FAMILY LAW CHILDREN BEST INTERESTSOF THE CHILD allocation of parental responsibility with whomchildrenshall live - children have lived with mother since separation where the father was charged with possessing child abuse material wherethe charges were dismissed where allegations of sexual abuse againstanother member of the family prior tothe marriage where it is foundthat the father did sexually abuse another member of the mother's family priorto their marriage evidence that father may lack capacity to provide forthe children's psychological needs presumption of equal sharedparentalresponsibility not applied sole parental responsibility allocated to themother father to spend supervisedtime with the children. FAMILYLAW PROPERTY where it is just and equitable for the court tomake orders altering the parties' property interests where bothparties earn a reasonable level of income where there is an adjustmentmade in favour of the wifeon account of s 75(2) factors. Family Law Act 1975 (Cth) s 69ZT(3),s.75(2) Evidence Act 1995 (Cth) Maluka & Maluka [2012] FamCA 373; (2012) 47 Fam LR272 MRR v GR (2010) 263 ALR 368 M v M (1988) 166 CLR 69 W & W (Abuse allegations: unacceptable risk) [2005] FamCA 892; (2005) FLC 93-235 N & S & the Separate Representative (1996) FLC92-665 Stanford v Stanford [2012] HCA 52 APPLICANT: Mr Blan RESPONDENT: Ms Faulconer Blan INDEPENDENT CHILDRENS LAWYER: Legal Aid NSW SydneyCentral FILENUMBER: SYC 2791 of 2013 DATE DELIVERED: 17 October 2014 PLACE DELIVERED: Sydney PLACE HEARD: Sydney JUDGMENT OF: Stevenson J HEARING DATE: 29, 30 May 2014, 2, 3,4,5,6,11,12,13 June 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Kearney SC SOLICITOR FOR THE APPLICANT: Abrams Turner Whelan Family Lawyers COUNSEL FOR THE RESPONDENT: Ms Druitt SOLICITOR FOR THE RESPONDENT: Matthews Folbigg Pty Ltd COUNSELFOR THE INDEPENDENT CHILDRENS LAWYER: MsFalloon SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Ms Power ORDERS Parenting Orders (1) Thatall existing orders herein in relation to the children: E BLANborn on ... 1998 F BLAN born on ... 2001 K BLAN born on ... 2003 are discharged. (2) That the mother have sole parental responsibility for E, F and K, oncondition that she: 2.1 advises the father in a timely manner ofany issue in relation to the long-term care, welfare and development of thechildrenand the decision which she proposes to make and 2.2 considers and takes into account any views expressed by the

fatherconcerning such issues and 2.3 advises the father in a timely manner of her decision. (3) That the children live with the mother. (4) That the children F and K spend time with the father asfollows: 4.1 until the commencement of the 2017 school year, fora period of five (5) hours once per calendar month in the presence of thepaternal aunt Ms O or such other person as the parties may agree in writing fromtime to time, with the father to provide to themother not less than fourteen(14) days written notice of the proposed time and date of such occasions and 4.2 thereafter, from 10.00 am until 5:00pm each alternate Sunday 4.3 at such other times as the parties may agree in writing from time totime. (5) That the mother ensure that E, F and K are able to communicate with thefather by Skype, email and telephone at times of thechoosing of thechildren. (6) That both parties are entitled to attend events at the childrensschools to which parents are invited from time to timebut excluding sportsfixtures. (7) That both parties do all things and execute all documents necessary toensure that the father receives copies of school reports,photograph orderforms, notices of parent/teacher meetings, school assemblies, sports andswimming carnivals and other significantevents which are normally attended byparents. (8) That the mother inform the father as soon as reasonably practicable of anyillness or injury suffered by the children which requiresadmission to ahospital. (9) 9.1 That both parties do all things and execute all documents required tocause K to commence attendance at X School for Year7 in2016. 9.2 That each of the parties pay one half of Ksschool fees and incidental educational expenses. (10) That order 4 commence operation only when: 10.1 the mother,the Independent Childrens Lawyer and the childrens psychologist,Ms N have conferred upon and agreedas to information to be provided to thechildren, or any of them, as to the courts orders and reasons forjudgment. (11) That pursuant to s.65DA(2) and s.62B, the particulars of the obligationsthese orders create and the particulars of the consequencesthat may follow if aperson contravenes these orders and details of who can assist parties adjust toand comply with an order areset out in the Fact Sheet attached hereto and theseparticulars are included in these orders. Property Orders (1) That, within 28 days of the date of these orders,the wife pay to the husband a sum of $28,524. (2) That, simultaneously with such payment by the wife to thehusband 2.1 the wife shall do all things and execute alldocuments necessary to cause the transfer to the husband of the

whole of herrighttitle to and interest in the Mazda ... motor vehicle registered number ...and 2.2 the husband shall do all things and execute all documents necessary tocause the transfer to the wife of the whole of his righttitle to and interestin the property situate at and known as Z Street, Suburb U in the State of NewSouth Wales. (3) That, in the event that the wife fails to make payment to the husband inaccordance with order 1, both parties shall do all thingsand execute alldocuments necessary to effect the sale, for the best price reasonablyobtainable, of the property situate at andknown as Z Street, Suburb U in theState of New South Wales and to distribute the proceeds of such sale asfollows: 3.1 in payment of agents commission andexpenses 3.2 in payment of legal costs and expenses incidental to the sale 3.3 in payment of all monies necessary to discharge the mortgage, line ofcredit and everyday account owed to the National AustraliaBank 3.4 in payment of an amount equal to 91% of the balance then remaining to thewife 3.5 in payment of the balance to the husband. (4) That the wife indemnify the husband and keep him indemnified in respect ofall liabilities arising pursuant to the mortgage,line of credit and everydayaccount owed to the National Australia Bank. (5) That all material produced on subpoena bereturned. IT IS NOTEDthat publication of this judgment by this Court under the pseudonym Blan& Faulconer Blan has been approved by the Chief Justice pursuant to s121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT SYDNEY FILE NUMBER:SYC 2791 of 2013 Mr Blan Applicant And Ms Faulconer Blan Respondent REASONS FOR JUDGMENT THE PROCEEDINGS MrBlan (the father) and Ms Faulconer Blan (the mother)are in dispute as to property settlement and parentingorders in relation totheir children: E Blan born in 1998 (15) F Blan born in 2001 (13) K Blan born in 2003 (11). A specific issue in dispute was whether K should attend X School and, if so,what arrangements should be made for payment of theresultant fees andincidental expenses. Ultimatelythe only order which the father sought in relation to the child E was that theparties have equal shared parental responsibility. The mother sought an orderthat she have sole parental responsibility for all three children. The fathersought no orders for Eto spend specified times with him and was content for herto make her own decisions and arrangements. Themother sought orders to the effect that the children spend no time with thefather and that he be restrained by injunction fromapproaching or

communicatingwith them. Alternatively, the mother proposed that the children spend time withthe father, under professionalsupervision, from 10:00 am until 2:00 pm on oneoccasion in each school holiday period. In final submissions, counsel for themotherindicated that she agreed to supervision on these four occasions by thefathers sister, Ms O. The father proposed that thechildren F and Kspend time with him on a graduated basis, commencing with day periods only eachSunday and leading to five nightsper fortnight and half of all school holidays. Inrelation to property settlement, it was common ground that the wife have anopportunity to retain the former matrimonial home atZ Street, Suburb U uponpayment of a sum of money to the husband. He sought orders to the effect thatthe wife pay to him an amountof $194,082 and she proposed a sum of$22,000. Theparties agreed that their contributions as at the date of trial were equal andthat an adjustment in favour of the wife was warrantedon account of section75(2) factors. The substantial issue in relation to alteration of propertyinterests was the quantum of that adjustment. Themother and the Independent Childrens Lawyer (the ICL)contended that the children would be exposed to anunacceptable risk of sexualand psychological harm in the unsupervised care of the father. Counsel for boththe mother and the ICLcontended that there should be a finding that the fatherwilfully accessed child pornography. On behalf of the mother it was submittedthat a finding is open that the father sexually abused her brother, Mr FF, whenhe was aged approximately 11 to 15 years. Counselfor the ICL contended thatthe fathers admitted conduct with the mothers brother illustratedhis propensity to oversteppersonal boundaries, as was identified by the singleexpert Associate Professor J. The ICL submitted that the fathersdifficulty in understanding personal boundaries constitutesan additional risk to the children. Thefather conceded that he accessed consensual adult pornography but denied anyinterest in or viewing of material involving children. He admitted that heengaged in skinny dipping, viewing of pornography anddiscussions about sexual matters with the mothers brother when he wasaged between 11 and 15 years. Otherwise, the father denied the allegations madeby the mothers brother as to his conduct. These allegations areconsideredin detail below in these reasons. Thefather proposed that K attend X School from the commencement of Year 7 in 2016. In 2012 the parties both signed an enrolmentcontract but the mother is nowopposed to Ks attendance

at this school. The Evidence and Witnesses Theapplicant father relied on the following affidavits: MrBlan (the father) sworn on 16 May 2014 MsL (the paternal grandmother) sworn on 16 May 2014 MsO (a paternal aunt) sworn on 16 May 2014 MrR (the fathers treating psychologist) sworn on 22 May 2014 MrNN (computer forensic specialist) sworn on 27 May 2014 FinancialStatement verified by affidavit of the father sworn on 18 February2014. With the exception of Mr NN, all of these witnesses gave oralevidence. MrNN and Mr T, a computer forensic specialist retained by the mother, conferredand produced a joint statement dated 12 June 2014.(exhibit 18) They reachedagreement in relation to all questions submitted to them by the legalrepresentatives of the parties andthe ICL. Accordingly, neither of theseexperts was required for cross-examination. Therespondent mother relied on the following affidavits: MsFaulconer Blan (the mother) sworn on 8 May 2014 MsFF (a maternal aunt) sworn on 7 May 2014 MrFF (a maternal uncle) sworn on 6 May 2014 MrT (a computer forensic specialist) sworn on 27 May 2014 FinancialStatement of the mother verified by affidavit sworn on 12 February2014. With the exception of Mr T, all of these witnesses gave oralevidence. Seniorcounsel for the father objected to the admission of the affidavit of Mr T on anumber of bases, including late service. Ielected to receive the affidavit ofMr T and indicated that I would set out my reasons in this judgment. I do notnow consider itnecessary that I do so, as the two experts reached fullagreement. Seniorcounsel for the father objected to the affidavit of the mothers brother,on the basis of relevance and because its probativevalue was said to beoutweighed by its prejudice to him. It was contended that the allegations haveno relevance because the supposedevents took place between 1991 and 1995/1996and were described in broad and general terms. Ielected to receive the affidavit of Mr FF. I took the view that I could notsimply conclude that allegations of sexual conductdirected at an 11 to 15 yearold boy by a man aged between 27 and 31 were irrelevant to the parenting issuesin these proceedings,albeit that the alleged events took place in the 1990s. Iconsidered that senior counsel for the father was well able to test theallegations made by the mothers brother. Additionally I was consciousthat these allegations were addressed by both Dr Jand Mr R, who had read theevidence of Mr FF. Asappears below, however, I acceded to an application by senior counsel for thefather pursuant to s 69ZT(3) of the Family Law Act 1975

