

**FAMILY COURT OF AUSTRALIA**

**GARZELLI & LEWIS (NO. 3)**

**[2014] FamCA 742**

FAMILY LAW – CHILDREN – Concerns expressed by three experts about the wife’s parental capacity and the risk of the parties’ child becoming parentified. Expert’s view is to minimise wife’s time. Opinion accepted by the Court.

FAMILY LAW – PROPERTY – Self-represented litigant seeks property settlement and spousal maintenance but produces no evidence to support orders. Husband presents plausible financial evidence which is accepted by the Court. Husband offers to pay spousal maintenance for one year which is the only evidence to support any order. Order made.

*Family Law Act 1975 (Cth)*

*Chappell and Chappell* [2008] FamCAFC 143

*Hardie & Capris* [2010] FamCA 1046

*SS & AH* [2010] FamCAFC 13

**APPLICANT:**

Mr Garzelli

**RESPONDENT:**

Ms Lewis

**INDEPENDENT CHILDREN’S LAWYER:**

**FILE NUMBER:**

MLC 3869 of 2013

**DATE DELIVERED:**

9 September 2014

**PLACE DELIVERED:**

Melbourne

**PLACE HEARD:**

Melbourne

**JUDGMENT OF:**

Cronin J

**HEARING DATE:**

18, 19, 20, 21, 22, 26  
August 2014

**REPRESENTATION**

**COUNSEL FOR THE APPLICANT:**

Ms Smallwood

**SOLICITOR FOR THE APPLICANT:**

Wilmoth Field Warne

**THE RESPONDENT:**

In Person

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

Ms Treyvaud

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

Schetzer Constantino

## **ORDERS**

- (1) That all extant parenting orders are discharged.
- (2) That paragraph 1 of the orders of the Federal Circuit Court made on 17 May 2013 is discharged.
- (3) That if the Australian Federal Police have not removed the name N ("the child") born ... 2009 from the Airport Watch List at all points of international departure from the Commonwealth of Australia (as provided by paragraph 2 of the orders made on 17 May 2013), the child's name be now removed.
- (4) That the husband have sole parental responsibility for the child born ... 2009 but for that purpose, the husband ensure the wife is kept abreast of all major issues about the child and in particular:
  - (a) advise the wife of any medical treatment for the child;
  - (b) authorise and direct the school at which the child attends to provide all school reports, newsletters, photographs and invitations usually directed to parents to be provided to the wife.
- (5) That until the start of February 2015 (or the first date thereafter when the existing cycle of contact ceases) the child live with her parents in the following fortnightly cycle:

- (a) In the first week, with the husband from the commencement of school on the Tuesday until the commencement of school on the following Friday and with the wife from the commencement of school on the Friday until the commencement of school on the following Thursday; and
  - (b) In the second week, with the husband from the commencement of school on the Thursday until the commencement of school on the following Monday and with the wife from the commencement of school on the Monday until the commencement of school on the following Tuesday.
- (6) From the start of the month of February 2015 but taking into account the cycle just referred to, the overnight period with the wife and the child referred to in paragraph 5(b) shall cease and the child shall remain with the husband for that particular period.
  - (7) From the start of the month of April 2015, the overnight period that the child spends with the wife on the Wednesday of the second week of the fortnightly cycle as referred to in paragraph 5(a) shall cease and the child shall remain with the husband for that period.
  - (8) For the avoidance of doubt, the cycle in paragraph 6 means that the child spends eight consecutive nights with the husband and six consecutive nights with the wife and the cycle in paragraph 7 means that the child spends nine consecutive nights with the husband and five consecutive nights with the wife.
  - (9) That during school term and long summer holiday periods, paragraphs 5, 6, 7 and 8 of these orders are suspended and the provisions of paragraph 10, 11 and 12 shall apply.
  - (10) That the child spend holiday time with each parent for one half of the school term holidays at times to be agreed and failing agreement with the wife for the first half.
  - (11) That the child spend time with her parents over the long summer holidays during one half each at times to be agreed and in default of agreement, for the first half with the wife in the holidays that commence in December 2014 and for a similar period in each alternate year thereafter and during the second half for the long summer holidays that commence in December 2015 and for a similar period in each alternate year thereafter.

- (12) That the child spend the discrete Christmas period between her parents as follows:
- (a) with the husband in 2014 from 2.30pm on Christmas Day until 5.00pm on Boxing Day and for the same period in each alternate year thereafter;
  - (b) with the husband in 2015 from 4.00pm on 24 December 2015 until 2.30pm on Christmas Day and for the same period in each alternate year thereafter;
  - (c) with the wife in 2014 from 4.00pm on 24 December 2014 until 2.30pm on Christmas Day and for the same period in each alternate year thereafter; and
  - (d) with the wife in 2015 from 2.30pm on Christmas Day until 5.00pm on 26 December 2015 and for the same period in each alternate year thereafter.
- (13) That all changeovers of the child between the parents occur at the child's school but if that is not possible because of schooling, then the parent who is commencing time shall collect the child from the other parent's residence.
- (14) That upon the completion of the holiday periods, the provisions of paragraphs 5-8 shall resume as if they had not been suspended.
- (15) That the child shall spend time with the husband on the husband's birthday and if it is not a period of his time under these orders then he shall have from 10.00am to 2.00pm on a non-school day and from 5.00pm to 7.00pm on a school day.
- (16) That the child shall spend time with the wife on the wife's birthday and if it is not a period of her time under these orders then she shall have from 10.00am to 2.00pm on a non-school day and from 5.00pm to 7.00pm on a school day.
- (17) That the child shall spend time with the husband on Father's Day and if it is not a day that she would normally be spending with him then from 6.00pm on the Saturday until 6.00pm on Father's Day.
- (18) That the child shall spend time with the wife on Mother's Day and if it is not a day that she would normally be spending with her then from 6.00pm on the Saturday until 6.00pm on Mother's Day.

- (19) That if the husband is travelling internationally, he shall give the wife 45 days notice prior to the commencement of the travel with a full itinerary (noting that any such travel must be within the terms of these orders unless the parties otherwise agree).
- (20) On Tuesday of each week (unless the parties agree otherwise) the child shall communicate with the parent in whose care she is not at that time by Skype or by telephone.
- (21) Without the consent of the husband, the wife be restrained from obtaining a passport or renewing a passport for the child from and for Country I.
- (22) For the purposes of the giving effect to paragraph 21 the husband is at liberty to provide a copy of this order to the relevant officials at the Embassy of Country I in Australia.
- (23) That the passports of the child be forthwith released into the custody of the husband who shall thereafter retain them.
- (24) That the Independent Children's Lawyer is forthwith discharged.
- (25) That for a period of twelve (12) months from the date of these orders, the husband pay the wife \$2000 per calendar month, the first of such payments to be made on the day, one month after the last payment was made by the husband under the parties' existing arrangements.
- (26) That pursuant to s 65DA(2) and s 62B of the *Family Law Act 1975* (Cth), the particulars of 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 these particulars are included in these orders.

IT IS CERTIFIED:

- (27) That pursuant to Order 19.50 of the Family Law Rules 2004 it was reasonable to engage counsel to attend.
- (28) That the application of the husband and the response of the wife filed 27 June 2014 are otherwise dismissed.

**IT IS NOTED** that publication of this judgment by this Court under the pseudonym *Garzelli & Lewis (No. 3)* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT MELBOURNE

FILE NUMBER: MLC 3869 of 2013

**Mr Garzelli**  
Applicant

And

**Ms Lewis**  
Respondent

**Independent Children's Lawyer**

## REASONS FOR JUDGMENT

1. Mr Garzelli ("the husband") married Ms Lewis ("the wife") in January 2007 after they had met in 2005 through the internet. The husband is a 61 year old company director who was born in Australia. The wife is a 48 year old woman who was born in Country I. She is not currently engaged in paid employment but has qualifications in healthcare and worked in Country I as a healthcare worker for two years. Her qualifications do not permit her to work in that field in Australia. The husband and wife have one child N ("the child") who was born in 2009 in Country I.
2. These proceeding which began in the Federal Circuit Court concern both parenting and a limited financial matter. The parenting proceedings about the child required the intervention of the Court in relation to:
  - (a) Whether there should be orders for equal shared parental responsibility (as the wife would have it) or sole parental responsibility (as the husband would have it); and
  - (b) What time should each parent care for the child? Leaving aside holidays, the husband seeks a block of nine nights out of 14 with him whilst the wife now seeks a rotating seven nights in each household.

