked you just like that? [S] asked you, "Is there anything about" - what do you say, asked about woman's body, is there anything private about woman's body. She just come and ask like that, right?

HER HONOUR: "Secret".

[THE FATHER]: "Secret".

INTERPRETER: After she started crying we sat down having a meal and she asked me.

[THE FATHER]: So after she cried. So how long?

HER HONOUR: How long did she cry for?

INTERPRETER: Quite a long period of time, about an hour or so.

HER HONOUR: During this hour you didn't ask her?

INTERPRETER: Very upset kind of crying.

HER HONOUR: Then you had dinner?

INTERPRETER: Yes. She was leaning on the wall in the sitting room crying non-stop.

HER HONOUR: Is this before or after dinner?

INTERPRETER: After she came home.

HER HONOUR: Then what happened? She cried like this for an hour.

INTERPRETER: I can't remember whether it was lunch or dinner, whether she came back in the morning or in the afternoon.

HER HONOUR: But did you have a meal?

INTERPRETER: She was still kind of short of breath due to the crying and she asked during the meal suddenly. The question was, "Is female body a secret?" I felt strange when she asked that question and I was a little bit worried. I said, "What? What do you mean?" I didn't think of anything else. She said she had baths there for 10 days and her father helped her but she is a very shy girl. I said, "You normally have bath or shower" - your Honour, because Chinese doesn't describe whether it's a bath or shower. "You normally have bath or shower yourself. Why your father help you or force you to have bath or shower?"

[...]

INTERPRETER: Your Honour, when I said "help you", because I wasn't sure whether she said "forced" her to have shower or bath, so I put both.

[...]

INTERPRETER: She just roughly described the things to me. Then I said to her, "If you want to talk to someone you can trust" - then at that time actually I was worried. [Ms H]'s (indistinct) child is a good friend of her. They play together very well.

[...]

INTERPRETER: She said her father helped her for her bath and touched her private part with finger. Then she was not willing to keep on, keep - then I said to her, "You can find a person you trust, either [Ms H] or [...]." Then she agreed. Then she told [Ms H] and she was with [Ms H] in one room. As for what she said to [Ms H] I don't know.

HER HONOUR: How long did it take for [Ms H] to come over?

INTERPRETER: About within 30 minutes. [Ms H] came to our house around 6.30, about 20 or 30 minutes later.

HER HONOUR: How did [Ms H] know to come?

INTERPRETER: As for exactly how long I cannot tell.

HER HONOUR: All right, but how did she know to come?

INTERPRETER: With the consent of [S] I rang [Ms H]. If [S] did not agree I wouldn't have rang her.

HER HONOUR: Where's the phone in the house?

INTERPRETER: Whose phone?

HER HONOUR: Your phone.

INTERPRETER: In the lounge room, the sitting room.

[...]

HER HONOUR: Where was [S]?

INTERPRETER: [S] was eating.

HER HONOUR: Where was she eating?

INTERPRETER: In kitchen area.

HER HONOUR: How far is the kitchen from the lounge room?

INTERPRETER: Next to the kitchen is the lounge.

HER HONOUR: Is there a wall or do you just - - -

INTERPRETER: Yes, there is a wall and also door.

HER HONOUR: Also a door. So what did you say to [Ms H]?

INTERPRETER: I said to [Ms H], "Can you come over for a while? [S] wants to see you."

HER HONOUR: Did you say anything other than that?

INTERPRETER: No.

HER HONOUR: This is 6.30 on - was it a Sunday night?

[...]

INTERPRETER: I cannot remember whether it was the same day or the next day. I don't remember exactly what time. But she did talk to [Ms H] and [Ms H] did come to my place.

HER HONOUR: All right. Well, let's take it a bit more slowly. You telephoned [Ms H] from the sitting room. Is this when [S] was having her dinner in the kitchen?

INTERPRETER: Yes, because we used to have meals near the kitchen. This is kitchen and there's a dining table there. I remember I made the phone call while [S] was eating her meal, but I cannot remember whether that was the same day or the next day.

HER HONOUR: Are you sure that you made the phone call, asked [Ms H] to come over, and then she came over within 30 minutes, but you don't

know whether you made the phone call and she arrived on the same day that [S] had told you about the bath?

INTERPRETER: Did I say 30 minutes later [Ms H] came?

HER HONOUR: Yes, 20 or 30 minutes after you called, she came, and she arrived at about 6.30.

INTERPRETER: What I was said was the conversation between her and [Ms H] is about 20 to 30 minutes.

HER HONOUR: So you were talking on the phone to [Ms H] for 20 or 30 minutes.

INTERPRETER: Sorry, the conversation between [S] and [Ms H]. [S] talked to [Ms H] for about 20 or 30 minutes.

HER HONOUR: Did [Ms H] arrive very shortly after you asked her to come over?

INTERPRETER: No.

HER HONOUR: What was the delay?

INTERPRETER: She has children of her own. She needs to get - - -

HER HONOUR: I'm not asking you why there was a delay. I'm asking you how long the delay was.

INTERPRETER: I still don't understand your question. Your question is how long did [Ms H] take to come to my place or when [Ms H] came to my house.

HER HONOUR: The question is, how long did she take to come to your place after you called her.

INTERPRETER: If I called her and she came straightaway with her car, it would be within five minutes.

HER HONOUR: I'm not asking you to calculate, I'm asking you to remember.

INTERPRETER: I remember she came 6.30 pm. I just can't remember whether I made a phone call that same day or the next day.

HER HONOUR: When you originally gave evidence about [S] asking you if the female body was secret, you said, "Later on, I thought about it. Why would she ask the question? At the time, she did not say much. She only told me a little about being in the bath, and I said she could find someone she can trust to talk to." Do you recall that?

INTERPRETER: Yes.

HER HONOUR: When you said, "Later on, I thought about it," was that later on in the same day that she asked you whether female bodies were secret?

INTERPRETER: Did I say I thought about that?

HER HONOUR: Yes, you did, "Later on, I thought about it."

INTERPRETER: What did I thought about? Did I say I thought about it?

HER HONOUR: Yes, you did. I want you to try to remember as hard as you can because it's very important.

INTERPRETER: Yes, she came in, she was crying, and during meal time suddenly she asked that question, and then I said to her, "If you want to talk to someone, you can." Suddenly, she asked the question about the female body. I was worried, so I thought about whether she should talk to someone who she can trust.

HER HONOUR: How long did it take you to think?

INTERPRETER: Not very long, about a second, a kind of reflection. I felt that she did not want to disclose to me a hundred per cent because she started talking and then stopped, and talking and stopped. It seems that it is hard for her to say it. Therefore, I was worried. Then I thought about it. I thought maybe it is better for her to talk to someone who she can trust instead of getting me worried. She is worried that I will be worried.

HER HONOUR: So, "Then you thought about it," was something that happened in a second.

INTERPRETER: Because she said something, then stopped, and said something, then stopped, so I start getting worried why she does not want to say things - speak out. Then I said, "Do you want to talk to someone you can trust, such as [Ms H] or me?"

HER HONOUR: Why wouldn't she have thought that she could trust you?

INTERPRETER: I don't know. It's not that she - I don't think she did not trust me, but I think she wasn't worried about me.

HER HONOUR: Okay. So did you then go to the sitting room and ring [Ms H], or did you wait for a day?

INTERPRETER: I think that we went to the church and I just can't remember whether I made a phone call or the next day.

HER HONOUR: When do you go to church?

INTERPRETER: Sorry, when?

HER HONOUR: When do you go to church?

INTERPRETER: Sunday.

HER HONOUR: Sunday what time?

INTERPRETER: Normally around 9.30 till 10.00, or sometimes 9.00 or - - -

HER HONOUR: In the morning or at night?

INTERPRETER: Sometimes in the morning, sometimes at night.

HER HONOUR: Well, is it 9.30 at night that you go to church?

INTERPRETER: No, night-time was 5.30 pm.

HER HONOUR: Well, do you recall going to church after she asked you these questions and you said, "Do you want to talk to [Ms H]?"

INTERPRETER: Can't recall.

HER HONOUR: Well, can you picture her sitting eating her dinner and you saying, "Do you want to talk to someone you can trust?"

INTERPRETER: Yes. I just can't remember whether I made a phone call to [Ms H] the same day or the next day. I must get [S'] consent to make phone call, otherwise I won't make that phone call.

HER HONOUR: If you didn't ring [Ms H] that night, what did you do?

INTERPRETER: If I didn't make the phone call that same night, I would have questioned her more.

HER HONOUR: So did you?

INTERPRETER: I just can't remember that. I feel like I did make the phone call that same day, but maybe I made a phone call the same day. I just put down my chopsticks and my bowl and went to the lounge room and made a phone call. [Ms H] came around 6.30 or 7.00 pm. [S] and [N] was eating at the dining table.

HER HONOUR: Is that your specific recollection, or is that something you're making up now as a guess?

INTERPRETER: Not hundred per cent sure. But there was this incident and [Ms H] came. She definitely talked to [Ms H]. She talked to [Ms H] for about 20 or 30 minutes and it was in the lounge room and the door was closed.

HER HONOUR: Okay. Go back to when you called [Ms H]. When you called [Ms H], how long did you talk on the telephone to [Ms H]?

INTERPRETER: Not long.

HER HONOUR: Did you describe anything about secret female bodies, showers, baths, forcing her to have a bath, crying?

INTERPRETER: Definitely not.

HER HONOUR: So if it was on the same day, how long was it between you making the phone and [Ms H] arriving?

INTERPRETER: Normally - - -

HER HONOUR: I'm not asking about normally, I'm asking about this time.

INTERPRETER: She didn't come straightaway. She said, "I need to finish the things I'm doing now, then I'll come."

HER HONOUR: So was it hours or a day?

INTERPRETER: I don't know. I can't remember. A few hours.

HER HONOUR: You can't remember if it was a few hours or a day?

INTERPRETER: I cannot remember how long, but I do remember [S] had a conversation with [Ms H] in the lounge room with the door closed. I do not know what they talked about.

HER HONOUR: You made the phone call to [Ms H] on the following day. Did she come perhaps the day after that?

INTERPRETER: I can't just remember. The problem is I just can't remember whether I talked to her the same day or the next day lunchtime or et cetera. But I do remember they talked in the lounge area with the door closed.

HER HONOUR: Yes, we've got that bit. If you did not [Ms H] until the next day, or [Ms H] did not arrive until the next day, your evidence was that you don't remember whether you asked [S] questions.

[...]

INTERPRETER: I don't whether I asked her or not, but it was a very serious matter. I was worried.

HER HONOUR: Your evidence earlier was that you would have asked her.

INTERPRETER: I think I would have an entry in my diary if she did talk to her that day.

[...]

HER HONOUR: I'm conscious of the fact that I've taken the wife through this part of her evidence, not necessarily in a non-leading way. This isn't a less adversarial trial matter but I'm concerned not to leave solely to [the father] at this stage evidence which is fairly crucial. Has anyone got any submissions to make contrary to what I've done? That I'm certainly happy to listen to.

MS WIENER: No, your Honour.

MS GLAISTER: No, your Honour.

[...]

MS GLAISTER: Your Honour has to juggle the general trial management issues and, as your Honour has said, this witness does present some challenges in that regard. I have got no objection to the way your Honour is approaching the matter.

[...]HER HONOUR: So you don't know whether or not you questioned her, questioned [S], on the night of 10 July 2005?

INTERPRETER: I can't remember.

HER HONOUR: That's okay.

INTERPRETER: Well, I remember [S] was crying a lot and she was very upset. [S] only told me (indistinct) about the 10 days she spent over there. As for the day I remember it was Sunday, I did take children to church. Whether it was in the morning or in the afternoon I cannot remember.

HER HONOUR: When you came out of church was it light or was it dark?

INTERPRETER: Should be night.

HER HONOUR: Should be light or night?

INTERPRETER: Night.

HER HONOUR: Night.

INTERPRETER: I think it's getting dark. I just can't remember clearly but I know that we went to church. I had a feeling that because [S] was really upset and she cried and cried and I did not want to ask her too many questions. I made a telephone call to child protection centre. Anyway - - -

HER HONOUR: No, wait a minute. When did you make the telephone call to child protection?

INTERPRETER: When?

HER HONOUR: When?

INTERPRETER: Just can't remember. Can't remember, I really can't remember.

HER HONOUR: Which church do you go to?

INTERPRETER: Church in [H] area over there.

HER HONOUR: On the main road?

INTERPRETER: Next to the school.

HER HONOUR: That's [H]? Right. Do you remember sitting in church thinking about what [S] had told you?

INTERPRETER: Of course I was worried. I couldn't sleep, I remember. I was asking myself what shall I do? I really didn't know what to do.

HER HONOUR: Did you think of ringing up the husband and saying what happened?

INTERPRETER: No, I didn't think of it and I dare not.

HER HONOUR: Why would you dare not?

