FAMILY LAW CHILDREN With whom a child lives With whom a child spends time Young child. FAMILY LAW PROPERTY De facto relationship Whether there should be an adjustment of property between de factoparties in a very short relationship and limited contribution Application dismissed. Family Law Act 1975 (Cth) ss 60CC, 90M,90(3) C & B [2007] FMCAfam539 Jurss & Jurss (1976) FLC 90-041 Jonah &White [2011] FamCA 221 Smyth & Pappas [2011] FamCA 434 Crowley & Pappas [2013] FamCA 783 Bevan & Bevan [2013] FamCAFC 116; (2013) FLC 93-545 Chapman& Chapman [2014] FamCAFC 91 APPLICANT: Mr Saviane RESPONDENT: Ms Marriott FILENUMBER: SYF 739 of 2013 DATE DELIVERED: 17 October 2014 PLACE DELIVERED: Hobart PLACE HEARD: Sydney JUDGMENT OF: Benjamin J HEARING DATE: 1, 2 & 3 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Gould SOLICITOR FOR THE APPLICANT: Mr Forster of Forster Solicitors COUNSEL FOR THE RESPONDENT: Mr Mackay SOLICITOR FOR THE RESPONDENT: Christopher Mackay Lawyers PARENTING ORDERS BYCONSENT Allprevious parenting orders in relation to X Saviane born April 2012 (thechild) are discharged. MrSaviane (the father) and Ms Marriott (the mother)have equal shared parental responsibility for thechild. BYDETERMINATION Thechild live with the mother except as is otherwise provided in these Orders or asagreed in writing between the parties. Themother be and is permitted to enrol the child in the F School, with the child tocommence at that school from August 2015. Themother be and is permitted to remove the child from Australia to travel toFrance each year during the long French school vacationin or about July andAugust of each year (the summer break), as follows:- for aperiod of five (5) weeks over the summer break 2015. The mother is to arrangethat trip and enable the child to spend timewith father from 9.00 am on day oneto 5.00pm day two, for two (2) days before she and the child depart for Franceand for threedays commencing 9.00am the day after the child returns from France(namely day 1) until 5.00pm on day 3 (being three days and twonights). for aperiod of six (6) weeks over the summer break 2016 and each year thereafter. The mother is to arrange that trip and enablethe child to spend time withfather from 9.00am on day one to 5.00pm on day two, for two (2) days before sheand the child plan todepart for France. Themother shall provide the father with details of the childs proposedflights to and from France at least three (3)

monthsprior to the childsdeparture from Australia, for the summer break, together with details of wherethe child will be primarilystaying during the summer break in France, a contacttelephone number, Skype number and email address. themother shall facilitate communication between the child and the father by Skype(or the like) twice per week during the time thatthe child will be in France. eachof the parents shall sign all documents and do all things necessary to permitand enable the issue (and subsequent reissue) ofan Australian passport for thechild and in the event of any dispute as to who should hold the passport, thepassport be held insafe custody by the mothers solicitor and shall bereleased to her twenty eight (28) days before each of the proposed annualtripsto France. Such passport to be returned to the mothers solicitor withinfourteen (14) days of her return from Francein August of each year. themothers application for an order that the father provide financialassistance to her in terms of the cost of the childsairfare to and fromFrance is dismissed. Thechild shall spend time with the father during the F School school term asfollows:- (a) Until thechild attains the age of four (4) years in April 2016:- eachalternate weekend from 9.00am Saturday until 5.00pm Sunday commencing the firstweekend after the start of each school term;and eachWednesday from 3.00pm until 6.00pm; and (b) After thechild attains the age of four (4) and before he attains the age of five (5)years:- eachalternate weekend commencing after school Friday until 5.00pm Sunday, and eachWednesday from 3.00pm to 7.00pm; and (c) After thechild attains the age of five (5) years; eachalternate weekend commencing after school Friday and concluding at thecommencement of school the following Monday, or Tuesdayif the Monday is a pupilfree day or a public holiday; and eachalternate Wednesday from after school Wednesday to the commencement of schoolThursday, such alternate Wednesday to commencethe first Wednesday after thealternate weekend time. Asto the remainder of the F School school holidays the child will spend time withthe father as follows:- (a) during eachof the three (3) one-week mid year holiday periods, up to the summer break 2015,each alternate weekend from 9.00amSaturday until 5.00pm Sunday, being acontinuation of the school term time arrangements with the father; (b) during eachof the three (3) one-week holiday periods in the ten months following the summerbreak 2015 the child will spend:- four(4) nights with the father from after school Friday until 10.00am the followingTuesday in the

remainder of 2015 and subsequentodd numbered years; and six(6) nights with the father from 10.00am Tuesday morning until commencement ofschool the following Monday in 2016 and even numberedyearsafterwards. (c) during thetwo week Easter school holiday period:- from2015 and each alternate year afterwards, the child is to spend the weekcontaining the childs birthday with the fatherasfollows:- i.i if the childs birthdayfalls in the first week, then from after school on the last day of that term to12 noon of the middleday of the Easter holiday period; and i.ii if the childs birthday falls in second week, from 12 noon on themiddle day of the Easter holiday period until the commencementof school thefollowing Monday (or Tuesday if the Monday is a pupil free day or a publicholiday); and i.iii if the childs birthday falls on the middle day of the Easterholiday period, the child is to start time with the fatherat 5.00pm the daypreceding the middle day and continue with until the commencement of school thefollowing Monday (or Tuesday ifthe Monday is a pupil free day or a publicholiday); and from2016 and each alternate year afterwards, the child is to spend time with thefather in the week not containing the childs birthday andconsequently:- ii.i if the childs birthday falls in thefirst week of the Easter school holiday period, then the child will live with orcontinue to live with the mother from after school on the last day of term to 12noon of the middle day of the Easter holiday period;and spend time with thefather the remainder of the Easter holiday period until the commencement ofschool the following Monday (orTuesday if the Monday is a pupil free day or apublic holiday); and i.ii if the childs birthday falls in second week of the Easter schoolholiday period, then the child will live with the mother,from 12 noon on themiddle day of the Easter holiday period until the commencement of school thefollowing Monday (or Tuesday ifthe Monday is a pupil free day or a publicholiday) and as such the child shall spend time with the father from afterschool on thelast day of school to 12 noon of the middle day of the holidayperiod. i.iii if the childs birthday falls on the middle day of the holidayperiod, the child is to start time with the mother at 5.00pmthe day precedingthe middle day and continue to live with her until the commencement of schooland as such the child shall spendtime with the father from after school on thelast day of school to 12 noon on the day preceding the middle day of that Easterholidayperiod. to beclear it is intended that the child spend his birthdays with the father in 2015and odd years afterwards and to live with hismother

on his birthday in 2016 andeven years afterwards. (d) during the Christmas and New Year holiday periods:- December2014 and January 2015 the child is to spend:- i.i five(5) days with the father from 3.00pm on 25 December 2014 ending at 5.00pm on 30December 2014; and i.ii five (5) days with the father from 9.00am commencing the second Saturdayof January 2015 until 5.00pm the following Wednesday. forDecember 2015 and January 2016 the child is to spend:- ii.i six (6)days with the father from 3.00pm on 25 December 2015 ending 5.00pm on 31December 2015; and ii.i six (6) days with the father from 9.00am commencing the second Saturdayof January 2016 until 5.00pm the following Thursday. forDecember 2016 and January 2017 the child is to spend:- iii.i seven(7) days with the father from 3.00pm on 25 December 2016 ending 5.00pm on 2January 2017; and iii.ii seven (7) days with the father from 9.00am commencing the secondSaturday of January 2017 until 5.00pm the following Friday. forDecember 2017 and January 2018 and thereafter annually the child is to spendthree (3) weeks with the father from 3.00pm on 25December 2017 ending 3.00pmthree weeks later. IfMothers Day falls on a day when the child is otherwise spending time withthe father, then the time the child spends withthe father shall cease at 9.00amon the Sunday of Mothers Day. IfFathers Day falls on a day when the child is not spending time with thefather then the mother shall arrange for the childto be delivered to the fatherat 9.00am on the Sunday of Fathers Day and the father shall return thechild to school the followingMonday. Ifduring the non summer break holidays the child is spending more than five (5)consecutive days with a parent, that parent shallfacilitate telephone calls bythe child to the other parent at least every third day. Duringschool term the mother shall ensure that the child is available to receivetelephone calls from the father at 6.00pm on Tuesdays,Thursdays or Saturdays orsuch other times as reasonably nominated by the parents given the circumstancesand the activities to whichthe child is involved. Eachof the parties be restrained from threatening, abusing, assaulting, demeaning orverbally abusing the other party. Eachof the parties shall be restrained from abusing, demeaning and/or belittling theother party or members of the other partysfamily in the presence orhearing of the child. Changeoveris to take place at:- the YHotel car park; fromAugust 2015, (where the start or finish of times with the father are specifiedas being at the start or end of school), at theschool; and suchother places as agreed in