3. When the proceedings began, the wife's outline of case document (and also her formal response) sought an order that the husband pay her \$200,000. The husband had always been aware of the wife's property settlement application and at the interlocutory hearing prior to trial, he justifiably complained that the wife (who was at that time represented by lawyers) was repeating requests for production of documents when, he said, he had already provided them. There was a long gestation period of this case much of the focus of which was on parenting matters and from the wife's side, little attention was paid to financial matters.
4. The wife's claim for property relief was always vague but, as the case was fixed for trial and the husband was the applicant, he had to provide his evidence about the financial position.
5. The wife equivocated on the first day of the trial about whether she was proceeding to seek an alteration of the husband's property interests. I accept that the wife has virtually no property. The husband simply sought a dismissal of the wife's claim for \$200,000. She did not cross-examine the husband about his evidence. Her own evidence as set out in her affidavit was, at its highest, an admission that although she did not accept the husband's evidence, she had no evidence to refute what he said.
6. It was only on the fourth day of the hearing when she entered the witness box that she said she would not seek property orders. I am confident that the wife was neither pressured to adopt that position nor was she handicapped by lack of legal representation. Before she withdrew her claim, I asked the husband when he was being cross-examined by the wife to explain and expound upon his affidavit of evidence in chief as well as his financial statement because it was evident that the wife would not or could not do so. He answered my questions confidently and without equivocation. The wife did not thereafter take up any of the points about the property issue.
7. It is also important to record that in the pre-trial interlocutory hearing, the wife advised the Court that she was having the husband's financial documents sent



to Country I for a forensic investigator to examine and then advise her about the husband's financial position. Nothing came of that. In evidence, the wife said that she had misunderstood what she could do with such material but importantly, at no time did she indicate that the investigation had established that the husband's position was untrue. Some of that might be due to the wife's disorganisation but having observed the husband giving evidence, I am satisfied there was no seriously held view by the wife that what the husband was putting before the Court was untrue.

8. The property proceedings are therefore no longer relevant. There is however, an extant spousal maintenance claim in which the wife seeks \$500 per week for an indefinite period or for at least the next five years.
9. The husband's counsel opened his case by saying the husband would pay the wife's rent for a year which amounts to just under \$2000 per month. In reality, that was what the wife was seeking. The duration of the order was in dispute. It is therefore a limited dispute about the duration of the spousal maintenance order.

#### **THE TRANSFER OF THE PROCEEDINGS**

10. The proceedings began in the Federal Circuit Court and were transferred to this Court because the wife had sought an order that (if granted) would have seen the child living in Country I. That proposal had always been opposed by the husband. Ultimately the wife chose not to proceed with that.
11. In the lead up to the final hearing, a variety of experts became involved in the parenting matter. Both parents were examined by psychiatrist Dr H. The wife attended upon psychologist Dr G (at the suggestion of Dr H) and both parents along with the child, attended upon Dr F for the purpose of a family report. In addition to that assistance, the Court had the benefit of an Independent Children's Lawyer.

### **THE WIFE HAS NO LEGAL REPRESENTATION**

12. During the lead-up to the final hearing, the wife had assistance from lawyers but at trial, she had no public or private funding for legal assistance and accordingly, represented herself. That was difficult for not just the wife but also the Court and the represented parties. Despite whatever assistance a court endeavours to provide through fulfilling its obligations to provide a level playing field, it is not only a stressful event but also complicated by jargon and the requirement to cross-examine the former partner in the marriage relationship in circumstances where the relationship has unhappily disintegrated.
13. It has been said that a judge at an interim hearing where both parties are self-represented has an advantage of being able to see the advocate and the witness (see *SS & AH* [2010] FamCAFC 13). In many respects, that applies to a trial judge observing a self-represented litigant where, as in this case, the wife was both advocate and litigant. Observing both of those characters, I was able to also observe the parent and the partner. One could see how the wife as a parent dealt with decisions that had to be made and in this case, the wife was difficult to tie down to a definite answer. As a partner, the dialogue between husband and wife where the wife was cross-examiner showed on the one hand how she would not listen to his answers and on the other hand try to negotiate with him to change his answers about what his perception of things had been. My observations therefore about the wife more so than the husband, come out of all of those aspects of her demeanour.

### **ASSESSMENT OF THE WIFE**

14. Psychiatrist Dr H described the wife in the following terms:

I was left with concerns as to her level of emotional functioning. Her manner was unusual and she experienced the interview as difficult and tortuous.

From the observations of other people given to Dr H, he said:

Such a description is consistent with that of emotional disturbance of a significant degree at a personality or developmental level, raising the

diagnostic possibility of a Borderline or Schizoid personality style or Asperger's Spectrum Disorder.

15. Dr H thought the wife's mood was anxious and her affect restricted. He said she was "difficult" to join with and there was a sense of distance. He found she struggled to express herself and she was wary and watched him cautiously. These few descriptions are apt because that is exactly how I found the wife throughout the proceedings. Her thought patterns were not consistent and her conversations rambling and disjointed. She had trouble expressing herself but even greater trouble trying to formulate questions for cross-examination. That remained the case notwithstanding my endeavours to explain how to cross-examine. She explained that her stress levels associated with the proceedings meant that she was sleep-deprived. Looking over the whole of the torturous cross-examination that she conducted, she knew what she wanted to challenge even if it took a long time to get there. Unfortunately however, much of what she disputed had little impact on the determination in this case. The Court has powers to appoint a litigation guardian of its own motion but despite what I have set out as the opinion of Dr H, I could not find that the wife had an inability to conduct the case. She had her documents prepared, came along with an accompanying person and at all times, despite being ponderous, asked questions about important issues such as family violence and aggression. These factors indicated a person who was in control. The evidence of the experts, and in particular Dr H showed she was watchful, contemplative and very much trying to control the way the case was to proceed. I find she knew what the proceedings were about and understood my directions.
16. This wariness continued when the wife gave evidence. She began her case by wanting the opportunity (given to counsel for the husband) to formally open her case. This request by the wife was on the afternoon of the fourth day and amounted to just an explanation of what had happened to her in her marriage life and how she thought she had not put her case forcefully because she had not understood the process and how, in recent weeks, she had come to understand that change had to occur in her life as a consequence of which, she

now felt she could be more flexible. I permitted those statements (when confirmed on oath) to be put as part of her evidence. She wanted to alter some of her affidavit even though it was only 21 days or so old. Her discourse in the witness box both as to evidence in chief and her answers in cross-examination were rambling. She was difficult to interrupt in long and often irrelevant discourses. When cornered in relation to expressions and concepts used, she was evasive. She was accused of being manipulative which she denied. I find that she was manipulative during the marriage subsequent to the separation and sadly, during this hearing. Little I heard gave me confidence that there is a possibility of a cooperative parenting arrangement in the future. That becomes evident from the findings specifically set out below.

17. After completing his assessment, Dr H wanted a psychologist to undertake psychometric testing of the wife. That was undertaken by Dr G. Dr G is a clinical and forensic psychologist. He concluded that the wife had personality difficulties with some vulnerability towards borderline personality issues with a tendency towards “black and white” emotional functioning. He thought the wife presented as highly defensive with an approach that showed her not only not to be transparent but also to be actively attempting to present herself in a naively positive light.
18. Both of Dr H and Dr G were required by the wife to attend for cross-examination but all of her questions of them focussed on either minor descriptive errors (none of which I find to be important) or on statements of other people such as the husband and her own brother where she said their statements were untrue.
19. Even allowing for the possibility of the wife to be correct in her assertions (which I do not accept), Dr H thought that the factual matters which were contentious did not alter his opinion.
20. The wife challenged Dr H about his borderline personality concerns but when he considered the history he was given of her childhood, her presentation and the descriptions of others, he felt he had diagnosed the wife correctly. All of

the observations of the two experts are borne out in the evidence of the husband which I found reliable. The question is, what difference does all this make to the wife's parenting of the child?

#### **THE HUSBAND IS EXAMINED BY THE PSYCHIATRIST**

21. The husband too faced the examination of Dr H. Of the husband, Dr H said:

At times he acknowledged that he felt very threatened. There is an unrelenting quality about (the wife) which he finds disturbing. He can't reach her. It is intangible. She can't be reasoned with.

22. With the description just given, I have to agree. Dr H said the husband did not present with a psychiatric condition which was a comforting diagnosis because I am satisfied that the child needs a stable parent. I shall turn below to the disturbing elements of the wife's parenting but the issue is what role she should play in the child's life bearing in mind that until now, she has been the predominant parent.

#### **THE HUSBAND AS A WITNESS**

23. As a witness, I found the husband calm, placid, conciliatory and indeed truthful. He was challenged about a number of issues where he calmly responded that his version of history was correct yet the wife persisted (having asked the question) in commenting that he was not truthful. In re-examination of the husband by his counsel, voluminous text messages, correspondence and the parties' own communication book, corroborated the husband's version of events. I have accepted his evidence.

#### **PARENTING PROPOSALS**

24. In the context of the evidence set out above, the first challenge was to get the wife to articulate her parenting proposals. She vacillated from saying that her proposals were as set out in her outline of case filed on 8 August (where the husband was to have alternate weeks from Wednesday through to the Monday and one night after school of the following week) which she said she was pursuing "at the moment" to a position where she then said that she would leave it up to the Court.

25. When specifically challenged about whether she continued to pursue a nine:five fortnightly regime in her favour, she said that that was not her position but that it should be from Monday to Monday which she then altered to Tuesday to Tuesday and only a short time later back to Monday to Monday again. She said that could work and she wanted that arrangement.
26. The husband's position did not alter. He wanted an arrangement under which he had nine days with the child per fortnight.
27. The Independent Children's Lawyer's position was to wait and see. That was the position set out in the outline of case filed in July which was prior to the completion of the family report.
28. Each party relied upon a string of affidavits and rulings were made in respect of objections to evidence on the grounds of relevance. The wife required most of the husband's witnesses for cross-examination.