INTERPRETER: I remember - and that organisation a person called [Ms VA] knew that matter.

HER HONOUR: Why would you - why did you say you dared not ring the husband to find out what had occurred?

INTERPRETER: Didn't think of - I knew if I ring there will be no good result. The only outcome would be a big argument on the phone. Also, I was not hundred per cent sure about that matter. I was not clear about that matter, but I believe [S] will never lie.

MS WIENER: [S] what?

MS GLAISTER: Believe [S] will never lie.

INTERPRETER: Will never lie. It must be something happened otherwise she would not make up that story. I remember there were two people came from child protection centre. They were talking to [S] in the room; one called [...], the other I cannot remember the name. I also

remember definitely she talked to [Ms H] and also in a room. As for when, I cannot remember.

HER HONOUR: Well, did [Ms H] ring them or did you?

INTERPRETER: At that time [Ms H] didn't know. I was the one who made the phone call. I just can't remember. I have no memory of whether I rang that day or the next day. I don't know which period of time I made a phone call. I don't remember whether I talked to the Child Protection Centre, those two female officers first, or to [Ms H] first. I'm talking about whether [S] talked to the child protection officer first or to [Ms H] first.

[THE FATHER]: Your Honour, can I just give her some memory.

HER HONOUR: No. You can have a good turn later. I just need to get out as much evidence as possible without confusing the witness.

Can you look at your diary entry for 10 July 2005. Can you read it out, please.

INTERPRETER: 10 July 2005, "[S] and [N] came home around 1 o'clock. Went and bought a very small hamburger for them. As soon as the children got home, they start crying very loud, and they were very, very upset, they were crying." I know, maybe for the last 10 days while they are there they were suffering. Therefore, they could not control themselves, and they start crying loudly. I did not tell them to stop crying. I just let them cry."

HER HONOUR: Stop there. What had they said to you that made you know that they had been suffering for 10 days?

INTERPRETER: No, they didn't, they were just crying. I was just thinking while they were with their father something their father did caused them to cry, and constantly crying.

HER HONOUR: But this was just something you assumed, not anything that they said.

INTERPRETER: That's what I thought, my assumption. Maybe for those 10 days they were suffering.

HER HONOUR: Because in fact that hadn't been your experience, had it?

INTERPRETER: What do you mean? I don't understand.

HER HONOUR: Moving back to 8 July 2005. Can you read out the first few sentences of it.

INTERPRETER: "Today I'm quite happy." There's nothing.

HER HONOUR: Is there no entry for 8 July 2005?

INTERPRETER: Yes, I did have an entry for 8 July.

HER HONOUR: Can you read it?

INTERPRETER: "Today I'm very happy."

HER HONOUR: What else?

INTERPRETER: "Because things - since July 1, 2005, Friday, kids went to [the father]'s place. They were sick. I was also sick for a week."

HER HONOUR: Does it say anything about the tone of the children's voice?

INTERPRETER: They were not happy.

HER HONOUR: That's what your diary entry on 8 July 2005 says, is it?

INTERPRETER: Yes, I haven't finished, but I cannot remember. Every time the kids rang me I don't know whether I should cry or laugh. I can hear from their voice that they are not happy. Because I know today they will come back. Because [S] and [N] had been there for a week.

[...]

HER HONOUR: Thanks. All right, okay, go back to 10 July 2005.

INTERPRETER: 10 July 2005.

[...]

HER HONOUR: Yes. "I let them cry" - I think you got up to the part that said, "I let them cry out".

INTERPRETER: "I didn't ask them to stop crying, just let them cry, especially [S] was crying and she was crying very hard, very upset." She said those 10 days - can I clarify with the Chinese? "For the last 10 days I have been suffering. I just want to cry, cry out. From now on I'm not going there any more. She called 'mummy'. From now on I will not go there again. While she was crying she was telling me and she cried for about 40 minutes." This is what I wrote down. She might cry for more than 40 minutes, maybe a bit longer. "However, I didn't ask [S] to stop crying. I knew that they are things in [S'] mind. If she was not suffering she would not have cried, because I knew [S] too much. I knew [S] a lot. After [S] finished her crying, asked [S], "Why did you cry and you cried so hard? Can you tell mummy?" However, [N] told me - - -

[...]

INTERPRETER: It is in English - "My daddy pinch me all time." When I saw that, I was very upset. I saw a big bruise on [N]'s head. At that time, I

took a photo. [S] only told me she will not go there again. "It doesn't matter how much pressure you put on me, I won't go there." Then I asked why. "Your father didn't treat you well?" However, [S] unwilling to tell me. Only she was upset and she had tears. After about half an hour, suddenly [S] asked me, "Girls' body and females' body, is that very secret?" I was shocked. I said, "Yes. Why did you ask that? Do you have any trouble? While you are there for those 10 days, did you wash yourself or someone else helped you?" Then [S] told me [the father] helped her wash. Wash her, I mean either bath or shower. She told [the father] before that she has grown up. "At home I wash by myself. Mummy never help me to wash. Therefore, I always wash myself." Hope [the father] can go out and let her wash herself. [S] said that not only [the father] did not listen but also he watched [S] wash. Not only that, he also helped [S] to wash often, and [S] feels very shy. Then they are not say or do anything because [S] said she is really, really scared of [the father]. After I heard that, I was very worried and very upset. I told [S], "Your father is too unreasonable. You should learn to help yourself. You have grown up and you should wash your body by yourself and also close the door not to let anybody inside, especially man. Do you understand?" [S] was just all crying, upset, and didn't tell me anything else.

HER HONOUR: When did you write that entry?

INTERPRETER: At night.

HER HONOUR: Which night?

INTERPRETER: That night.

HER HONOUR: Would you say that it is accurate, being written so close to it having occurred?

INTERPRETER: Yes. Whatever [S] said I wrote down, and when [S] came in, how she was crying, I wrote down.

HER HONOUR: It doesn't mention that you rang [Ms H].

INTERPRETER: No, not here. I said I cannot remember.

HER HONOUR: Isn't your diary a record of important events for a day?

INTERPRETER: Maybe not. I just can't remember when I called [Ms H]. Really, I can't remember. What I mean, after a while was either a few weeks later or just a month later or a day. I can't remember. Also she talked to two female officers from child protection centre. As for - - -

HER HONOUR: When you set out in your diary entry of 10 July 2005 what was said to you and what you said to [S], is that word for word what was said?

INTERPRETER: Roughly.

HER HONOUR: Well, do you think there is any more accurate statement of what occurred on 10 July 2005 than that which is in your diary?

INTERPRETER: Maybe something was recorded later on or I had already told some - certain organisations.

HER HONOUR: Why would something that is said or written later be more accurate than what you wrote on the night of 10 July?

INTERPRETER: I don't understand your - - -

HER HONOUR: Well, I'm trying to find an accurate statement of what happened on 10 July because you say largely you cannot remember.

INTERPRETER: As for 10 July whatever [S] told me I wrote it down.

HER HONOUR: Did you write it down in your diary? Is that what you've just read out?

INTERPRETER: Maybe, yes.

HER HONOUR: Well, you know there's a difference between "maybe" and "yes"?

INTERPRETER: I don't know, yes.

HER HONOUR: You don't know that there's a difference?

INTERPRETER: I recorded roughly the things happened. As for whether it's complete or not I don't know.

HER HONOUR: You don't - - -

INTERPRETER: I cannot recall. Roughly the things happened, I wrote them.

254. DHS records⁹⁹ indicate that on 19 July 2005, the mother's domestic violence worker, Ms VA, made a notification. She stated that she saw the mother and girls once or twice a month and that she had spoken with the mother and S the previous day. She is recorded as saying:-

- Children live with mother [...]
- Mother is aware of notification being made
- She has been working with mother for several months

⁹⁹ Exhibit "ICL18"

- Mother is victim of domestic violence from children's father
- Mother has residency of both children
- Mother is Chinese, Father is Indian
- History of father being physically abusive towards mother resulting in mother attending refuge system with children to get away from him.
- She sees mother once or twice a month, she sees her less regularly as issues re original referral to service have been addressed i.e. mother no longer residing with father
- She saw mother yesterday and also spoke directly with S
- [S] is unhappy about going to her father's house for access
- Access occurs every fortnight, overnight
- [S] told the notifier and her mother that she does not like going to her father's house because he hits and pinches her when she is naughty
- He hits and pinches her on the legs or bum
- Mother told notifier that children have returned from access with bruises
- They do not have any current bruises
- [S] also told notifier that her father washed her in the bath tub and she does not like this
- [S] told her father that she can do this by herself but he insists on washing her
- Father does not allow girls to be washed at the same time
- [N] has also stated to her other that she does not like her father washing her but she can't do this herself
- [S] and [N] have not been able to verbalise why they didn't like their father washing them
- [S] has stated that she would prefer her father's partner to wash her instead of him
- [S] stated that she feels different when her father washes her to when her father's partner washes her
- Notifier suggested to [S] that she help her father wash [N]. [S] stated he won't let her stating that the bathroom is too small

- [N] has returned from access with soiled underwear. [N] has stated that she is scared of her father
- This has been happening since the end of last year
- [S] wouldn't give any information to notifier when she tried to ask her questions about this.¹⁰⁰

This is the first complaint or notification received after 10 July 2005.

255. The DHS worker, Ms AN, spoke to the children's school principal, Mr DP who advised that 'both children were well presented, immaculate. No concerns re issues of neglect, physical abuse, sexualised behaviours. Has never seen any bruises on the children.'¹⁰¹

256. The DHS records indicate, but the mother denies, that at 9.48 a.m. on 19 July 2005 the mother spoke to Ms AN by telephone with a Mandarin interpreter. The notes entered by Ms AN include the following :-

Mother thinks that it is ok for father to wash [N] as she is younger than [S]. Mother stated that children do not have any bruises and this has not happened in the past 2 weeks. Mother stated that she has taken photos of bruises on her children in the past. Children have had bruising on their bottom and back of the thighs in the past (this year).

[S] has told her mother that her father pinches or hits her when they disobey him. Mother stated that father is too strict with the girls and reprimands them if they do not want to go to church for example.

[The father] kept children for ten days during school holidays and was supposed to return them after the first week.

Mother can't understand why the girls dislike their father so much. Mother has tried to talk with her children about this and tell them to respect their father however they still say that they don't want to see him.

Mother stated that father has breached access before. Mother has not spoken to solicitors about her concerns. Mother not sure what father will do if she does not let father have them for access this weekend.

Mother stated that she doesn't mind children seeing their father but wants to understand why they are so fearful of their father. Mother not concerned about children's safety in father's care.¹⁰²

257. As indicated, the mother denies that the recorded telephone conversation ever took place. She says that there was no conversation at all. The protective

¹⁰⁰ Exhibit "ICL 19" paragraph 9.1

¹⁰¹ Exhibit "ICL18"

¹⁰² Exhibit "ICL 18" paragraph 9.4

worker, Ms AN, was called to give evidence and was cross examined.¹⁰³ She testified that she was 'sure' that the conversation took place. She said that the statement '[m]other not concerned about safety [of children] in father's care' was a summary of a series of questions. Ms AN gave evidence that the initial report by Ms VA 'detailed concerns indicative of the mother being worried about the safety of the children in the father's care but her conversation with the mother did not disclose concerns at that level.' It is part of the statutory duty of a protective worker to investigate matters and to record those investigations for reference by herself and by other protective workers. The telephone call as recorded falls at a sensible time in the various communications. I am satisfied that the conversation occurred and that the note of the protective worker is a reasonably accurate account of the contents of the conversation.

258. On 21 July 2005 the girls were interviewed by SC T at school, without notice to mother or the children. It was a requirement of DHS that a school representative attend. In this case, it was the school principal, Mr DP. The summary police report includes the following details of the interview with N (then aged five years):-

21/07/05 [Senior Constable T]

0935 HRS: Attended at [H] School. Debriefed by Principal – [Mr DP] who stated both subjects are well-adjusted children that present themselves as happy, clean, quiet and attend school regularly and on time. Nil injuries sighted by school staff members. Principal stated a couple of months ago the mother brought [S] to school and said in his presence to [S] "Tell him, Tell him". [S] then told the Principal "I need to speak to a counsellor". Principal asked "What about?" [S] said "About what my dad does – hitting me".

Principal states the incident of the hitting happened approx. two years ago. Principal organised for independent counsellor/mediator for the parents (free service) and provided vouchers for taxi transport. Mother did not attend counselling service. Mother and [S] have not mentioned this since.

0945 HRS: S/C [T] conducted discl I/V with [N] (Subject 2). [...]. Principal present during disc I/V.

[...]

22/07/05 [SC T] – Updating narrative from discl I/V's conducted on 21/7. During discl I/V with [N] she initially stated she feels happy at her dad's place. [N] stated she was naughty at her dad's place and said "I hurt my dad". She explained this to mean that when she fell asleep she would kick her dad in her sleep as she shares a bed with her dad and sometimes her big

¹⁰³ 25 July 2008

sister. Her dad tells her in the morning that she has kicked him during her sleep and that he gets mad.