(theAct) that the rules of evidence apply to two issues in these proceedings.One of those issues was allegations as to the husbandsbehaviour in relation to [Mr FF]. Senior counsel for the father thensuccessfully took objection to numerous particular words, sentences and passagesin the affidavit. Consequently, a considerable volume of material in thisaffidavit was excluded from the evidence. Ihad the benefit of a report dated 18 December 2013 and oral evidence from asingle expert psychiatrist, Associate Professor J (DrJ). Priorto the commencement of the trial, I granted leave for Mr R to be provided withthe report of Dr J. Asnoted above, senior counsel for the father made an application pursuant to s69ZT(3) at the start of the trial. He sought that the rules of evidence applyin respect of the following two issues: The allegations as to the husbands possession and/or access topornographic material and The allegations as to the husbands behaviour in relation to [MrFF]. Thisapplication on behalf of the father was supported by counsel for the ICL. Shesubmitted that the [mothers] application would see an end toany normal relationship between the children and the father, so the rulesofevidence should apply. Counsel for the mother opposed theapplication and, by implication, contended that the proceedings should begoverned entirely bythe provisions of Division XIIA of the Act. Asnoted, I acceded to the application on behalf of the father. I am loath to makefindings in relation to two highly significantissues in the proceedings otherthan in accordance with the rules of evidence. I am satisfied thatexceptional circumstances exist for the purposes of section69ZT(3)(b) of the Act. I agree with the contention of senior counsel for thefather that the findings which I make in respect of these twoissues are likelyto impact significantly upon the courts determination of theseproceedings such that it would appear to be unsafe to affordinadmissible evidence any significant weight in the exercise of thecourts fact-findingfunctions: Maluka & Maluka [2012] FamCA 373; [2012] 47Fam LR 272. Background Thefather was born in 1964 and is currently aged 50 years. The mother was born in1965 and is presently 49 years of age. The mothersbrother, Mr FF, wasborn in 1980 and is now aged 34 years. Theparties married and commenced cohabitation in 1987. The father was thenemployed in the IT industry. The mother worked in thepublic service, whileundertaking a university degree on a part-time basis. Upon graduation in 1993,the mother undertook professionalpractice requirements. She worked for

thepublic service in Sydney and Brisbane until 1997. The mother then commencedwork in theprivate sector. In 2007 she established her own business as aprofessional practitioner. Atthe date of marriage neither party possessed any significant assets. They livedon a rent-free basis in an apartment at SuburbY owned by the fathersbrother-in-law. For approximately six months in 1989 they occupied a holidayhome on the Central Coast,which was owned by the fathers family, on arent-free basis. They rented accommodation until late 1992/early 1993 and thenmoved into the fathers mothers home on a rent-free basis. In1991 the parties purchased an investment property in Brisbane for $82,000. Thepurchase money came from their savings, a payoutwhich the mother received fromthe public service and a mortgage advance. The parties sold this property forapproximately $67,000in about 1999. In1993 the parties purchased a property at Suburb V for $216,000, utilisingsavings and a bank loan of $205,000. The parties livedin this property untilthey moved to Brisbane in 1995, when it was leased until sold in 1999. Theparties then purchased a property at Suburb RR in Brisbane for $250,000,utilising the sale proceeds of the home at Suburb V anda mortgage advance of$205,000. The RR property was sold for approximately $325,000 in 2002. Earlyin 2001 the parties left Brisbane and returned to Sydney. They lived in rentedaccommodation for approximately twelve monthsand then purchased the formermatrimonial home at Z Street, Suburb U for $670,000. The purchase money camefrom the sale proceedsof the RR property, a gift of $10,000 from thefathers mother and a mortgage advance of $545,000. Thefather was made redundant in April 2005 and received a payout of $12,500, whichhe deposited into the mortgage account. He receiveda redundancy payment of$37,000 in 2009 and again deposited these funds into the mortgage account. After drawdowns in 2006, 2007,2008 and 2010 the mortgage balance stood atapproximately $691,800 as at the date of separation. Asnoted, in 2007 the mother commenced a business as a professional. For some sixyears she saw clients in serviced offices at SuburbW and Suburb HR andotherwise worked from the family home. Since 2013 she has leased office spacefor her business at Suburb W. Thefather contended that, in 2010, the mother informed him that she suffered sexualabuse as a child. The mothers versionof these events was that, when shewas six or seven, the son of a cousin who was eight or nine years old

insistedthat she touchhis penis. The mother maintained that she did not tell herparents on account of threats made by this boy and his brothers. Shesuggestedthat the main issue for her in relation to these events was that she experiencedthe conduct of the boy and his brothersas a form of bullying. In2009 the parties attended a series of three Landmarkcourses, independently of each other, with the hope of improving the qualityof their relationship. It was common ground that sexualintimacy was alongstanding problem in their marriage. Byhis own admission, the father engaged in conduct of a sexual nature which heconcealed from the mother for many years during themarriage. He participatedin on-line chats with sexual content between about 1995 and 2008, in particularwith a woman named AA in Perth. The father andAA engaged in telephone sex on one occasion. Heparticipated in cybersex with approximately twelve women over an eight yearperiod. Between approximately 2006 and 2008 the father met four women forsexual encounters on five to six occasions. Thefather proffered that he started to visit pornography websites during the1990s, accessing movies, still pictures and textstories. He found awebsite called XXX, from which he downloaded textstories. He deposed that usually he downloaded 50 to 60 stories, using his worklaptop computer. Hethen saved this material to a drop box folder on hiscomputer. The drop box then synchronised these stories to all devices whichwere connected to this service, including a 27 inch and a 24 inch Mac computerin the family home and the fathers iPad. Itwas common ground that the mother knew nothing whatsoever of these sexualactivities of the father until the events which precipitatedthe partiesseparation. She deposed that he told her on about five or six occasions that hehad no interest in pornography. According to the mother he said to her: Im not like other men, I have no interest in pornand porn does nothing for me. The father concealedthese activities from the mother, in what can only be regarded as acomprehensive and long-term deception ofher, over several years. In2011 the child E commenced high school and currently attends OL School at SuburbU. Early in her high school career, the partieswere made aware of a severeimpairment to her reading ability. The father read with her each night forapproximately eighteen months,so as to improve her level of skill in this area. Accordingto the father, in about 2011 two incidents took place which involved the child Kand another child being in a partiallyundressed state. The father

maintainedthat he and the mother discussed these incidents, which they elected tocharacterise as ordinary behaviour and typical ofchildrens general curiosity around sexuality and nakedness. On30 May 2012 the parties attended a meeting at X School in relation to Ksproposed enrolment in 2014. He was offered a placeand the parties signed anacceptance, paying a security deposit of $4,000. Thefather maintained that the mother said to him in late August/early September2012: [Ms S] says that [M] told her that [K] doesnt know how to play mothersand fathers properly. [Ms S] said that when she asked what she ([M]) meant [M] told her that [K] askedher to lick his penis. Apparently this happened when we were all together ... for Christmas lastyear. Ms S is the mothers sister and M is her daughter, who was thenaged three and a half years. The child K was approximately eightyears of ageat the time of this alleged event. MrFF maintained that he was prompted to reflect on his experiences with the fatherwhen he became aware of the alleged events involvingK and M. He deposed thathe decided to inform the mother of the fathers conduct toward him inmid-November 2012. He gavepermission for his sister, Ms S, to provideinformation to the mother. The mother deposed that her two sisters, Ms S and MsFF,arrived unexpectedly at the former matrimonial home on 21 November 2012. MsS is a psychologist and Ms FF a police officer. Themother deposed that she spoke to her brother on 21 November 2012, although shesaid in her oral evidence that the conversationcould have taken place on thefollowing day. She deposed that her brother said to her wordsincluding: It started pretty harmlessly, just talking about sex. The he started showing mepornography, magazines and movies. Things justdeveloped to skinny dipping andtouching and masturbating. It ended in a fight when he wanted to give me oralsex. Inhis oral evidence, the mothers brother said that his first telephone callwith the mother in relation to these matters wasof approximately 90 secondsduration. He said that he did not believe that he told herabout skinny dipping, touching, masturbation or the fathers wish to givehim oral sex on that occasion. Hesaid that they had a longerconversation within about a week. Accordingto the mother she was unable to sleep that night. At approximately 1:15am sheentered her home office and logged on tothe fathers account on a Maccomputer. She opened a folder entitled Misc. and sheobserved file names such as the stepdaughters, mynieces, ... and the first time. The mother copied the contents of the Misc.

folder ontoa thumb drive. During the next two days, she accessed the XXXwebsite. MsFF deposed that, on 22 November 2014, she observed approximately 60 text fileson a Mac computer in the former matrimonial home. She opened some of thesefiles and saw titles including my stepdaughter, girlnext door and my slut. Upon opening each ofthese files, she saw a paragraph headed XXX followed by awarning that there would follow sexually explicit material. On22 November 2012 the mother telephoned the father at his office. The fathergave this account of their conversation: [The mother] said to me I have just learned that you sexually abused mybrother, I dont want you to come home. Pleasego and stay with yoursister until I work out what I am going to do next. I was unaware as towhat, or even which of [themothers] brothers, she was talking about. Iwas shocked by the allegations and I said to her, what?. [Themother] repeated the allegation to which I then said, I dont knowwhat is going on here but I have never abused anyonelet alone yourbrother. [The mother] then said to me again words to the effect,I dont want you here. Youare not to come back to thehouse. I then said to [the mother], It is my home too, we need totalk about this, itis a very serious allegation. [The mother] thenreplied, I dont want you at home or anywhere near the kids,stayaway. I said I am going to come home so we can talk aboutthis. Themother and the children left the former matrimonial home on 22 November 2012 andstayed at a hotel that night. They spent 23and 24 November 2012 at Town A, inthe company of the mothers sister Ms FF. On25 November 2012 the mother and Ms FF attended Suburb B Police Station. Themother provided a statement and a police officer tookout an apprehendedviolence order (AVO) against the father in respect of the motherand the children. TheAVO was served upon the father by police officers at approximately 8:30 pm on 25November 2012. The provisions of this orderprohibited the father from makingany contact with the mother or the children. He left the former matrimonialhome when served withthe AVO and has since stayed at the homes of his sisters,Ms Q and Ms O. Withthe permission of the mother, police officers collected a 27 inch Mac computerfrom the former matrimonial home on 25 November2012. On 26 November 2012 themother delivered to police twelve additional computer data storage devices,including a 24 inch Maccomputer. On 27 November 2012 she delivered to policethree additional computer data storage devices. At7:15am on the child Es birthday, the mother emailed