writing between the parties. Pursuantto s 65DA(2) and s 62B of the Family Law Act 1975 (Cth), the particularsof the obligations these orders create and the particulars of the consequencesthat may follow if a personcontravenes these orders and details of who canassist parties adjust to and comply with an order are set out in the Fact Sheetattachedhereto and these particulars are included in theseorders. THE COURT NOTES: Themothers application for relocation of the residence of the child fromAustralia to France was not pursued or argued byher in the hearing upon whichthe Orders are based. The mother did not pursue that application and withdrewit. Suchrelocation application was not determined on the merits. Themother made it clear that she may agitate that issue in 2018 and that the fatherconceded that the Rule in Rice v Asplund would not apply in such anapplication made at or after 1 January 2018. Theseparenting Orders in relation to the child are intended to give to the parentsrights of custody for the purpose of the Hague Convention on the CivilAspects of International Child Abduction, concluded 25 October 1986. Theseparenting orders are intended to apply with regard to jurisdiction arising fromThe Convention on Jurisdiction, Applicable Law, Recognition, Enforcement andCo-operation in Respect of Parental Responsibility andMeasures for theProtection of Children, concluded 19 October 1996 (the ChildProtection Convention). Interms of the Child Protection Convention the Court GIVES LEAVE to eitherparty to apply, for a period of twelve (12) months from the date of theseOrders, for any mechanicalchanges or additions to these orders to enableoperation of the Orders pursuant to the Child ProtectionConvention. PROPERTY ORDERS Themothers property application pursuant to Part VIIIAB of the Family LawAct having been considered on its merits is dismissed. GENERAL ORDERS Allsubpoenaed documents be returned to the persons or institutions from which theyemanated and all exhibits are returned to theperson or persons who tendered thesame. Allextant applications (except costs) are dismissed. Anycosts application be dealt with in accordance with the Family Law Rules2004. IT IS CERTIFIED Pursuantto Rule 19.50 of the Family Law Rules it was reasonable to engage counsel toattend IT IS NOTED that publication of this judgment by this Court underthe pseudonym Saviane & Marriott has been approved by the ChiefJustice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT SYDNEY FILE NUMBER:SYF 739 of 2013 Mr Saviane

Applicant And Ms Marriott Respondent REASONS FOR JUDGMENT INTRODUCTION MrSaviane (the father) and Ms Marriott (the mother)are involved in parenting proceedings regarding theirson, X (thechild), born in April 2012 (the child) and propertyproceedings under the provisions relatingto parties to a de facto relationshippursuant to Part VIIIAB of the Family Law Act 1975 (Cth) (theAct). Theseproceedings were commenced in February 2013 by an application filed on behalf ofthe father in the Federal Circuit Court Sydney. After interim parenting orderswere made in that Court the proceedings were transferred to the Family Court inApril 2013. At thattime the matter was considered complex as it seemed thatthe parenting dispute would involve a question of the international relocationof the residence of the child. However, that aspect of the proceedings was notpursued by the mother. Inthis proceeding no Independent Childrens Lawyer had been appointed. Thechild the subject of these proceedings is very young having just celebrated hissecond birthday in April 2014. His primary attachmentfigure is the mother. Thefather has been significantly involved in the childs care since his birthand the child spent abouteight days with the father in about December 2012. Asto parenting arrangements:- Theparties agree that there should be an order for equal shared parentalresponsibility and that the child should be able to travelto France on anannual basis (but disagree on the start time and time away). They also agreethat the child should be with his motheron Mothers Day and his father onFathers Day. Thefather wishes to spend more time with the child and then move quickly to anequal time parenting arrangement. The father is concernedabout thechilds English language skills and wants the child to spend more timewith him to address this perceived problem. In addition he opposes the motherenrolling the child in the F School. The fathers reasons for this arehis concerns aboutthe childs English language skills and the age thatthe mother proposes the child commences school. The father proposes thatthechild attend an English speaking pre school, initially one day per week then twodays in the year before the child commencesfull time school. The father wantsthe child enrolled in a Catholic Primary School and to that end wants permissionto have thechild baptised in that religion. The father opposes some otherorders sought by the mother. Themother sought orders that the child live with her and that the move not be toequal time, but rather significant and substantialtime over a longer period. She also sought permission to

enrol the child in F School from August 2015. Thisbeing a school wherethe mother works and the childs elder sibling, Z,attends. Given that the mother is a French National, and that French ishermother language she wants the child to be bilingual (in French andEnglish) as are both she and Z. The motheropposed the child being christenedin the Catholic Church and wants to leave that decision to the child when he isolder. The motherseeks to take the child to France every year (over the sixweeks of the French School summer break) to enable him to spend time withtheFrench side of his family and be exposed to his French culture. The father doesnot oppose the travel but says the time thechild is away from him ought to belimited and that the travel not be permitted for a few years. The mother soughta mutual orderrestraining each of the parties from abusing and/or harassingeach other and if she is to participate in change overs it is to bea policestation. There were also issues about Christmas mornings, special occasions,and the like. THE ISSUES Theparenting issues are:- (a) What timethe child should spend with or live with the father and how increases in thistime ought to be accelerated. All partiesagree there should be acceleration. There is also the end point to which the parties disagree. (b) When thechild should be permitted to travel to France with his mother to spend time withhis French maternal family, and thelength of time he is permitted to spendthere. (c) Specialoccasions. (d) Telephonecommunication. (e) Whether aninjunction ought to be put in place restraining each party from abusing,assaulting each other. (f) ChristmasDay. (g) Thechilds baptism. (h) Whether thechild should attend the F School (as suggested by the mother) or attend aCatholic or public primary school. PROPERTY Inthese proceedings the mother sought an order that there be a division ofproperty made in her favour for $100,000 although thiswas reduced to $30,000 infinal submissions. Inthe fathers case outline he asserted that there was a pool ofnon-superannuation property of about $222,000 and superannuationof about$12,000. The property was primarily that of the father prior to cohabitation.There was an issue about whether the netdebit value of the mothers carought to be included. Given the amount I have chosen to include it. There wasalso an issueabout the amount of money spent or incurred by the father on hislegal costs in these proceedings, of some $117,000. The motherhas spent orincurred about $25,000 to $30,000 in legal costs. Neitherparty sought superannuation splitting orders. There was no issue that

theparties were in a marriage like relationship, althoughthere was an issue as towhether it was five months followed by ten months, as asserted by the mother orten months as asserted bythe father. I accept the mothers approach. Thesubstantive issue was whether, given the factual circumstances, an order oughtto be made at all. There was no issue that theCourt had jurisdiction and powerto deal with the parties property but the father asserted that no orderought to be madein the circumstances of this case. For the reasons set outbelow I have accepted the fathers submissions and I have dismissedthemothers application for division of property. BACKGROUND Thefather is aged 44 and is employed as a salesman earning about $80,000 per year($15,000 of that sum is a car allowance). In additionhe is paid superannuationcontributions. The fathers health has been problematic although he hashad some surgery arisingfrom a cerebral aneurysm in 2000 and 2011. Theevidence of Dr M, the fathers cerebrovascular neurosurgeon, is that apartfrom the loss of a sense of smell the father has no other neurological deficits.As such, I have treated the father as being in goodhealth. Apartfrom the child, the father has no other dependents. He works full time and heclaims his starting and finishing hours are flexible,except on Wednesdayafternoons. Themother is aged 35. She is a French citizen and has a permanent residence visafor Australia. She a qualified teacher and isemployed to teach at the FSchool. She is paid a salary of about $89,000 per year. In addition the motherhas recently commencedworking up to two hours per week tutoring and earns afurther $60 per hour for this work. This income is not always consistent,givenschool holidays and the like. The mother says, and I accept, that this is thelimit of her part time earning capacity, givenher full time employment and theneed for her to parent her two children. Themother has the responsibility for the parenting of the child and her son ofanother relationship, Z (now aged nine). The childZs father has adaughter who is Zs sister but who is not biologically related to thechild or the mother. Z has littlecontact with his sister and his father. Thecontact he has is generally monthly or six weekly telephone calls. Theparties met in South America in September 2010 and they lived together for aboutfive months, after which the father returnedto Australia and the mother toFrance. Inthe middle of 2011 the father needed further surgery in relation to his aneurysmand that operation was carried out in May 2003. The result of that operationwas that the fathers health is now not an issue.

