FAMILY LAW CHILDREN- Undefended Violence including assault on child. Family Law Act 1975 (Cth) APPLICANT: Ms Peyton RESPONDENT: Mr Briffa FILENUMBER: MLC 11552 of 2010 DATE DELIVERED: 19 September 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Cronin J HEARING DATE: 19 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Goldberg SOLICITOR FOR THE APPLICANT: Lanham Lawyers THE RESPONDENT: No appearance ORDERS Thatthe mother have leave to proceed without further notice to the father. Thatall extant parenting orders are discharged. Thatthe mother have sole parental responsibility for the children B born ...September 1999, J born ... May 2002 and R born ... November2001. Thatthe children live with the mother. Thatthe father be restrained by injunction from having any contact with thechildren. Thatpursuant to s 65DA(2) and s 62B, the particulars of the obligations these orderscreate and the particulars of the consequences that may follow if a personcontravenesthese orders and details of who can assist parties adjust to andcomply with an order are set out in the Fact Sheet attached heretoand theseparticulars are included in these orders. Thata copy of this order be served by the solicitor for the mother by post to thefather at the two last known addresses referredto in the order of RegistrarField made 6 August 2014. Thatall extant applications are otherwise dismissed. Thatthe reasons this day be transcribed and be placed on the courtfile. IT IS NOTED that publication of this judgment bythis Court under the pseudonym Peyton & Briffa has been approved bythe Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975(Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER:MLC 11552 of 2010 Ms Peyton Applicant And Mr Briffa Respondent REASONS FOR JUDGMENT Thisis an application that was filed on 3 June 2014, returnable in the FederalCircuit Court on 25 June 2014. The applicant is MsPeyton (themother) who is the mother of three children to the relationship with MrBriffa (the father). The children are B, who has just turned 15; J, who in May 2014 turned 12; and R, who will, in November this year, turn 11. Thesignificance of this particular case is that on 26 April 2013, consentorders were made by me which effectively created the situationin which thechildren were to live with the father and he was to have sole parentalresponsibility for them. Thoseorders provided for the mother to spend time with the children under a veryrestricted and limited arrangement at the

contactcentre at Suburb C. Theobvious inference from the orders was that, having been consented to by themother, there was a significantproblem with her relationship with the childrenat that particular time. The evidence before me arises out of three things. First,there were two affidavits filed by the mother at the time theapplications were lodged. Those documents that I am relying on aretheaffidavits filed on 3 June this year and 23 June this year. Secondly,there is an affidavit of service filed in the Federal Circuit Court. Althoughit is stamped 21 July, I suspect it was 21June, having regard to the timing ofthe hearing in the Federal Circuit Court. The third issue is the oral evidencegiven todayby the applicant. Dealingfirst with the question of natural justice and the fathers knowledge ofthis particular case, it seems that a processserver delivered to the father thedocuments to which I have referred, personally on 8 June 2014, and he signed anacknowledgmentof those documents. He also confirmed to the process server thathe was Mr Briffa. Theapplicant today has confirmed in evidence that the signature on that document isthat of the father. For reasons which are notat all clear to me, when thematter came before the Federal Circuit Court it was transferred to this court. It may be that, as thefinal orders were only made in the preceding April, thelearned judge decided that this case had a sufficient history of connectionwiththis court to send it back. Suffice to say that the father, who had been servedpersonally with the documents and not havingattended that day, the learnedtrial judge transferred it to this court where it came before Registrar Field on6 August. RegistrarField made a number of orders, most of which are now irrelevant, but theimportant one was that the order be served uponthe father by post. I have twoaffidavits, one which was filed and the other which I have been handed and whichI have marked asan exhibit, indicating that the relevant order was sent to thetwo addresses referred to in the orders of 6 August. There is noindicationthat those documents have been returned to the sender. Theorder of Registrar Field reads as follows: In the event therespondent does not comply with paragraphs 2 and 5 of these orders which I interpolate include attending personally and filing a response the applicant has liberty to have her amended initiatingapplication proceed on an unopposed basis. Justafter half past 10 this morning, the father was called and did not attend to thecall. I am satisfied that he has had sufficientnotice of these proceedings andhas chosen not to participate. Whatprecipitated these