[N] went on to say that dad is naughty as well. She described him being naughty by pushing her sister ([S]) down once on the bed and stated him kicking her. As she went on she stated dad was kicking in his sleep and snoring.

[...]

When [N] was asked if there was anything else that was naughty, she stated "Dad pinches me and hits me. It's painful". This occurred a long time ago. [N] states that Dad pinches her on the legs and indicated her left knee and sometimes on her hand. Further stated he hits her on the leg and indicated her right knee. Further stated her dad gets a bamboo stick and hits her with it leaving a black mark on skin. Unable to state where he hits her on her body with bamboo stick.

Conclusion of disc I/V with [N] – understands truth and lies. [N] states at the end of the I/V that she is only a "little bit happy" to go to dad's place and does not feel safe. [N] was unable to particularise any incidents but stated they occurred at her dad's place in [B] – U/K how long he has been at this address.¹⁰⁴

259. The summary report includes the following details about the police interview with S (then aged seven years) on 22 July 2005:-

1015HRS: S/C [T] conducted Disc I/V with [S] (Subject 1). [...]. Principal present.

During disc I/V with [S], stated she does not like going with Dad because he has strong hands and sometimes he hits me and lies to me. Further stated he hits me when he gets mad for no reason. Stated he hits her on the face whilst he was holding his keys and scratched her face with the keys. Stated she started crying and her dad tried to make her dance but she was still crying. Then her dad hit her again on the head with his fists two times. [S] did not remember when this happened but it happened at [the B property]. [S] further stated her dad sometimes hits her on her hand & bottom, and sometimes pinches her for no reason but that he is mad at the time. [S] doesn't like her dad as he doesn't let her go to children's parties when he has custody and because he acts in bad ways and tells lies.

[S] stated she cries when she comes back from dad's place. She says that mum tells her dad is not a nice man and that she has to like him because he is her dad. Mum takes [S] to a doctor in [...] and mum takes photos of bruises. (approx 3-4 photos).

¹⁰⁴ Exhibit "ICL9", page 5

Conclusion of disc I/V with [S] – understands truth and lies. [S] feels worried about going to dad's place. She was concerned that dad took the furniture. [S] is reportedly a quiet child that hardly says anything. During the disc I/V [S] talked continuously and only about the things she did not like about her dad. [S] was also concerned about what [N] had said to police but police informed her that this was confidential as was her conversation.¹⁰⁵

260. Following the interviews at H School, one of the attending police members telephoned Ms AN, protective worker, and reported that both girls said that the father pinches them when they are naughty (but neither said when), N is not scared to go to the father's home and S said that she does not wish to see him at all and that he lies to her and will not let her see her friends. The police woman said that she had been present for the interview and that the 'information by [S] sounded rehearsed' and that S did not mention the bathing incident at all.¹⁰⁶ The account provided to the protective worker appears to be an accurate summary.

261. I accept that when interviewed by the police on 22 July 2005 S did not refer to the father having touched her inappropriately in the bath or at all. I have considered whether the presence of the school principal, Mr DP, could have been off putting for S and led her to feel inhibited about talking about something as private as being touched, as the mother alleges. However, I am unable to accept that. It is most likely that if there had been an incident, it did not worry S and she therefore did not think to raise it.

262. The DHS records disclose that on 22 July 2005, being the day after the police interview with the girls, Ms H (the mother's friend) telephoned DHS, spoke to Ms AN and said:-

[Ms H] advised that she left message for writer as she has concerns about [S]. [Ms H] advised that last year [S] had refused to be bathed at school and stated to [Ms H] "that people can hurt you in the bath".

She advised that she had made a notification last year when children were residing in separate locations, one with the mother and other with the father.

[Ms H] advised that she and another parent from the school had assisted the mother to relocate last year when she had left her husband due to domestic violence.

[Ms H] stated that she is concerned that the principal would not give an accurate depiction of what is happening for these children, and described him as socially inept. [Ms H] claimed that she told him about the statement

¹⁰⁵ Exhibit "ICL9", page 6

¹⁰⁶ Entry in DHS records made by Ms AN on 21/7/05 at 1.22 p.m. found at exhibit "C1", page 49

that [S] had made last year and he had told her not to notify to child protection. Principal also did not advise the children's teacher of the domestic violence and had allowed the father to collect the children from school whilst this was occurring.

[Ms H] stated that [the mother] is concerned about sending the children to access this weekend and father usually pick them up from school. Pw advised that child protection and the police have advised [the mother] to call her solicitor about this given there are current access conditions through FLC.

[Ms H] stated that mother appears worried about what might happen and [S] is refusing to go with her father today.¹⁰⁷

The conversation between Ms AN and Ms H is noted as having taken place as a return call placed by the protective worker at 1.16 p.m. on 22 July 2005. The fact that it was a return call indicates that Ms H initially called earlier. The time of day is significant because Ms H's evidence, as given initially, was that S stated 'people hurt you in the bath' in the later afternoon or early evening of 22 July 2005, the timing of which is clearly inconsistent with her having reported the statement to DHS much earlier in the day. In oral evidence before me Ms AN's note taking was not impugned. She testified that her note was accurate. Ms H could not explain the discrepancy. I accept that Ms H called DHS shortly after 1.00 p.m.

263. Under cross examination the wife gave a different version of Ms H's involvement from what she deposed in her affidavit sworn 18 January 2008.¹⁰⁸ On 30 August 2005 the father filed a contravention application alleging that the mother had contravened the consent orders made on 7 October 2004 by failing to make the children available during the times he was authorised to spend time with them from the date of 2 February 2005.
264. On 2 September 2005 the mother completed and signed a statement to Victoria Police, following interviews conducted over a number of weeks.¹⁰⁹ The statement deals with a number of allegations of abuse directed at herself and the children.
265. Between 8 September and 19 September 2005, the father made a sixth notification to DHS alleging that the mother has mental health issues, and that she was 'depressed, angry and shouts at the children.'¹¹⁰
266. On 19 September 2005, S and N gave their evidence for the County Court trial in the form of a videorecorded VATE tape. They were interviewed by SC T.

¹⁰⁷ Exhibit "C1" page 50

¹⁰⁸ On 7 May 2008 under cross examination by the father.

¹⁰⁹ Exhibit "F4"

¹¹⁰ Exhibit "C1", p 6

267. Under ss 37B(1)-(2) of the *Evidence Act 1958* (Vic), the evidence in chief of a witness for the prosecution who is under the age of 18 years may be given (wholly or partly) in the form of a VATE tape in a legal proceeding relating to a sexual offence. A VATE tape is an audio or video recording of the witness answering questions put to him or her by a person prescribed for the purposes of the section.
268. Both of the girls seemed fairly comfortable speaking to SC T. They had an appreciation of the purpose of the interview and appeared to have a developed understanding of the difference between truth and lies.
269. S was the first to be interviewed. When asked the purpose of the interview, she commenced a long monologue about the reason being to 'talk about that man, my father, because he made lots of trouble.' She proceeds to enumerate how her father had hit her; that he had hit her with keys; that he scratched her with keys; that he bruised her, and that he forced her to dance. She described feeling frightened and that she had cried after he had punched her on the head. She re-enacted the punches and showed her cheek where she described he had slapped her.
270. She described both herself and her sister as 'suffocating' and made reference to her concern 'if we don't win this case.'
271. The tape records her continuing to make reference to him hitting them every time – 'any time we go there he just hits me '...sometimes with a closed fist.' S also makes reference to a bath incident. This incident, according to her interview, is described as follows:
- Well, usually – usually, I always push him out, and I always do it myself. But for ten days now he just watches me. And I don't like it. And he – he teach me how to... - using these two fingers (*indicates index and middle of right hand*), he said – he said, 'You mu-, you must learn how to do it.' And I say, 'I don't know how to do it.' He doesn't listen, he just pushes hand inside and it went really in there (*gestures*). And I hate talking about that, it makes me cry. Taki – talking about these things makes me upset.'
272. She demonstrated washing between her legs to show what he does. With a reasonable level of specificity, S described where he was positioned near the tub and the proximity of the shower curtain. She specifically says that he touched her on the inside of her vagina.
273. N was then interviewed by SC T. Understandably, she was less articulate due to her age, but seemed comfortable enough to explain her experiences of physical violence at the hands of her father. Notably, she commenced with a similar understanding to her sister of the purpose of the interview: -

SC [T]: Tell me what you've come her to talk about today.

[N]: Talking about what he does wrong and my mum does nice.

SC [T]: Mm'm. When you say, 'What he does wrong'---

[N]: Yeah.

SC [T]: Who are you talking about?

[N]: That man, my father. He – everytime – like, everytime we get hurt – like, we – I get hurt and my sister gets hurt, he always like, hits us and my mum always never does that, but he always does that. And a long time ago, he hitted my sister with a key, and scratched here (*indicates right cheek*) on the face. And---

Then he was saying – because she was – my sister was crying. Then he was saying, 'dance, dance,' to my sister and she was crying then. Then she didn't, then he – he throwed the keys on her face and scratched her here (*indicates right cheek*).

He rubs us and play with. And he makes a little more wetter and doesn't look like it but then he rub her and really cold.

SC [T]: So, who's – who's he rubbing?

[N]: The bath cover. He makes a bit wet then rubs us.

SC [T]: Rubs who?

[N]: Yeah.

SC [T]: Who are you talking about?

[N]: About me and his.

SC [T]: Are you talking about yourself?

[N]: Yeah.

SC [T]: Okay. So, where does he – where – where does he rub this bath cloth?

[N]: He rubs it just on our body, and also on our leg. He just puts the pants – our pants on.

274. It is unfortunate that the camera does not allow a clear view of either S or N's faces. This deficit does not assist an assessment of their affect nor does it allow for much detail to be gleaned of the girls' emotional response to the material they are disclosing. A clearer view is obtained of SC T.
275. A number of incidents of physical abuse of both of the girls were described, yet they were described in a manner which appeared to lack affect. Most

certainly, the girls each described an incident involving keys where the father scratched S with the keys and an incident in the bath which amounted to sexual abuse of S by digital penetration. There did not appear to be much engagement by the SC T with the girls as part of the interview. The girls were not asked more probing questions which might have elicited more detail about the incidents that might have assisted the court in determining their veracity. Unfortunately, this lack of engagement and detailed questioning, bearing in mind the artificiality of such an interview, does contribute to my own difficulty in making a conclusive finding in relation to the events. What does seem evident is that the children are hostile to the father regardless of whether the content of the allegations have any foundation.

276. The children seemed to be consistent in their description of the physical assaults and the key incidents had an air of reality, notwithstanding the lack of affect. It was clear that both the girls felt strongly about relaying the information. This was apparent when SC T took a break from the interview and told N she would be back in a few minutes. N continued to be recorded and said:

Hello. Hello. Hello, hello, hello. And he like, yeah. all this trouble. And he always trouble when he – he pulls our hair and he scratches us. And he like, pinches us. And we – yeah. You know. Yeah. Yeah. He - - - ¹¹¹

277. It is likely that the children's affect is informed by cultural factors. The mother, Ms L and her sisters were all quietly spoken and to that extent the women each share a similar demeanour in their communication. In that context, and with the limitations of the medium, I cannot be satisfied that the statements made by the girls were based on their experiences rather than on what the mother had told them to say or, perhaps most likely, what the mother had told them and they now believe occurred.
278. On 10 October 2005 the mother filed an application to suspend all parenting orders. On 30 November 2005 those proceedings were transferred to this Court.
279. On 28 April 2006 the girls were interviewed, at home, by DHS in the presence of the mother. The relevant case note record appears as pages 27 to 31. The girls' statements of the father's conduct escalated significantly. The girls had not seen their father for over eight months. I accept the accuracy of the case note insofar as it is a record of what the children said. I do not accept that the children's allegations reflected their personal experience.
280. A family report, written by Ms Y, was released on 22 November 2007. Ms Y conducted individual interviews with the mother, father, N and S, as well as

¹¹¹ Exhibit "M2", page 24.

with their siblings Ms L, J and E. She observed interactions between the parents and the girls, and had access to the family report by Mr RM and the psychological report by Ms G.