the father and hissister Ms O. The mother offered her consent to thefather telephoning E at7:30am but he did not receive the email until 8:30am. Subsequently, the motherconsented to the father speakingto the children by telephone on 30 November2012, 1 December 2012, 2 December 2012 and 3 December 2012. On4 December 2012 the AVO proceedings came before the B Local Court. Theconditions of the orders were varied so as to allow thechildren to initiatetelephone contact with the father on three occasions per week, with Skype andfacetime as permissible alternatives. On17 January 2013 the parties agreed that the children would see a psychologist. They began to consult Ms N in early February 2013and continued to see her atthe time of the trial. On28 February 2013 the father was charged with three counts of produce,disseminate or possess child abuse material. He entered a please ofnot guilty on 30 April 2013 and the proceedings were listedfor trial in September 2013. Judgment was reserved and the charges against thefather were dismissed on 15 October 2013. The AVO proceedings were adjourned to3 February 2014, when the father consented to afinal order in relation to thechildren until 14 December 2014 on a without admissionsbasis. On1 March 2013 the father began to attend upon Mr R, pursuant to a referral from apsychiatrist. He continued to consult Mr R atthe time of the trial. On15 July 2013 the mother indicated to the father for the first time that shewished to postpone Ks enrolment at X School. On 17 October 2013 staff atX School informed the parties that Ks placement could be deferred only ifthey both providedtheir consent. On31 October 2013 a Registrar made the following interim parenting orders after acontested hearing: Thatthese orders prevail to the extent that any inconsistency over any AVO. Thechildren spend time with the father for three hours each alternate Sunday on asupervised basis. 3. That the husband pay the costs of supervision. Theparties are restrained from discussion of any criminal, family law or any otherissues arising from the marital breakdown withthe children except in accordancewith professional advice. Thefather have telephone or Skype contact for a reasonable period between 6:30pmand 8:30pm each Tuesday, Thursday and Sunday. Themother filed a Review and sought to stay these orders. A Registrar dismissedthe mothers application for a stay on 8 November2013. On 20 January2014 the same interim parenting orders were made on the hearing of the Reviewapplication. On16 November 2013 the children began to

see the father each fortnight undersupervision of staff at the H organisation. Contactreports (exhibit 4 andannexures to the affidavit of the father) demonstrate that these occasions areenjoyable for the childrenand that the father acts entirely appropriately onthese occasions. Parenting Orders Approach To These Proceedings Inmaking a parenting order, the court is governed by a determination of whatarrangements are in the best interests of the childwho is the subject of theproceedings. Part VII of the Act sets out a number of mandatory considerationswhich prescribe the pathway to that decision. Section 60CC sets outprimary and additional considerations,to which the court must have regard in determining what orders are in achilds best interests. Thecourt must have regard to the objects of Part VII, as contained in section60B(1) and the principles underlying those objects, as set out in section60B(2). Section 60B(3) makes particular provision for the right of anAboriginal or Torres Strait Islander child to enjoy his or her culture. Section61DA requires the court to apply a presumption that it is in a childsbest interests for his or her parents to have equal sharedparentalresponsibility. This presumption does not apply if there are reasonable groundsfor the court to believe that a parent(or a person who lives with a parent) hasengaged in abuse of the child (or another child who was a member of theparentshousehold) or family violence. The presumption may be rebuttedby evidence which satisfies the court that it would not be in a childsbest interests for his or her parents to have equal shared parentalresponsibility. Ifa parenting order provides for equal shared parental responsibility the courtmust consider whether it is in the childsbest interests, and reasonablypracticable, for him or her to spend equal time with each parent (section65DAA(1)). If there is no order for equal time, the court must consider whetherit is in the childs best interests, and reasonably practicable,for himor her to spend substantial and significant time with eachparent. The concepts of substantial and significant timeand reasonable practicability are defined in sections65DAA(3),(4) and (5). There is no temporal definition of substantialand significant time. InMRR v GR (2010) 263 ALR 368 the High Court of Australiasaid: [8] Subsection (1) of s 65DAA is headed Equaltime and provides: If a parenting order provides (or is to provide) that a childs parentsare to have equal shared parental responsibility forthe child, the courtmust: (a) consider whether the child spending equal time with each of the parentswould be in the best

interests of the child; and (b) consider whether the child spending equal time with each of the parentsis reasonably practicable; and (c) if it is, consider making an order to provide (or including a provisionin the order) for the child to spend equal time witheach of the parents. Subsection (2) makes provision for where a parenting order provides that achilds parents are to have equal shared parentalresponsibility for thechild (para (a)) but the court does not make an order for the child to spendequal time with each of the parents(para (b)). In such a circumstance the courtis obliged to: (c) consider whether the child spending substantial and significant timewith each of the parents would be in the best interestsof the child; and (d) consider whether the child spending substantial and significant timewith each of the parents is reasonably practicable; and (e) if it is, consider making an order to provide (or including a provisionin the order) for the child to spend substantial andsignificant time with eachof the parents. Subsection (3) explains what is meant by the phrase substantial andsignificant time. [9] Each of subss (1)(b) and (2)(d) of s 65DAA require the court to considerwhether it is reasonably practicable for the child to spend equal time orsubstantial and significanttime with each of the parents. It is clearlyintended that the court determine that question. Subsection (5) provides in thatrespectthat the court must have regard to certain matters, suchas how far apart the parents live from each other and theircapacity toimplement the arrangement in question, and such other matters as thecourt considers relevant, [i]ndetermining for the purposes ofsubss (1) and (2) whether it is reasonably practicable for a child to spendequal time, or substantialand significant time, with each of the childsparents... [13] Section 65DAA(1) is expressed in imperative terms. It obliges the courtto consider both the question whether it is in the best interests of the childto spend equal time with each of the parents (para (a)) and the question whetherit is reasonably practicable that the child spendequal time with each of them(para (b)). It is only where both questions are answered in the affirmative thatconsideration may begiven, under para (c), to the making of an order. The wordswith which para (c) commences (if it is) refer back to the two precedingquestions and make plain that the making of an order can only be considered ifthe findings mentioned are made. A determination asa question of fact that itis reasonably practicable that equal time be spent with each parent is astatutory condition which mustbe fulfilled before the

court has power to make aparenting order of that kind. It is a matter upon which power is conditionedmuchas it is where a jurisdictional fact must be proved to exist. If such afinding cannot be made, subss (2)(a) and (b) require thatthe prospect of thechild spending substantial and significant time with each parent then beconsidered. That subsection followsthe same structure as subs (1) and requiresthe same questions concerning the childs best interests and reasonablepracticabilityto be answered in the context of the child spending substantialand significant time with each parent.... [15] Section 65DAA(1) is concerned with the reality of the situation of theparents and the child, not whether it is desirable that there be equal timespent by the child with each parent. The presumption in s 61DA(1) is notdeterminative of the questions arising under s 65DAA(1). Section 65DAA(1)(b)requires a practical assessment of whether equal time parenting is feasible.... Aleading decision on the approach of the court to allegations of sexual abuse ofchildren is that of the High Court of Australiain M v M (1988) 166 CLR69. Their Honours said (at page 76): ...the resolution of anallegation of sexual abuse against a parent is subservient and ancillary to thecourts determinationof what is in the best interests of the child. TheFamily Courts consideration of the paramount issue which it is enjoinedto decide cannot be diverted by the supposed need to arrive at a definitiveconclusion on the allegation of sexual abuse... and at page 75: ...the ultimate and paramount issue to be decidedin proceedings for custody of, or access to, a child is whether the making oftheorder sought is in the interests of the welfare of the child. The fact thatthe proceedings involve an allegation that the childhas been sexually abused bythe parent who seeks custody or access does not alter the paramount and ultimateissue which the courthas to determine, though the courts findings on thedisputed allegation of sexual abuse will naturally have an important,perhaps adecisive, impact on the resolution of that issue. InM and M (at pp 76-77) the High Court identified the relevantstandard of proof in these terms: In considering an allegation of sexual abuse, the court should not make apositive finding that the allegation is true unless thecourt is so satisfiedaccording to the civil standard of proof, with due regard to the factorsmentioned in Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 at p.362. ThereDixon J said: The seriousness of an allegation made, theinherent likelihood of an occurrence of a given description, or

the gravity oftheconsequences flowing from a particular finding are considerations which mustaffect the answer to the question whether the issuehas been proved to thereasonable satisfaction of the tribunal. In such matters reasonablesatisfaction should notbe produced by inexact proofs, indefinitetestimony, or indirect inferences. TheBriginshaw test is now encapsulated in section 140 of theEvidence Act 1995 (Cth), which provides: 140(1) In acivil proceeding, the court must find the case of a party proved if it issatisfied that the case has been proved on thebalance of probabilities. (2) Without limiting the matters which a court may take into account in decidingwhether it is so satisfied, it is to take into account: (a) the natureof the cause of action or defence; and (b) the natureof the subject matter of the proceeding; and (c) the gravityof the matters alleged. TheHigh Court in M and M addressed the issue of unacceptablerisk of sexual abuse and said (at page 77): In resolvingthe wider issue the court must determine whether on the evidence there is a riskof sexual abuse occurring if custodyor access be granted and assess themagnitude of that risk. After all, in deciding what is in the best interests ofa child, theFamily Court is frequently called upon to assess and evaluate thelikelihood or possibility of events or occurrences which, if theycome about,will have a detrimental impact on the childs welfare. The existence andmagnitude of the risk of sexual abuse,as with other risks of harm to thewelfare of a child, is a fundamental matter to be taken into account in decidingissues of custodyand access. In access cases, the magnitude of the risk may beless if the order in contemplation is supervised access. InW and W (Abuse allegations: unacceptable risk) [2005] FamCA 892; (2005) FLC 93-235the Full Court (Warnick, May and Boland JJ) discussed the theunacceptable risk test, and said: 111. In summary, thelaw is well settled as to the standard of proof required to make a positivefinding of sexual abuse, and thatsuch a finding should not be made unless atrial Judge is satisfied to the highest standard, on the balance ofprobabilities abusehas occurred. We accept, as a matter of practice, a trialJudge will almost inevitably be required in a case where sexual abuseallegations are raised to consider whether abuse has been proven on the balanceof probabilities as well as considering whether ornot an unacceptable risk ofabuse exists. The High Court in M and M recognised the difficulty indefining with any degree of precision what constitutes an unacceptablerisk and the casesdetermined after that