proceedings was an incident in May 2014, at which time thefather attended the home of the mother and assaultedthe oldest child, B. Theevidence before me is that, as a result of that assault, the police were called,the father was arrested,released on bail, attended the Magistrates Court andindicated that, on an application brought by the police for an interventionorder, he would contest it. Thecontested hearing was listed for two weeks later and he did not attend, and theunchallenged evidence before me is that thereis now an intervention orderfavouring the applicant and also B. Returningto the simple facts of this case, notwithstanding the orders that were made in2013, a very short time thereafter, the fathereffectively handed the childrenback to the mother on the basis that he could not care for them. Her affidavitis a litany of problems,not only with the children but also with people withwhom the father lives. Thereis an indication that his partner (of sorts) was the subject of some sort offamily violence. There is another woman, whosegiven name is D, with whom hehad some association, and the children complained to their mother that there wassome sort of sexualactivity which they had either witnessed or overheardinvolving their father and D. There is further evidence that the father was,whatever it means, hanging around with a [female given name of E],who she believed to be an ice junkie andthief. All of this wouldindicate, again on the basis that it is unchallenged evidence, that the fatherhas a problem whichmight be defined as lacking social skills, but, moreimportantly, he does not seem to have much of an understanding of theresponsibilitiesof parenthood. Needlessto say the children have been living with their mother virtually since justafter the orders were made in 2013 and, as aresult of his behaviour, the fatherwas arrested and charged. Since then, there has been no time between them atall. As a consequence,and probably, more importantly, since after the 2013orders were made, the mother has been making all of the decisions in relationtothe welfare of the children. Notwithstandingthat the application is unopposed and the evidence unchallenged, thisjurisdiction is not a default jurisdiction likethe civil jurisdictions in theState courts. The wife needs to prove her case. Section60CA of the Family Law Act 1975 (Cth) (the Act) requiresthat a court must not make an order unless it is satisfied that it is in thebest interestsof the children that it should do so and, in determining justwhat is in the best interests of those children, the Court is obligedtoconsider the matters set out in s

60CC. For reasons that are set out in variousauthorities, s 60CC is divided into two parts. The first part relates toprimary considerations, and the second is the additional considerations. Ican take notice of the fact that, in the primary considerations, there was atwin pillars argument, as it was so called, showinga dichotomy between thebenefit of the children having a meaningful relationship with both parents asagainst the need to protectthe children from physical or psychological harm,from being subjected to or exposed to abuse, neglect or family violence. In2012,the primary considerations section was amended to add the phrase that, inapplying those considerations, the Court is to give greaterweight to theconsideration of the need to protect the children from the harm that I have justdescribed. Thisis a classic example where the Court must place the protection of the childrenahead of the benefit that they might have fromhaving a meaningful relationshipwith both of their parents. Whatever the relationship is between these threechildren and theirfather, it must be protected from the sort of violenceexhibited in the affidavit of the mother but also the sort of conduct thatisreferred to in the association that I have described that the father seems tohave with other members of the community. The additionalconsiderations in thiscase are fairly easily dealt with. Ihave little doubt that the views of the children are that they just want to beleft in peace. Whether they can have a relationshipin the future with theirfather seems to me to depend not upon the children but on his indication of someform of responsibility. To that end, I asked the mother, in giving evidence,whether if I simply made these orders she would go back and allow him sometime,and she reassured me that she would not, bearing in mind he has, in her view,significant problems. She needs to be very consciousof the fact that, if thiscase comes back before the Court again, a judge will have the benefit of thesereasons. Anotheradditional consideration is the nature of the relationship of the children withthe parents. Absent some indication of whatthe fathers position is atthe moment and how he wants to conduct his relationship with the children in thefuture, I haveno idea what sort of relationship he currently has. It is quiteclear that he has failed to take the opportunities to participatein decisionmaking relating to long term issues and that that has been left to the mother. He has also obviously had the difficultythat the police are more interested inprotecting members of the community, as a result of which he will face thecriminal courtsin the foreseeable