#### **THE SEPARATION**

29. In about February 2011, the wife asked the husband to obtain alternative accommodation for her and the child. The parties had been living in a home long owned by the husband. The husband rented an apartment in a large block of units. The payments, for which the husband was responsible, were about \$3000 per month. Despite being physically separated, they continued their relationship including travelling to Country I as a family. All of that came to an end in May 2013 when the wife took out a Magistrates' Court application and obtained an ex parte intervention order.

#### **THE INTERVENTION ORDER**

30. In early May 2013, the parties were together dining at a restaurant. Like a number of events described by the wife, it is hard to know exactly what was said, what happened and what impact it had on the parties as individuals. This vagueness permeated the wife's evidence. For example, (at paragraph 28 of her affidavit), the wife said:

The husband's continual undermining and abuse and threats of me caused me to take out an intervention order in May 2013. The husband has been very demanding and used his standover tactics for a number of years. He would yell at me and comment that I was worthless, and valueless. He threatened divorce. His anger and potential anger has frightened me over a long period of time. I felt degraded by the husband's remarks and for the last two or three years felt helplessly restrained in Australia.

31. It will be seen from that description that it is hard to know exactly what the husband did. The wife relied upon evidence from her own mother and brother in Country I but their evidence was equally vague and did not get better when they were cross-examined as I shall set out below.

32. On 12 May 2013, the husband sent the wife a text message which said:

Happy Mother's Day. I know that you don't want to hear it, but I do care.

The wife responded to that text message instantly. She questioned that if the husband cared, he would take both she and the child back to Country I as a family. She said that with real counselling, they could return to "beauty" but that could not happen without her family and friends all of whom were in Country I. She then said:

I have already promised u (sic) that we would be equal and progressive parents on everything there.

The wife ended the text by asking the husband to:

Return to the light w (with) us for [the child's] sake, and hopefully ours. I will take care of u (sic) if u (sic) do.

33. I find on the basis of that communication, the wife simply wanted to return to Country I but there was no indication of fear; rather it was one of unhappiness particularly about being stuck in Australia.

34. An arrangement was then made for the parties to attend psychologist Ms S to try to assist their relationship. The husband attended the appointment on the day but the wife did not. The husband sought an indication by text as to where the wife was and she gave a vague and evasive response. It transpires that she had gone that morning to the Magistrates' Court and had completed an application for an intervention order. It was apparent from the cross-

examination of the wife that she was endeavouring to say that she had gone there upon the urging of some other person and that she did not understand the process but was just simply swept along. She went before a magistrate but the only evidence I have of what occurred is contained in the application itself. The allegation, like other allegations that the wife made in these proceedings, was vague and certainly inconsistent with the examples set out in the text mentioned above.

35. The child's name was placed as a protected person on that intervention order. It was the wife's evidence that this was the magistrate's idea although that is hard to fathom bearing in mind the nature of the evidence alleged.
36. Late in the afternoon when the wife had obtained the order and while the husband was still not aware of it, the wife sent a text message organising for the husband to collect the child from day care. This would be completely inconsistent with the intervention order but it was the wife's evidence that the police had not served him. When I queried about the possibility of the police attending when the husband delivered the child back to the wife, she said that she had made arrangements for that not to happen and in any event, she went to live with a friend and took the child that night in any event.
37. It was put to the wife that she was deceitful in doing what she did and she seemed to acknowledge that what she had done could be construed that way. Bearing in mind the nature of the relationship between the husband and the wife up until that time and particularly the time that had elapsed after the restaurant night, I find the wife's approach perplexing. I do not accept that she was swept up in the process because the text messages subsequent to all of that indicate manipulation. The husband, after becoming aware of the intervention order endeavoured to get some arrangement to see the child but the wife obfuscated.
38. It is important to note that the intervention order remained an interim arrangement until October 2013. At that time, the wife withdrew her application. It was still evident by October that the relationship between the



parties had not improved. Her explanation for withdrawing it was that she wanted to work cooperatively with the husband in relation to parenting. Nothing I observed nor anything I heard justified the making of that intervention order and nothing indicated any reasonable fear held by the wife.

#### **PROCEEDINGS IN THE FEDERAL CIRCUIT COURT**

39. After the making of the intervention order, the husband immediately filed an application seeking injunctive relief to preclude the wife from flying to Country I and that order was made by Judge Maguire without notice to the wife. Some days later, the husband filed an application for a shared care regime and on 24 May 2013, Judge Maguire ordered (by consent) a shared parenting arrangement although not an equal one.
40. In June 2013, the husband filed an application that the child live with him and spend limited time with the wife. It was not until September 2013 that the wife filed a response indicating a desire to move to Country I and as a consequence, the proceedings were transferred to this Court. In the same month, Senior Registrar FitzGibbon ordered that the child spend six nights out of 14 per fortnight in the husband's care.
41. In October 2013, the parties attended Dr F as a result of the order of Senior Registrar FitzGibbon and that report was completed and made available to the parties on 21 November 2013. At that time, Dr F recommended the retention of the status quo. There then erupted a dispute about which school the child would commence in 2014 because the wife had moved out of the city apartment to the western suburbs of Melbourne where she was renting accommodation. The wife's perspective was that she was evicted from the apartment because the husband failed to pay the rent. For reasons that I gave at the time of hearing the school application, it was more appropriate for the child to commence school in the area close to the husband notwithstanding the inconvenience such an order would cause to the wife.
42. Subsequent to that order, the wife moved back to the Suburb B area close by to the husband and that was where things remained until the final hearing. That

is, at trial, the child was spending six nights with the husband and eight per fortnight with the wife.

#### **THE DISPUTED FACTS**

43. Much of the dispute centred around questions of family violence but as I have earlier indicated, the assertions of the wife, denied by the husband, were vague.

#### **THE PARTIES' VISITS IN COUNTRY I**

44. The parties were in Country I when the child was born. The wife said that the husband placed a lot of pressure on her to return to Australia where his business was predominantly conducted. The wife was resistant to that but at its highest, she said he "continued to pressurise" her commenting to her that she was not a supportive wife. It was the wife's case that after returning to Australia, the husband yelled at her, became angry and raised his voice regularly. Her role she said, was to try and calm him. Some of this argument was said to have occurred in the presence of the child. She described the child as regressing badly and reverting to using a baby's bottle and carrying her security blanket. The child is an intelligent and articulate child for her age and none of this was borne out in the evidence of psychologist Dr F who interviewed the child.

45. The wife said the husband was continually undermining her but again, nothing concrete was led in evidence nor was anything exposed in the interview between Dr F and the wife. The affidavit of the wife was replete with statements that the husband had been demanding and had used "standover tactics" for a number of years. Nothing in the evidence supports any of those allegations.

#### **THE EVIDENCE OF THE WIFE'S FAMILY IN RELATION TO ALLEGATIONS OF ANGER AND VIOLENCE**

46. Sadly, the wife's family is fractured. The husband relied on the evidence of the wife's brother Mr A and the wife relied upon the evidence of her mother and brother Mr C. Each of those three witnesses was required by the other side for cross-examination by telephone from Country I.

47. Mr A described the childhood relationship between he and his siblings. In my view, nothing turns on that.
48. Mr A saw the husband, the wife and the child immediately after the child's birth. He saw the father's role in caring for the child as against that of the wife who was sleeping in and staying up late at night watching movies. He was less than complimentary about the wife's flexibility and said that she easily became angry. One such example related to his own children. He said that the wife would berate the husband in front of the child but she would also yell at him when he criticised her approach to parenting. He was sufficiently concerned to remove his own four year old son from the conflict. The wife denied that all of this occurred at all. She put to her brother that what he had said was untrue but then she asked him what he meant by verbal abuse. He gave a particularised version of the words used and the conduct involved. The brother stood by his version of events but also volunteered that much of this occurred around the wife's style of doing things which seemed to me to be an assertion that the wife was leaving much of the daily responsibilities to the husband. The evidence of the brother is consistent with the evidence of the husband. I accept that the brother was a truthful witness.
49. The wife's mother gave evidence by telephone from Country I and in respect of the contentious issue of aggression said that the husband was frequently critical, angry and outspoken every day during their several months visit. In an unusual statement, the maternal grandmother said that the child:

Would observe this behaviour and would then frequently dance in front of him, attempting to distract him.

The implausibility of a child taking on that responsibility speaks for itself having regard to the very young age of the child then. Dr F examined the issue of aggression and saw nothing to indicate that the child had observed any. The description of the maternal grandmother was of discussions in which there was a dispute over how the child was to be raised. One specific example related to a restaurant visit at which the husband and wife disagreed about the quality of

the food that the child was being given to eat. The grandmother's version was that as a result of the disagreement between the parents, the husband stormed out. It was said that the husband became angry and yelled at the wife before leaving. Having regard to the assessment of the experts about the rigid approach of the wife, I can well understand how the husband may have become frustrated at having his views ignored.