decision testify to thedifficulty. However, the questions posed by Fogarty J in N and S, andreferred to by us in paragraph 105, do provide a structure or framework whichmay assist a trial Judge to assess future risksto a child. TheFull Court in W and W cited with approval the following passage from thejudgment of Fogarty J in N and S & the Separate Representative (1996) FLC 92-665: In asking whether the facts of the case doestablish an unacceptable risk the Court will often be required to ask suchquestions as: What is the nature of the events alleged to have taken place? Who has made the allegations? To whom have the allegations beenmade? Whatlevel of detail do they involve? Over what period of time have the allegationsbeen made? Over what period of timeare the events alleged to have occurred? What are the effects exhibited by the child? What is the basis of theallegations? Arethe allegations reasonably based? Are the allegationsgenuinely believed by the person making them? What expert evidence has beenprovided? Are there satisfactory explanations of the allegations apart fromsexual abuse? What are the likely future effects onthe child? I would respectfully observe that this series of questions is a useful,practical tool for a court to utilise in assessing whetherthere exists anunacceptable risk of sexual abuse of a child. The Allegations as to the Fathers Behaviour in Relation toMothers Brother Afterproper objections were taken to the contents of the affidavit of Mr FF, thefollowing allegations as to the fathers conductremained in evidence: on numerousoccasions he spoke to the mothers brother about his (the brothers)experience, when he was 11 years oldwith another boy of the same age whichinvolved nudity and looking at the others genitals he providedalcohol and condoms to him when he was about 15 years old, after themothers brother said that he may have sexwith a girlfriend and thenasked him how did you go? he and themothers brother skinny-dipped together on at least ten occasions when hewas aged between 11 and 16 years he and themothers brother played strip pool on no less thantwelve occasions when he was aged between 13 and 16 years. This game involvedthe loser of a game of pool removingall of his clothes. during thesegames of pool he and the mothers brother touched their own and the otherpersons penis and scrotum on three or fouroccasions during games of strip pool he and the mothers brother lickedthe other persons penis andgenitals. Thisevidence remained in the mothers brothers affidavit afterobjections: 28. I recall a

trip to [SS] Island in either 1995 or 1996. [The father] and Ihad been for an evening skinny-dip at the beach andhad gone back to thecampground (just behind the dunes) to go to bed. We had a couple of beers. Wewent into the four person tentand lay down (on or in the sleeping bags). Wewere looking at ...magazines. I cannot remember the exact course of events butIrecall that [the father] said: I want to suck you off...till youcome...please can I...please can I...come on I wonttell anyone... 29. I was extremely uncomfortable and said no... 30. [The father] rolled over to be right next to me. I had shorts on. He triedto persuade me. He said again: Please canI....come on...no-one willknow...I have always wanted to know what it felt like for someone to come in mymouth. 31. I said no several times and pushed [the father] away from me. 32. Soon after the incident at the beach I stopped talking to [the father]. Ifelt very angry and confused and embarrassed aboutthe situation. I did nottalk to anyone or tell anyone. I stopped going to the beach and playing poolwith [the father]. He stillattended family functions (as did I) but I avoidedhim. Inhis oral evidence the mothers brother said inter alia: I have avery clear recollection of what happened in that tent and some are slightly morevague. I am lessclear about the number of times things occurred. Skinny-dipping becamecommonplace. After the1995/1996 incident I exchanged pleasantries with [the father] at familyfunctions. I dont believe that wenecessarily hugged or shook hands. Iavoided him after 1995/1996. I chose not to be alone with him. I went tofamily events becausethere were the other people there. Yes itwas a long time ago. I am not exact on the number of times things happened andI am not clear on dates. I have aclear recollection of things happening around the pool table andskinny-dipping. It is notcorrect that I did not discuss sexual matters with him until I was 14 or 15. Iwas about 12. I remember the firstmemorable one was walking along the headlandat Port Macquarie. I viewedpornography. I have no recollection of him walking in on me but that is notsomething which would necessarily stickin my mind because [the father] and Ioften shared pornography. [Thefather] bought me alcohol on numerous occasions. Strippool in my parents home very much added to the colour andexcitement. Itoccurred more than once that we touched each others genitals with hands,tongues and other parts of the body. In mymind there was a clear distinction between fooling around at the pool table andfull blown oral sex. I was very ashamed.

Themothers brother explained that he admired the father, whom he regarded asa brother, and generally enjoyed spending timewith him. He said that theybecame re-acquainted in 1997, when he began a relationshipwith his now wife P. He and P socialised with the mother and the father. Themothersbrother explained that our friendship with [the mother]and [the father] meant that [P] and I could spend time togetherchaperoned butwithout our parents. He said that heand the father had quite a close friendship after there-acquaintance. Inresponse to questions from counsel for the ICL, the mothers brother saidthat he and the father camped at SS Island forthree nights in 1995/1996. Hesaid that he thought that the father requested oral sex on the second night. Hedescribed the thirdnight as awful and explained that heknew nobody at the campground and had no way of contactinganyone. He said: I had resolved the situation and I didnot want to tell anyone that I had a homosexual encounter with a man. Inhis affidavit the father made these admissions as to his conduct toward themothers brother: he skinny dippedwith the mothers brother on two occasions he twice viewedpornography with the mothers brother he purchasedalcohol for the mothers brother on oneoccasion The father claimed that the mothers brother told him that he and hisfriends intended to steal alcohol from a bottle shopto take to a party. Themothers brother denied this allegation convincingly in his oral evidence. Thefather made the following admissions in relation to his conduct toward themothers brother in his oral evidence: We talkeda lot about sex. We didview porn together. We wentskinny-dipping twice, once at a beach and once at home. If I needto apologise I will because I did not tell his parents or [the mother] aboutporn and skinny-dipping. Iacknowledge that my behaviour was inappropriate. The age gap suggests somethingother than what it was. If it has had aneffect on his development, I sincerelyapologise for that. I concedethat even what I admit to may have created problems forhim. Thefather otherwise denied all of the allegations made by the mothersbrother. He agreed with the mothers contentionthat he said to her, on27 March 2013,: I crossed a line [mothers first name]...but Inever hurt [brothers first name]. DoctorJ discussed with the father the allegations made by the mothers brother. She was provided with the brotherstwo affidavits but did not interviewhim. Dr J reported as follows: Regarding [the mothers brothers] allegations, [the father] is intwo minds whether there is anything behind it. [The father] had nothing to do with any of

the allegations; it is crystal-clear;possibly [the mothers brother] is misleadingeveryone to assist hissister. (note: [Mr FFs] disclosure came ahead of [the mothers]move to end the marriage). Possibly something did happen to [the mothers brother] in that hesuffered a serious blow to the head in a skate-boardingaccident when he was 15or 16; he was in ICU. [The father] wonders whether that can cause misdirectedmemories. The other possibility is that there is really nothing in it. There is the thinnest veneer of truth in [the mothersbrothers] story. They did play pool together but nevernaked; Ihave never touched his genitals; I have never suggested oral sex. They did have conversations of a sexual nature, but I never asked abouthis fantasies. [The father] did show [the mothers brother] porn, but this was in thecontext of: two occasions when I came across[the mothersbrother] viewing porn and so I participated too so he didnt feel in thewrong. It was not erotic forme; it was nice being available so he could talk. Our talks were informational. There were two episodes of skinny-dipping, once at the familyhome, after one of those times when [the mothersbrother] was looking atporn, and another time, earlier, at the beach on a family holiday. Imeant nothing by it at the timebut in retrospect I realise it probablywasnt wise. [The mothers brother] has said they argued over oral sex and that hethen stayed away from me; that is strange becauseit is not true. [The father] had never noticed any estrangement between them. From around age16 to 17 [the mothersbrother] was spending more time with his friendsbut that seemed normal for his age. When [the mothers brother] was 16and9 months [the father] contributed to helping him learn to drive and afterthat the two of them went to [SS] Island on a four-wheeldrive. DoctorJ was asked for her opinion of the significance of the fathers admissionsthat he watched pornography twice with themothers brother and that theyskinny-dipped together on two occasions. She replied: without more,I would say that is possibly grooming behaviour. DoctorJ was asked to comment upon the breakdown in the relationship between the fatherand the mothers brother in 1995/1996,and followed by a rapprochement in1997, in circumstances where they again spent time alone together. She said: I did not know about weekends away alone but I knew about the joint socialising.I think that what happened to [the mothersbrother] is of concern becausewhat the father admitted to was inappropriate and may be grooming, a violationof boundaries and trustwith another family. DoctorJ

was asked to comment on the significance of the fathers acknowledgementthat he behaved inappropriately with the mothersbrother. She said: I have concerns about his response, saying a head injury may have caused [themothers brother] to say these things, no sensethat he may have causedfor example confusion for [the brother]. I dont think it was an effortto understand, it was an effortto justify or dismiss, that is not to value theconcerns of the other person. Doctor J said also: What [the mothers brother] describes isgrooming. What [the brother] says indicates a long period of grooming. Groomingis a strategic assault as it is intended to have a particularoutcome. DoctorJ was asked to comment on the fathers contention that the mothersbrothers allegations were part of aconspiracy with the mother to enableher to move to Brisbane with the children. She said: This is what Iwas alluding to earlier, dismissiveness and lack of empathy for the victim. There are chiefly two explanations,a genuine belief and a way of dismissingwhat other people are saying. MrR discussed with the father the allegations of the mothers brother. Hereported: In reference to [the mothers brothers] sex education, he said thathe wanted to normalise that experience. He regarded himself as anolder brother to Mr [FF], and thought he was helping him. [Thefather] was in his mid-twentiesat the time; however, in hindsight he nowbelieved that it was not his role. MrR reported further: In reference to [the mothers brother],[the father] stated he could recall the skinny-dipping incident. He stated thatnudity was common within the family environment in some situations. He saidthat he saw his father-in-law ... naked during a campingholiday when he wasshowering. He thought nothing of the skinny-dipping incident. He again denieda sexual attraction toward [themothers brother]. MrR reported that the father informed him that the mothers brother suffereda head injury at the age of 16. He opined that[The father]demonstrated empathy toward [the mothers brother] and expressed concernthat [the brother] might have beensexually abused by someone and misidentifiedhim ([the father]) as being the perpetrator. MrR disagreed with Doctor Js conclusion that the father lacks empathy. Hewrote in his report: In my opinion [the father] does not manifest alack of empathy. In my opinion he dismissed the allegation by [themothersbrother] because he does not believe he committed a sexualoffence of [the brother]. Seniorcounsel for the father submitted that a conclusion is unavailable thatthese allegations are made out or that there is an unacceptable risk. It

was contended that there was doubt about the extent of hisrecollection without the assistance of others. It was suggested, ineffect, that he discussed his recollections with his wife and his sister Ms S. Senior counsel for the fathermaintained that he had a series ofconversations with [Ms S] in the context of him responding to herenquiries. It was submitted that a Jones v Dunkel inferenceis available because Ms S gave no evidence in the case for the mother. Itwas submitted that there were differences between the interim andfinal affidavits of the mothers brother. He was criticisedbecause he said he had a very clear recollection of events in the tentbut his recollection of other incidents was more vague. Seniorcounsel for the father pointed to the continued relationship after thesummer of 1995/1996 between the mothers brother and thefather. The suggestion seemed to be that this relationship was inconsistentwith conducton the part of the father as alleged by the mothersbrother. Ifound the mothers brother to be an impressive witness, who appeared to betelling the truth to the best of his recollection. I can envisage no reason whyhe would provide false evidence as to the fathers conduct toward him, andsubject himself torigorous cross-examination, purely to bolster hissisters case. On the other hand, the father appeared to me to be awitnesswho made limited admissions in relation to the mothersbrothers allegations for strategic purposes. I prefer the evidenceofthe mothers brother to that of the father. Iam unpersuaded that Mr FFs conversations with his sister Ms S affectedthe reliability of his evidence or his veracity. I could identify nothing inthe evidence to suggest that these conversations added any material to hisindependent recollection. Inmy view, it is unremarkable and insignificant that the mothersbrothers recollection of events on the camping tripin 1995/1996 is muchmore vivid than is the case with other incidents. Mr FF gave convincingevidence that he perceived a significantdifference between skinny dipping,strip pool, the viewing of pornography and discussion ofsexual topics on the one hand and oral sex on the other. He conceded readilythat hehas a poor recollection of dates and the number of occasions whenincidents occurred between himself and the father. Iam unable to give weight to alleged differences in the contents of the twoaffidavits of the mothers brother. His firstaffidavit was not includedin the evidence placed before me. Ido not regard the resumption of a relationship between the mothersbrother and the father as indicative that the former fabricatedhis allegationsas