281. The family report outlines much of the history which I have already covered in my reasons. I will relay the most relevant aspects of the report insofar as they relate to the report writer's findings and recommendations.
282. The report writer described the father as presenting in a 'highly anxious and animated manner, [he] spoke very quickly, which at times caused his speech to become incoherent, and his overall presentation to become concerning.'¹¹² The writer noted the father's apparent intentness to discuss his 'alleged financial victimisation' by the mother.¹¹³ Most concerning to the writer, was her observations of the father upon seeing S and N. This interaction is described as follows:-

[The father] presented in a highly excited and animated state when preparing to see the children. The writer acknowledged to [the father] that he must be feeling very excited about seeing his daughters given he had not seen them since 2005, however asked him to compose himself as both [S] and [N] were very fearful of seeing him. The writer specifically asked [the father] to enter the playroom in a calm and gentle manner. Although [the father] indicated that he understood this request, upon entering the playroom he rushed to [N], who was seated in a chair, grabbed onto her waist, pushing her back and forth and began repeating in a loud voice '*[N]...it's your father... it's all over now... I'm innocent... the court case is all over... it was all lies.*'

Both girls began to cry silently and appeared frozen in their chairs. They flinched and turned away each time [the father] touched them and would not make eye contact with their father. [The father] did not appear to comprehend the level of his daughters' distress and continued to talk to them about the ongoing litigation and his criminal hearing. The girls became so distressed that the writer had to terminate the observation which lasted less than 5 minutes... [The father] did not seem to comprehend the girls presentation, stating, '*they were not upset... they were crying because they miss me.*' [The father] then requested that the girls see [J]. The writer asked [N] and [S] if they would be prepared to say 'a quick hello to [J]' however they were both extremely upset. They refused to see [J], were sobbing and asking for their mother.¹¹⁴

283. In contrast to her description of the father, the report writer describes the mother as presenting as a 'quietly spoken and mature woman who from the outset stated "*my whole heart is with my children... I wanted them to see their*

i) ¹¹² Family Report dated 22 November 2007, pg 3.
 ii) ¹¹³ Family Report dated 22 November 2007, pg 4.
 iii) ¹¹⁴ Family Report dated 22 November 2007, pg 7-8.

father but not now... he has done too many bad things".¹¹⁵ The report includes similar allegations of physical and sexual abuse of the children as have been covered in my reasons. In addition, the writer notes the mother's serious allegations of emotional and physical abuse perpetrated by the father against her, including pouring hot oil over the mother whilst she was pregnant with N, threatening to kill the mother and raping her several times throughout their marriage.¹¹⁶ She also recounts the mother's depiction of the relationship between Ms L and the father as follows:-

[The mother] believes that [the father] has forced Ms [L] to have a sexual relationship with him in order for her to be allowed to continue living in his home and to obtain his financial assistance. She stated *'he has convinced [Ms L] I don't love her and she sees no option but to stay with him and do what he says... just like I did... it is very sad... he has made her a victim to him... just like he made me.'*¹¹⁷

284. Ms Y observed a 'loving and close relationship' between the mother and the girls, and noted the mother's deep concern regarding the impending meeting between the girls and the father.¹¹⁸
285. Ms Y records, without commenting on, Ms L, E and J's denial of the mother's allegations, and notes that 'regardless of the outcome of [the father]'s application, the sibling and stepsibling relationship is often the most enduring relationship in one's life.'¹¹⁹
286. Ms Y's recommendations are ultimately based on her concern for the welfare of S and N. She notes that:-

The fact that there is insufficient evidence to find [the father] guilty in a criminal court does not, in the writer's opinion, automatically mean that the abuse has not occurred. What cannot be disputed however is that [S] and [N] are very traumatized by their belief that [the father] has been and will continue to be a direct source of harm. It is possible that [the mother] has contributed significantly to their world view, however, it is equally possible that their presentation is as a result of the actual abuse perpetrated by their father, which they have continued to disclose to professionals.¹²⁰

287. Ms Y's recommendations may be summarised as follows:-

- The mother have sole parental responsibility for the children, and the children continue to live with her;
- If the father's parenting time is re-instigated, that this occur on a supervised basis only, at a service such as Centacare, X;

iv) ¹¹⁵ Family Report dated 22 November 2007, pg 8.

v) ¹¹⁶ Family Report dated 22 November 2007, pg 9.

vi) ¹¹⁷ Family Report dated 22 November 2007, pg 12.

vii) ¹¹⁸ Family Report dated 22 November 2007, pg 13.

viii) ¹¹⁹ Family Report dated 22 November 2007, pg 25.

ix) ¹²⁰ Family Report dated 22 November 2007, pg 23.

- N and S undertake counselling to support them with their reconnection to their father (such as through the Children's Protection Society);
- The father's parenting time recommence subject to the advice of the Children's Protection Society or a similar service;
- The father engage with the Men and Relationships Services (MARS) program at the Children's Protection Society, or a similar service;
- E, J and Ms L undertake counselling to assist in their reconnection with their sisters.
- The mother and father undertake counselling.
- A s 65L supervision order be made.¹²¹

288. Ms Y was cross examined extensively on her family report.¹²² In her cross examination, Ms Y conceded that it was possible that the children had been influenced by the mother. Furthermore, Ms Y deposed that if the court were to find an absence of unacceptable risk, that 'it would be imperative that [the children] were offered the opportunity to have regular interaction with the father and siblings,'¹²³ and that this should be facilitated through a family therapy service such as Centacare.

289. In cross examination by counsel for the mother, Ms Y rejected the proposition that she had accepted the mother's allegations that the father was 'an abuser' at face value.¹²⁴ However, I am unable to accept this. Ms Y's family report, including her final recommendations, were more consistent with a prima facie belief that the allegations against the father were true than with any other outcome. This is especially evident in her recommendation that 'in the event that the Court finds '[the father]'s parenting time should be re-instigated, then the writer believes this should occur on a supervised basis only.'¹²⁵

290. Because of the limitations of Ms Y's report, I am unable to accord it much weight.

Legal principles in parenting matters

291. In determining the applications I must regard the best interests of S and N as the paramount consideration. The aims and object of the legislation are to 'ensure that the best interests of the children are met by:

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

x) ¹²¹ Family Report dated 22 November 2007, pg 27-28.

xi) ¹²² Ms Y was cross examined for approximately two hours on 30 July 2008, and approximately five hours on 31 July 2008.

xii) ¹²³ Transcript of proceedings, 30 July 2008, pg 48.

xiii) ¹²⁴ Transcript of proceedings, 30 July 2008, pg 55.

¹²⁵ Family Report dated 22 November 2007, pg 27, paragraph 55.

- (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.¹²⁶

292. The objects are the core values of the legislation. Sub-section 60B(1)(a) of the Act has particular relevance in these proceedings. It emphasises that the involvement of both parents in the children's life should be meaningful as to its quality and to the maximum regularity and frequency permitted by the child's best interests. Sub-section 60B(1)(b) is also of prominent import and, in this case, it requires the assessment of risk to which S and N will be exposed as a consequence of the alleged behaviour of both parents. That is, the mother alleges that the father has sexually and physically abused S and N and caused them to be exposed to his assaults of her and is likely to do so again whereas the father alleges that the mother would, if she could, sever any relationship between S and N and the father to an emotionally abusive extent.

293. The principles which underlie the objects are more specific but not exhaustive. They are that, except when it is or would be contrary to the child's best interests:

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children; and
- (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).¹²⁷

294. In proceedings under Part VII of the Act, the best interests of the child are the paramount, but not sole, consideration.

¹²⁶ s 60B(2) *Family Law Act 1975* (Cth).

¹²⁷ s 60B(2) *Family Law Act 1975* (Cth).

Determining the child's best interests

295. In determining what is in S and N's best interests, I am required to consider two primary considerations and several additional considerations listed in s 60CC of the Act. The primary considerations are set out in s 60CC(2) and are described as follows:-

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

296. This is a case where both of the primary considerations are relevant. However, the issue of sexual abuse and physical assaults is of great significance and should be dealt with first. After doing so, I will make an assessment of what benefit there will be for S and N of having a meaningful relationship with both parents.

Protection from harm – as a primary consideration

297. S 60CC(2)(b) of the Act recognises the necessity of protecting children from physical or psychological harm, including being exposed or subjected to abuse, neglect or family violence.

298. The term, 'abuse' is narrowly defined in s 4 of the Act as 'an assault, including a sexual assault, of the child'¹²⁸ or as the involvement of the child in a sexual activity by a person, where the child is used either directly or indirectly as a sexual object and where there is an unequal balance of power between the child and that person.¹²⁹

299. These proceedings are brought under Part VII of the Act. Pursuant to s 60CA, in deciding to make any parenting order in relation to S and N, I must regard their best interests as the paramount consideration.

300. Subject to the best interests of the child being the paramount consideration, s 60B sets out the aims and principles of Part VII. The section provides the context within which the relevant best interests factors listed in s 60CC are to be examined and ultimately weighed. The importance of s 60B factors varies from case to case.

301. Section 60B defines the objects of Part VII as to 'ensure that the best interests of the children are met' by:-

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

¹²⁸ s 4(a) *Family Law Act 1975* (Cth).

¹²⁹ s 4(b) *Family Law Act 1975* (Cth).

- (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

302. The objects may be regarded as the core values of the legislation. Sub-section 60B(1)(a) of the Act has particular relevance in these proceedings. It emphasises that the involvement of both parents in the child's life should be meaningful as to its quality and to the maximum regularity and frequency permitted by the child's best interests.

303. The principles which underlie the objects are more specific but not exhaustive. They are that, except when it is or would be contrary to the child's best interests:-

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children; and
- (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

304. In proceedings under Part VII of the Act, the best interests of the child are the paramount, but not sole, consideration.

305. In determining the best interests of a particular child, I am required to consider two primary considerations and several additional considerations, listed in s 60CC of the Act.

The primary considerations

306. The primary considerations echo the first two objects set out in s 60B of the Act. The primary considerations are set out in s 60CC(2) and are described as follows:-
- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
 - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
307. This is a case where both of the primary considerations are relevant although, by the end of the trial, neither party asserted that S and N would not benefit from a meaningful relationship with both parents.

Protection from harm – as a primary consideration

308. The second of the primary considerations mirrors s 60B(b) of the Act and recognises the necessity of protecting children from physical or psychological harm, including being exposed or subjected to abuse, neglect or family violence.
309. The term, 'abuse' is narrowly defined in s 4 of the Act as 'an assault, including a sexual assault, of the child'¹³⁰ or as the involvement of the child in a sexual activity by a person, where the child is used either directly or indirectly as a sexual object and where there is an unequal balance of power between the child and that person.¹³¹
310. 'Family violence', however, is given a broader definition as actual or threatened conduct toward another person, their family or their property, which causes reasonable fear or apprehension for their safety and wellbeing.¹³² A notation to the definition in the legislation adds that the standard for such reasonable fear or apprehension is that of the reasonable person in those same circumstances. 'Neglect' is not defined in the Act.
311. This factor also requires a prospective evaluation. As such, I must assess the future risk of exposure of S and N to physical or psychological harm and formulate orders which protect them from that harm.
312. There are numerous authorities in relation to the principles relevant to the determination of cases involving allegations of sexual abuse of a child. Brown J extensively discussed the principles applicable to sexual abuse cases in the matter of *Hemiro & Sinla*.¹³³ Her Honour's analysis and discussion is

¹³⁰ s 4(a) *Family Law Act 1975* (Cth).

¹³¹ s 4(b) *Family Law Act 1975* (Cth).

¹³² s 4 *Family Law Act 1975* (Cth).

¹³³ *Hemiro & Sinla* [2009] FamCA 181, paragraphs 20 to 51. For ease of reference those paragraphs are extracted and annexed to these reasons as Annexure "A"

detailed and comprehensive and I adopt it in this judgment and incorporate it by reference.

Finding in relation to abuse allegations

313. The wife alleges that the husband was physically abusive to her in that he assaulted her on numerous occasions from 2000 onwards. These included the wife's allegation that the husband directed his adolescent sons to tie her up and then hit her with sticks, causing the bruises with which the mother presented to Dr I in 2001. For reasons that I have stated above, I do not accept that the husband was a perpetrator of physical violence against the wife.
314. I am satisfied that there was domestic violence but I regard it as more likely than not that it emanated from the wife rather than from the husband and that the husband engaged in it only to the extent of self defence or to contain the wife's behaviour. I am satisfied that the mother attacked the husband on 31 December 2000.
315. I find that the children were exposed to continual arguments, tension and discord in the home to an extent which was harmful to them and must have impacted adversely upon them. As I said, I do not accept the wife's allegation that the father was the source of the violence. I am satisfied the wife was the source.
316. The mother alleged that the father threw S to the floor in April 1999 when she was 18 months old and pinched and punched her leaving bruising. I do not accept that the husband assaulted or injured S on these occasions or on any other occasion alleged by the wife. I accept that the husband scratched S' face with a key in 2004 but I accept the husband's explanation that it was an accident.
317. The wife alleges that the husband sexually abused S by inserting his fingers into her vagina in July 2005. S apparently made statements to the mother and to Ms H and to a domestic violence worker, Ms VA. Ms VA was not called to give evidence. The mother and Ms H were cross examined. It is likely that S may have mentioned something about bathing at her father's home but I am satisfied that anything over and above that is embellishment and exaggeration at the mother's behest. I am not satisfied that there was inappropriate touching for which there is some excuse. I am not satisfied that the father touched S' genitals at all in July 2005. I cannot be satisfied of the accuracy of Ms H's evidence but I accept that S has made statements indicative of inappropriate behaviour in a sexual sense to police officers. I accept that the child made those statements, however, I am not satisfied that they were based on any personal experience or that the events alleged happened.