Themother visited the father in Australia for two weeks in July 2011. She spenttime with the father and during this visit she fellpregnant with the child. After the mother returned to France and discovered she was pregnant she haddiscussions with the father. As a consequence the mother and Z moved toAustralia and she commenced living with the father in a marriage likerelationship from1 September 2011. Thechild was born in April 2012. Theparties separated in early July 2012, at which time the child was about threemonths old. The parties separated but remainedliving under the same roof untilearly August 2012. Atthe time of the physical separation in August 2012 there was an altercationbetween the parties. As a consequence the father wascharged by police withassault of the mother. The mother alleged that the father had spat on her andhad dragged her out of thebedroom. Those proceedings were heard beforeMagistrate Pearce in October 2012 and the criminal charge of assault wasdismissed. The mothers application for an intervention order waslikewise dismissed. Themother has complained that the father has been verbally abusive of her. Thefather denies those allegations. Variousorders were made in relation to the time the child spends with the father overthe subsequent period of almost two years,and the proceedings were then listedfor hearing before this Court. Inthese reasons any statement of fact is to be regarded as a finding of factunless the contrary is clear from the context surroundingthat fact. THE EVIDENCE The father Thefather provided written evidence through his:- trial affidavitfiled 2 July 2014 (trial affidavit - parenting); affidavit filed3 March 2014 (financial); affidavit filed25 August 2014 (annexing updated material and annexing a transcript of the LocalCourt proceedings); affidavit ofProfessor M filed the 16 March 2014; affidavit of MrsS filed 2 July 2014; affidavit of MrS filed 2 July 2014; affidavit of MrC filed 2 July 2014; financialstatement filed 8 July 2014; and financialquestionnaire of 23 July 2013. Inaddition the father gave some limited evidence in chief and was cross-examinedon behalf of the mother. Incross-examination he prevaricated and obfuscated in relation to answers to somequestions. Thefathers evidence about the changes to his employment, which madeWednesday afternoon less flexible than he had previouslyasserted, had a senseof implausibility or invention. Therewas also an inherent implausibility with regard to the fathersexplanation of how the mothers computer was damaged. The fatherexplained that he took

the computer from the mother when she said she was goingto buy tickets (presumably online) toFrance. I find that he was endeavouringto control the mother when took the computer from her. I do not accept that hewas forcedto drop the computer to the ground when the mother lunged at him. Ifind that the father removed the computer from the mother, preventedher fromusing it and that he damaged it by throwing it to the ground or out a window. Thefather proposed that there be equal time with the child when he commences schoolin the year of his fifth birthday. The fathersevidence in this areaseemed more about his rights rather than the interests of thechild. He had difficulty seriouslyacknowledging the relationship between thechild and Z. Thefather was cross-examined in relation to his mother and fathers health. He prevaricated in respect of his father who hadbeen in hospital for some twomonths. Iwas concerned about the veracity of his evidence in relation to fittingin with the mother as to parenting arrangements. He said he wouldendeavour to harmonise the holidays to fit in with the mother to ensure that thechild went to a public school. Yet when the mother made arrangements for thechild to spend time with him over the recent school holidays, he implicitlycriticisedher (through his counsels cross-examination) for leaving thechild with him to enable the mother to party (giventhe terms usedin cross examination). He similarly criticised the mother for going to a shortwork course overseas and not leavingthe child with him or letting him know ofher travel. The father does not consent to the child attending the same schoolas thatis attended by his brother Z and at which the childs motherworks. He opposes the child attending the F School which willlead the child tobeing bilingual. He opposes the mother taking the child to visit his extendedmaternal family in France for someyears. The fathers evidence that hetries to fit in or implicitly that he is co-operative, is plainly wrong. Thefather gave little weight to the benefit of the child being at school with hismother in those early years and asserted that itwould be better for the childto be with a nanny or others rather than at the school where the mother works. This evidence of thefather, like that about his inflexibility in work hours ona Wednesday afternoon, had a sense invention to support his position. Iam concerned that the father is endeavouring to limit the childs contactwith the French side of his family. Thefathers responses, when questioned by the solicitor for the mother, withrespect to the language spoken in the paternalgrandparents home, wasglib and

unconvincing. Whenasked why the child could not go to France with the mother until after his fifthbirthday, the fathers answer was againunconvincing. His explanationincluded his view that the child would have no memory of such visits. Yet heclaims, and I accept,that the child would miss him. That does not sit inharmony with his evidence as to the childs family in France. Therewas significant conflict between the parties around the time the father wastaken into custody by the police in August 2012in relation to the assaultcharge and I am satisfied, that the father, in discussions with Mr C, left thepayment of the rent tothe mother in circumstances where, whilst she had beenoffered a job, her employment had not at that time commenced. I am satisfiedthat this was controlling behaviour by the father relating to that time, arisingin the heat of the breakdown of the partiesrelationship. I accept thatthe father subsequently provided assistance to the mother to enable her to findher own accommodation. Thefather was cross-examined in relation to his threats to the mothersimmigration status following the failure of their relationship. The mother gaveone version of events and the father gave another. On balance, I prefer theevidence of the mother given my commentsabout the general reliability of theparties respective evidence. Thefather was cross-examined in relation to the comments made by him set out atparagraphs 101 and 102 of the mothersaffidavit.[1] He denied making theremarks and speaking other than appropriately to the mother. Yet a little laterin his cross-examination hewas asked about the mother seeking further fundsfrom him and he made what could only be described as a snideremarkabout the mothers ability to budget. It was a tellingcomment. Thefather asserted that the child is delayed in the development of his Englishlanguage skills but adduced no objective evidenceto that end. It was simplythe fathers view and those of some members of his family. Counselfor the father said that the father gave evidence of being insightful and wasnot caught out and that I should prefer hisevidence to that of the mother. Ido not accept that assessment. The father has shown a lack of empathy with themother in termsof the situation in which she finds herself. Thefather was critical of the mother for travelling overseas for work and incircumstances where there was significant conflict betweenthe parties. Heinstructed his counsel to use the term party when the mother askedthe father to assist over the recentschool holiday period. On one hand thefather complained that the child was not available to him when the

mother wasgoing awayand later complained that the mother only used him to care for thechild when she wanted to attend social functions. His complaintsseem to beused to further his case rather than meet the needs of the child. Thefather was not an impressive witness and hearing his evidence and observing hisdemeanour I find that his evidence was at timesunreliable. The mother Themother gave evidence in terms of her consolidating affidavit filed 13 August2014, financial statement filed 7 May 2014 and herfinancial questionnaire filed15 July 2013. The mothers had limited funds and in the context of this case arelatively modest legalbudget; as such I make no criticism of her in terms ofthat affidavit. These three documents were deposed by the mother as correctand were read into evidence, subject to weight. Themother updated her financial information to say that she was now earning about$89,000 per year and in addition to this was receivingchild support of either$134 per week or $150 per week for the child from the father, support for Z fromhis father of $53 per weekand a Government benefit of $130 per week. Themother said that she was undertaking about two hours casual teaching a week andearningabout $120 for that work. The work is not available every week. Incross-examination the mother was criticised for failing to disclose thoseearnings earlier. It was put to her that she did notdisclose working the extrahours until she gave evidence on the first day of hearing. The motheridentified that she had informedthe Family Consultant of the additional workwhich was set out in the May 2014report[2]. The mother was correct inthat respect. Themother was cross-examined as to why she should not take in extra work. Giventhat the mother works full time and has the careof two children and is alreadydoing some additional work to meet the costs of the litigation and had expressedto the Family Consultanther concerns about the time she is spending with thechild, her reluctance, in the circumstances, is understandable. Themother was cross-examined in relation to making the child available to thefather over the recent summer holiday break for themothers school. As Iindicated earlier in these reasons, I was concerned about the fathersapproach in that regardas he seeks more time but was not afraid to implicitlycriticise the mother for leaving the child with him so that she could attendsocial activities. It reflects badly on the fathers attitude toparenting. Themother agrees that the time the father spends with the child should beincreased. It is the rate of that increase which is ofconcern to themother. Themother gave

evidence in her affidavit both as to the impact of participating inthese proceedings and the impact of being awayfrom France had upon her. Thisis set out in various paragraphs in her affidavits including, but not limited toparagraph 106. Iaccept that evidence of the mother. The impact upon the motherwas confirmed by the evidence of the Family Consultant, which I accept. Duringthe second day of the trial the mother had been the subject of intensecross-examination in respect of her fears of the fatherand in respect of thefathers alleged violence. At one stage the mother became extraordinarilydistressed and her desireto go back to France was palpable. I accept this wasreal. Iaccept the mothers evidence as to the percentage of French language andEnglish language in the F School in which she teaches. Iraised with counsel for the father, in respect of his criticism of themothers evidence, whether I should have some regardto the circumstancesthat she was speaking in a language other than French. Counsel for the fathersubmitted that I ought not todo so. However, given my observations of themother and observing her demeanour in the witness box I am satisfied that themotherdid, from time to time, struggle with the nuisances and subtleties of theEnglish language although, she clearly understood thatlanguage and endeavouredto answer frankly where she could. Thefather submitted that the mothers evidence ought to be impeached as aresult of her approaching the father to assist herto move shortly after thealleged acts of violence. I do not adopt that submission. The mother wasliving in Australia and hadonly been here for a relatively short period oftime. Whether Mr C meant it or not it became clear to the mother that hewantedto be paid his rent, irrespective of the mothers financialcircumstances. The mother in fact paid the rent and then madearrangements tomove elsewhere. She was criticised for asking the father to assist her inattending at the real estate agentsoffice and moving herself and thechildren to that new address. Given the circumstances that the mother was in, Ido not adopt thatcriticism. Sometimes circumstances are such that unhappy orunpalatable steps need to be taken. Ifind that the mother endeavoured to be frank in her evidence and that herevidence was generally reliable, albeit from her subjectivepoint of view. The Family Consultant MsR is a family consultant (the Family Consultant) and she preparedtwo reports being; the memorandum of August 2013and the family report of May2012. Both of those reports were read into evidence. Each of the legalparties legal