to the conduct of the latter. The relationship prior to the summer of1995/1996 was one between the father andthe mothers brother. Therelationship after 1997 was, to a significant extent, one between two couplesand was convenientto Mr FF and his now wife. Additionally, the father and themothers brother remained connected by family ties. Iattach little or no significance to the inconsistencies in the evidence of themother and her brother concerning their telephoneconversations in November2012. No doubt the mother was considerably disturbed by information which shereceived at that time. It would be unsurprising if she now has aless-than-perfect recollection of the details of her telephone conversationswith her brother. Certainly, I do not consider that these inconsistenciesbolster the suggestion of the father that the mother and her brother concoctedthese allegations to assist her case. Seniorcounsel for the father submitted that it was to his great credit thathe admitted to skinny dipping, viewing of pornography and purchase of alcoholand that he now saysthat he recognises inappropriate behaviour but hehad no intent to groom or be malicious; at the time he acted in good butmisguided faith. I respectfully disagree with that contention andtake the view that the father made strategic admissions of only a few of thelessserious allegations made by the mothers brother. It may well bethat the father, who is an intelligent man, considered thatthis tactic wouldappear to be more credible than a blanket denial of every allegation made by themothers brother. AccordinglyI find, to the requisite standard, that the father directed the followingbehaviour toward the mothers brother: he discussedsexual matters from a time when the mothers brother was approximatelyeleven years old he providedalcohol and condoms to the mothers brother when he was about fifteenyears old, after he indicated that he mayhave sex with a girlfriend, and laterasked how did you go? he skinny dippedwith the mothers brother on at least ten occasions when he was agedbetween approximately thirteen and sixteenyears he viewedpornography with the mothers brother he playedstrip pool with the mothers brother on at leasttwelve occasions when he was aged between thirteen and sixteen, which involvedthe loserremoving all of his clothes during games ofstrip pool, he and the mothers brother touched theirown and the other persons penis and scrotum on three or fouroccasions during games of strip pool, he and themothers brother licked the other persons penis and genitals during a campingtrip in

the summer of 1995/1996 he asked the mothers brother for oral sexin the manner set out in paragraph68 of thesereasons. The Allegations as to the Fathers Use of Pornography, IncludingMaterial Relating to Children Asnoted, the father admitted that he accessed adult pornography and downloadedstories from a website known as XXX. In his affidavit thefather deposed: Iadmit I have previously accessed the website known as [XXX] in thepast. I would estimate that from about early tomid-2011, I began to searchonline for erotic stories for couples. All text files from [XXXs]collection that I had storedon my computer were either downloaded by medirectly from the website or from a zip file on a USB given to me. Iadopted a pattern where I would: (a) Download a large volume of stories, based primarily on selecting storieswhich had multiple parts to them. (b) Over time, I would start reading the stories and once a story was finishedor I formed the view that I was no longer interested,either because it waspoorly written or did not involve a subject in which I was interested, then Iwould delete the file. AfterI had obtained stories, I occasionally scanned the titles and file names andclicked open the story to read the synopsis. There were stories that I knewimmediately would not interest me and I deleted those. I do not recall that Isaw any titles whichsuggested that there were text files of a paedophilic/childabuse nature or even involving underage children. Had there been anywhich wereimmediately obviously as containing such material, I would have deleted those aswell. I wold not have deleted any storiesbecause I understood them to beillegal, as I was not aware that a text file could be categorized as child abusematerial or thatthere was a criminal element in possessing such files, but Iwould instead have deleted those files as I was not interested in storiesinvolving that sort of material. Onthe occasions that I went online to download more stories, I often hadntreached the end of the stories downloaded fromthe previous occasion. I woulddownload new stories which would be stored in the same place as the storiesalready there and I wouldthen gradually read through them. I did not workthrough them in any order such as date of download or title name but insteadrandomlyselected a story to read. Idid not save stories. Each story was deleted once I had read it or had formedthe view that it was not of interest to me. The storage of text files Inabout February or March 2013, I experienced some space problems with Dropbox dueto the limited space

available with their freeservice. That limited storagespace arose because Dropbox was used by me to store and share information acrossmy devices. My Dropboxfolders contained not just the stories I was downloadingbut a wide range of other material such as files relating to household matters,finances, baseball statistics, Radio Controlled Modelling and various othertopics. The children did not have access to anythingstored in the Dropboxfolders. Asa result of the space limitation, I created a folder called HOLDwhich was then compressed into a zip file calledHold.zip. Thiscompressed all the text files which were in the HOLD folder at that time. Theeffect of this was tocreate more space in Dropbox. I named itHOLD as my intention was that the file would hold material forlater reading. Afterthis, I continued downloading files from online and I believe exclusively[XXXs] collection but I am unable to say forcertain. When I downloadeda text file, I would right click, save the file in the MISC folderin Dropbox and thenI would either:- (a) move it into the hold.zip file for later reading; or (b) Open the file in the MISC folder and read it straight away. (c) If it was read straight away, then it would be deleted at the end of thestory or at the stage that I determined I did not wantto continue readingit. Atvarious times, I would move files back from the Hold.zip folder into the MISCfolder. I would do this as I most typically accessedthe stories for readingfrom my iPad and an iPad cannot read a zip file and therefore the files wouldneed to be in the MISC folderto be accessible. If I finished reading a storyon the iPad, or lost interest, I would delete the story directly from the iPad.Courtesy of the Dropbox service, this would mean the file was also removed fromall other devices. Inor around June/July 2012, the storage issue was no longer an issue as Dropboxbegan providing greater space for free as part ofan upgrade to the service. That meant I no longer needed to move files in the Hold.zip file anymore. Fromthe point onwards, Ibelieve I was only ever extracting and deleting files fromthe HOLD.zip file. Ofthe ten stories, that I was charged with, five were in the Hold.zip file andfive were in the MISC folder. The five in the Hold.Zipfile had not yet beenopened and read and were awaiting me to open them. The remaining five whichwere in the MISC folder had eitherbeen: (a) Moved from Hold.zip to MISC and not yet read to the point that I coulddetermine their nature; or (b) Not opened at all as yet. Therewas no particular pattern to my selection of which story I would move across tothe MISC folder from the .zip file. I did

notuse the oldest files, or go byanything more than random choice and which filename happened to catch myattention at that point intime. Accordingly, I would sometimes move a fileacross that had been only recently downloaded and on other occasions, I mightmovea file that had been in the .zip file for several months. Ialso used an application called Notepad++ on my PC. This application wouldallow multiple files to be opened simultaneously eachappearing under a separatetab similar to a web browser. Only one of the files would be readable at oncehowever all files wouldshow as having been opened. This may have resulted inthe metadata showing that a number of files would appear as having been openedeven if they had never been read. Iacknowledge that I could certainly have been more vigilant in screening thefiles that I was in possession of by November 2012. At that stage I was unawarethat I was in possession of files that allegedly contained child abuse materialand I was also unawarethat to be in possession of such material in textual formpotentially represented a criminal offence. I was not aware of this until[themother] provided me with the references to the NSW crimes act in late February2013. Allegations I changed my passwords Ourcomputer set up at home was established so that [the mother] and me, as well asthe children, each had our own log in. This wasnecessary because [the mother]operated her business from home and stored on the computer under her user namewere her files relatingto her work. The 27 Mac was intended to only beused by [the mother] and I. The 24 Mac was for use by the childrenaswell. Ichanged my password in mid 2012 because:- (a) I had on a number occasions suggested to [the mother] that the children notbe given our passwords or permitted to use her mainwork machine in order toavoid a situation where the children either inadvertently deleted files oraccessed client information ormaterial related to [the mothers] workthat perhaps they should not see. Unfortunately I became aware that in mid2012, [themother] had provided [the child E] with my password and I thereforetook steps to change it. After I changed my password, I made[the mother] awarethat I had changed it, the reason why and I gave her the new password. (b) The other reason was that we used a service from openDNS toprovide internet security and to ensure that the childrenwerent exposedto websites that were age or content inappropriate. The setup we used relied oneach of the children accessingthe computers via their own individual log in. Itherefore changed my password to

ensure that [E] used her own login rather thanusing mine which would offer her unrestricted internet access. Ihad a double password set up on the routers themselves. The double passwordarrangement occurred after I became aware that someonehad been piggybacking onour Wi-Fi network without permission. I already had the Wi-Fi connectionpassword protected so I addedin MAC address access lists known as whitelisting. This meant I had to specifically allow any device to connect tothe network and therefore required the use of twopasswords. Deleting files Ihad no reason to delete the files on my computer at 3.00 a.m. If I had deletedfiles, I have the necessary knowledge to do so properlyand that would haveincluded emptying the trash properly such that they were not left behind andwere securely deleted. In2 to 3 hours, I would have been able to completely wipe the entire hard drive,reinstall the operating system and return all normalfiles totheir previous locations. It would not have taken me till 3am to complete thisexercise. Thematerial on the computers was not hidden from [the mother]. I can say thisbecause of the following: (a) [The mother] knew all of my passwords and was able to freely access all ofthe files located in my area of the computer or onthe various storagedevices (b) The .ZIP file that contained the bulk of the files was completely open. IfI had wanted to hide it, it would have at leastbeen password protected (c) The MISC folder was also completely open. If I had wanted to hide itscontents, I would have password protected thatdirectory/folder. DoctorJ discussed this issue with the father and reported asfollows: [The father] volunteered: Any issues about information on my computershave been dealt with: there were text stories, novideos, norecordings. Asked what his interest was in these stories, [the father] said he wasstruggling with intimacy issues and came across the website: It was a very generic website, there were all kinds of stories of it; myintent was in adult information; it was part of anexploration to deal with myown intimacy issues and it got derailed; I got too interested in it. There wasno child abuse stuffin them. Ten stories were found on his computer that did have some child abuse materialin them but they were part of a larger number of about200 files that he haddownloaded; he wouldnt have looked at them because, once I readthem, I discarded them; I didnthave a need to keep them; so if they werestill on my computer it meant I hadnt got around to reading them yet. Asked what he understands about [the mothers] concerns in this regard,[the