50. The maternal grandmother also gave evidence in her affidavit where she complained about the husband ignoring her in relation to toilet training issues but also in relation to him showering with the child. Before the grandmother was called to give evidence, I queried the wife as to what she understood her mother's allegation against the husband to be. She told the Court that she had not wanted that particular evidence to be "put in" by her mother yet she made no effort to avoid the evidence being called and that meant it was ultimately challenged. At its highest, the grandmother conceded the showering and the toileting were not appropriate by her standards although I am not entirely sure why bearing in mind the child's age. The wife did not seem to be troubled about it. What was somewhat disconcerting was the fact that although the grandmother thought that the showering was inappropriate and the wife in this hearing did not seem to want it raised, the grandmother went on to say that the wife told her that she had tried to stop "this behaviour" but to no avail. That evidence was not put before the Court by the wife and not clarified in any way as to any concerns. Just how the evidence of the grandmother was relevant remained something of a mystery.
51. The nub of the grandmother's evidence was that the husband was aggressive and uncompromising. The vagueness of the assertions means that none of the evidence of the grandmother justifies such a conclusion. In my view, the evidence of the maternal grandmother does not assist.
52. The second brother of the wife was also a deponent of an affidavit. There was some concern that he had been freely listening in to the evidence of his mother so he may have easily just adopted her position. I doubt whether he was

inappropriately influenced. He gave evidence in relation to the restaurant incident. He made an unusual statement in relation to this event in that after the argument between the parents, he said the wife calmly responded and “tried to help the child to feel safe”. He was asked what that meant but all he could say was that the husband was very angry, stood up, threw his food down and stormed out. He described the husband as very intense and it was disconcerting to the child as well as not only the family but people around. He said he followed the husband out but the husband did not return.

53. The brother also gave evidence about an argument between the parents over a booster car seat. He described the husband as shouting at the wife about whether this broken seat could be used or not. Even if it occurred, all it shows is that the parents disagreed about parenting aspects. Although the brother wanted to indicate that it was illegal and unsafe for such a seat to be used, I am not in the position to make such a finding on the evidence before me.
54. If this evidence was led, as I suspect it was, to establish that the husband is an angry and violent man, it did not establish that at all. I appreciate that the grandmother and brother are not lawyers and that the affidavit was prepared by them for use by an unrepresented litigant but it did not give me any clear sense of their understanding of aggression and violence. All of the evidence that I heard from the husband did not fit the picture portrayed by them. The evidence therefore of the grandmother and brother does not assist me at all.
55. Having regard to the evidence I heard about the intervention order application and its subsequent withdrawal, the evidence of the wife’s family and the evidence of the parties, I do not find that the husband is an angry and uncompromising man.

#### **THE PARTIES AS PARENTS**

56. The dispute between the parents over particular incidents was not out of the ordinary. It is quite common to see parents disagree about the raising of their children but in this case, two important things must be said. The position of the parents is such that decisions about the child cannot be made jointly. As I shall

find, the wife's uncompromising attitude towards parenting and her reliance upon having the child with her creates the possibility of the child becoming a parentified child. Thus, it is important to look at the particular incidents that give rise to this concern.

#### **THE BABY'S BLANKET AND BABY'S BOTTLE**

57. The husband complained that when the child had begun school, he found in her bag a baby's bottle which he knew had previously been used for comfort purposes. He did not use it and saw no need for it. When the wife was asked about this by the family report writer, she prevaricated. The only inference to be drawn from what she told the psychologist was that it was still happening but she was no longer encouraging it. She told the psychologist that the very night prior to the assessment, the child had not asked for her blanket and bottle. The wife told the psychologist that she had been conscious of the fact that the husband had been trying to wean the child off these items but because of what had been going on the previous year, that exercise was difficult. Only days later when the wife filed her affidavit of evidence, she described the child as using these comfort things when going to bed and that the blanket and bottle were in the bottom of her school bag as security. The wife's evidence and case before this Court was that it was no longer an issue and that the last time that the items had been used was quite some time ago. The affidavit was only sworn three weeks prior to the wife giving evidence.
58. There is importance in this evidence in that the husband maintained that there were no problems of insecurity when the child was in his care. That is in complete contrast to the position portrayed by the wife to the psychologist. It is particularly important to note that the psychologist spoke to the child and gained an impression that the husband's view was right.
59. It is also important to observe that, accepting as I do, by the wife putting the blanket and the bottle in the child's bag, the child may be put in an embarrassing position with her school friends but more importantly, she clearly does not need such a security blanket.

### **THE CHILD CRYING AWAY FROM HER MOTHER**

60. The wife's position was that the child was missing her and distressed when with the husband. She referred to the fact that the child had complained that when she had asked her father to be able to telephone, the husband put her off and she never got the opportunity to telephone her mother.
61. In a remarkable statement for a young child to the psychologist, the child made it clear that she knew of her mother's distress but it was not caused by her and she was not crying when she was with her father and had indeed told her mother just that. This behaviour of the wife was very concerning for the psychologist.

### **THE SKYPE CALLS**

62. When the parties had settled into a routine, there were occasional Skype communications. The husband said that the wife was heard on a number of occasions asking the child whether she was safe. The wife's explanation was that on one occasion, the child entered the room and slammed the door and made some remark as if in frustration. Nothing in the evidence otherwise supported any basis for any concern. The wife was adamant when she cross-examined the husband that this raising of the safety issue had only occurred on one occasion but he disagreed. Having regard to all of the matters I have heard, I find it is more likely that the wife does ask that question at various times. There is no basis for that question of the child and bearing in mind what the child told the psychologist, the wife's conduct is quite disconcerting. It shows the wife is exhibiting a dependence on the child. The child was away from the wife for a period of seven days during a holiday period and there were no adverse consequences. That was specifically put to the wife and her response was:

As far as I know, there were periods where she was missing me especially in May.

Having said that, she agreed with counsel for the Independent Children's Lawyer that the child enjoyed time with both parents and had told the

psychologist that she was quite comfortable in changing over households. The wife also agreed that the child was happy and well-adjusted as well as intelligent.

#### **NAPPIES**

63. The parties even disagreed about the use of night nappies. The husband said that he had not been using them because the child had not wet herself at night but he was concerned to find the child had been using them in the wife's house. He said he tried to have the wife cease using them but she ignored him. The wife did not respond to that accusation in her affidavit.

#### **LATENESS FOR SCHOOL**

64. In his affidavit, the husband raised as an issue, the fact that the wife had been late in getting the child to school. One incident in particular was of relevance. The child knew that her birthday would be acknowledged in school assembly and had obviously told the husband so he attended. The wife was late (as she said because of traffic) and the child missed the assembly. The wife was at pains to point out that she rectified the situation by asking the school to repeat the performance at the next assembly but that was some days after the child's birthday. Interestingly, the wife said that she spoke to the child and the child was not troubled about it. I acknowledge that the wife had to travel from the western side of Melbourne and traffic can obviously be a problem (although the wife said she allowed plenty of time) but the point was that the husband's evidence indicated that the child was generally an early riser but still the wife could not organise to get the child to school on time. I take into account also the evidence of the wife's brother about her late night activities and unavailability in the morning all of which points to a management of time problem. But that same problem permeated her conduct of the litigation before the Court.

65. It was also the wife's cross-examination of the husband that elicited the fact that the child had only been late for school on six occasions during the year. I



asked whether she was tendering any records to show the extent of the lateness but she declined to do so.

66. I find that the husband is a very organised person and the wife is not.

#### **THE MEDICAL PROBLEMS**

67. It appears that for some time now, the child has had a polyp problem. The problem was recognised and is now being addressed. Unfortunately, that has not been the case for some months and the husband has felt excluded. An expected appointment was cancelled by the wife without the knowledge of the husband. The wife has given no plausible explanation as to why that has happened but now simply says that the issue is under control. Indeed, the hearing was delayed whilst the appointment took place.

#### **IMMUNISATION**

68. Another issue of some concern related to the question of immunisation. It was common ground that schools and day care centres would not take the child without her having been immunised. There is apparently an exception where the parents sign a form of conscientious objection to the immunisation. The evidence seems clear. The husband read a book indicating the homeopathic solutions were equally suitable so he signed the objection at the request of the wife but later found on his reading that they were disapproved of. The wife's position was that there was not to be any immunisation in any event.

69. The dilemma in this case was that the husband then wanted the child immunised and the wife would not agree. Even as late as the cross-examination of the wife, I am uncertain as to whether she was agreeing to the course of injections or not. I asked the question a number of times to try to ascertain whether the dispute over immunization would be a problem if I left the parties with that joint responsibility and was unable to get an answer from the wife. That creates a dilemma because I accept that the husband saw not only benefit for the child but also importance in it. I can also take some notice of the fact that the parties' agreed that immunization is compulsory absent

“conscientious” objection. That must say something about how the education authorities view its importance. I find that the husband saw immunization as important for the child’s health yet I have little understanding of the wife’s objection. This issue could be a problem for future schooling and a stand-off between the parents is not appropriate for the child’s welfare.

#### **THE WIFE’S COMPLAINTS ABOUT THE HUSBAND**

70. In addition to the matters mentioned about anger, the wife also asserted that the husband did not set boundaries so that the child returned from time with the husband and had tantrums when she tried to impose discipline. She also complained that the husband did not attend to matters of hygiene. The evidence does not support any such assertions. Quite the contrary, all of the evidence of Dr F showed a very good and close relationship with the husband and very clear indication that he was a capable parent. Nothing the wife put to the husband indicated to the contrary either.

#### **SCHOOLING**

71. In late 2013, the husband was endeavouring to engage with the wife to sort out what school the child would begin in 2014. The husband gave evidence of his attempts at the latter part of 2013 to which there was no response by the wife. In cross-examination, she conceded that she had left that to her solicitor who presumably had not done anything about it. When eventually the lawyers’ correspondence was produced, it showed the wife’s nominated school but the opportunity for the husband was lost because the school had already closed for the summer holidays when he received the letter. It had been the wife’s position that she had provided the information to the husband but the correspondence showed otherwise. Bearing in mind the very clear evidence of the husband about his desire to be involved in the child’s education, this was not just ignoring the husband, it was plainly manipulative. The husband has a very significant interest in education having been professionally involved in that field. The wife’s approach gave me little confidence that there would be any flexibility about educational issues in the future.