representativescross-examined the Family Consultant. Noissue was taken as to her qualifications. Igenerally accept her evidence. I also accept her opinion that the build up oftime that the child spends with the father, includingovernight time, should beadopted in a cautious way given the profound distress of the mother and theimpact this would have on herability to parent the children. TheFamily Consultant said that the child has a good relationship with the fatheralthough the child was primarily attached to themother. I accept that evidencealthough I am not convinced that significant time away from the father wouldunduly impact upon thechilds relationship with him, particularly if itwas on an annual basis rather than a regular basis. TheFamily Consultant was cross-examined in relation to the childs language. The Family Consultant has no significant expertisein that regard although shesays that her understanding is that in children bilingual language developslater. There is no expertevidence that the childs language is in anyway slow and I accept the evidence of the Family Consultant that given Zsgood English it is likely that the child will follow in that languagedevelopment. Thefather said that he had taught Z to speak English in the five months he spent inSouth America. I find that the evidence of thefather as to the skills that heallegedly imparted was unreliable but that the ability of Z to move fromprimarily French speakingto being bilingual is perhaps indicative of thatcourse which the child is likely to follow. TheFamily Consultant gave evidence that she would prefer changeovers to occur otherthan at the police station although understoodthose circumstances given themothers expressions of extreme fear of the father. TheFamily Consultant gave evidence that two or three weeks would be the maximumtime that the child should be away from the fatherand I have dealt with thatelsewhere. Given the circumstances and the mothers need for connectionwith France, I am satisfiedthat on balance, in this case, that the child beingaway for a period of five weeks for the first visit would be appropriateprovidedthere was time between the father and the child prior to and at the endof those visits and communication via Skype during the timethe child wasaway. Igenerally accept the evidence of the Family Consultant. Professor M ProfessorM is a professor of neurosurgery. He filed an affidavit on the 26 March 2014 inrespect of the fathers health. In that affidavit he provided evidencethat the father had repairs to cerebral aneurysms in 2011 and apart from a lossof smell

thefather has recovered completely with limited possibility ofreoccurrence. That evidence was read in unchallenged. Mrs S MrsS is the childs paternal grandmother who is aged 71 and she lives withher husband (aged 74) in Suburb U. Mrs S providedevidence in an affidavitfiled 2 July 2014 in support of the father. She has a good relationship withthe child. She gave evidenceof that relationship. Herevidence was more of a cheer squad variety. I accept her evidencebut it must be seen in the context of her partisansupport of thefather. Mr S MrS is the brother of the father who provided evidence contained in his affidavitfiled 2 July 2014. He was cross-examined in relationto the time the childspent with the father. His evidence was relativelyunchallenged. Mr C MrC provided evidence in accordance with his affidavit filed 2 July 2014. Mr Cwas the landlord of the apartment in which the motherand father resided untilabout August 2012. MrC is a friend of the father and has been for many years. Mr C has offered thefather accommodation (albeit on a paid basis) overmany years. Initially in hisevidence Mr C endeavoured to put some distance between he and the father interms of their friendship. That endeavour did not succeed as the evidence wasthat the father and Mr C are very close. Such was their friendship that thefather, at one stage, considered him as a godparent (Mr C had no recollection ofbeing asked to do so) and he was the first personthe father telephoned when hewas arrested in about early August 2012. MrC lived in a flat in the same townhouse complex where the father, the mother andthe children resided. Inmany areas Mr Cs evidence was of a cheer squad variety. He may havespent a few days a week at the home of the partiesup until the birth of thechild, but from that time he was there less frequently. MrC gave evidence in the proceedings at in the Local Court on 22 November 2012. He said that he had never observed the father beingdifficult with Z nor did heobserve the father being forceful, physical of Z or any indication that thechild was afraid of him. Afterthe father had been arrested by police Mr C said in oral evidence that themother contacted him. He said in his evidence tothe Magistrate of the LocalCourt[3] where he said he spoke to themother and pressed for the rent, he then asserted both in the Local Court and inhis affidavit thatthe mother said to him in the context of therent:-[4] You know I cant afford it. I dont have the money. I cantpay $350.00. Hereplied:-[5] ... $350.00 isnt enough. It is $700.00. Hethen said that the mother said tohim:-[6] Look what if I told the police that

the story was made up. Then what wouldhappen. MrC then said:-[7] What do you mean? If you like, you mean the father was living inthe apartment? [The mother] said yes I saidwell if [the father] isliving there he will pay the rent. Themothers evidence was that no such conversation took place. Iam troubled by this evidence by Mr C particularly given his demeanour, the wayhe answered questions and the inherent unlikelihoodthat such a statement wouldbe made, and the inconsistency with that statement having regard to theallegation made by the motherin her email to the father at 7.38 on 13 August2012.[8] Themother in fact paid the rent to Mr C. Mr C struggled to concede that he had haddiscussions with the father in relation to therent, which clearly he had. Iprefer the evidence of the mother and I have serious concerns about thereliability of the evidence of Mr C. He is protective ofthe father andprevaricated in his answers to a number of questions, such as the discussionswith the father and the demand for rent. As a consequence I am not satisfiedthat such an assertion was made by the mother. THE LAW Therewas no issue that the Court had both the jurisdiction and power to makeparenting orders pursuant to the provisions of the Family Law Act 1975(Cth) (the Act). These proceedings were commenced after the2012 amendments commenced on 7 June 2012 and as a consequencethe amendments tothe definition of family violence in s 4(1) of the Act, and to ss60B and 60CC that took effect on that date apply. Whendetermining parenting orders the approach is governed by Part VII of the Act. The objects of Part VII of the Act and the principles underlying them are setout in s 60B. Subjectto the presumption of equal parenting under s 61DA and any parenting plans(there are none in this case) a court exercising jurisdiction under that Act maymake such parenting orderas it considered appropriate. Thechilds best interests are the paramount consideration in deciding whatparenting orders should be made, and in determiningthose interests the Courtmust consider the factors set out in s 60CC of the Act, which in turn providesprimary and other considerations, namely:- Primaryconsiderations (2) The primary considerations are: (a) the benefit to the child of having a meaningful relationship with bothof the child's parents; and (b) the need to protect the child from physical or psychological harm frombeing subjected to, or exposed to, abuse, neglect orfamily violence. Note: Making these considerations the primary ones is consistent with theobjects of this Part set out in paragraphs 60B(1)(a) and(b). (2A) In

applying the considerations set out in subsection (2), the court isto give greater weight to the consideration set out inparagraph (2)(b). Additional considerations (3) Additional considerations are: (a) any views expressed by the child and any factors (such as the child'smaturity or level of understanding) that the court thinksare relevant to theweight it should give to the child's views; (b) the nature of the relationship of the child with: (i) each of the child's parents; and (ii) other persons (including any grandparent or other relative of thechild); (c) the extent to which each of the child's parents has taken, or failed totake, the opportunity: (i) to participate in making decisions about major long-term issues inrelation to the child; and (ii) to spend time with the child; and (iii) to communicate with the child; (ca) the extent to which each of the child's parents has fulfilled, orfailed to fulfil, the parent's obligations to maintain thechild; (d) the likely effect of any changes in the child's circumstances, includingthe likely effect on the child of any separation from: (i) either of his or her parents; or (ii) any other child, or other person (including any grandparent or otherrelative of the child), with whom he or she has been living; (e) the practical difficulty and expense of a child spending time with andcommunicating with a parent and whether that difficultyor expense willsubstantially affect the child's right to maintain personal relations and directcontact with both parents on a regularbasis; (f) the capacity of: (i) each of the child's parents; and (ii) any other person (including any grandparent or other relative of thechild); to provide for the needs of the child, including emotional and intellectualneeds; (g) the maturity, sex, lifestyle and background (including lifestyle,culture and traditions) of the child and of either of the child'sparents, andany other characteristics of the child that the court thinks are relevant; (h) if the child is an Aboriginal child or a Torres Strait Islander child: (i) the child's right to enjoy his or her Aboriginal or Torres StraitIslander culture (including the right to enjoy that culturewith other peoplewho share that culture); and (ii) the likely impact any proposed parenting order under this Part willhave on that right; (i) the attitude to the child, and to the responsibilities of parenthood,demonstrated by each of the child's parents; (j) any family violence involving the child or a member of the child'sfamily; (k) if a family violence order applies, or has applied, to the child or amember of the child's family--any relevant inferencesthat can be drawn from theorder, taking into account the following: (i) the nature of the order; (ii) the

circumstances in which the order was made; (iii) any evidence admitted in proceedings for the order; (iv) any findings made by the court in, or in proceedings for, the order; (v) any other relevant matter; (l) whether it would be preferable to make the order that would be leastlikely to lead to the institution of further proceedingsin relation to thechild; (m) any other fact or circumstance that the court thinks is relevant. Ifa court makes an order for equal shared parental responsibility, it must firstconsider children spending equal time with eachparent, and if such an order isnot to be made, then the Court must consider the children spending substantialand significant timewith each parent. In addition the Court must considerwhether such an arrangement would be in the children's best interests andthenconsider whether such an arrangement is reasonably practicable. If the Court issatisfied of those matters, the Court mustthen consider making such an order (s65DAA(1)(c) and (2)(e), and see MRR v GR [2010] HCA 4, (2010) 42 Fam LR531, (2010) FLC 93-424). Section 60CC(2)(a) the benefit to the child of having ameaningful relationship with both of the childs parents; and Thereis no issue in this case that the child will benefit in having a meaningfulrelationship with both parents as he has done soto date and will continue to doso in the future. It is how this is best managed given the conflict, thedifferent cultures andbackgrounds of the parents and the age and maturity ofthe child. Section 60CC(2)(b) the need to protect the child fromphysical or psychological harm from being subjected to, or exposed to, abuse,neglect or familyviolence; Neitherof the parties sought orders preventing the child from seeing the other parentother than in an unsupervised way. Given thatI accept the evidence of themother, I am satisfied that there was a level of family violence at the time ofthe relationship breakdown. That behaviour has diminished over the years sinceseparation. Iaccept there is evidence of some form of physical interaction between theparties which was observed by Z, where he reported tothe FamilyConsultant:-[9] He [[Z]] said that he does not like [the father] and described hiding under atable the last time he saw [the father] because hewas really meanto him and to his mother. [Z] described [the father] grabbing him and pushinghim against the wallwhen he spoke in French at the dinner table and throwinghis toys out the window if he played with them in the bath. He said thathe alsosaw him throw his mothers laptop out the window and [the father] throwhis mothers ring and earrings on thefloor and step on them. Iaccept the evidence of the