father] said he is not sure; possibly all of thisis motivated by herdesire to go back to Queensland. Initiallythe father was charged by police in relation to 73 text files which were locatedon the 27 inch Mac, the 24 inch Mac computerand an external Seagate hard drive.The prosecution withdrew the charges in relation to the files on the Seagatehard drive on thefirst day of the criminal trial because the fatherslegal representatives ascertained that this device was the property of Ms FF. The father was found not guilty in respect of the remainingcharges. Seniorcounsel for the father made detailed and careful submissions as to whether afinding is available, to the requisite standard,that the father knowingly wasin possession of child pornography. For the purposes of both the criminal trialand these proceedings,the father maintained that he did not knowingly downloador possess child abuse material. On the fathers behalf it was submittedthat he accepts that he may well have downloaded this materialunknowingly but that does not establish intent, interest orexcitement. MrNN and Mr T agreed inter alia, as follows: [NN]: On the issue of the relevant files being opened, I state the following. On the iMac27 computer, someone using the user account named [MrBlan] opened two files named [Mary].txt andusherette.txt in the TextEdit program. The file [Mary].txt matches the second one listed on page 1 of Mr[T] Appendix O v2, indicating thatit was opened from a removabledevice with no volume label, from within a folder named Misc on orbefore 25 Nov 2012. The file usherette.txt matches the one listed at the bottom ofpage 13 of Mr Towers Appendix O v2, indicatingthat it was openedfrom the local folder /Users/.../Dropbox/Misc on or before 22 Nov2012. On the iMac21 computer, someone using the user account named [MrBlan] opened two files named [Mary].txtandmyhappyday1.txt in the TextEdit program. The file [Mary].txt matches the one listed towards the bottom ofpage 14 of Mr [T] Appendix O v2 (firstentry of the sectioncoloured red), indicating that it was opened from the folder/Users/.../Dropbox/Misc on or before29 April 2014. The file myhappyday1.txt matches the one listed towards the bottomof page 14 of Mr [T] Appendix 1 v2(second entry of the sectioncoloured red), indicating that it was opened from the folder/Users/.../Dropbox/Misc onor before 29 April 2014. It is important to note that the last accessed timestamp of a fileon a Mac computer does not necessarily show whena user accessed afile, just that it was accessed. Other actions can also cause a fileslast accessedtimestamp to be updated,

such as copying or renaminga file, or extracting it from a compressed ZIP archive. [T]: On the issue of the relevant files being opened, I state the following. As stated in my report, I agree files listed in Police Statement of Facts havebeen opened. Inmy view, it is significant that the mother gave evidence that she opened andread a story entitled [Mary], a Chance Encounter in theearly hours of the morning of 22 November 2012, having logged on using thefathers password. The mother deposed thatshe opened a folder entitledMisc. and saw file names including TheStepdaughters, My Nieces, [Mary] andThe First Time. The mother stated in her affidavit thatshe opened several of these files. MsFF also deposed that on 22 November 2012 she opened files on a Mac computer. She stated in her affidavit that she observed approximately60 files, some ofwhich were entitled My Stepdaughter, Girlnextdoorand Myslut. She deposed that she opened afew of these files and observed a paragraph at the top headed[XXX], followed by a warning that the contents containedsexually explicit material. Nothingwhatsoever in the evidence suggested that any person other than the fathercaused these files to be downloaded, whether knowinglyor unknowingly. As wassubmitted by counsel for the mother, the titles of some of these files areoffensive in themselves. Examples include herlittle sister, !!-12 kiddie suck, young andnasty, neighbours daughter. Thecentral questions, however, are whether the father knowingly downloaded thesefiles and whether he opened any of this material. In my view, it is ofevidentiary significance that both the mother and Ms FF opened several of thesefiles in November 2012. MrNN and Mr T assumed that time stamps extracted from the evidence arereliable. They indicated, however, that they have notconducted any specific testing to validate this assumption. Accordingly, it maybe that the time stamps did not accuratelyreflect the time of accessing ofthese files. MrT and Mr NN agreed that the time stamps do not necessarily indicate when a filewas accessed and that other actions may producean update. In my view, thatpiece of evidence is significant in light of the fact that both the mother andMs FF accessed this material. Accordingly, it does not necessarily follow thatonly the father opened these files. Iharbour suspicions that the father knowingly downloaded and accessed childpornography. Suspicions and the appearance of offensivelytitled material in acomputer folder of his creation, however, are no substitute for evidence ofactions and intent. I find, tothe requisite standard, that the

father did notknowingly download and/or access child pornography. The Best Interests of the Children Section 60CCConsiderations The mother told Doctor J that the children love and trust the father and thatthey want to spend time with him. She indicated thatthey seemed tobe in unison in parenting the children until the separation. In heroral evidence the mother indicated that she has read the reports of staff of HSupervisors in relationto the childrens time with the father. She saidthat the reports are positive in every respect anddo not indicate any concerns. I share that opinion, on thebasis of my reading of these reports. DoctorJ observed the children with the father and reported: The three children joined us now and it was plain that they were very pleased tosee their father: there was a very affectionatereunion. All three sat on the couch close to [the father] and there was an easyinteraction: they chatted easily and brought him up to dateon various eventsthat he had missed with them. There was a lot of good humour. It was an easysession and there were no issues. [The fathers] behaviour was entirelyappropriate. Thefather deposed that the mother was the childrens primary carer but thathe had a great deal of involvement in their lives. There was a dispute betweenthe parties as to the extent of the fathers involvement but, in her oralevidence, the motherreadily made concessions in relation to his input. Shesaid: I dont quibble that we shared in the care of thechildren from 2005 and he was actively involved inassisting them. The mother described the assistance which he gave tothe child E with reading as a turning point for her anda valuable contribution by him. Therewas no suggestion whatsoever that the children have been subjected or exposed tofamily violence. Counsel for the ICL submittedthat risk is a majorissue and that the children should spend time with the father only inthe presence of their paternal aunt, Ms O. Counsel for the mothercontendedthat the risks associated with the father outweigh any benefit thatmight flow to the children from time with the father. Counselfor the ICL contended that the matters to which the father admits giverise to concern without more and pointed towards his conduct towardthe mothers brother; his use of pornography and online relationships. Counsel for theICL pointed out that Doctor J could not eliminate a risk thatthe child K may suffer sexual harm in the unsupervised care of thefather. Inher report Doctor J addressed the issue whether there is any risk ofharm either physical, psychological or sexual imposed by the father or themother to the

childrenand if so, the nature of that harm. Sheopined that there is nothing to suggest that the mother poses a riskof harm to the children. DoctorJ offered these opinions as to whether the father poses a risk of harm to thechildren: The question of any risk of harm from the father depends on whether the courtdetermines that it is likely he has been accessingchild pornography on line. If the court were to make such a determination then this would have implicationsfor his parenting capacityand there would also be a question of whether thereis a risk of progression from online offending to handsonoffending, a question that is considered below. With the respect to theimpact of pornography to the family, there area number of issues can besummarised as follows (from Manning 2006): Pornography consumption in general affects the individual consumer, encouragingdistorted perceptions and beliefs about relationshipsand sexuality, devaluationof marriage and child rearing, increased aggression and the trivialisation ofcriminal behaviour; it increasesrisk of sexual deviancy, sexual perpetration,negative intimate relationships and accepting rape myths (eg assigningresponsibilityto the victim). Internet pornography may be incompatible withthe characteristics of a stable, healthy marriage; there is decreasedsexualsatisfaction and intimacy and partners perceive it as an act of betrayal orinfidelity. This undermining of marital and familyrelationships affectschildren and increases the risk of their exposure to sexually explicit contactand/or behaviour; discoveryof the activity often necessitates the need fordiscussions of sexual matters prior to the child being ready. (Manning2006) DoctorJ opined further: In terms of recidivism following a sexual offence of some kind, rates arereported to be low in general (13%), but there is a sub-groupwhich has a highrate, which relates to other indices of sexual deviancy and, to a lesser extent,general criminological factors. (Hansen et al 1998; 2005). I note that veryfew of these factors would apply to [the father] so if he were regarded as anoffender,he would have to be considered as being in the low risk group withregard to recidivism. Inher oral evidence Doctor J said inter alia: Icant be certain that [E] is at no sexual risk from him Whetherthere is a psychological risk to [E] if she has contact depends on the criticalelement of child pornography. If itis accepted that he does not have aninterest in child pornography, it is less clear that there is a psychologicalrisk. If it ischild pornography, that is a high level risk. If it is general pornography,that is well within the

bounds of normalbehaviour but not if it is an intenseoccupation that impacts on parenting capacity but is not necessarily a sexualrisk. With sucha parent, alternate weekends and a night in the off week, onlyone overnight and less than half the holidays because they are likelyto beaccessing pornography while the children are around. If what[the mothers brother] says is accepted, it has progressed to a hands-onoffence and that moves into a differentcategory of risk. There is a risk toany child once there is a hands-on offence. That is a bigger risk than viewingpornography. Themother and the ICL both expressed concern at the possibility that the father mayhave been grooming K prior to the separation. It should be noted, however, thatthe mother said in her oral evidence: I do not say that he hasbehaved toward [K] in any way that could be considered grooming. Themother described in her affidavit behavioural changes in K in the months priorto November 2012. She said that he repeatedlystated that he loved her andbecame anxious around bedtime. She deposed that this behaviour ceased withinweeks of the separationbut, in December 2013/January 2014, K becameteary and clingy. Themother informed Doctor J of these changes in Ks behaviour. She said thatK asked her during the criminal proceedings if Dad is found not guiltywill he come home?. The mother informed him that the marriage wasfinished so that the father would not come home regardless of the outcome of thetrial. She stated that K settled again after this conversation. DoctorJ reported that K doesnt recall any bad experience that he hashad in the family. Neither Mum nor Dad has ever done anything that hasmade himfeel uncomfortable or unhappy. She observed: (note: [K]was not asked explicitly about sexual contact but was given a lot of opportunityto raise any issues of discomfortwithin his family. It seemed clear that hehad nothing to report and he remained relaxed and open). Inher oral evidence Doctor J said: [Ks] statement is notnecessarily indicative that he has not been groomed. It is incompatible withovert inappropriatesexual behaviour by the father. If [K] had started to feela little uncomfortable, he may feel happy at the removal of thefather. Inher report Doctor J opined as follows: I note the mothers account that [K] seemed to be more secure since hisfather left. On the face of it this might suggestthat [K] had reasons to beuncomfortable living with his father. I note also concerns regarding hissexualised behaviour; this isdifficult to assess since some such behaviour inyoung children is common, however in this case