### **THE WIFE'S ATTITUDE ABOUT THE HUSBAND'S ROLE**

72. The wife filed an affidavit by Ms W who had a lot of contact with her through a parenting group. The description in the affidavit about the husband can only have come from the wife. It talked about him working long hours and his role in the child's life being only when he had some time. It was put to the wife that this was not a true description of the husband's role and the best she could respond was that he was working a lot. All of the evidence indicates that the husband has had a very significant role in the child's life and spent significant amounts of time with her. The evidence of the wife's brother Mr A suggests that right from birth, the husband was involved in the child's daily activities. The affidavit of Ms W went on to say that the husband was involved in "little things". That comment, apart from necessarily emanating from the wife, had a clear pejorative connotation. In a moment, I shall refer to the wife's attendances on a social worker where similar reflections appeared. Contrary to the wife's view, I accept that the husband has had a very significant role in the child's life.

### **THE COMMUNICATION BOOK**

73. The parties endeavoured to overcome their lack of face to face communication by the use of an exercise book. The husband made regular sensible and child-focussed entries but was rebuffed by the wife in writing. Whilst I accept that the husband had legal advice and may very well have been conscious of what he was writing and how it might end up in evidence, the wife showed little restraint. Her criticisms of the husband showed her disdain for him as a parent. His requests were reasonable and her responses cryptic.

### **THE SUBURB D INCIDENT**

74. In the period prior to orders being made when the parties were living in two different households, there was regular contact between the husband and the child. One particular day which was scrutinized in the proceedings, the husband arrived, and notwithstanding he had a key to the wife's premises, he sent a text message to her that he had arrived. He waited for one and a half

hours before entering the residence. There was little dispute that he was to take the child to day care that day. When eventually he did enter the premises, the wife described him as angry and when she ultimately voiced her displeasure with what he had done in a text message, she said that he had “ruined” everything. Nothing in the wife’s evidence justified her remark.

75. The wife said that there was an explanation as to why it had all gone awry that day. Her view was that the husband was not to come up to the premises until such time as the child awoke and when she did, according to the wife, the child was talking about monsters at the day care centre and she was trying to deal with it. None of that evidence appeared before the Court nor was it mentioned at any stage to the psychologist preparing the family report. Nothing was put to the husband about that issue either. The only conclusion I can draw on the evidence is that the husband was fulfilling his obligation and the wife, who knew of the arrangement, thought she would simply inconvenience him. She said the child had slept longer than usual but that seemed irrelevant to the husband’s role that day. She said he was angry but this seems a conclusion drawn out of his justifiable frustration. Nothing in the whole case suggests that the child has witnessed anything like anger.

#### **THE EVICTION**

76. In that same period prior to orders being made, when the husband was paying the wife’s rent, it appears that an administrative error was made by his staff and the rent was not paid. As soon as the problem was brought to the husband’s attention, he rectified it. For reasons which remain unclear, the wife chose to leave the property even though she had been given a formal notice to vacate but she certainly left prior to the time in the eviction notice. I am satisfied that there is nothing in the evidence to indicate that the husband deliberately or indeed negligently orchestrated the eviction of the wife from the rented property at the Suburb D. That was not how the wife portrayed the picture to anyone who would listen.

### **THE WIFE'S INTERACTION WITH A SOCIAL WORKER**

77. Unbeknown to the husband and the Independent Children's Lawyer, throughout the latter part of 2013 and into 2014, the wife attended upon a social worker employed by Organisation K. This came to light when the wife attended upon Dr F the psychologist. The social worker attended the wife's home and the child was present throughout much of the conversation on a number of occasions. Although the wife said that the child saw this person as a friend, that is hardly how it was portrayed in a report prepared for the wife by the social worker. The wife said she did not request this report. That seems implausible and I do not accept her evidence. The tenor of the letter suggests it was prepared well-knowing there were parenting proceedings afoot. The social worker was not called as a witness by the wife. The social worker took a very dim view of the husband as a violent and angry man who in her view, should have a very limited role in the child's life. The letter was admitted into evidence by the consent of all parties. This was an example of the wife portraying an inaccurate picture to anyone who would listen.

### **THE WIFE LOCKS ENTRY TO SUBURB D**

78. In another very unusual event, the wife conceded that she put items of furniture in the hallway in front of the door to prevent access during the night to the Suburb D premises. It was conceded that the husband had a key to the premises. In her complaint for the intervention order, the wife recorded that she had "barricaded" herself in. The wife said that was the terminology by the person who completed the form albeit that she signed it. She said she simply put items of furniture in front of the door that were in the hallway. She was cross-examined about the understanding or reaction of the child of this security issue. The wife said that the child would not have recognised the difficulty. I have doubts about all of that. This has all got something to do with the fact that the wife continues to see the child as not being safe in the husband's care. Nothing I read or heard indicated that the husband had ever violated the wife's privacy and this conduct has an element of paranoia about it.

79. It was the wife's case that, of late, things between the parties had improved. That was how she cross-examined the husband; he disagreed. I accept his version.

#### **THE EVIDENCE OF DR F**

80. Dr F is a forensic psychologist who was appointed to prepare a family report. Dr F first interviewed the parents and the child in October 2013. At that time, the husband was pursuing orders that the child live with him and spend only four nights per fortnight with the wife. The arrangement at that time was eight nights out of 14 with the wife and six nights out of 14 with the husband. Dr F understood the husband's concern at that time was the wife's "tendency" to put her own issues ahead of the child or on to the child. The husband was alleging that the wife could not cope with mornings and that changeovers were being made difficult. The evidence supports those assertions.
81. Dr F also understood the wife's position to be that she was a better role model than the husband because she did not lie or abuse people in front of the child. The wife gave imprecise and unparticularized examples of anger, road rage and yelling at employees. The wife told Dr F that the husband put her down and he would be angry with her. There is significance in the respective positions of the parties because by the time of the final hearing, the husband's position about parenting had not changed at all but the wife gave no evidence about the types of behaviour that she had described to Dr F. I have dealt with those issues as to specificity above. The husband's complaints about the wife were corroborated by the wife's brother.
82. Notwithstanding the wife had had the brother's affidavit since October 2013, she had difficulty indicating what she was disputing. The brother's evidence focussed mostly on the husband's role with the child yet the wife said that all of the complaints about her conduct were lies. There was little attention paid by the wife to the supportive statements of the husband by the brother. I accept there is an estrangement between the wife and her brother caused, he said, by the wife's behaviour and the allegations against the husband but nothing from

the wife's cross-examination indicated unreasonableness on the part of the brother. Thus, what Dr F was considering was what I was observing.

83. Dr F had concerns about the child being separated from the wife because of what she observed was the mother and child attachment. Despite that, she recommended in late 2013 that the husband have substantial time with the child. The level she recommended was five out of 14 nights and an evening meal on one other night. That recommendation has now radically changed.
84. In her second report, Dr F saw significant change. The mother's position to Dr F was still as it had been in November 2013.
85. For my purposes, it is significant that the interviews for this report occurred three weeks prior to the final hearing and immediately prior to the wife filing her trial affidavit. Thus, Dr F was only aware of the wife's position from an earlier affidavit and what the wife told her at the time.
86. The history reported by Dr F was not seriously challenged by either party. The husband gave her a list of concerns. The wife said the child was still young and the current arrangement was not "going well" which was obviously contrary to that portrayed by the husband. It must be observed that there was no cross-examination of the husband or of Dr F by the wife as to what that concern was about nor was anything said by the wife in her affidavit four days after the interview about it other than that circumstances of the child and the husband were not ideal. A second point is that the wife began the final hearing by saying that she was adopting the recommendations of Dr F which were that the parties should move to equal time. When asked at the conclusion of her evidence whether that could be immediately implemented, the wife equivocated and said she could not make a decision.
87. In cross-examination, the wife asked Dr F whether the husband was deliberately endeavouring to make it look like they could not work together. The wife had cross-examined the husband only at a very superficial level about this but he seemed to resignedly say that they had been to counselling on a number of occasions unsuccessfully and that whilst he would attend an

arbitration type of therapy, he did not see much prospect otherwise of success. Nothing I heard suggested the husband was orchestrating the situation as alleged by the wife.

88. A similar statement was made by the wife to Dr F about how the husband had lied to Dr H and Dr G. This insinuation that the experts were somehow misled by the husband could only be of concern if the lies were established but nothing I heard in the evidence suggested that the husband had lied about anything. For example, the husband told Dr H that the wife told him that her own mother had borderline personality disorder. The wife said that she did not say that but to prove the point, the wife's mother produced a certificate to say that such a diagnosis was not true. It was not an allegation made by the husband but rather that he had said the wife told him that. Despite a denial by the wife about that and a strongly worded affirmation by the wife's brother that she was a truthful person, I have doubts about her credibility as well as about her perception of events. It is conceivable that the wife did say something like that to the husband. Thus, Dr F was assessing the wife's personality including her truthfulness in the context of what she read, what she was told and what she observed. Her assessment was not complimentary of the wife.
89. Dr F assessed the child as "fairly happy" and well-adjusted. The child saw no difficulty about the time that she had with her father which was obviously not the wife's view. Remarkably, for a child so young and completely contrary to the wife's view, the child said that it was her mother who missed her and that she had told her mother so. She confirmed to Dr F that she was not distressed at the husband's house. Also interestingly, bearing in mind the wife's view that the husband was angry in front of the child, the child told Dr F that her parents did not get angry with one another at all. The child was positive about spending more time with the husband.
90. The portrayal by the child did not sit comfortably with the wife's vague but persistent view that the child was a vulnerable child who needed only a limited time with the husband.