318. The wife alleges that the husband has strangled and beaten N. I do not accept that he has done so.
319. I find that the mother readily fabricates allegations of violence against the husband. Either the allegations do not withstand scrutiny, such as the incident in 1999 when S had a febrile convulsion, or they just did not occur at all. Instances of them being entirely make belief include the incident in the take-away shop in February 2001, when the wife says she was bound and beaten; at the C property in February 2002, when the parents argued over the husband's reduced income; before the wife left the B property in November 2004; and, in February 2005 when she alleged that the husband tried to run her down with a car in C. The wife's allegations of villainous behaviour by the father go beyond a distortion of memory. Witnesses commonly have different recollections of the same events. They also go beyond the mother treating truth as a malleable concept. I find that the wife has completely fabricated violent incidents and attacks and done so with no regard for telling the truth and for the purpose of demonising the father. By exposing the children to those distortions of truth and unfairly and unjustifiably refusing to permit the girls to see the father or to pay him proper regard, I am satisfied that the mother has abused the children psychologically.
320. The father's case is that the mother's overbearing behaviour in relation to the girls, including being physically rough with them, her requirement that they tolerate her false allegations and participate in them to the extent of making statements to the police and others, constitutes emotional and psychological abuse of the girls. I accept the father's allegations. I find that the mother's conduct has amounted to emotional abuse of the girls.
321. The girls' relationship with the father, including spending time or living with him, carries no unacceptable risk of sexual or physical abuse. However, the girls remaining in the care of the mother is likely to expose the girls to behaviour which is emotionally and psychologically harmful to them. Against that factor, I must weigh the benefit to the girls of having a meaningful relationship with the mother and the father including how any such relationship, in particular with the father, can be achieved.

The benefit of a meaningful relationship as a primary consideration

322. S 60CC(2)(a) of the Act requires an evaluation of the nature and quality of the relationship between the parents and the children by reference to additional considerations. It is a prospective enquiry. I am therefore required to evaluate the extent to which a meaningful or significant relationship with both of the children's parents is going to be beneficial and of advantage to them into the future.

The child's views¹³⁴

323. In determining what is in the children's best interests the Court must consider, amongst other factors, any views expressed by the children and any other factors that the Court thinks are relevant to the weight to be accorded to the child's views. Previously there was a similar provision,¹³⁵ which required the court to take into account the child's 'wishes'. There is significant jurisprudence from this court in relation to children's wishes which, as will become apparent, I consider relevant and helpful in relation to the Court's assessment of, and weight to be accorded to, children's views in the context of s 60CC(3)(a) of the Act.

324. The Full Court of the Family Court considered children's wishes in *R & R: Children's Wishes* (2000) FLC 93-000. The Court, there comprising Nicholson CJ, Finn and Guest JJ, cited with approval the following statement of principle drawn from the joint judgment of Fogarty and Kay JJ in *H & W* (1995) FLC 92-598 at 81,944:

The wishes of children are important and proper and realistic weight should be attached to any wishes expressed by children.

325. There is a distinction between the concept of children's wishes and children's views. 'Views' will capture a child's perceptions, inclinations and feelings but not necessarily involve an aspiration or conclusion. 'Wishes' are the result of perceptions, inclinations and feelings coalescing into a specific desire or ambition in the child's mind. The requirement to focus on the child's views, as opposed to wishes, means that I may have regard to the child's perceptions and inclinations without requiring the family consultant or independent children's lawyer to make enquiries or elicit the child's ultimate preference or wish. I agree with the reference in the Revised Explanatory Memorandum¹³⁶ that consideration of the children's views will:-

allow for a decision to be made in consultation with the child without the child having to make a decision or express a 'wish' as to which parent he or she is to live or spend time with.¹³⁷

Consideration of a child's views does not exclude consideration of a child's wishes.

326. Once the children's views are ascertained, the next step in interpretation and assessment of these views requires a balancing of the views against the applicable primary and additional considerations which are relevant to the

¹³⁴ s 60CC(3)(a) *Family Law Act 1975* (Cth).

¹³⁵ The repealed s 68F(2) *Family Law Act 1975* (Cth).

¹³⁶ Revised Explanatory Memorandum, *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth).

¹³⁷ *Ibid* paragraph 56.

child's welfare. This process was is described by the Full Court in *R v R*, in relation to children's wishes, as follows:-

42. [...] the court will attach varying degrees of weight to a child's stated wishes depending upon, amongst other factors, the strength and duration of their wishes, their basis, and the maturity of the child, including the degree of appreciation by the child of the factors involved in the issue before the court and their longer term implications. Ultimately the overall welfare of the child is the determinant. That is so because the legislation says so and also because long before specific legislation the practice of the Court in its *parens patriae* jurisdiction established that view.

54. [...] There are many factors that may go to the weight that should be given to the wishes of children and these will vary from case to case and it is undesirable and indeed impossible to catalogue or confine them in the manner suggested. Ultimately it is a process of intuitive synthesis on the part of the trial judge weighing up all the evidence relevant to the wishes of the children and applying it in a commonsense way as one of the factors in the overall assessment of the children's best interests.

327. I consider that in the discussion by the Full Court in *R v R*, reference to 'wishes' may be read interchangeably for 'views'.

328. The court may inform itself of views expressed by children by having regard to anything contained in a report given to the Court by a family consultant¹³⁸ or other expert or appropriately qualified person retained by the parties or through the independent children's lawyer.¹³⁹

329. There is a significant body of evidence resting with the report of the family consultant, Ms Y, on which I can be satisfied that the children do not want to see the father, are expressing fear of him and are oppositional to spending time with him. I am satisfied that the children possess a distorted impression of the father. The mother has demonised the father to very many people including the children. I cannot make a finding about the genuine state of mind of each child. Likewise, I cannot exclude the possibility that, by now, each child believes that what they described in the VATE tape in September 2005 actually happened to them although it may be harder for N to hold on to false memories than it would be for S who was older when she first adopted them.

330. Ms R, S' teacher at P School in B in 2004, described S as follows:-

I remember thinking that [S] is a very, I want to say closed, but I don't mean closed, I think she's - well she seemed to me at that time a young girl who learned very quickly to mask her true feelings and not to appear to

¹³⁹ ss 60CD(2)(b), 62G(2) and 68LA(5)(b) *Family Law Act 1975* (Cth), the last provision of which requires an independent children's lawyer to ensure that the child's views are put before the court.

much of a troublesome person and to try and get smoothly back into whatever the situation would have been.

Mr DP, the principal of S' current school, adopted as accurate Ms R's description of S. He told me that the description was as applicable at the time he gave evidence (July 2008) as it was in November 2004 when S came back into his care at H School, in C. I accept the evidence of the school teachers. So, whilst it is easy to ascertain S' stated views, I must be cautious when assessing the weight to be accorded to them. On the basis of Ms R's evidence, I am satisfied that in 2004 and 2008 S was a child who subordinated her interests to the interests of others, in particular, her mother. As such, those views must be scrutinised in light of her desire not to be bothersome particularly, in my assessment, bothersome to the mother. Since 2008, S could have matured somewhat.

331. At the trial, the mother gave evidence that S is becoming too independent for her to be able to tell S what to do. As far as the mother is concerned, S now has a mind of her own so it cannot be assumed that she will be able to make S see the father if she does not want to do so. I accept that as between the mother and S, S may have started to assert herself more. It is likely that the mother's parenting of the girls is likely to engender more fear than respect and that as S gets older, she does not find the mother as daunting as she did previously. However, it is more likely than not that the mother would still hold sway with S.
332. I have not forgotten N's views but there was not a great deal of evidence about N's sensibilities. I assume that she is likely to follow S.

The nature of the children's relationships¹⁴⁰

333. I consider the nature of the children's relationship with each of the parents and other persons inclusive of grandparents and other relatives.
334. There is no expert evidence of the nature of the children's relationship with the father over and above their opposition to seeing him. I cannot regard this snapshot in time illustrative of the girls' actual or residual relationship with the father particularly given that I am satisfied that the children have been subjected to the adverse influence of the mother. In 2001, Mr RM observed the girls to have a warm and affectionate relationship with the father. I accept the father's evidence of his involvement in the care of the girls when he has been permitted to perform that role. It is more likely than not that the girls had a close bond with and a positive attachment to the father. The question that I am unable to answer, and to which no expert evidence was directed, is what has become of that attachment given the mother's interference and destructive influence. If the girls' attachment to the father was as good as I

¹⁴⁰ s 60CC(3)(b) *Family Law Act 1975* (Cth).

consider it to have been prior to November 2004 then, I speculate, that there should be potential for it to be revived. However, that is just speculation on my part. The quality of the girls' relationship with the father is something that needs to be assessed when, or if, the distraction of the false allegations of violence and sexual assault can be swept away.

335. Similarly, there has not been a proper assessment of the nature of the girls' relationship with the mother. She has been a significant care giver and, since mid- 2005, the sole care giver. The girls are reliant upon her in a material and physical sense. However, I have enough evidence (which I accept) of the mother's erratic and destructive behaviour within the household to doubt that the relationship between the girls and the mother is a positive or emotionally fulfilling and nurturing one for the girls. I also have doubts as to whether the girls' attachment to the mother was ever positive. I accept that the girls would have yearned for a positive and loving relationship with the mother but, based on all of the evidence in this proceeding, I cannot be satisfied that an attachment which is consistent with that relationship was established between the girls and the mother. It may be that the girls' earnest desire for a good and loving relationship with the mother have lead them to engage her in any way that they can, including adopting her hatred of the father and repudiating their relationship with him, but that is speculation on my part.
336. Just as there should be some assessment of the nature of the relationship which the girls have with the father, so should there be an assessment of the girls' relationship with the mother. At the moment I am unable to bring to my assessment of the benefit for the girls of having a meaningful relationship with both or either of their parents the essential element of having identified the nature of the relationship which they have, and could potentially have, with each parent.
337. It is more likely than not that the strongest and most secure attachment the girls have is with each other.
338. I heard evidence from the girls' brothers and older sisters. They all adore the girls. Ms L yearns to see them again. I cannot say what damage the mother has inflicted on the girls' once positive regard for their siblings. I am satisfied that she has tried to demonise Ms L in the same manner as she has demonised the father and her allegation that Ms L and the father are in a "de facto relationship" is the high point of her efforts as far as the evidence is concerned. I am satisfied that the girls' relationships with their other siblings are relationships that can be worked on and repaired even more easily than their relationship with the father. E, J and Ms L have much to offer S and N.

The willingness and ability of each parent to facilitate and encourage the children's relationship with others¹⁴¹ and the parties attitude to the children and to the responsibilities of parenthood¹⁴²

339. I am required to consider the ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the children and the other parent. It is also necessary for me to assess the extent to which each of the parents has, to date fulfilled or failed to fulfil their obligations or frustrated the other parent's participation in this regard.¹⁴³
340. I must consider the extent to which each of the children's parents has fulfilled, or failed to fulfil his/her responsibilities as a parent. This factor includes the extent to which each parent has taken or failed to take the opportunity to spend time¹⁴⁴ with and communicate with¹⁴⁵ the child and to participate about major long term issues concerning child¹⁴⁶. It includes the extent to which the parent has fulfilled or failed to fulfil his/her obligations to support the child financially¹⁴⁷ or otherwise maintain the child. It also includes the extent to which each parent has facilitated, failed to facilitate or frustrated the other parent's participation in the long term welfare¹⁴⁸ and the other parent communicating with the children¹⁴⁹ or spending time with the children.¹⁵⁰
341. I am required (and do) have particular regard to events which have happened, and circumstances which have existed, since the parties separated.¹⁵¹
342. I have found that the father has conducted himself in a principled manner with laudable forbearance in the face of the most challenging circumstances. I am satisfied that the father is sufficiently sensitive to the emotional needs of S and N that he recognises that they need to be able to have a relationship with the mother if the mother wishes to have a relationship with them. That is what he said in his evidence. He has demonstrated that attitude *vis a vis* Ms L and the mother.
343. It should be apparent from my findings above that I regard the mother's behaviour *vis a vis* this consideration to date as dreadful. However, those are my findings on her behaviour to date. They are not determinative of how I predict she will or could operate into the future.

¹⁴¹ s 60CC(3)(c) *Family Law Act 1975* (Cth)

¹⁴² s 60CC(3)(i) *Family Law Act 1975* (Cth)

¹⁴³ s 60CC(4) *Family Law Act 1975* (Cth)

¹⁴⁴ s 60CC(4)(a)(ii) *Family Law Act 1975* (Cth).