there are a number of relatedissuesthat might raise more concern: [the mother] describes a lack ofcloseness between father and son; there was a period of marked insecurityandfear just prior to [Mr FFs] disclosure and this seemed to stop when [thefather] did not return to live with the family;recently, when the criminal casewas being heard and [K]was aware of this, the same anxious behaviour emergedwhich settled oncehis mother assured him that acquittal did not mean that hisfather would return home. None of those behavioural changes in and of itself is sufficient to raise thepossibility that [K] has experienced abuse; there isno specific syndrome ofabuse, sexually abused children may display no symptoms or any of a variety ofnonspecific symptoms and signs(eg sleep disturbances, enuresis or phobias) thatmay equally indicate physical or emotional abuse or other stressors unrelated tosexual abuse, such as family difficulties. DoctorJ then referred in her report to the two instances of sexualbehaviour on the part of K, being the incident with another littleboy and the events involving his cousin M. Her overall conclusion in relationto K was as follows: Thus, there may be some cause for concern, but none of these behaviours isdiagnostic in itself; it is the overall profile of disturbancesthat must beconsidered. It is also important to note that nothing emerged during myassessment of [K] that would raise any concernsof this nature. Iam not satisfied that the father was grooming and/or had sexually abused K priorto the separation. As Doctor J observed nothing emerged during myassessment of [K] that would raise any concerns of this nature. Clearly, Doctor J was alert to this issue and undertook what she consideredto be appropriate investigative steps. Themother raised concerns as to [The fathers] focus on [the childE]. She deposed: (b) I recalled some unease about [the fathers] focus on [the child E]. [The father] had a close relationship with [E] often to the exclusion ofthe other two children. For example: [the father] focused his time more on herthan the other children. He spent 30-60 minutes in her room at nighttucking her in to bed. He permitted her to watch television showswhichI thought were not appropriate for a 12-13 year old because of the sexualcontent, including Underbelly and PoliceRescue. When Ispoke to him about my concerns he would say: its fine. I recall on the holidaywith my family to the Whitsundays,[the father] spent his time almostexclusively with [E]. I recall seeing them holding hands and skipping alongWhite Haven Beach. That behaviour made me

feel uneasy. When I suggested to himthat he encourage [E] to spend time with other family members on theholiday, helaughed at me and was dismissive of my concerns. (c) The main problem was that [the fathers] time was not shared with theothers and for example [the father] (i) Made avideo of [Es] softball pitch and sent it to the States to a friend whowas an expert (ii) Made avideo of [Es] trip to my Dads 70th birthday (and spentthe whole of the birthday weekend finessing the video) (iii) Spokewith [E] about her friends, school, sport and extracurricular activities atlength and for significantly longer periodsthan he spent with [K] and[F] I was happy that [E] was involved but [the father] did not spend that time withthe others and it was a source of tension betweenus and I said words to theeffect of: you have two other children ... Themother conceded that the father spent time with E in her bedroom when heassisted her with reading. With respect to the mother,it is probably the casethat she now looks back on the behaviour of the father through a prism ofsuspicion and expresses these concernsin relation to E. Thefather told Mr R that he has never viewed child pornography and that hewanted to normalise Mr FFs experience of sexeducation. Mr R reported that the father admitted to a physical attraction togirls in the age rangeof fifteen years but that he had never, norwould he contemplate, sexual activity with young girls. MrR disagreed with Doctor J that the father demonstrated a lack of empathy for themothers brother. He took the view thatthe father expressedconcern that [the mothers brother] might have been sexually abused bysomeone and mis-identified him as theperpetrator. He also opinedthat the father dismissed the allegation by [the mothersbrother] because he does not believe he committed a sexual offence on [thebrother]. MrR opined: I have observed [the father] experience significant distress over the period oftreatment. At times his personality may be interpretedas reserved. However,that is not to say that he lacks empathy. His distress about the break-up ofhis marriage, about not beingable to see his children and his ongoing concernsfor the welfare of his children provided evidence that he does experience agreatdeal of emotion. Itwas Mr Rs assessment that the father does not meet the Diagnostic andStatistical Manual of Mental Disorders 5th Edition criteria for anykind of paraphilic disorder including paedophilic disorder. He opined further: [The father] has no personality traits shared by individuals shared by schizoid,avoidant or dependant personality. From my observationsand in my

opinion, heis likely to have retreated into online sexual behaviour as a directpsychological response to the intimacyproblems he experienced with hiswife. MrR was asked for his opinion as to whether the father poses any risk to thechildren. He reported: I am of the opinion that [the father] is not a risk to his children or any otherchildren. Biological fathers rarely sexually offendagainst their children andwhen they do it is because they are highly paraphilic, which in my opinion [thefather] is not (paraphilic). MrR was asked whether any of the opinions which he expressed in his report wouldbe different, in the event that the court were todetermine that either or bothof the allegations of use of child pornography or sexual abuse of themothers brother were establishedon the evidence adduced in theseproceedings. He said: If the court was to determine either (or both) of those allegations to be truein whole or in part, my opinion would differ in thetreatment which [the father]would require. My opinion of his risk to the children would notchange. Ihave concerns as to the fathers apparent capacity to compartmentalise hislife and engage in a long-term deception of themother. Clearly, he lied to herwhen he stated that he had no interest in pornography. I consider it likelythat the father understatedhis interest in pornography and the time which hedevoted to such material. For example, he wrote a story (exhibit 9) of apornographicnature which is of twenty closely-spaced pages in length. He saidin his oral evidence that it took him several hours towrite this story, a proposition about which I entertain serious doubts. Thefathers own admission in relation to pornographywas I got toointerested in it. Allthree children expressed a clear view to Doctor J that they want to see thefather. In the video on a USB stick (exhibit 15)the children can be observedtelling the father that they miss him. As noted, thecontact reports of staff at H organisation portray the children as happy in thecompany of their father and enjoyingtheir interaction with him. Noissue was raised in relation to the quality of the relationship between thechildren and the mother, who is the unchallenged primaryresidence parent. Doctor J assessed that the children strongly attached to [the father]and the bonds between the father and the children are warm andaffectionate. Thechild E told Doctor J that the children spend considerable time with members ofthe maternal family and that she feels close to [Ms FF] inparticular. She indicated that her closest relationship within thepaternal family is with [Ms O]. Thechild F indicated to Doctor J that the children see the maternal familyregularly and that she is

possibly closest to hergrandfather. She said that her closest relationship within thepaternal family is with Uncle .... Thechild K indicated to Doctor J that he is close to his maternal family,particularly his grandmother. He said that he likes Dadsfamily too, perhaps [Ms O] especially. Inmy view, the children are fortunate in that they share loving and constructiverelationships with both their maternal and paternalextended families. Iconsider that they will benefit from ongoing, strong connections with both sidesof their family. Having observedthe paternal grandmother and Ms O in thewitness box, I formed the view readily that the paternal family has much tooffer the children. Of course, the same observation applies to the maternalextended family. DoctorJ was of the view that there could well be limitations on the fatherscapacity to meet the psychological needs of thechildren. Shereported: The mother is well able to provide for all the needs of the children, includingemotional and intellectual. The fathers capacity would have to be assessed in the light of whether ornot the court determines that the matters in itemB are likely to be true (theallegations of child pornography and sexual abuse of [the mothersbrother]). Should the courtdetermine that there is a basis to those concerns,it would have considerable bearing on the fathers capacity to meet thechildrens emotional and intellectual needs. Should the court determine that there is no basis to those concerns then thereis no reason why [the father] could not meet the childrensintellectualneeds, but there would still be concerns about limitations in his capacity tomeet their psychological needs as follows: there is a manifest lack of empathy,for example, in the way [the father] dismissed the allegations made by [themothersbrother]; empathy is a critical attribute of good parenting soin that regard he is not well equipped as a primary carer. Further,if it werethe case, as suggested by the mother that [the father] used to spend hisevenings in online activities, then this maysuggest a lack of emotionalavailability that might extend to the children as well as it apparently did tohis wife. There wouldalso be an issue of a degree of deception that wasinvolved in these secret activities. Thus, if the court were to determine there is no risk of sexual harm then [thefathers] parental capacity would be assessedas not optimal in respect ofemotional needs but as adequate. Nevertheless, the children are stronglyattached to him and the bondsbetween father and children are warm andaffectionate. I share these concerns of Doctor J. Inmy view there is no issue as to the extent to which each of the

parties hastaken the opportunity to participate in making decisionsabout major long termissues in relation to the children and spending time and communicating withthem. Similarly, I see no issueas to the extent to which each of the partieshas fulfilled their obligations to provide financial support for thechildren. DoctorJ considered that the children have coped very well with the cessationof contact so far, which shows that they are resilient and can cope withupheavalsin their lives. She opined that it is likely that theywill continue to adjust to their circumstances, whatever is the determination ofthe court. The Presumption of Equal Shared Parental Responsibility Iam required to apply a presumption that it is in the best interests of thechildren that the parties have equal shared parentalresponsibility. There wasno suggestion of family violence and I have made no finding that the fatherabused any of the children. I have made findings that the father sexuallyabused the mothers brother. He, however, was not at thetime...a member of the parents family as prescribed by section61DA(2)(a) so as to render inapplicable this presumption. Iam satisfied that the presumption is rebutted by evidence that it is not in thechildrens best interests for the partiesto have equal shared parentalresponsibility. After her discovery of the fathers comprehensive andlong-standing betrayalof her, the mother now is understandably profoundlysuspicious of his motivations and behaviour. I accept her evidence that shewould find it extremely difficult to consult with the father concerning issuesrelating to the children. The mother said: I would keep [the father] up to date but I would not consult. I donttrust [the fathers] judgment any more. I donthave a referencepoint for his true motivations. I dont think he hasinsight. Thechildren have a practical need for decisions to be made in relation to theirlong-term care, welfare and development. At thispoint, it seems to me thattheir parents are unable to consult with each other and reach consensus. Thatthe court is required todetermine whether K attends X School illustrates thatinability. Conclusion As To Parenting Issues Asthere will be no order for equal shared parental responsibility I am notrequired to consider whether it is in the childrensbest interests, andreasonably practicable, that they spend equal or substantial and significanttime with their mother and father. I am at liberty to determine directly whichparenting orders are in the best interests of the children. Ihave found that the father subjected the mothers brother to sexual abuse.As noted above, Doctor J considered that the

behaviourdescribed by themothers brother constitutes a hands-on offence,which is a bigger risk than viewing pornography. Iregard the fathers conduct in relation to the mothers brother as avivid illustration of his lack of respect for personalboundaries, as identifiedby Doctor J. DoctorJ could not exclude a risk that the children may be subjected to behaviour whichconstitutes sexual harm in the unsupervisedcare of the father. I agree withthat conclusion but I am conscious that they are aged fifteen, thirteen andeleven years. Accordingly,it is reasonable to assume that they have a capacityfor self-protection. Ishare the concerns expressed by Doctor J as to the father capacity toprovide for the childrens psychological needs,to which I have referredabove in these reasons. I agree with Doctor J that the father showed a lack ofempathy in relation to theallegations made by the mothers brother. Hewas prepared to attribute these allegations to a head injury; a sinistermotivationin collusion with the mother or an inaccurate identification of theperpetrator of sexual abuse as himself. In my view, his lackof acceptance ofresponsibility was reflected in his comment I will apologise if I haveto.... Icannot agree with the view of Mr R that the father displayed empathy. Withrespect to Mr R, he was entirely dependent on the fathersself-reportingand appeared to be embarking on the path of advocacy for him. DoctorJ also drew attention to the fathers degree of deception, involved in hissecret activities in relation to his capacityto provide for thechildrens psychological needs. It is clear that the father engaged in acomprehensive deception of themother and his family, to a point where he led acompartmentalised life. DoctorJ referred also to the time which the father devoted to his secret activitiesand the impact upon his emotional availability. As noted, I tend to the viewthat he understated the extent of his use of pornography. I have only his wordthat he no longer usespornography, as expressed both to the court and to MrR. Iam conscious of the recommendations which Doctor J made ultimately in her oralevidence. She said: I would think that time with family members would be acceptable, especially withthe three children together. That would be pleasantfor the children in thelong-term. Yes, I would take this view if there is a concern about the fatherviewing child pornography. TheICL supported this recommendation and submitted a Minute of Proposed Orderswhich would see the children spend day periods withthe father in the presenceof the paternal aunt Ms O until the beginning of 2017. Thereafter, they wouldspend