91. Dr F observed the professional assessments of the wife had shown only possibilities and vulnerabilities. She went on however to opine that the absence of a formal diagnosis did not mean the impact of the behavioural traits ought not be concerning. She described the wife as giving paranoid-based answers, showing that she was out of touch with reality and as having an uncanny way of recognising Dr F's concern but avoiding addressing it by deflecting to something else. There was a remarkable similarity in that assessment to the wife's demeanour in the court room both as a witness and as a cross-examiner. At times the wife reverted to the mantra of not understanding the process and of not being properly prepared. I saw nothing to explain, let alone justify, that assertion. There were days where she had not done things such as examine all of her text messages notwithstanding the child was in the husband's care during the previous evening.
92. One possible interpretation absent a psychological explanation, is that the wife's behaviour is deliberately manipulative. In my view, the wife's disorganisation militates against that. However, her conduct of the proceedings which is described elsewhere in these reasons was at times very focussed and her questions targeted. Her prevarication and obfuscation were more likely to be indicative of a person cornered who could no longer avoid facing the problem. That is, the husband was and is a good father to the child and should have a serious role in the child's life.
93. In her second report and evidence, Dr F said that just because the child was currently adaptive did not mean that as she got older and more cognitively aware, she would not be put in a difficult position having to choose to support her mother and align herself with her mother just to make things easier. In other words, that the child would be living two different realities and that would be very difficult for her. Dr F opined that it was likely that as the child got older, the wife would lean on her more and more for her own emotional needs and desires to be met. This was the parentified child problem.

According to Dr F, that in due course could lead to the possibility of the child abandoning her relationship with her father.

94. Dr F opined:

The mother's behaviour and [the child's] exposure to it is also likely to have a long term impact on [the child's] social development, her behaviour and learning, her school experiences and her psychological well-being too; and it is highly likely that [the child] will also develop personality difficulties or disorders in the longer-term as a result too.

95. But Dr F also observed that the difficulty was that the child needed her mother as well. She was concerned to move the child from the wife. Thus she said:

So the real dilemma here is to try to weigh up the potential damage for [the child] of remaining primarily with her mother; against the potential damage to her of removal from the mother's primary care to the father's primary care; and there is just no real way to predict which may be worse.

Dr F thought that six months might see what impact all of this was having on the child but ultimately, she conceded that little would change. She thought that whatever attempts were made professionally, the problem would remain because the wife would not or could not, change. There is a resonance about that which I accept.

96. Having heard the wife say regularly that she accepted that she had to be (and could be) more flexible, nothing I heard suggested that she had a desire to listen to the concerns of all of the three experts. That being so, the child faces an uncertain future and as Dr F agreed, the child could become a parentified child caring for her mother. The answer was therefore not to remove the child entirely but to minimise the extent of the exposure to the behaviour of the wife by limiting her time. There being no other opinion explaining all of this, I accept that evidence.

97. To give effect to that protection of the child, Dr F's view was that there should be an immediate move to increase the husband's time with the child and then sequential increases to a nine day fortnight with him. I accept that opinion.

## **HOLIDAYS IN COUNTRY I**

98. One of the orders sought by the wife but not supported by any evidence was a request that the wife be able to take the child to Country I every second year for a four week period. That was opposed by the husband.
99. As I observed in discussion, I had no clear understanding of how the wife would manage either from a financial position or how arrangements would be made for the ongoing relationship with the husband. It is clear that the wife's parents and brother do not have a high opinion of the husband but are very supportive of the wife. I have some concerns as to whether the extended family would disparage the husband and destabilise the child's relationship with her father. The wife and her mother denied that but their disapproval of the husband was palpable.
100. Another disconcerting factor was that some 30 years ago, the wife simply disappeared from her family. Although her mother and brother seemed to indicate that no such event occurred, it was the wife's evidence that it did. Bizarre as it may seem, the wife agreed that she was having people send letters and cards to her parents to hide the fact that she had disappeared. Just what all that was about was not investigated nor should it have been but it raises questions of how much reliance the Court could place on the wife to return to Australia. At this point there is no absent evidence of a plan to go overseas any way. It is for that reason that it is not appropriate that I factor into the orders any future plans for international travel. That is not to say that in the future if an appropriate application is made on proper evidence, a court would not contemplate the situation again.

## **THE LEGAL ISSUES**

101. The determination of parenting matters is governed by the provisions of Part VII of the *Family Law Act 1975* (Cth) ("the Act"). Section 65D empowers the Court to make an order regarding the care arrangements for children including who is to be responsible for making long-term decisions about them, who the children are to live with and also a variety of contact arrangements.

### **PARENTAL RESPONSIBILITY**

102. As can be seen, the focus of the husband was on having sole parental responsibility for decisions about the child. This is an issue about important decisions that affect a child's long term future.
103. Parental responsibility is defined in the Act to mean "... all the duties, powers, responsibilities and authority which, by law, parents have in relation to children".
104. Save where the court orders otherwise, each parent has that parental responsibility. This joint decision-making process is referred to as equal shared parental responsibility but that term is not defined. As the law provides for parents to decide about their children's futures (and presumably together) there has to be a reason to remove that responsibility. That legal process can be seen in the rebuttal of the statutory presumption that each parent has that responsibility.

### **THE PRESUMPTION OF PARENTAL RESPONSIBILITY**

105. The particular provision now considered in Part VII of the Act is really directed to a pathway to be followed about what time each parent should care for a child if an order for equal shared parental responsibility is made by the Court. The rebuttal of the presumption removes the pathway about determining parental time. If so, the Court's attention is still to determine how parental responsibility should be divided (if at all) and then what parenting orders are in a child's best interests. As the order for parental responsibility was disputed, attention must be given to s 61DA.

### **IS THERE A BASIS FOR A MANDATORY REBUTTAL?**

106. The presumption in s 61DA does not apply where the Court finds there are reasonable grounds to believe that a parent has engaged in family violence. Family violence is now widely defined and includes exposure of children to that violence. Section 4AB(1) defines it as including:

- i. violent, threatening or other behaviour...that coerces or controls a member of the person's family or causes the family member to be fearful.

107. The wife maintained that the husband's conduct typified family violence. In addition to his angry outbursts, she said he threatened her under his breath on the night they were at the Thai restaurant in May 2013. That night started the path to the intervention order. She asserted the husband had always had a "plan" when they were in Country I to get her back to and keep her in Australia. The family travelled internationally on business although the wife seemed to stay with her family when the husband was doing business but it is hard to escape the fact that the core of the business or its principal base was in Australia.
108. The wife's evidence was that whilst in Country I, the husband was pressing her to return to Australia and she agreed to go but on the basis that it was temporary. Subsequent to coming to Australia, there were further trips to Country I. Nothing I heard in the evidence would justify a finding that she was held in Australia as some sort of captive. It was readily obvious that she was unhappy here and wanted to return to her family. Her suggestion of the husband having an alternative plan had little cogency to support it bearing in mind the Australian base of the business. I find that when she became unhappy, she wanted to return home to her family and that exacerbated the problems in the marriage relationship leading to the 2011 physical separation. I do not find that any of this evidence supports a conclusion that the husband was involved in family violence.
109. The wife asserted he controlled her by not giving her a credit card only allowing her to use his. As she was not working, she would have been dependent upon his financial position anyway. Nothing turns on that.
110. She pointed to the "eviction" from the Suburb D apartment but as I have found, she chose to leave at a point in time where the husband acknowledged there had been an administrative problem which he immediately rectified.

111. There was reference to threats and aggression but without specific detail. It was hard to get a sense of what happened. It is not sufficient to simply assert fear and in this case, the wife's continued texting and communication showed her to be calculating rather than frightened. In my view, the example of the day of the intervention order hearing and the morning of the day when the husband waited in the foyer of the Suburb D apartment all show the wife to be manipulative. She knew he had a key to the apartment but she made no attempt to remove it from him. She led no evidence to show that the husband abused that privilege. She agreed for him to come into the apartment to take the child to child care.
112. There is therefore no basis for a finding that would satisfy the definition in s 4AB as set out above. The presumption is not rebutted mandatorily.