¹⁴⁵ s 60CC(4)(a)(iii) *Family Law Act 1975* (Cth).

¹⁴⁶ s 60CC(4)(a)(i) *Family Law Act 1975* (Cth).

¹⁴⁷ s 60CC(4)(c) *Family Law Act 1975* (Cth).

¹⁴⁸ s 60CC(4)(b)(i) *Family Law Act 1975* (Cth).

¹⁴⁹ s 60CC(4)(b)(ii) *Family Law Act 1975* (Cth).

¹⁵⁰ s 60CC(4)(b)(ii) *Family Law Act 1975* (Cth).

¹⁵¹ s 60CC(4A) *Family Law Act 1975* (Cth).

344. Under cross examination¹⁵² about whether she would encourage the girls to see the father, the mother stated “I have made decisions for them before and you can see the result and consequences so I will not make decisions for them now. I will allow them to make their own decisions.” In the circumstances of this case, with the girls being in the mother’s thrall, this attitude by the mother amounts to an abrogation of her responsibility to promote and facilitate what is best for the girls.
345. There was nothing in the mother’s evidence which was supportive of the girls having a relationship with the father. In cross examination¹⁵³ the mother said that there was nothing “that [Ms L] could do that would make me think that the children should go” which, in the context of the cross examination, meant that there was no basis upon which she would support the girls spending time with Ms L. Similarly, she was at a loss to say that she could support the girls spending time with J and E and she said “[J and E] have never bought a gift for [the girls’] birthday” and “even since they listened to their father and the violence to me I cannot trust them”, and “[J and E] haven’t got time to see children, they have not even got time to go on dates.”
346. When asked whether she would permit the children to see their older siblings without the father being present, the mother replied “I have told you already I cannot make decisions for my girls. If [the siblings] took them away who could trust them not to go to the father.”
347. At the conclusion of the hearing, the mother proposed orders which contemplated the children spending time with the father albeit after counselling intervention which, if not pursued vigorously, might stymie any reunification indefinitely.
348. I am prepared to give the mother an opportunity to demonstrate that she will permit the children to have a meaningful relationship with the father, to see him and their siblings and to share completely in all of the benefits which I am satisfied the father, Ms L, J and E, have to offer. I am satisfied that to do otherwise at this point would be to treat the girls’ best interests as something less than paramount. The father is likely to feel aggrieved by my decisions not to make final orders but fairness to the parties takes a back seat to what is best for the girls.
349. I am satisfied that, hitherto, the mother considered that her role as the primary or even sole care giver was unimpeachable. I do not think that is the case any longer. However, I have no confidence in the mother’s willingness or ability to facilitate or encourage a relationship between the father and the children absent ongoing scrutiny and awareness on her part that the competing

¹⁵² 14 May 2008

¹⁵³ 14 May 2008

residence applications are in abeyance whilst the girls' reunification with the father and their siblings is trialled.

The likely effect of any changes in the children's circumstances¹⁵⁴

350. In determining what is in the best interests of the child I am required to consider the likely effect of any change in the children's circumstances particularly in relation to separation from their parents, other children, wider family including grandparents and other persons with whom the children have a relationship.
351. The father and the siblings have an enormous amount to offer S and N. Whether or not the girls are permitted or willing to accept reunification with the father and the siblings is a matter about which there is insufficient evidence for me to be satisfied.
352. On the evidence, the mother appears to me to a deeply insecure woman. It is more likely than not that her determination to villainise the father is based on a fear or appreciation that S and N prefer the father over herself or would do so if they had untrammelled will. As a consequence, I take into account the possibility that reunification between the girls and the father could result in the mother cutting off her relationship with S and N in the same way as she has cut off her relationship with Ms L. Hopefully, the mother will be able to support the reunification.

Practical difficulties and expense associated with contact¹⁵⁵

353. I consider the practical difficulty and expense of the children spending time with and communicating with the parent with whom they will not be living and whether this will affect their right to maintain personal relations and direct contact with both parents on a regular basis.
354. At the time of the trial, the father was likely to remain in living in B. It is rental accommodation but very convenient for Ms L. The Office of Housing accommodation in C has been a constant feature of the mother's life. The father is accommodating in relation to driving the children around.
355. The most significant issue was the attendance by the children at Chinese school, parties and extra curricular lessons. Having heard the evidence, I am satisfied that the mother used these commitments to thwart the father's time with the children. If that was not the case, the mother would have permitted the father to take the girls to Chinese school and would have told the father about party invitations but she did not. I am also satisfied that the mother represented to the girls that their father would not permit them to undertake these activities during his time with them when that was not the case.

¹⁵⁴ s 60CC(3)(d) *Family Law Act 1975* (Cth)

¹⁵⁵ s 60CC(3)(e) *Family Law Act 1975* (Cth)

356. I am confident that the father will work around genuine commitments which each child has in relation to activities which each child wishes to pursue. However, if the father is to be integrated back into the girls' life, it is appropriate that the father be completely involved in all of the girls' activities.

Capacity of the parents to meet the children's needs¹⁵⁶

357. In determining what is in the best interests of the children, I need to consider the capacity of the parent or of any other person to provide for the needs of the children, including emotional and intellectual needs.
358. The father has much to offer S and N.
359. I do not know why the mother acted as she has but her behaviour in not permitting the girls to have a relationship with the father is a serious deficit to her being able to provide for the needs of the children, at least historically. The mother's imagination and capacity to invent allegations of immoral and violent conduct on the part of the father and others associated with him appears to be completely unrestrained by any moral sense of right and wrong. It is common ground that the mother's life in China was difficult. I do not know to what extent those difficulties have shaped her personality. For whatever reason, the mother appears to me to have no appreciation of truth as an abstract value so that she appears to be readily able to dispense with acting honestly or being truthful when it is convenient for her to do so. This has had tragic consequences for S and N who have been deprived of sharing in the lives of the father and their siblings since 2005 and who were required to give evidence in the Country Court trial. It has been tragic for the father who has gone through a committal hearing, a lengthy criminal trial and this trial on the basis of the mother's allegations of violence, sexual abuse and moral misconduct which, I am satisfied, have no foundation in fact.
360. The mother's conduct to date leaves me with no confidence that she recognises that moral values apply to her even when it is inconvenient. That is an unfortunate life strategy if she is to have the responsibility for the moral education of S and N. It is significant from the court's perspective on her capacity to parent the girls, particularly to the exclusion of the father, as it leaves the young girls without a moral anchor which is so important for their ability to form and benefit from personal relationships, formal and informal, in life.
361. What currently challenges me is that I have insufficient evidence of the girls' emotional needs. I am unaware as to whether the mother's destructive influence can be reversed and on what basis the girls can be reunited with the father and/or their siblings. In short, without knowing what the emotional

¹⁵⁶ s 60CC(3)(f) *Family Law Act 1975* (Cth)

needs of the children are, I cannot make a determination as to which of the parents has the necessary or better capacity to provide for those needs.

The children's maturity, sex, background and other characteristics¹⁵⁷

362. I consider the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the children and her parents. The attitude to the children and to the responsibilities of parenthood demonstrated by each of the children's parents.¹⁵⁸
363. The children are entitled to share in the background and culture of both parents. The extent to which that can be facilitated will depend largely on what final parenting orders I make.

Any family violence involving the children or any member of the children's family and family violence orders¹⁵⁹

364. As noted above, the definition of family violence provided in s 4 of the Act is broad and may include threatened or actual violence toward a person, members of their family or their property.
365. I have found that the children have been exposed to domestic violence to a most inappropriate degree. I have also found that it was initiated by the mother.

Whether it would be preferable to make an order that will be least likely to lead to the institution of further proceedings in relation to the children¹⁶⁰

366. Parenting proceedings are never final in the sense that children and their parents' circumstances change and arrangements may need to alter as a consequence of those changes.
367. Ideally courts should make parenting orders that minimise the prospects of future litigation. Litigation is costly in emotional and financial terms and may have the effect of standing in the way of parties parenting children effectively. Parents and children are readily distracted by litigation. However, in this case, I am satisfied that to make a final order is unlikely to be in the best interests of the children. That is because I am firmly of the view that the children deserve a further opportunity being given to the possibility of them living between two homes and being able to maintain a meaningful relationship with both of their parents and all of their siblings.
368. Given the very unfortunate history of this matter and the fact that the children have not spent time with the father since July 2005, I am pessimistic about the viability of any parenting regime which is imposed on the parties (and the

¹⁵⁷ s 60CC(3)(g) *Family Law Act 1975* (Cth)

¹⁵⁸ s 60CC(3)(i) *Family Law Act 1975* (Cth)

¹⁵⁹ ss 60CC(3)(j) and (k) *Family Law Act* (Cth)

¹⁶⁰ s 60CC(3)(l) *Family Law Act* (Cth)

girls) without strong counselling and therapeutic support. Without that support being fully established, I am unable to determine the date upon which any regime of the girls living or spending time with the children ought to commence.

369. I intend for the parties and the family to enter a structured counselling program which has as its initial objective a reunification of S and N with the father and their siblings. That is a process through which the mother and father as well as the children and siblings will require support. The next objective will be to facilitate or provide a pathway to substantial and significant time being spent between the father and the children. My reference to substantial time is a reference to that time as defined in s 65DAA(3) of the Act which states that a child will be taken to spend substantial and significant time with a parent only if that time includes weekdays, weekends, holidays and non-holidays¹⁶¹ and involvement of the parent in aspects of the children's daily routine¹⁶² and occasions of significance to both parent and children.¹⁶³ The legislation notes, however, that these factors are not intended to limit the matters to which the Court may consider in determining whether the time spent with a child is substantial and significant.¹⁶⁴
370. Once all necessary steps have been taken to secure that children being able to share in the father's life, I will be in a proper position to assess the competing residence applications.
371. On a practical level, I propose to review the matter in four months to see that the therapeutic intervention, in the form of a post order program, is in place. At that hearing, I would be assisted by a brief progress report from a family consultant appointed pursuant to s 65L although the parties would be best assisted by having that updating report prior to the adjourned date. On the adjourned date, I expect to have some evidence of what progress has been made with the children, to be made aware of what time they have been able to spend with the father and/or their siblings and to make a determination of what parenting orders ought to apply up to and until a final hearing.

Any other fact or circumstance the Court thinks relevant¹⁶⁵

372. In order to implement my decision, it is necessary for a family consultant, preferably the supervising family consultant, to explain this Order to the children as soon as practicable. There are a number of professionals that have been involved with the children whose appreciation of the father and mother and children may be enhanced by having access to these reasons.

¹⁶¹ s 65DAA(3)(a) *Family Law Act 1975* (Cth).

¹⁶² s 65DAA(3)(b)(i) *Family Law Act 1975* (Cth).

¹⁶³ ss 65DAA(3)(b)(ii) and 65DAA(3)(c) *Family Law Act 1975* (Cth).

¹⁶⁴ s 65DAA(4) *Family Law Act 1975* (Cth).

¹⁶⁵ s 60CC(3)(m) *Family Law Act* (Cth)

Accordingly, I will direct that the independent children's lawyer provide all specified persons with a copy of the reasons. I will request that the supervising family consultant provide the reasons to the proper officer of whatever agency accepts the family for treatment.

Conclusion

373. The issue of the parent with whom the girls should reside has not been decided.
374. I have decided that it is in the interests of S and N to make only interim orders at this stage. It would be a mistake for either party to interpret this decision as me having devolved my decision to a counsellor or a therapist. I have not made specific parenting orders because I need to know more about what parenting arrangement S and N can be expected to cope with. I expect that on the adjourned date, I will have that information.
375. In the meantime, these reasons explain why and on what basis I have rejected the mother's allegations against the father of violence and sexual abuse and am satisfied that that father and the girls' siblings have a great deal to offer them.

I certify that the preceding three hundred and seventy five (375) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Bennett

Associate

Date: 20 March 2009

“ANNEXURE A”¹⁶⁶

20. I recently summarised the core principles in the determination of a case of alleged sexual abuse in *Hartford & Ansilda* [2009] FamCA 23, as follows :

19 The core principles are those enunciated by the High Court in *M and M* (1988) 166 CLR 69. The High Court (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ) made it clear that the ultimate and paramount issue to be decided in proceedings for what are now called parenting orders is whether the making of the orders sought is in the interests of the welfare of the child. The fact that the proceedings involve an allegation of sexual abuse by the parent who seeks residence or time with a child does not alter the paramount and ultimate issue which the court has to determine. The High Court found (at 76) that although findings on the disputed allegation of sexual abuse will have an important, and sometimes a decisive, impact on the resolution of that issue,

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

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

¹⁶⁶ *Hemiro & Sinla* [2009] FamCA 181(17 March 2009, Brown J, paragraphs 20-51)

Court to try the case as if it were no more than a context between the parents to be decided solely by reference to the acceptance or rejection of the allegation of sexual abuse on the balance of probabilities.