mother which is, to some degree, supported by Z. Thefather asserted that he had a good relationshipwith the child Z. The mothergave evidence that that relationship was difficult and that the father wasdemanding of Z. It is clearthat Z does not have a close relationship with thefather. The Family Consultant noted in her report that he does not like thefatherand described hiding under the table last time he saw the father becausehe was really mean. Z also said that the fathergrabbed him,pushed him against the wall when he spoke in French and was otherwise not warmand loving to him.[10] TheFamily Consultant was cross-examined in relation to this evidence and said therewas no evidence that Z had been coached in thatregard. I have given thisevidence some weight. Onbalance, I prefer the mothers version of those events to that of thefather. Anexample of this was the evidence of the damage to the mothers computer,with the removal of it from the mother and the smashingof it by the father.Even on the fathers evidence it was an act of violence by him towards themother in removing the computerfrom her. Iam satisfied that the father broke the mothers computer as part of theunfortunate interaction between the parties at thetime that their relationshipbroke down. I have read the transcript of the evidence before the Local CourtMagistrate, however,the evidence before me was more complete and enabled me tomake the findings on the civil burden as between these parties. Iam satisfied that since August 2012 the father has from time to time beenverbally abusive to the mother. I am satisfied that sheis afraid of thefather, and that fear was observed by the Family Consultant. The mother hastaken steps to avoid the father andhas arranged for the au pair to do most ofthe changeovers involving the child. Themother has made allegations of family violence which have been established and Ireject the fathers denial of that familyviolence. Themother has alleged the operation on the fathers aneurysm may haveaffected his behaviour however, there is no objectiveevidence upon which tobase that contention. Section 60CC(3)(a) any views expressed by the children andany factors (such as the childrens maturity or level of understanding)that the courtthinks are relevant to the weight it should give to thechilds views; Thechild is about two and a half years old and is too young to express anymeaningful views. Section 60CC(3)(b) the nature of the relationship of thechildren with: (i) each of the childs parents; and (ii) other persons (including any grandparent or other relative of thechild); Themother is the

primary attachment figure for the child. The child is only abouttwo and a half years old. He has been in themothers primary care sinceseparation. The father has been engaged in the childs upbringing and hasseen the childon a regular basis since separation. Nothing in these orderswill prevent or preclude that from continuing. Thechild has a good and close relationship with the father although not at the samelevel as that of the mother. The child has avery close relationship with hissibling Z, who is a key figure in the childslife.[11] Onthe evidence before me, the child has a good relationship with his maternal andpaternal broader families. The child is fortunatein that he will be exposed tovarious cultures including that of his mother and that of his father. Iaccept that the child appears happy and comfortable in the care of each parentand has established firm relationships them. Thisis to the credit of themother. Thechild has a close and loving relationship with Z. In part this siblingrelationship has been a factor in the decision that thechild spends ChristmasEve and Christmas morning in the care of the mother. It has also been a factorin the determination thatthe child travel to France each year including 2015for a period of five weeks. Section 60CC(3)(c) the extent to which each of the child's parents has taken,or failed to take, the opportunity: (i) to participate in making decisions about major long-term issues inrelation to the child; and (ii) to spend time with the child; and (iii) to communicate with the child; Thechild has been primarily cared for by the mother. The father has been regularlyinvolved in the care of the child since his birth. There has been ongoingacrimony about the level of time each parent spends with the child, to which Ihave referred elsewhere inthese reasons. Section 60CC(3)(ca) the extent to which each of the child's parents hasfulfilled, or failed to fulfil, the parent's obligations to maintain the child; Themother is the primary financial provider for the child, including child carewhen the mother works. Thefather provides for the child when he is in his care, and the father hasfulfilled his child support responsibilities. The fatherfinanciallyfacilitated the move by the mother, Z and the child from the Northern Beaches totheir present accommodation in SydneysEastern suburbs. Section 60CC(3)(d) the likely effect of any changes in the child'scircumstances, including the likely effect on the child of any separationfrom: (i) either of his or her parents; or (ii) any other child, or other person (including any grandparent or otherrelative of the child), with whom he or she has been living; Thefather

submitted that the child is likely to adversely suffer from beingseparated from his father during the mothers visitsto France with thechild during the summer break. The father asserted that he has had substantialcare of the child during the earlypart of his life. The evidence of the motheris that she was pressed and agreed to the father spending eight nights with thechildin 2012 when the child was less than twelve months old. I do not regardthat single event as creating substantial time, and I amconcerned that themother was intimidated into this arrangement by reason of her believe that hervisa status may be at risk. Thechilds primary attachment is that to the mother and he has a significantattachment to his brother, Z and to the father. Itis important that the child maintain his relationship with his brother as wellas with his father and mother. Interms of the childs time away to visit relatives in France, whilst I havesome concerns about the extent of that time, Iam satisfied that it can beameliorated by reason of the father spending time with the child before heleaves, time with the childafter he returns (at least in 2015) and by way ofSkype and the like. Ashorter period of time would involve significant travel which I am satisfiedwould have a negative impact upon the child and themother. Section 60CC(3)(e) the practical difficulty and expense of a child spendingtime with and communicating with a parent and whether that difficulty orexpensewill substantially affect the child's right to maintain personal relations anddirect contact with both parents on a regularbasis; Thereis no general practical difficulty and expense in respect of the child spendingtime with and communicating with his parentsas the parties live close to eachother. There is a difficulty in terms of the mothers fears of the fatherat changeovers. The mother seeks such changeovers occur at a police station andI have dealt with this in more detail later in these reasons. Section 60CC(3)(f) the capacity of: (i) each of the child's parents; and (ii) any other person (including any grandparent or other relative of thechild); to provide for the needs of the child, including emotional and intellectualneeds; Themother has a demonstrated capacity to care for both children. The evidence ofthe Family Consultant was that Z has grown up withvery good English and is anarticulate, outgoing and polite youngboy.[12] Thefather was concerned about the development of the childs language skills.The Family Consultant (albeit with limited information)expressed the view thatchildren who are bilingual develop English skills later. In this case Z hasdeveloped very good Englishspeaking skills. Therewas

evidence by the father, his mother and his brother that the childsEnglish speaking, in their view, was delayed. There was no expert evidence tosupport that assertion and given the outcome with Z and that the child is livingin an English speakingcountry, I accept that the child is likely to developgood English language skills. The father also complained that if the childwasattending a foreign language school he would have a limited grasp of English. Given the evidence of the Family Consultant andthe mother and having examinedthe records of the F School I am not satisfied that that is likely. Thefather complained that the mothers long term proposal is to relocate toFrance with the child and says that this view adverselyreflects on themothers insights into the child. The mother is entitled to have a viewthat it is better for her and thechildren to live in France, given herbackground and that of her eldest son. That she has deferred this debate anddecision forfour years is to her credit. However,if the parties are unable or unwilling to agree then that will be a matterdetermined by a court in 2018 or beyond, dependingon what the circumstances ofthe parties and the child are at that time. Section 60CC(3)(g) the maturity, sex, lifestyle and background (includinglifestyle, culture and traditions) of the child and of either of the child'sparents, and any other characteristics of the child that the court thinks arerelevant; Thefather asserts in his case outline document that this is not relevant, and Idisagree with him. It is relevant. The mother isfrom France and her familyare French. The mothers parents travel to Australia at least annually tospend time with theirdaughter and grandchildren. The first language of themother and Z is French. Thischild is likely to be brought up bilingual, particularly if he attends theschool which the mother proposes that he attend. The mother speaks fluently inFrench and English as does the childs elder brother Z. Thechild has the benefit of living in an English speaking community and the fatherwill no doubt ensure that the child speaks Englishwhen in his care. Inaddition, the child will have the benefit of the Arabic speaking culture of hispaternal family. Itis important to the mother that the child has a bridge between his Frenchculture and background and his English culture and background. Given themothers culture and nationality that desire is entirely appropriate andthere is no reason why it should not occur. Section 60CC(3)(h) if the child is an Aboriginal child or a Torres StraitIslander child: (i) the child's right to enjoy his or her Aboriginal or Torres StraitIslander culture (including the right to enjoy that culturewith other