**IS THERE A BASIS FOR THE DISCRETIONARY REBUTTAL?**

113. The presumption in s 61DA may also be rebutted by evidence that satisfies the Court that it would not be in the best interests of a child for the parents to have equal shared parental responsibility (s 61DA(4)).
114. In *Chappell and Chappell* [2008] FamCAFC 143, the Full Court examined the approach to the discretionary rebuttal of the presumption and, in reiterating what the legislation says, said that the Court had to make a finding that it would not be in the best interests of the child for the presumption to be applied. To do that, the Court said that the prescribed matters in ss 60CC(2) and (3) had to be taken into account. I have set out some of those in general observations and findings below but I make clear that all of the provisions of s 60CC have been considered in determining this discrete task.
115. An observation that the Full Court made was that if the "track record" of the parents would suggest a high probability of "deadlock", which would inevitably lead to further proceedings, the discretion could be appropriately exercised to rebut the presumption. I would add to that the problem of a child being in a limbo-like state awaiting a parental decision about health or education. In my view, that is the case here but I stress again that it is major

decisions about the child that are relevant not simple matters such as diet and haircuts.

116. As Murphy J observed ( and I respectfully agree) in *Hardie & Capris* [2010] FamCA 1046 (at paragraph 69):

An order for “sole parental responsibility”, or something akin to it, suggests (at least arguably by reference to the various statutory definitions, and lack of definition) that the other party has no rights, responsibilities and authority in respect of “major long term issues”.

117. The exercise of discretion in favour of excluding one parent from consultation and decision-making in respect of major long-term issues for their child is a serious interference with the responsibilities of parenthood which the legislature encouraged and saw as fundamental to a child’s welfare and development (s 60B).

118. Whilst there is no suggestion of physical harm to the child and she is well adjusted and happy, Dr F expressed concern about the future in two areas. First, the child was becoming the parent and secondly, children who learn to take over the role from a dependent parent can face the prospect of having to choose between parents and that leads to a breakdown of the relationship with the other parent. The psychological harm flowing from that would affect the child’s development into teenage and adult years.

119. I find there is significant potential harm here such as to override the rights of the wife as a parent. The facts that underpin that concern are as follows.

120. The prospects of the parties being able to communicate about the child are not good. Their forms of communication about her to date leave questions about how major decisions would be made in the future. At the moment, even though there is communication through a written book and also electronic means, it is superficial.

121. The written communication shows an evasiveness and lack of response by the wife. The wife does not respect the husband’s role on the most important of issues such as education and health. That can be seen in the immunisation issue

and the polyp problem as the wife either rebuffed or ignored him. On education, the wife ignored the husband's requests in late 2013 when he appropriately wanted to be involved in choosing the child's first school. That was not just an oversight on her part. The problem with major decisions such as health and education is that lack of communication leads to indecision and places the child in a state of flux. That is not appropriate where one parent is decisive and has the child's best interests at heart. Clearly, there are parents who hesitate and have difficulty making a decision but I find that the wife is manipulative and more likely to simply rebuff or ignore the husband. That is not good for the child.

122. The best test about whether the parties can make decisions together lies in what the law requires of parents if an order for equal shared parental responsibility is made. Section 65DAC provides that if two or more persons are to share parental responsibility about major long-term issues, any order is taken to require the decision to be made jointly by those persons. That, as the legislation provides, requires each of those parents:

- (a) to consult the other person in relation to the decision to be made;  
and
- (b) to make a genuine effort to come to a joint decision.

123. As can be seen, there is a gulf between the two positions about decision making. The wife sought a sharing arrangement based upon an acknowledgment that she had been criticised for not being flexible but now thought she could be. The husband's position was abundantly clear. He thought that the parenting styles could be worked out if they had counselling but with a directive approach from the counsellor on issues of parenting similar to an arbitration type of approach and if both parents agreed to the determination. He doubted whether that would work and because of the evidence of the experts, I find that is correct. The wife's equivocation about moving to a shared arrangement after having begun the proceedings on that basis was an example of how difficult any future shared determination would be. The wife's own



evidence sworn only shortly before the trial began and her statements to Dr F indicate that the husband is not respected by her as a parent. Her stated indication of the possibility of a more flexible approach provided little comfort.

124. There is no basis here for the Court to make an order for equal shared parental responsibility. As such, the legislative provisions in s 65DAA do not apply. The Court is not therefore required to explore the practicability of equal shared time between households or substantial and significant time. It comes back to what is in the child's best interests but even that requires the determination of who should have the responsibility for making major long term decisions about her future.

125. I have focused on the problems of decision-making and communication. There are obviously problems in co-parenting inside intact families and probably also in separated families where there is co-operation. The focus of s 65DAC just mentioned refers to parental responsibility in respect of "major long-term issues". "Major long-term issues" is defined (s 4) as follows:

- i. **"major long-term issues"**, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:
  - (a) the child's education (both current and future); and
  - (b) the child's religious and cultural upbringing; and
  - (c) the child's health; and
  - (d) the child's name; and
  - (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

126. In this case, the majority of those issues arise as contentious.

127. Accordingly, I consider it is in the best interests of the child for the husband to have sole parental responsibility. I find he is decisive and I consider he will be inclusive. That will work for the child's best interests. The remaining

parenting question is how should the child's time be divided between her parents. It is important to first turn to the legislation.

128. Section 64B(1) defines the various aspects of a parenting order. An order may be made in relation to any aspect of the care, welfare or development of a child as well as any other aspect of parental responsibility.

129. When making a parenting order, s 60CA requires the Court to determine those orders on the basis that the child's best interests are the paramount consideration.

130. To determine what is in the child's best interest, s 60CC provides a check list of how those interests are determined. The primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both 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.

131. There is no doubt that the child has a good relationship with, and benefits from, her relationship with both parents as can be seen from the evidence of Dr F.

132. Similarly, the second limb is not of concern as I have found that family violence is not an issue even though it was the focus of the wife's case. In respect of the period immediately after the ex parte intervention order hearing, the child was unreasonably and inappropriately separated from her father and having regard to his almost daily involvement in her life at that time, it must have been very confusing. The wife's conduct was evasive saying that she was getting advice or not understanding the process. That did not reflect well on her as a parent.

133. Section 60B of the Act provides the principles and objectives of Part VII of the Act. It is the right of a child to have contact with and communicate with both parents but that is always subject to the best interests of the child. Those objects and principles guide the Court's determination as to what is an

appropriate set of orders for the future so that the child can benefit from having both of her parents assisting her development through childhood.

134. Section 60CC(3) sets out additional considerations to those set out above. Those are now dealt with as follows.

135. The child is too young to fully comprehend what this dispute is about but to the extent that she has expressed a view about how orders should be crafted, she made clear to Dr F that she was comfortable with both of her parents and not frightened or insecure in her father's household. Beyond that, I do not consider it appropriate to take her views into account.

136. Section 60CC(3)(b)(i) requires the Court to consider the nature of the relationship of the child with her parents but others too. There was no evidence of the nature of the child's relationship with the extended family members other than by reference to the people with whom she socialises. Importantly, her relationship with both parents was sound except that in respect of her mother, she was showing signs of protective behaviour that Dr F thought would only worsen. I find that very concerning in circumstances where the wife did not give encouraging signs that she would involve the husband in any significant role in the child's life. One example of that related to a birthday where the wife sarcastically referred to the importance of the day being that it was when the child was taken from her body. I am not entirely sure what the purpose of that statement was but it left the impression that she saw herself as a more important figure in the child's life.

137. Section 60CC(3)(c) and s 60CC(3)(ca) requires the Court to look at how the parents have participated in carrying out their parental responsibilities but also how they have fulfilled their obligations as parents. There can be little more said than what I have already mentioned. The wife has made the husband's participation difficult in circumstances where the husband has been constantly desiring a real parenting role. I found the evidence of the wife's brother Mr A helpful to understand that the husband right from the birth of the child, has been a significant carer. The husband in recent years has been involved in

getting the child to school and kindergarten. The wife relied upon witnesses whose evidence was not disputed that she was a regular attendee at parenting groups and events but those seemed more about the wife's social interaction with other adults than about the child. The wife's call to Organisation K and the involvement of the social worker thereafter was a clear indication that she needed assistance but the letter she obtained was more about her concerns than anything about her relationship with the child. I am not sure that I can find that it reflected poorly on the social worker because of the manipulative approach I found the wife has adopted.

138. It is of concern that the wife has involved the child in the dispute. She was not positive about the Skype communications yet the matters about which the husband criticised her seemed to have little effect on the child. That can be seen in the child's response to Dr F. However, that negativity did little to support a conclusion that the wife will encourage a relationship in the future. Nothing I heard or read could be said to justify a conclusion that the husband would do anything other than be positive with the child about the wife.

139. Section 60CC(3)(d) requires the Court to consider the change in circumstances arising from any orders and how they would impact on the child. I have the evidence of Dr F that it was important not to destroy the attachment of mother and child but at the same time, the change had to be made. Dr F thought that could be achieved by a slow change and she guessed that two month gaps would suffice. I consider that, because this is unknown territory, I should be conservative so that the child does not realise that the change is being made. The husband indicated in final submissions an understanding of that by his suggestion of the retention of the broken fortnightly arrangements and introducing the longer times over the forthcoming school holidays. I consider that it may be too early for that so I propose to make the gaps just that bit longer. I have no doubt from the submission of the wife (who was prepared for an immediate weekly turn around) that she believed that the child would cope provided there was an evening contact in the other week. I think that might be

disruptive. I have the evidence of Dr F who observed that the child coped well with the time arrangements and wanted more time with her father. The parties have had one block period already where the child spent 10 days with the husband and nothing I heard indicated that such a long period was traumatic. I therefore do not envisage a problem with a smooth transition.