20. In a joint judgment in *B and B* (1993) FLC 92-357 the Full Court (Fogarty, Baker and Purvis JJ) discussed the relevant principles, having regard to the High Court's decision in *M and M* and at 79,778 said:

The test propounded by the High Court in *M and M* and which is authoritative in this jurisdiction, is that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.

The 'unacceptable risk' test is therefore the standard used by the Family Court to 'achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access'. In other words, where the court makes a finding of unacceptable risk it is a finding that the risk of harm to the children in having access with a parent outweighs the possible benefits to them from that access.

21. In *Re W (Sex abuse: standard of proof)* (2004) FLC 93-192 the Full Court (Kay, Holden and O'Ryan JJ) examined the principles applicable in cases involving difficult questions of sexual abuse where the only witnesses to the alleged abuse are the alleged perpetrator and the alleged victim, noting the particular difficulties where the victim is young and does not give any direct testimony that can be the subject of forensic testing.
22. The Full Court considered the relevance of the decision in *WK v SR* (1997) FLC 92 -787. In that case the trial judge had found that the father had sexually molested both his step-daughter and his own daughter. The Full Court said, at 84,691:
26. However, the evidence of ZH was in fact the core evidence relied upon by his Honour in order to substantiate the allegations of abuse against the father. Given the gravity of the allegations raised by the evidence, and the Court's duty to apply a rigorous civil standard of proof pursuant to the test enunciated by the High Court in *Briginshaw* (supra) and restated in s 140 of the *Evidence Act 1995 (Cth)*, her evidence needed to be very carefully evaluated.

[...]

46. It is clear therefore, that a finding that abuse has occurred can only be reached by a strict application of the onus of proof as

set out in *Briginshaw*. Section 140 of the *Evidence Act* 1995 (Cth) has adopted this test as follows:

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

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

- (a) the nature of the cause of action or defence; and
- (b) the nature of the subject matter of the proceeding; and
- (c) the gravity of the matters alleged.'

47. In children's matters under Part VII of the *Family Law Act*, where the issue is a child's contact or residence with a significant person in his or her life, the grave consequences of a finding of sexual abuse cannot be overstated. Accordingly, before trial Judges find themselves impelled to make a positive finding of sexual abuse, as opposed to a finding of unacceptable risk, the standard of proof they are required to apply must be towards the strictest end of the civil spectrum as set out in *Briginshaw* and s 140 of the *Evidence Act* 1995 (Cth). Inexact proofs, indefinite testimony, or indirect inferences are insufficient to ground a finding of abuse.

48. This is a matter which must be specifically borne in mind by a Court which is exercising jurisdiction under Part VII of the *Family Law Act*. When exercising its jurisdiction under this Part, the Court's paramount consideration must be the best interests of the child, in accordance with s 65E. The application of this overriding factor often allows the admission into evidence of material which would otherwise be excluded if a rigid application of the rules of civil evidence were followed. Furthermore, when deciding what orders are in the best interests of a child, a trial Judge may often be confronted with a multiplicity of issues and facts. In these circumstances, evidence which, for example, is relevant and probative in relation to the question of an unacceptable risk of abuse occurring, may not be relevant or probative when deciding whether or not a specific incident of abuse has in fact occurred.

The Full Court found that the trial judge had not paid attention to these views, and that unless the rigorous approach set out in *WK v SR* is taken, in circumstances where the often inevitable result of a positive finding of abuse is a cessation of the relationship between parent and child, there is a major risk of inflicting upon the parent and the child the disastrous effects of a positive finding that is reached in error. The Full Court found that the termination of a worthwhile relationship between the parent and child ought in most cases be the course of last resort, noting (at 79,217-8):

The Court should not shy away from reaching such a result in an appropriate case but at all times judges should be conscious that the adversarial or inquisitorial systems often reach results that are artificial. The truth does not always come out. A false negative finding accompanied by appropriate safeguards as to the future relationship between parent and child, such as adequate supervision to guard against possible abuse, may be far less disastrous for the child than an erroneous positive finding that leads to a cessation of the parent-child relationship. The Court needs to remain conscious of this imperfection at all times.

23. The Full Court then referred with approval to the dissenting judgment of Kay J. in *K v B* (1994) FLC 92-478 where his Honour said, at 80, 972:

In cases of alleged sexual abuse, there is a significant risk that the ultimate effect of orders to be made by the court, and of the proper operation of the legal system, will be overlooked in the court's anxiety to ensure that the risks of sexual interference are minimised. Where the evidence of sexual abuse consists of ambiguous statements of a pre-kindergarten aged child coupled with perceived but possibly otherwise explicable behavioural changes, it is almost impossible for the party denying any impropriety to prove that party's position.

In an article entitled 'Prediction, Prevention and Clinical Expertise in Child Custody Cases In Which Allegations of Child Sexual Abuse Have Been Made', appearing in Volume XXVI No 2 Summer 1992 Family Law Quarterly (Publication American Bar Association Section of Family Law), at p 170, it was observed:

'Unfortunately the magnetising force of the simple *allegation* of a heinous event such as child sexual abuse, which legitimately invokes consideration of the *possibility* of that event, draw the clinician — and perhaps even judges and jurors as well,... away from what ought always to be the starting point of her or his evaluation enquiries, which is that the event did not (or very highly probably did not) occur.

Because the null hypothesis (and, correlatively the absence of an event) cannot be proved, in their testimonies concerning *possibilities* of alleged events, clinicians strongly resist exonerating the targets of their evaluation. Because it is always *possible* that a given individual — even one randomly drawn from the general or a specific population — has sexually molested a child, an inconvertible *proof* that the individual has *not* molested a child is impossible.' (*emphasis in original*)

The article concerns itself with research carried out at the University of Michigan. Case notes concerning the possible sexual abuse of a three year old child were provided to 8 senior clinical psychologists, 23 graduate students undergoing clinical training in psychology and 50 members of staff of child guidance clinics including social workers, clinical psychologists and psychiatrists all specialising in child development in areas of child mental health. They were asked individually and then in groups to evaluate the probabilities that sexual abuse had occurred and then to recommend what if any ongoing child/father contact should take place.

The range of opinion on whether there had been abuse was so wide that the authors concluded as follows:

The most striking feature of these studies' findings is the extremely large range across experienced and non-experienced clinicians of estimates concerning the likelihood that M was sexually abused by her father. When given all of the relevant facts of the case, child experts and trainees varied greatly in their individual judgment... These findings lend strong support for the view that individual experts can provide courts little if any assurance that they are able to provide even crudely reasonable (i.e. objective) estimates of likelihood that child sexual abuse has occurred or will occur, when they are confronted with the same set of ambiguities faced by the courts in these cases.

24. In *Re W*, the Full Court concluded its analysis of the relevant legal principles by remarking, at 79,218:

The lessons to be learned have not changed. The risk that the Court will find heinous behaviour where none has occurred needs be borne in mind at all times. The harm and injustice that flows to both parent and child from an erroneous positive is almost too horrible to contemplate.

25. As I have observed before, and with respect to the Full Court, one might as well say that the harm and injustice that flows to both parent and child from an erroneous negative finding is almost too horrible to contemplate, that harm including repeated sexual abuse of a child. Nevertheless, I am bound by the exposition of principle in the judgment.
26. In *W v W (Abuse allegations; unacceptable risk)* (2005) FLC 93-235 the Full Court (Warnick, May and Boland JJ) examined principles relevant to child sexual abuse cases with particular emphasis on what is meant by unacceptable risk, the potential cessation of a significant or meaningful parent/child relationship and the appropriateness or otherwise of supervised contact. As a starting point the Full Court referred to the significant detrimental harm to a child who is sexually abused, noting (at 79,906) the discussion by Fogarty J in *N and S and the Separate Representative* (1996) FLC 92-655 where His Honour said, at 82,709:

The sexual abuse of a young child by a parent or care giver or other person associated with that household is so alien to the concepts and actions of most people in the community that there is an understandable resistance to accepting that it may or does occur. Regrettably, the actuality is otherwise.

It is difficult to overstate the importance of protecting children from sexual abuse, and from the consequences which often follow from sexual abuse. Sexual abuse involves the most severe exploitation of children, the most serious invasion of their rights to personal integrity and freedom, and the most serious denial of their rights to personal growth and development. Its effects, both in the short and long term, can be devastating.

27. The Full Court also had regard to Fogarty J's acknowledgement of the potential for false allegations. Referring to Thomas J's judgment in *S v S* [1993] NZFLR 657, Fogarty J said (at 82,711):

Courts must be aware that not all allegations of sexual abuse are true. False allegations may be made either by parents acting in good faith, as a result of a misperception or information about their child, or by parents deliberately fabricating allegations in order to gain an advantage in proceedings. Ambiguous events often have an innocent explanation.

28. After considering a number of decisions in which the concept of unacceptable risk was considered, the Full Court in *W v W (Abuse allegations; unacceptable risk)* concluded (at 79,910):

In summary, the law is well settled as to the standard of proof required to make a positive finding of sexual abuse, and that such a finding should not be made unless a trial judge is satisfied to the highest standard, on the balance of probabilities abuse has occurred. We accept, as a matter of practice, a trial judge will almost

inevitably be required in a case where sexual abuse allegations are raised to consider whether abuse has been proven on the balance of probabilities as well as considering whether or not an unacceptable risk of abuse exists. The High Court in *M and M* recognized the difficulty in defining with any degree of precision what constitutes an “unacceptable risk” and the cases determined after that decision testify to the difficulty.

21. *W v. W (Abuse allegations: unacceptable risk)* (2005) FLC 93-235 was delivered after *Re W (Sex abuse: standard of proof)* (2004) FLC 93-192 and made no reference to the null hypothesis advanced in the article quoted by Kay J. in his dissenting judgment in *K v. B* (1994) FLC 92-478, which was endorsed by the Full Court in *Re W (Sex abuse: standard of proof)*. Nor was there any reference to the article in *Potter & Potter* (2007) FLC 93-326 in which the Full Court endorsed the approach described in *Re W (Sex abuse : standard of proof)* or in the earlier decision in *Napier & Hepburn* (2006) FLC 93-303 in which the Full Court considered the approach to determining whether the evidence establishes an unacceptable risk of abuse. It is timely to say something further about that article.
22. Neither Kay J in *K v. B* nor the Full Court in *Re W (Sex abuse: standard of proof)* named the authors of the article in question, nor was its sub-title stated. The article is *Prediction, Prevention and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made : III Studies of Expert Opinion Formation*. Its authors are Thomas M. Horner, Melvin J. Guyer and Neil M. Kalter. Kay J. recorded it as appearing in Volume XXVI No.2 Summer 1992 *Family Law Quarterly* (Publication American Bar Association Section of Family Law). The short reference for the article is 26 Fam.L.Q. 141 (1992-1993).
23. The article is the third in a series. Part I, sub-titled *Predictable Rates of Diagnostic Error in Relation to Various Clinical Decisionmaking Strategies*, was published in 25 Fam.L.Q. 217 (1991); Part II, sub-titled *Prevalence Rates of Child Sexual Abuse and the Precision of “Tests” Constructed to Diagnose It*, was published in 25 Fam.L.Q. 381 (1992). The authors of the first two parts are Thomas M. Horner and Melvin J. Guyer.
24. In the introduction to Part I the authors make clear their interest in the decision making processes that are generated under the mantle of expertise in cases of alleged child sexual abuse. The introduction to Part II sets out its focus as the problems inherent in attempting to reach firm conclusions about allegations of sexual contact between young children and adults. Part III deals with the field and scope of clinical expertise in these cases. The same case study was used in the research referred to in all three parts.
25. The authors frankly state their concerns about the accuracy of expert evidence and uncritical reliance on it and draw conclusions based on the research to

which Kay J referred. Not all their assertions are attributable to their research; for example, in Part I they assert, at 251, that “(t)he contemporary preoccupation with child sexual abuse surely has many parallels with the preoccupations of other times, such as witchcraft and other heresies.” While a footnote is provided (*Child Abuse from Salem to Jordan: Therapists as Culprits*, 9 AUGUSTUS 7(1986)) the authors go on to wonder how many people over the course of history have been “mortally persecuted for the alleged practice of witchcraft, but had indeed not practiced it” and maintain and flesh out the analogy in their concluding paragraph. Part II continues where Part I left off, commencing with an aphorism attributed to Nietzsche: Convictions are the greater enemies of truth than lies.