unsupervised timewith the father on each alternate Sunday. These orderswould commence only after the mother, the ICL and Ms N have agreed on whatinformation should be provided to the children concerning the courtsorders and reasons for judgment. Ifound Ms O to be an impressive witness and I have no hesitation in accepting herin the role proposed by the ICL. In her affidavit,she offered her consent toacting as a supervisor of the childrens time with the father. I agreewith the observation ofcounsel for the ICL that no-one knew about thefathers double life, so it is not unreasonable for [Ms O] to say that heis a person of honourand integrity. Notably, Ms O remained in courtand heard a considerable amount of the evidence after her turn in the witnessbox. Iwill make orders substantially as proposed by the ICL. I can see no reason toexclude members of the paternal family in additionto Ms O from occasions whenthe children spend time with the father. I can see no reason to prevent thechildren from interactingwith the father by telephone, Skype, email and textmessage. Iwill not accede to the application of the mother for injunctive orders torestrain the father from approaching or contacting thechildren by any means. Iwill make orders which permit the father to attend events at thechildrens schools to which parentsare invited from time to time butexcluding sports fixtures. My intention is to allow the father a continuingknowledge of the childrenseducational progress for example, byattendance at parent/teacher interviews, but not to provide additionalopportunities for himto spend time with them. Alteration of Property Interests Approach to theseproceedings InStanford v Stanford [2012] HCA 52 the majority of the High Courtof Australia held as follows: 35. It will be recalled that s 79(2) provides that [t]he court shall notmake an order under this section unless it is satisfied that, in all thecircumstances,it is just and equitable to make the order. Section 79(4)prescribes matters that must be taken into account in considering what order (ifany) should be made under this section. The requirementsof the twosub-sections are not to be conflated. In every case in which a propertysettlement order under s 79 is sought, it is necessary to satisfy the courtthat, in all the circumstances, it is just and equitable to make theorder. TheirHonours further observed as follows: 42. In many cases where an application is made for a property settlement order,the just and equitable requirement is readily satisfiedby observing that, asthe result of a choice made by one or both of the parties, the husband and wifeare no longer living

in a maritalrelationship. It will be just and equitableto make a property settlement order in such a case because there is not and willnotthereafter be the common use of property by the husband and wife. No lessimportantly, the express and implicit assumptions thatunderpinned the existingproperty arrangements have been brought to an end by the voluntary severance ofthe mutuality of the maritalrelationship. That is, any express or implicitassumption that the parties may have made to the effect that existingarrangementsof marital property interests were sufficient or appropriate duringthe continuance of their marital relationship is brought to anend with theending of the marital relationship. And the assumption that any adjustment tothose interests could be effected consensuallyas needed or desired is alsobrought to an end. Hence it will be just and equitable that the court make aproperty settlement order. What order, if any, should then be made isdetermined by apply s 79(4). Bothparties seek orders which would alter their interests in property. Mostsignificantly, they each wish to terminate their jointownership of thematrimonial home at Z Street, Suburb U. I construe their respectiveapplications as mutual concessions that itis just and equitable for the courtto make orders for alteration of property interests. Iam comfortably satisfied that it is just and equitable that there be orders foralteration of property interests. The parties separatedalmost two years agoand now lead separate lives, with no prospect of a reconciliation. They nolonger intermingle their financesand have no intention to do so in the future. In these circumstances, it seems to me to be just and equitable to allow thepartiesto terminate their financial interrelationship on a final basis. The Assets, Superannuation, Liabilities and FinancialResources Theparties agreed on the nature and value of their assets and superannuation andthe identity and extent of their liabilities. Itwas common ground that neitherparty holds a financial resource. Theparties agreed that the balance sheet is as follows: ASSETS Ownership Description Husband Wife J Z Street, Suburb U $ 1,050,000 $ 1,050,000 W Honda motor vehicle 20,000 20,000 W Mazda motor vehicle 2,000 2,000 J Household Contents 27,000 27,000 W Shares 2,500 2,500 H Sailing Boat 2,000 2,000 W Business known as Faulconer Blan Firm 20,000 20,000 Total $ 1,123,500 $ 1,123,500 LIABILITIES Ownership Description Husband Wife J NAB - mortgages $ 652,640 $ 652,640 J NAB Line of Credit Account 46,000 46,000 J NAB -Everyday Account 1,300 1,300 H MasterCard 12,000 12,000 H Visa

card 1,600 1,600 Total $ 713,540 $ 713,540 SUPERANNUATION Member Name of Fund Type of Interest Husband Wife W MLC Accumulation $ 19,350 $ 19,350 14 W Legal Super Accumulation 6,600 6,600 15 W AGEST Accumulation 35,000 35,000 16 H MLC Accumulation 282,400 282,400 Total $343,350 $343,350 SUMMARY Husband Wife 17 Gross assets $ 1,123,500 $ 1,123,500 18 Liabilities (713,540) (713,540) 19 Net assets 409,960 409,960 20 Superannuation 343,350 343,350 21 Net assets + superannuation $ 753,310 $ 753,310 The designations (H), (W) and (J) indicate ownership of an asset or asuperannuation fund and the holding of a liability by the husband,the wife andthe parties jointly. Contributions Itwas common ground that the contributions of the parties were equal as at thedate of trial. Independently of these mutual concessions,I am satisfied thatequality is the appropriate finding as to contribution. In summary, neitherparty introduced assets of any significanceinto the relationship; they adoptedcomplementary roles during their twenty five year marriage and raised theirthree children together. Section 75(2) Factors Thehusband and wife are aged 50 and 49 years respectively and are each in goodhealth. The husband is employed as a project managerand earns approximately$158,000 gross per annum. The wife conducts her own professional practice anddeposed that she draws a grossannual sum of about $104,000. In her oralevidence she said that she expects that her gross fees in the 2014 tax year willamountto $280,000 to $300,000. Thehusband pays child support of $1,020 per week for the three children. There wasno suggestion that he has been in arrears orin any way unreliable with paymentof child support. Theparenting orders which I will make will result in the children spending most oftheir time in the care of the wife. Of course,I cannot predict what role thehusband will play in the care of the children as they grow older and make theirown decisions andchoices. Iam comfortably satisfied that there should be an adjustment in favour of thewife on account of section 75(2) factors. The net assets and superannuation arevalued at $753,310. I assess that an adjustment of 10 per cent of that amountinfavour of the wife is appropriate in all of the circumstances of theseproceedings. Accordingly,I find that the net assets and superannuation should be divided in the ratio of60 per cent to the wife and 40 per centto the husband. Those percentagesequate to $451,986 and $301,324 to the wife and the husband respectively. Asnoted, the parties agreed that the wife should have an

opportunity to retain theU property, upon payment of a cash sum to thehusband. It was also agreed thatthe wife will transfer to the husband her interest in the Mazda motorvehicle. TheMinute of Orders submitted on behalf of the husband sought a splitting order inrespect of his superannuation benefit. No submissionwas put as to why I shouldmake an order which would see the wife unable to access part of her entitlementfor many years, in circumstanceswhere she has an immediate need to accommodatethe children of the parties. Iappreciate that the husband likewise will be unable to access his superannuationbenefit for many years. On the other hand, MsO gave evidence that the husbandhas accommodation available in her home for an unlimited period. The husbandearns a reasonablelevel of income and might be expected to re-establish himselffinancially within a relatively short time-frame. For these reasons,I will notmake a splitting order in respect of the husband's superannuation fund. Thewife will thus take or retain the following assets andsuperannuation: 1. Z Street, Suburb U $1,050,000 2. Honda motor vehicle $20,000 3. Household Contents $27,000 4. Shares $2,500 5. Business Faulconer-Blan Firm $20,000 6. MLC Superannuation $19,350 7. Legal Super $6,600 8. AGEST Superannuation $35,000 $1,180,450 She will assume sold responsibility for the followingliabilities: 1. Nab Mortgage $652,640 2. NAB Line of Credit $46,000 3. NAB Everyday Account $1,300 $699,940 The wife will thus hold net assets and superannuation to the value of $480,510,which exceeds her entitlement of $451,986 by $28,524. Thehusband will take or retain the following assets andsuperannuation: 1. Sailing Boat $2,000 2. Mazda motor vehicle $2,000 3. MLC Superannuation $282,400 $286,400 He will retain sole responsibility for the followingliabilities: 3. MasterCard $12,000 4. Visa card $1,600 $13,600 The husband will thus hold net assets and superannuation to the value of$272,800, which falls short of his entitlement of $301,324by$28,524. Thewife thus will be in a position to retain the U property upon payment to thehusband of a sum of $28,524. In the event that thewife fails to make suchpayment to the husband the parties will effect a sale of the U property and adivision of the net proceedsas to 91 per cent to the wife and the balance tothe husband. Thispercentage of 91 per cent is calculated asfollows: Net equity in U property $350,060 Net value of assets and superannuation held by the wife $130,450 Difference between the wifes entitlement of $451,986 and$130,450 $321,536

$321,536 is equal to approximately 91 per cent of the net equity in the Uproperty Net value of assets and superannuation held by the husband $272,800 Difference between the husbands entitlement of $301,324 and$272,800 $28,524 $28,524 is equal to approximately 9 per cent of the net equity in the Uproperty. The child Ks education Thereis no doubt that the parties made a joint decision that K should commenceattendance at X School from Year 5 in 2014. Theyboth signed anAcceptance of Offer of Enrolment Contract on 10 August 2012(exhibit 14). They paid a non-refundable fee of $4,000. AsI understood the evidence of the mother, she changed her mind about Ksattendance at X School because of concerns aboutthe ability of herself and thefather now to meet the fees and incidental costs. In final submissions,however, counsel for themother suggested that there be orders to the effectthat each of the parties bear one half of these costs in the event that KattendsX School. Iwill order that the child K attends X School, at the shared expense of theparties, for three reasons. Firstly, the parties enteredinto a contact andpaid a deposit pursuant to their agreement upon this school for K. Secondly,the parties daughters E andF attend a private school. Thirdly, themother acknowledged that X School is a goodschool. I certify that the preceding one hundred andseven eight (178) paragraphs are a true copy of the reasons for judgment of theHonourableJustice Stevenson delivered on October2014 Associate: Date: 17 October2014