140. Section 60CC(3)(e) requires the Court to consider the practicality and expense that would arise from any orders. As the parties currently live close to one another, I do not consider that an issue. I have expressed concern in the hearing about what would happen when the next 12 months have expired but the wife had no real plans.
141. Section 60CC(3)(f) and (g) relate to the capacity and characteristics of the parents. I have comprehensively dealt with those matters above and there is little further I can say.
142. Section 60CC(3)(i) refers the Court to the attitudes of the parties to the child and the responsibilities of parenthood. Nothing in the evidence suggests there has been anything other than a responsible and focused part played by the husband. I have concerns about the wife which have been set out above.
143. I do not propose to repeat the matters contemplated by s 60CC(3)(k) in respect of family violence. I have made findings about that. In final submissions, the wife maintained that the husband had behaved badly. It was difficult to understand that argument.
144. Excluding another parent without foundation is poor parenting. Section 60CC(3)(m) allows the Court to consider that. The use by the wife of the intervention order process and avoiding telling the husband what was going on, deprived the child of interaction with her father. The wife's explanation that she did not get good advice or that she was not understanding the legal process, misses the point. Whilst both parents have provided physically and to an extent emotionally for their daughter, it is the attempts by the wife to exclude or limit the role of the husband that have been disconcerting. I appreciate that in

separations, people are usually not well-disposed towards the other but this had been going badly for a long time.

145. Although the child is still very young, the evidence of Dr F when examined in the courtroom showed that she was pessimistic about the prospect of any change even if a period of six months was used to see how the child would cope with the changed parenting structure. In my view, based on that evidence and the indication that the wife would be more flexible in the future, it is hard for me to see any change in the future. The orders should therefore be final and the parties can endeavour to show one another that any changes they propose would be good for the child.

146. Accordingly, I propose to make the parenting orders at the beginning of these reasons.

#### **FINAL SUBMISSIONS**

147. The Independent Children's Lawyer supported an immediate alteration of the existing parenting arrangements and that was supported by the husband. The wife's position, although somewhat hesitant and equivocal at the conclusion of her evidence was such that she agreed that the child could go to a seven day and seven day arrangement straight away. The husband sought a breaking up of the arrangement into two blocks and I considered that sensible having regard to the child's age and the attachment issues that Dr F was concerned about. It is perhaps ironic that the wife did not seem concerned about such an immediate large block.

148. Counsel for the Independent Children's Lawyer submitted that the evidence of the three experts was consistent with that of the husband and it should be accepted.

149. In respect of the presumption of equal shared parental responsibility, it was submitted by both the Independent Children's Lawyer and the husband that it was rebutted by virtue of it not being in the child's best interests that her parents have that joint responsibility. The wife's continued position was that

things were not as bad as they had been painted and that she and the husband could work together.

150. In respect of family violence, both counsel submitted that there was no evidence that would justify such a finding. The wife disagreed strongly and repeated throughout her submissions that the husband had been aggressive and threatening and she pointed to the evidence of her family members.
151. As for the future and the promotion of the relationship of the child and the other parent, it was submitted by counsel for the Independent Children's Lawyer that the evidence showed that Dr F thought the husband would promote it but the same could not be said of the wife.
152. Counsel for the husband sought orders in relation to the restraint on the child leaving Australia and the release from the continued holding by the Court of her passports. In addition, it was sought that the wife be restrained from seeking a new passport bearing in mind that the child is entitled to one from Country I. The wife's only response was that she wanted to be able to travel as well as the husband and she had no intention of seeking another passport.
153. The wife's submission focused on rejecting the submissions of the husband but as I observed, many of those were simply factual disputes about which I would make findings. In relation to the travel issue, she repeated what she had said in the hearing that she wanted to be able to take the child to Country I for holidays in alternate years.
154. Counsel for the husband submitted that the wife had shown relentless attacks on the husband on even the most insignificant of issues. I have addressed them above and made findings.
155. The submissions of the wife (as might be expected from a person without legal representation) were more a repetition of the facts in dispute than a justification for any proposed orders. I had on at least three occasions referred her to the legislation particularly in relation to Part VII of the Act and reiterated that those were the considerations that I was working upon and she should try to address

them. In the end, I think she could not undertake that exercise. Nothing I heard in final address indicated that in the period of some three and a half days from when the evidence closed, the wife had thought about anything that needed to be said.

156. I turn then to the only remaining matter which is spousal maintenance.

#### **SPOUSAL MAINTENANCE**

157. In her outline of case filed 8 August 2014, the wife sought “current child support” and “additional maintenance” for a period of five years. There was never any suggestion that the application was to seek a departure from the administrative assessment of child support. It is not clear what the wife was referring to when she described the maintenance as “additional”. However, in the proceedings, she made it clear that she was seeking \$500 per week spousal maintenance which was how she set out her claim for relief in the response.

158. In the proposed orders sought by the husband in final address, his counsel described the order he proposed as follows:

That the husband continue to pay by way of spousal maintenance the rental for accommodation for the wife of not more than \$2000 per calendar month for a period of 12 months.

159. In my view, it is not appropriate for the Court to limit the order or indeed define it as a payment of rental and more importantly, the order requires precision rather than “not more than” a specific sum. It is clear however that the husband’s case began on the basis that he was prepared to pay the wife’s rental for 12 months and it was concluded on that basis.

160. In her financial statement, the wife described her rental as \$452 per week but that amounts to approximately \$1875 per calendar month. It is clear that the husband was prepared to pay up to \$2000 per month and factoring in the prospect of changes during that period of time, I accept that he is willing to pay \$2000 per month.

161. The concession by the husband that he was prepared to pay spousal maintenance for 12 months made it significantly easier for the wife because



nothing in her affidavit material supported any claim for spousal maintenance. Whilst it might be concluded from her financial statement that she could not support herself adequately based on the calculations set out in that document, there was no narrative evidence that would be necessary to address the other issues required in Part VIII of the Act.

162. Section 72 of the Act provides that a party to a marriage is liable to maintain the other to the extent that the first mentioned party is reasonably able to do so if, and only if, that other party is unable to support herself or himself adequately whether by reason of having the care and control of a child of the marriage who has not attained the age of 18 years by reason of age or physical or mental capacity for appropriate gainful employment or, for any other adequate reason.

163. It will therefore be seen that the onus is on the wife to establish that she is unable to support herself without maintenance by reason of those matters set out. There is no question in this case that the wife has a significant role in the care of the child but there was no other evidence in relation to her incapacity for appropriate gainful employment. Indeed, in discussion, the wife indicated that she hoped to be able to return to the workforce in the future. I am satisfied that the wife does have the care and control of a child under the age of 18 years but I could not be satisfied because of that that she is unable to support herself adequately. It may be that an inference can be drawn from her financial statement to that effect but as I have already indicated, the husband has made the concession that the wife needs maintenance. Notwithstanding his dire financial position, he conceded that he was reasonably able to pay the sum equivalent to the wife's rent.

164. In determining these matters, the Court is required to contemplate the matters set out in s 75(2) of the Act. I have considered those matters but needless to say, there is little point in making specific reference to them without some evidence from the wife.

165. To the extent that I need to examine the husband's capacity to pay, he did not address the issue of spousal maintenance in his outline of argument but observed that his financial position was that his debts exceeded his assets and that his family was only protected by virtue of an insurance policy taken out to cover his debts. As I earlier mentioned, his evidence was not particularly clear but I satisfied myself based on the questions that I asked of him.
166. I am satisfied that whilst the husband has assets that are either encumbered beyond their estimated values (which the wife did not challenge) or they were only part-interests such that if orders were made for their alteration, other persons would be affected. No consideration had been given by anyone to a joinder of those parties. For example, the husband has never completed his obligations to transfer the house property to his former wife in which she currently lives.
167. In his financial statement, the husband showed that his company was not providing him with any income but simply the provision of benefits totalling \$350 per week and he was receiving royalties of just under \$200 per week. By the time various expenses were paid, there was a significant shortfall each week. The wife, although complaining about the accuracy of the property details, did not challenge the income position. There was evidence in this case of overseas travel, renovations to the residential property in which the husband lives and the purchase of a motor vehicle. Whilst all of those may give rise to the question of how that was possible, the wife did not address any of those issues in her affidavit or in cross-examination. Accordingly, I am left with the dilemma of the dearth of evidence generally.
168. In my view, there is no basis for me to find that the wife cannot adequately support herself without maintenance because the evidence does not support such a conclusion even if I try to draw some inferences from the wife's financial statement. The reality is, she has government financial support which must be ignored for the purposes of this exercise and was otherwise seeking \$500 per week for five years. Absent some evidence to support such an order,

the Court does not have the power to cobble together something to assist the wife. It remains to be seen what happens in 12 months time but as the husband offered 12 months equivalent of the wife's current rental payments, as an admission against interest notwithstanding the husband's apparent insolvency, that is the only order that I consider the Court can make at this stage. Accordingly, I will make an order in those terms.

169. I have not made orders in relation to injunctions about non-denigration and the like on the basis that I have grave doubts about their effectiveness particularly in this case where the child does not seem to have been affected by any parental conduct and the wife's time is now being restricted over a period of the next six months. Orders of that nature would have the potential to exacerbate the relationship between the parents and give rise to further litigation which the child does not need.

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**I certify that the preceding One Hundred and Sixty Nine (169) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin delivered on 9 September 2014.**

Associate:

Date: 9 September 2014