26. Part III of the series, which is the article referred to by Kay J., continues the critique of the involvement of clinical experts in child sex abuse investigations. As Kay J. observed, detailed case notes concerning the possible sexual abuse of a three year old child were provided to eight senior clinical psychologists, twenty-three graduate students undergoing clinical training in psychology and fifty members of staff of child guidance clinics, including social workers, clinical psychologists and psychiatrists. In one phase of the study participants were able to question the evaluating clinician who presented the case study. No participant met with the child who was the subject of the allegation or with any parent or family member of the child. They were neither treating experts nor forensic experts; the method involved the presentation of extensive clinical case material by the evaluating clinician in that case.
27. Participants were advised that until the allegation was made the child’s parents maintained a good relationship and the child enjoyed a positive relationship with each parent. When she was about 16 to 17 months old, the child began (on her mother’s account) to exhibit behaviours resembling ones referred to in certain media accounts as being associated with sexual abuse. They included nightmares, an interest in and references to sexuality, occasional resistance to having her nappy changed, an emergent negativism, protests against separation from her mother and, once when having her nappy changed, the child saying “daddy hurt ‘gina”, which the mother construed to mean the father had molested the child. The mother’s concerns moved to a strong suspicion when she discovered a hair in the child’s nappy which, she said, was the colour of the father’s hair, and she asserted, a pubic hair. She did not save the hair.
28. An examining paediatrician discovered no physical evidence of sexual contact and in the course of police investigations the father underwent two polygraphic examinations, which concluded that he was being truthful when he denied any sexual misconduct towards his daughter. The father acknowledged that his daughter had become avoidant of nappy changes and that he sometimes had to be firm with her during them. He corroborated the mother’s observations of

increased negativism and oppositionality. He could not explain the hair in the nappy.

29. Neither police nor protective services investigations substantiated the mother's suspicions and allegations. Following her receipt of their negative findings, the mother contacted a clinic specialising in the diagnosis and treatment of child sexual abuse; a therapist there stated that the child was being treated for (this is a direct quotation from the article) "trauma [sic] of possible [sic] sexual abuse". The evaluation team at the clinic never contacted the father but recommended a course of treatment to deal with the child's behavioural problems, which were deemed symptomatic of "some kind of abuse".
30. The clinician who presented the case study to the participants in the research exercise had been requested by a court to complete another clinical evaluation of the allegation of abuse.
31. The findings of the authors in Part III could be summarised in this way.
 - Expert evidence is highly imprecise and unreliable. Even if some of the experts were "correct" in their opinions, the broad spectrum of opinions makes it very difficult to discern which of those are to be trusted.
 - Estimates of the likelihood of abuse did not necessarily match the recommendations made when asked about the contact the child should have with the allegedly abusing father. In the authors' words, the implication of this is that "*. . . an allegation taken alone . . . has a powerful determining effect far beyond any failure to substantiate it* (p.165 (emphasis in original)).
 - Where an expert is confronted with ambiguous and conflicting evidence, he or she is rarely better placed than a court to assess the evidence.
32. The section of the article quoted by Kay J. in *K v. B* at 80,972 commences one sentence into a paragraph. The first sentence of the quoted paragraph, which is omitted, states :

Clinicians seem inherently averse to both the scientific standard of accepting the null hypothesis (and, correlatively, the legal standard of presuming innocence in the absence of incriminating proof) when adduced data are insufficient to make its rejection defensible. (170)
33. The authors' reference to the presumption of innocence is curious. Insofar as the authors refer to the admission of expert evidence, it is to evidence adduced in civil proceedings, not criminal proceedings. This is expressly acknowledged in their comparison, at 170, of the "clinical arena" with the "civil arena" and in the Introduction in Part I of the series. In Australia, "the legal standard of presuming innocence in the absence of incriminating proof" has no role in civil

proceedings and no role in the criminal standard of proof, which requires rather that the accused's guilt must be established beyond reasonable doubt, to achieve which the elements (ingredients or ultimate facts) of the crime must be established by the evidence beyond reasonable doubt; see *Evidence Act 1995* (Cth) s.141; *R v. Dickson* [1983] 1 VR 227 at 235, *Thompson v. The Queen* (1989) 169 CLR 1 at 12. The presumption of innocence is a vital part of the criminal law but to say an accused person is entitled to the presumption of innocence is to say no more than that a person suspected of or charged with a crime shall be assumed innocent unless and until his or her guilt is proved, either by a plea of guilty or by a jury finding.

34. All three authors of the article hold positions at the University of Michigan in the State of Michigan. The article quoted says nothing of the legal standard of proof (or, indeed, burden of proof) in that State however in Part I, at 250-251, the authors note that civil law generally accepts preponderance of evidence as the standard of proof that a party must meet to prevail in the judicial decision making forum while criminal culpability requires that the State meet the more stringent standard of proffering evidence of guilt beyond a reasonable doubt. A footnote, numbered 43, notes :

Certain questions brought before the courts require that the prevailing party meet a higher standard of proof than the usual civil standard. The determination of paternity, the termination of parental rights, and the civil commitment of the mentally ill, for example, all require the moving party to meet a clear and convincing standard of proof.

The authors may be working within a system in which the standard of proof in civil litigation is more variable than it is under Australian law and the court could not rule out constitutional ramifications in the United States.

35. While this court cannot know why the first sentence of the paragraph was omitted from the quotation in *K v. B*, it can say that its inclusion would have caused a legally qualified Australian reader to question the apparent analogy drawn between the null hypothesis and the presumption of innocence, its relevance to the arguments the authors sought to advance and the authors' non-expert assumptions about the law.
36. The authors refer to the null hypothesis as "the scientific standard" at 170, but say nothing more of it. The expression was coined by Sir Ronald Fisher, an English geneticist and statistician, in 1935; (see Fisher, R.A. (1966) *The Design of Experiments*, 8th edition, Hafner: Edinburgh). In statistics a null hypothesis is a concept which arises in the context of statistical hypothesis testing to describe in a formal way some aspect of the statistical behaviour of a set of data which is treated as valid unless the actual behaviour of the data contradicts this assumption. Although a null hypothesis always occurs in conjunction with an alternative hypothesis it would be misleading to consider the alternative

hypothesis as the negation of the null hypothesis. Importantly, the absence of evidence against the null hypothesis does not establish its “truth”; if the null hypothesis is not rejected there is no reason to change decisions or procedures predicated on its truth but it allows for the possibility of obtaining further data and then re-examining the same hypothesis. In the article the authors appear to use it to mean a hypothesis that sexual abuse has not occurred.

37. Tellingly, a clause is omitted in the midst of the paragraph quoted by Kay J. The first sentence of the quoted paragraph is reproduced below with the omitted words in bold :

Unfortunately, the magnetising force of the simple *allegation* of a heinous event such as child sexual abuse, which legitimately invokes consideration of the *possibility* of that event, draws the clinician – and perhaps even judges and jurors as well, **although the safeguards against this happening seem to us stronger in the civil arena than in the clinical arena** – away from what ought always to be the starting point of his or her evaluation enquiries, which is that the event did not (or very highly probably did not) occur. (170)

38. The omitted words, which qualify “perhaps even judges and jurors”, are consistent with the authors’ statements (at 162-163) that despite their view of the imperfection of expert evidence, “the findings do not mean, of course, that specialists in child mental health cannot be useful in the fact finding process, as they may offer modes and venues of communication that genuinely assist courts in fully weighing evidence”. The authors describe the central problem faced by courts which use experts in cases of alleged child sexual abuse as being :

. . . one of determining *which* of the diverse expert opinions one might solicit is veridical and which expert(s) among the many who present themselves as such in any given case can be expected and relied upon to exercise genuine expertise rather than simple ordinary judgment. (163)

39. The paragraph following that quoted by Kay J. is the concluding paragraph of the article, and is in these terms :

Certainly, one important implication of our observations and findings is that for each and every individual clinician an immense burden exists to demonstrate convincingly to the courts to which they testify, and to society in general (neither statements to the effect that one has seen “hundreds of cases” nor presentations of thick resumes or curricula vitae being inherently convincing), the grounds on which s/he can be confidently expected to reason or predict beyond the capacity of the ordinary judge or juror when s/he is faced with the same information. A further implication, of course, is that courts need to examine their experts beyond the customary scope (which is too often perfunctory) of *voir dire*, which in our opinion admits far more clinicians to the realm of privileged testimony than is justified by any

reasoned appraisals that have been made of them as a class of specialists. (170)

40. The authors of the article place much faith in the deductive capabilities of courts (as opposed to “clinical experts”) in drawing conclusions from conflicting and ambiguous evidence. The authors do acknowledge the “pragmatic utility” in the admission of expert evidence, however unsatisfactory (166). Their main point is that the court should be cautious when considering expert evidence; as its sub-title makes clear, the article is about the formation of expert opinion, not determination of allegations by a court. At 169, the authors make this clear when expressing this caution :

Courts need to recognize, therefore, that the thought processes of most clinicians, whose modes and manners of discourse may in their aplomb and tones of unflinching conviction, appear to be authoritative, are by dint of training and practice historically rooted in the traditionally divergent, intuitive, and speculative thought processes of the clinical case conference, and not in the traditionally systematic, fact-weighting thought processes of legal discourse. *Caveat curia!*

41. The authors refer to the problematic relationship between a low assessment of abuse and a “conservative” recommendation for contact. An example given involved a risk assessment by participants falling between 0.001 and 0.25 (mean probability: 0.11) where despite this low likelihood of abuse, several experts expressed the opinion that contact between the father and child should be supervised as a caution. That approach was criticised and attributed by the authors to “individual differences in tolerance for risk, as well as non-expert based views of parental rights”.
42. As the article was not concerned with the court process, it did not take into account the potential for such a poor correlation between a clinician’s assessment of risk and his or her recommendation for contact to be tested in cross-examination and the contradiction exposed. Nor did it take into account a court’s obligation to act according to law, rather than on personal views of “parental rights”.
43. By quoting that part of Kay J’s earlier dissenting judgment which includes an edited quotation from the article, the Full Court in *Re W (Sex abuse: standard of proof)* cannot have meant to endorse an approach which would have the court take as its starting point a premise that the sexual abuse did not, or “very highly probably did not” occur, as that would be inconsistent with s.140 of the *Evidence Act 1995* (Cth) and inconsistent with decades of jurisprudence about the standard of proof in civil cases, before and after the proclamation of the *Evidence Act 1995*. A revisiting of the article, and of the series of which it forms part, leads one to wonder whether it was considered in its entirety by Kay J in *K v. B*. As the Full Court itself made no reference to the article, save by

quoting that part of *K v. B* which refers to it, there is no reason to infer that it considered the whole of the article, or the series.

44. On occasions, submissions made in this court suggest that some readers extrapolate from the first paragraph of the article quoted by Kay J. that the starting point of a judge's evaluation should be the null hypothesis. The article does not support such a reading; nor does s.140 of the *Evidence Act* 1995 (Cth) or any of the other authorities to which I have referred.
45. While Dixon J.'s classic discussion in *Briginshaw v. Briginshaw* (1938) 60 CLR 336 at 361-363 of the operation of the civil standard of proof may appositely express the considerations which s.140(2) of the *Evidence Act* 1995 (Cth) requires a court to take into account, the correct approach (as recently observed by Branson J. (with whom French and Jacobson JJ. agreed) in *Qantas Airways Ltd v. Gama* (2008) 247 ALR 273, at para. 139 is that :

. . . references to, for example, "the *Briginshaw* standard" or "the onerous *Briginshaw* test" . . . have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s.140 of the *Evidence Act* provides.
46. Similarly, in *Johnson & Page* (2007) FLC 93-344, at 81,891, the Full Court of this Court expressly agreed with the "view that reference to the *Evidence Act*, rather than *Briginshaw*, is appropriate".
47. Section 140 is as follows :
 - (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
 - (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account :
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject-matter of the proceeding; and
 - (c) the gravity of the matters alleged.
48. The court is not in general required to exclude all reasonable hypotheses consistent with the non existence of a fact, or inconsistent with its existence, before the fact can be found. However, all the circumstances must be considered together at the final stage of the reasoning process and where the competing possibilities are of equal likelihood, or the choice between them can only be resolved by conjecture, the allegation is not proved; *Palmer v. Dolman*, [2005] NSWCA 631, IppJA at para 41.

49. In *Westbus Pty. Ltd. (Administrators Appointed) v. Ishak* [2006] NSWCA 198 at para 20, the Court of Appeal, citing a number of earlier authorities, observed that the standard of proof is not met if the circumstances appearing in evidence do not give rise to “a reasonable and definite inference”, but at most give rise to “conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture”.
50. In *Kuligowski v. Metro Bus* (2004) 220 CLR 363 at 385, the High Court, in a joint judgment, noted that disbelief of the case presented by the moving party does not necessarily permit the court to conclude that the positive case of the opposing party is correct. Quoting *Rhesa Shipping Co. SA v. Edmunds* [1985] 1 WLR 948 at 955, the High Court endorsed the finding that in a particular case it may not be possible for the court to reach a conclusion either way and in those circumstances the court is not bound to do so but may take the third course of finding that the party on whom the burden of proof lies has failed to discharge it.
51. Thus in this case, as in every case, the court must assess the competing probabilities of facts in issue, whether directly in issue or to establish a fact from which a further inference is to be drawn.