peoplewho share that culture); and (ii) the likely impact any proposed parenting order under this Part will haveon that right; Thisis not a relevant factor. Section 60CC(3)(i) the attitude to the child, and to the responsibilities ofparenthood, demonstrated by each of the child's parents; Thefather submitted that he has been diligent in seeking time with the child. Thefather asserted the mother has not been co-operativeleaving him to makeapplications to the Court. The father has a determination to achieve equaltime. In his diligencehe has not reflected upon the impact ofthe breakup upon the mother and the impact of his ever increasing demands fortime on thechild. Theorders that the father seeks are well outside what was recommended by the FamilyConsultant. I do not regard that as focusingon the needs of the child but moreabout focusing on his desires for a particular outcome. Thefather does not have a good relationship with Z despite the fathersevidence to the contrary. The evidence of the FamilyConsultant was that Z hasexpressed some strong negative views about the father and in circumstanceswhere, according to the FamilyConsultant, those views were unlikely to havebeen coached. Ihave discussed elsewhere the complaint by the father about being given furthertime with the child in the recent school holidaysso that the mother couldengage in social activities, combined with his criticisms of the mothertravelling overseas earlier in 2014and not informing him. Apparently the childand his brother were left in the care of the mothers parents in Australiaandthe mother was away for about nine or ten days. Giventhe mothers expressed fear of the father, the evidence of which I accept,it is understandable as to why she did notinform the father that she was goingaway as this could have led to further litigation, the emotional and financialcost of whichwould have been significant in the circumstances of themother. Section 60CC(3)(j) any family violence involving the child or a member of thechild's family; Ihave discussed this factor elsewhere and I have taken it into account in makingthis determination. Section 60CC(3)(k) if a family violence order applies, or has applied, to thechild or a member of the child's family, any relevant inferences thatcan bedrawn from the order, taking into account the following: (i) the nature of the order; (ii) the circumstances in which the order was made; (iii) any evidence admitted in proceedings for the order; (iv) any findings made by the court in, or in proceedings for, the order; (v) any other relevant matter; Ihave considered the findings of the Magistrate in the Local Court in terms ofthe proceedings against the father being

dismissed,which I have alluded toelsewhere. Thereare no family violence orders. The father says that the mothers creditwas impugned. There was some minor criticism,but unknown criticism, in thematerial before the Magistrate of the Local Court although the Magistrate alsodetermined that themother was likely to be honest. Ido not accept the fathers submission that the veracity of themothers evidence was in any way seriously impugned. Ido accept that there was a level of situational violence at the time the partiesphysically separated. I am satisfied that therehas been some low level verbalabuse used by the father to the mother since that time albeit in the light ofthese proceedings thatabuse is likely to have beenameliorated. Section 60CC(3)(l) whether it would be preferable to make the order thatwould be least likely to lead to the institution of further proceedings inrelation to the child; Itis likely, if the mothers mind does not change, that there will be a needfor a further hearing in relation to a relocationof the child to France in fouror five years time. Given the age of this child it is likely that theparties will need toreassess the parenting arrangements when the child turnssix or seven, and that will depend on the circumstances of the child andtheparents at that time. Section 60CC(3)(m) any other fact or circumstance that the court thinks isrelevant. Ihave considered the following in terms of this factor and, where relevant, theother factors. DISCUSSION AND CONCLUSION Residence Thereis no issue that the child should continue to live primarily with the mother; assuch a residence order has been made to thateffect. Parental Responsibility Theparties agree that there should be an order for equal shared parentalresponsibility. The father and mother communicate via emailand sometimes bytelephone. Given the conflict between the parents I have some concerns aboutthis proposed order. The fatherssubmission was that their communicationwas improving. I do not accept that submission. The mother communicatesbecause she hasto but struggles in her relationship and in her communicationwith the father, given her fearful views of him. However,given that the Order is aspirational and that the parties are moving slowlytowards better communication. I will make thatorder. Equal time and significant and substantial time Iam then obliged to consider equal time. I have done so in the light of theevidence before me and in particular the evidence ofthe mother and the FamilyConsultant. Given the age of the child, the continuing conflict and the factorsto which I

have alludedto earlier I am not satisfied that it is in the bestinterest of the child at this time, or for the foreseeable future, for suchanequal time order to be made. Iaccept the evidence of the Family Consultant that overnight time should be putin place slowly. I intend that overnight time notincrease until the childattains the age of four years in April 2016. Fromthat time, I will make orders enabling the child to spend time with the fatherover the weekends during school term two nightsper fortnight and the followingyear three nights a fortnight. Thereafter alternate weekends will operate fromafterschool Fridayuntil commencement of school Monday (or Tuesday if the Mondayis a pupil free day or public holiday) on alternate weekends duringschoolterm. Theweekend time will enable the child to interact with his paternal family and thefather. Theweekend time will cease over school holiday periods from August 2015 onwards,given the school holiday orders. Interms of the existing time on Wednesdays, the evidence of the mother is that thechild normally goes to sleep at 7.30 pm or 8.00pm. The father is unable tohave the child earlier on a Wednesday afternoon, notwithstanding that he hadpreviously indicated thathis working hours on that day were flexible. Giventhis circumstance in the light of the evidence, findings and relevant factors(including the age of the child), the order I will make will be for the child tospend time with the father during French schoolterm each Wednesday from 3.00 pmuntil 6.00 pm until the child leaves for France in June/July 2015. Thatstructure will ensure thatthe child has frequent time with the father. Afterthe child commences school in August 2015, such Wednesday time will continue butincrease to 7.00 pm when the child attainsthe age of four in April 2016. Afterthe child attains the age of five years the Wednesday time will change tosignificant and substantialtime in that the child will spend eachalternate Wednesday with the father being the Wednesday after thealternate weekend time. By that time the concerns of the Family Consultant,with regard to the child being away for the father for twelve days, would havebeen addressed. Thestructure of the school holiday periods for state schools in New South Wales isrelatively clear, it involves a four or five weekbreak over the Christmasperiod followed by four ten week terms with a two week break in the middle withan occasional Easter separatedfrom the first school holiday period. Interms of the F School (which given this decision is the school at which thechild will be attending and at where the mother

works)the holiday period isdifferent from the Australian school approach. The holiday schedule was set outby the mother in her affidavit.[13] The essence of the holiday period is a break of about six weeks for the Europeansummer through July and August each year followedby a one week break at thebeginning of October, and another one week break in mid November. There is abreak of approximately fourweeks in the Christmas/New year period followed byone week in March and two weeks in April. Giventhat structure and given the facts, findings as between these parties, andhaving determined that the child ought to attendthe F School, I am proposing todivide the holidays along the lines of that set out in the F School schedule ofholidays. Inrelation to the F Schools long summer break (July and August), the motherseeks orders to enable her to take the child toFrance for six weeks commencingJuly 2015. The evidence of the Family Consultant is that this would be a longtime for the childto be away from the father. When pressed she said that threeweeks may be manageable. Iaccept her evidence, although, this needs to be seen in the context that themother is the primary carer of this child, that themother is significantlystressed and upset and has a deep desire to spend time with her family inFrance. In addition, Z travelsto France each summer holiday and he and thechild are close. I have considered the evidence of the stress on the motherreferredto by the Family Consultant and as observed by me during the course ofthe trial. Given those circumstances, I intend to permit themother to take thechild to France in 2015 for five weeks and thereafter for six weeks over thenorthern summer break. Iam conscious that this will mean that the child will be away from the father forfive weeks over that summer break. In 2015 I proposeto put in place orderswhich provide for the child to spend time with the father three days with afterthe trip and two days beforethe trip. I will also put it place orders whichprovide for regular Skype communication between the child and the father whilethechild is in France. From2016 onward I intend to make orders that entitle the mother to take the child toFrance with her for a period of six weeks duringthe summer break. The fatherwill have the child for the first two days of the holiday period and the lasttwo days before the childgoes to school. There will be regular communicationbetween the father and child with Skype in the meantime. Those arrangementswill continue after that date. Asto the three one week breaks (October, November and March in each

year) I intendto make orders that these are times spent withthe father and increasing to mostof those breaks in 2016 and onwards. Asto Christmas holiday time this is to be two five day periods this comingChristmas, two six day periods the following year, twoseven day periods thenext and three weeks straight from December 2017 onwards. This will accord withthe general recommendationsof the Family Consultant. The end result is that thechild will spend more than half of the Christmas holiday period with the father,given his annual trips to France in the northern summer break. Theremaining holiday is Easter and it also is the period around childsbirthday. This holiday is structured to be week aboutfrom 2015 onwards. Themother also sought an order that the child attend and be educated at the FSchool where she works. It is also the school wherethe childs sibling Zis a student. Thefather has a number of objections to this school. His evidence is that theyfall into two categories. The first was that heis concerned that thechilds ability to speak English has been delayed as a consequence of thechild being taught French andspeaking French in the mothershousehold.[14] The second was thathe is concerned that the child was starting school too early (the mother seeksorders that the child commenceschool at the beginning of term in August2015). Themother gave evidence that the percentage of language taught to the child in thefirst year at the School is 75 per cent Frenchand 25 per cent English andthereafter in the pre-school at equal time French equal time English. Thechild lives in the household with the mother and his French speaking brother Z. I accept the evidence of the mother, and to acertain extent this was supportedby the evidence of the father, that Z speaks English well and did not speakEnglish particularlywell prior to coming to Australia and being in contact withthe father. Thechild will be living primarily in Australia, at least for the next four, five orsix years and I am satisfied that his Englishlanguage skills will develop,particularly given the evidence of the mother as to the education at the FSchool and the history ofthe childs elder brothers languageskills. Thechild is exposed to different languages and is likely to end up being bilingual.This is to his overall advantage and benefit,particularly as the child hasextended family in both France and Australia. The child is also exposed toArabic speaking in thepaternal household. Thereis no expert evidence that the childs English language is delayed andthere is no evidence that the child is other thanthriving in the