future and, as such, he cannot spend sometime with the children at the moment. Oneof the questions that the Court is obliged to consider is the likely effect ofchanges in the childrens circumstances asa result of being separatedfrom one of the parents. The evidence before me seems to strongly suggest thatthese children are quitecomforted by the fact that their father is not causingthe problems that he was up until May 2014. Thecourt is also obliged to consider the capacity of the parents to provide for theneeds of the children, including emotional andintellectual needs. Theunchallenged evidence is that the mother is providing those sorts of materialand psychological needs forthe children and the father is absent from theirlives. Having regard to the nature of his conduct, one would wonder what he hasto offer the children in any event. Avery significant issue, in my view, is the requirement that the Court considerthe attitude to the children and the responsibilitiesof parenthood demonstratedby each of the parents. The mother, who now seems to have her house in order,is providing for the childrenand I shall draw some comfort from the evidence,to which I shall refer in a moment, from the Department of Human Services. Itseemsto me that any parent who physically assaults children cannot be said tobe responsible. The very nature of the allegations thatthe mother has made,not only in relation to that assault but in relation to his behaviour generally,are completely inconsistentwith a responsible parent who must provide somementoring role as well as a security role for children. The father seems, ontheunchallenged evidence, to have failed miserably. Ihave already dealt with the family violence issues and I am told, in this case,there is an intervention order, so that must betaken into account. Thelast issue relates to the question of whether it will be preferable to make anorder that least likely leads to further institutionof proceedings. It isdifficult in this case to know what the father will do when ultimately it dawnsupon him that parents arenot favoured by the Courts if they behave as he has. In my view, absent his indication as to what he intends to do for thesechildren,it is appropriate that I make final orders. Beforeturning to the parental responsibility issues, I make the followingobservations. As a result of the mother filing a noticeof risk to thechildren, the mandatory reporting provisions were triggered in the statelegislation and also in s 67ZW of the Act. That notice triggered a report bythe Department of Human Services of 4 August 2014, which sets out the historicalbackground forthese

children. Itis a very sad indictment, I suspect, on both parents that these children havehad significant involvement with the Department ofHuman Services, going rightback to 2010. Just in case it is understood from what I have said that themother has had no cause forreflection, the Department of Human Services was, atvarious times, having a very careful look at her. Even subsequent to the ordersin 2013, there have been notifications expressing cause for concern about herunstable mental health and that the children were notattending school. Thedepartment investigated those matters, including issues associated with familyviolence and parental druguse involving the father. Thedepartment investigated all of those and has reported to the Court that, havingcompleted its investigation, it does not substantiatethe allegations as againstthe mother and that the children are not at significant risk of harm in her carenow. That assessment,however, is based on the fact that the father is nothaving time with the children. To the extent that the mother, as I indicatedearlier, decided, notwithstanding the orders, to allow him some time, she mayvery well face the fact that the Department of HumanServices may take adifferent view. Section61DA of the Family Law Act provides that, whenever a court is making a parentingorder, it starts from the presumption that it is in the best interests ofchildrenthat their parents have equal shared parental responsibility. Section61DA has two provisions that permit the Court to rebut the presumption; one is amandatory and the other is a discretionary provision. The mandatory provisionarises in circumstances where the Court is satisfied that there is familyviolence found to have occurred. I am satisfied in this case that that hasoccurred and, accordingly, the presumption is rebutted. Inthis case, because of the fact that the father is not here and seeking orders,it seems appropriate that I make an order excludinghim from thechildrens lives into the future and, to the extent that he considers thathe has some role in their lives, hecan then make the appropriate application tothe Court, which will no doubt read the reasons that I am now articulating. Itis appropriatein this particular case that the mother have sole parentalresponsibility for the children. I certify that the preceding twenty-nine (29) paragraphs are a true copyof the reasons for judgment of the Honourable Justice Cronindelivered on 19September 2014. Associate: Date: 22 October2014