currentenvironment. Theadvantage of the child attending school with his mother and brother are clear interms of shared holidays, his mother being availableat the school and of coursethe support of his brother Z at school. Thefather said he was concerned about the child attending school full time fromaged three and a half. This is to be seen in thecontext of the child attendingpre-school at the school in which his mother is a teacher. The father worksfull time and has difficultiesin taking time off work on a regular basis, suchas the difficulties he has on Wednesday afternoons. Thechild would otherwise be in the care of a nanny or attending pre-school. Thefather deposes he would prefer a build up for thechild in a pre-school otherthan the French School absent his mother. Giventhe evidence of the mother and the evidence of the school I have no concernsabout the child settling into the school, and settlinginto the arrangementgiven the close proximity of the mother and his brother. Accordingly, I will bemaking that order. Thiswill enable the child not only to have a good and close understanding of hisfathers English language and Arabic backgroundbut also to have a closeconnection with his French culture given the limitations on visits by him toFrance on an annual basis. Theparties submitted the School file. I also accept the evidence of the mother interms of paragraphs 108 through to 118 of herevidence set out in her trialaffidavit filed the 13 August 2014. That is whilst the child is young theprogram in the School forhim from August 2015 is bilingual and age appropriate.I also accept that the child will be going to and from school with his motherand brother and would have his mother nearby should issues arise. Themother would incur significant further costs if the child attended a differentschool from his brother having regard to the needfor childcare during thedifferent school holiday period. Ialso accept that it is important, giving the relationship between the child andhis brother, that their close and loving relationshipshould be enabled tocontinue. Forthe child to attend an English only school would mean that the involvement ofFrench language would be limited to that at home. The mother is able to meetthe costs of the childs school fees although it is open for her to makeapplication for any changeof assessment with the Child Support Agency sheconsiders or is advised is appropriate. Iam not concerned about overseas travel by this child with the mother for anumber of reasons. The first is that the father consentsto the child goingoverseas when the child is over five. His explanation as to why that

delayshould take place was unconvincingand in many ways he prevaricated in relationto that evidence. There is no reason why the child cannot travel to France tospendtime with his maternal family. Inaddition France is a party to the Convention on Jurisdiction, Applicable Law,Recognition, Enforcement and Co-operation in Respect of Parental Responsibilityand Measuresfor the Protection of Children, concluded 19 October 1996 (theChild Protection Convention) and that as the child is resident inAustralia and orderswill have been made, those orders are likely to beenforceable in France. In keeping with discussions I had with thepartieslegal representatives during the hearing I have made notations asto rights of custody and given leave to enable the parties to applyformechanical orders in the context of the Child Protection Convention. Thefather seeks an order that he be permitted to have the child christened into theCatholic faith. The mother opposes that order. Themother was christened a Catholic and her family were all christened in theCatholic Church. The mothers evidence was thatshe abandoned her beliefsin Catholicism some time ago. Her elder son Z was baptised as a Catholic,although the mothersevidence was that this arose in circumstances wherehe had been attending school in South America which was a Protestant School andwhere the child expressed a desire to know more about religious background andit was done in the context of that request. Themothers view was that if the child wished to be baptised at some laterdate it was a matter for him. The fathersdesire to have the childbaptised seems to be in support of his desire to have the child attend aCatholic school. The evidenceof the father is that he was christened aCatholic and his parents are Catholic, however, the father rarely attendsChurch. Theparties would be unable to agree on god parents (particularly since one of thegod parents initially nominated by the father gaveevidence against the motherin the Local Court) and I confirm the comments I have made earlier that I willnot make orders in thisrespect, although I considered doing so. Thereare some areas where the court does not need to make orders and this falls intothat area. As the then Federal Magistrate Altobellisaid in C & B [2007] FMCAfam 539:- Thisis a difficult issue. I do not have enough evidence to make a decision. I wouldin any event be reluctant to make an order interms of that sought by themother. I doubt it can be enforced. Even if it were contravened it would bealmost impossible to fashionan appropriate sanction. There are some matters ofparental

responsibility that are simply best left to parents to decide. This isone of those issues where, on the facts of this case, law should not intervene.The mother who is Jewish, and the father who is Catholic,might consider forthemselves the words of an eminent Mormon family lawscholar: Some advocates of childrens rightsmanifest the lingering hubris of the belief in the infinite and invinciblecapacity of thelaw to do good. They see law as a secular Messiah, a cure allfor every social ill, a big yellow social bulldozer that can shoveaway the oldproblems and build new temples of goodness. But rights and relationships arevery different things. It is troublingto try to define relationships betweenparent and child in terms that suggest separation, individualism, boundaries,legalism, lawyers,courts, lawsuits, and forcedcompliance.[15] Perhapsit is not just advocates of childrens rights who need to reconsider theview that law somehow has the answer to allthe issues that might arise inrelation to children. Perhaps many parents who have conflicts about theirchildren also need to recognisethe limits of family law. InJurss and Jurss (1976) FLC 90-041 Demack Jobserved:-[16] ... As both parents placed little value in the regular observance of religiouspractices, it seems to me that I should not make anyrequirements abouteducating the children in any particular faith. Iam not satisfied, in the circumstances of the child and these parties, that itis in the best interests of this child to make suchan order, particularly giventhat the child will not at this stage be attending a Catholic school. Duringthe course of the first day of the hearing the mother sought a permanentinjunction restraining the father from assaultingor abusing her. The effect ofthis was to pursue the apprehended violence proceedings which had been chargedby the Magistrate atthe Local Court in October2012.[17] TheMagistrate determined at that time that the allegation of the father assaultingthe mother was not established beyond reasonabledoubt. He also dismissed themothers application for an apprehended violence order. The Magistratedetermined that intothe future he was not satisfied, on balance, that thefather presented a risk to the mother. Themother claimed that since that time the father had been verbally abusive toher.[18] The mother gave evidenceof verbal abuse by the father to her and the father denied that abuse. Thefather was cross-examined in relation to an incident where he removed a computerpurchased by the mother to allegedly preventher from booking air tickets. Thefather said he held the computer away from the

mother, and it dropped and wasdamaged. I do notbelieve him. Iam satisfied that the father was endeavouring to render the computer inoperativeand succeeded in doing so. This was controllingbehaviour, but it was manyyears ago and occurred in the context of the parties relationshipbreakdown. Themother seeks an order that changeover occurs at a police station, this becauseshe says she has fears of the father. Given theevidence and my findings thosefears are, to some extent, justified. The father seeks orders that thechangeovers occur at the YHotel car park or someplace less confronting than apolice station. TheFamily Consultant was concerned about the inevitable negative impact on thechild in terms of his relationship with the fatherif a police station was usedfor changeovers. Themother sought mutual injunctions, restraining each from assaulting, abusing ordemeaning the other, to impose an obligation onboth parents to behave vis a viseach other. Given that I will make that order there will no longer be a needfor changeovers tooccur at the police station. Give the various factors whichI have earlier referred to and the relevant findings of fact, I am satisfiedthat the combination of the injunctions and changeover at a less confrontingplace meets the best interest of the child. Themother expresses fear of the father and I accept her evidence. That wasapparent in a number of areas, firstly her desire tohave the changeover for thechild at a police station (which is concerning in terms of the child) and theconcerns she expressedwhen cross-examined about going overseas for worktraining (in early 2014) and her concerns about letting the father know that shewas going overseas. Giventhat evidence and those findings I am satisfied that there should be the orderthat she seeks, that is a mutual order that noparty assault, abuse, belittle ordemean the other. I intend to make that order. Thefather sought orders that the child spend alternate Christmas Days with him. Thechild has lived primarily in the household of his mother and his brother. Thereis significant conflict between the parties whichhas been ongoing sinceseparation and there is mutual distrust of each party for the other. Giventhe circumstances of the conflict and the difficulties at changeover I amsatisfied there ought to be only one changeover atChristmas. Further, giventhat the fathers household will be predominantly an adult household onChristmas Day I am satisfied,in all of the circumstances and given the commentsmade elsewhere in these reasons, that the child should spend Christmas afternoonand

evening with the father with the commencement of an extended period of timewhich will increase over the years to provide forsignificant and substantialtime. Thefather and mother agree that the child should be in contact with the other partyon regular occasions. Accordingly, I have madeorders for regular telephoneand/or Skype communication when the child is overseas and regular communicationduring the week. However,I do not believe this will need to be fixed, it will need to be adjusted fromtime to time as the childs activitieschange as the years progress. Themother initially was seeking to relocate to France. Sensibly, given the age andmaturity of the child, the mother has not pursuedthis application but hasoutlined that she will do so sometime around 2018. Given her background andhistory the Court can understandwhy she would want to relocate without makingany comment as to whether it ought to be permitted or not permitted. Thefact that she has not pursued that application for relocation at this stageought not prevent her or inhibit her from commencingan application forrelocation of the residence of the child, in or about 2018, notwithstandingthese proceedings. That aspect hasnot been heard on its merits and it willenable the child to develop and form a relationship with the father. TheCourt does not intend to adjourn that part of the proceedings but simply notethat it was not determined on its merits and itis open for the mother to makeapplication again in or around 2018 given the sensible and pragmatic decisionshe took in 2014. Ifthe child goes to the F School he is likely to be bilingual. The evidence ofthe Family Consultant is that this is a positivestep and that language oftenimproves after a period of time. Iam not convinced that the childs English language is delayed as isasserted by the father and his family. I am satisfiedthat if the child attendsthe F School the child will speak English fluently (as does his brother Z) andthat the child will be wellable to cope with school. In terms of startingschool at three and half, from evidence provided by the mother and the evidenceofthe approach adopted by the School I am satisfied that it is, in all of thecircumstances, appropriate for the age and maturity ofthe child. Bothparents work full time. The alternative is that the child is left for one ortwo days a week in child care and the remainderof the time in some other formof care. Attending the school at which his mother teaches and which his brotheris present, and incircumstances where they will no doubt go to school togetherand go home from school together, I see that in all of the circumstancesas abetter

option giving regard to the needs of this child. Iraised with the parties and their legal representatives an approach in relationto Mothers Day and Fathers Day inthat the child would be returnedto the mother at 9.00 am or 10.00 am on Mothers Day morning and remainwith the mother fromthat time. Interms of Fathers Day, the child would go to the father on FathersDay and from 2015 (by which time the child willbe at school) the child wouldthen be returned by the father to school on the following Monday. Asto the childs birthday, it is likely that his birthday will fall in theApril school holiday period at the F School. Theorder I will make will providethat the child will spend the week of his birthday with the mother in 2015 andwith his father in2016 and odd years thereafter. I have adopted this coursebecause of the high level of conflict and the impact upon the mother,inparticular the impact upon her ability to parent. Ihave consciously made a determination that the child not sees his parents ontheir birthday if it does not happen to fall withinthat time. Celebrationssurrounding those events can be flexible. Theparties are agreeable that eventually the child will travel to France with themother. I raised with the legal representativesof the parties the ChildProtection Convention. Byconsent the parties asked me to make a notation (albeit their notation relatedto the abduction convention) and I gave them leaveto apply, for a period oftwelve months from the date of the orders, to make mechanical changes to theorders so that they couldbe registered in France pursuant to the ChildProtection Convention. Given the parties acquiescence in that respect I havemadethat notation and given leave for a period of twelve months. Theparties agree that there should be an order for equal shared parentalresponsibility for the children. Given the evidence ofthe parties and inparticular the evidence of the Family Consultant, I am satisfied that such anorder should be made. Observingthe demeanour of mother giving evidence and having read the family report, I amsatisfied that the mother has a deep desireto eventually return to France. Sensibly and in a child focused way the mother has deferred that decision untilaround 2018 to 2020. Counsel for the father criticised the mother in relationto her approach in leaving this issue outstanding. I reject that criticism.The mother did not pursue her application for relocation and in essence withdrewit. It has not been heard on the merits. Submissionswere made on behalf of the father that the so called rule in Rice vAsplund[19] should not apply inrelation to an application for relocation. I accept that submission on behalfof the

father and I will makea notation on behalf of the father in thesereasons. Themother should be entitled to consideration of such an application at that timeand ought not to be prevented from doing so giventhe approach that she hasadopted in these proceedings. Themother sought an order that the father contribute to the cost of the childtravelling to and from France every year. The fatherhas had significantlygreater resources which he applied to these proceedings and has spent at least$100,000 on legal costs. However,the fathers income is slightly lessthan that of the mother and he pays child support for the child. The mother isin receiptof an income of about $89,000 per year plus child support, someassistance for her elder child and she is able to do some additionalwork interms of teaching French. The mother says, and I accept, that she does not wishto spend significant time in this additionalwork, given her responsibilities tocare for the two children in her household. Noevidence was adduced as to the costs of the airfares and the basis upon whichthat money order could be made was not established. Itwill be a matter for the mother, should she desire to do so, to apply for changeof assessment if her circumstances are such thatwould enable a change ofassessment in those circumstances. I do not propose to make thisorder. PROPERTY Themother seeks an order that the father pay $30,000 to her in relation to thequestion of property. Werethe parties in a de facto relationship and if so for what period? For the Courtto have jurisdiction it is necessary for theapplicant to establish that a defacto relationship existed within the meaning contained in the Act. Thejurisdiction to hear defacto property proceedings in the Family Court is setout in s 31(1)(a)(aa) of the Act which provides:- Original jurisdiction of Family Court 31(1) Jurisdiction is conferred on the Family Court with respect to: (a) matters arising under this Act or under the repealed Act in respect ofwhich matrimonial causes are instituted or continuedunder this Act; and (aa) matters arising under this Act in respect of which de facto financialcauses are instituted under this Act; and ... Section39A of the Act provides jurisdiction for de facto financial proceedings to beinstituted in the Family Court. Section4 of the Act, relevantly, defines a de facto cause. To establish jurisdictionthe applicant must satisfy the Court that a de factorelationship existed. Section 4AA (1) of the Act provides:- (1) A person is in a de facto relationship with another person if: (a) the persons are not legally married to each other; and (b) the persons are not related

by family (see subsection (6)); and (c) having regard to all the circumstances of their relationship, they have arelationship as a couple living together on a genuinedomestic basis. Paragraph (c) has effect subject to subsection (5). Working out if persons have a relationship as a couple (2) Those circumstances may include any or all of the following: (a) the duration of the relationship; (b) the nature and extent of their common residence; (c) whether a sexual relationship exists; (d) the degree of financial dependence or interdependence, and any arrangementsfor financial support, between them; (e) the ownership, use and acquisition of their property; (f) the degree of mutual commitment to a shared life; (g) whether the relationship is or was registered under a prescribed law of aState or Territory as a prescribed kind of relationship; (h) the care and support of children; (i) the reputation and public aspects of the relationship. (3) No particular finding in relation to any circumstance is to be regarded asnecessary in deciding whether the persons have a defacto relationship. (4) A court determining whether a de facto relationship exists is entitled tohave regard to such matters, and to attach such weightto any matter, as mayseem appropriate to the court in the circumstances of the case. (5) For the purposes of this Act: (a) a de facto relationship can exist between 2 persons of different sexes andbetween 2 persons of the same sex; and (b) a de facto relationship can exist even if one of the persons is legallymarried to someone else or in another de facto relationship. InJonah & White [2011] FamCA 221 Murphy J considered authorities in theState jurisdiction about what constitutes a de facto relationship beforeheconsidered Part VIIIAB of the Act and said at paragraphs:- Inthat respect it seems to me also instructive that the Commonwealth legislaturedid not provide for relief of that type in circumstanceswhere two people wereparties to, for example, a domestic relationship, or, as in NewSouth Wales, a close personalrelationship but, rather, only whereparties were in a de facto relationship as defined. Inmy opinion, the key to that definition is the manifestation of a relationshipwhere the parties have so merged their livesthat they were, for allpractical purposes, living together as a couple on a genuinedomestic basis. It is themanifestation of coupledom, whichinvolves the merger of two lives as just described, that is the core of a defactorelationship as defined and to which each of the statutory factors (andothers that might apply to a particular relationship) aredirected. HisHonour concluded:- Theissue, as it seems to

me, is the nature of the union rather than how itmanifests itself in quantities of joint time. It is thenature of the union the merger of two individual lives into life as a couple thatlies at the heart of the statutoryconsiderations and the non-exhaustive natureof them and, in turn, a finding that there is a de factorelationship. InSmyth & Pappas [2011] FamCA 434 Cronin J referred to Jonah &White (supra) and to Barry & Dalrymple [2010] FamCA 1271 and saidthat two people could live very individual lives as a couple. Inthe unreported decision of Crowley & Pappas [2013] FamCA 783, Tree Jobserved in relation to s 4AA of the Act:- Thoseprovisions, or their state counterparts, have been the subject of considerablejudicial discussion, principally in an attemptto more precisely analyse whatwill comprise a couple. Much of that analysis seems to have itsgenesis in the difficultyin satisfactorily distilling the essence of such acommon, everyday concept. From those decisions the following propositions maybe stated: (a) whether a de facto relationship exists or not is a question of fact, not amatter of discretion; (b) a de facto relationship does not need to be akin to a marriage although thenature of the association involved in a marriagerelationship may beinstructive; (c) the parties determine the nature of their relationship and it may evolve andalter, even dramatically, over time; (d) there need not be full time living together; (e) the relationship may be unhappy, but still subsisting; (f) sexual or other exclusivity is not necessary; (g) the gist of the inquiry is the degree to which parties have merged theirlives into one. That connotes financial, emotionaland physicalinterdependence. Interms s 4AA(1)(a) & (b) of the Act, I find and accept that neither theapplicant father nor the respondent mother were legally married to eachotherand that they are not related by family. Havingregard to all the circumstances of their relationship as is outlined in thefollowing evidence I find; that the parties metin South America where themother, a French national, was employed as a teacher and was living there withthe child Z. The fatherwas travelling through South America and the partieslived together for about five months until February 2011. The father and motheragreed that the mother and Z should come to Australia to live with the father. Ona preliminary visit the mother became pregnant and on 1 September 2011 theparties commenced living together in a marriage likerelationship. Thiscontinued until July 2012 During that later period of time the parties had anintimate relationship, shared thesame home and the child of

the parties wasborn. In addition to those periods of common residence the mother and the childwerefinancial dependent upon the father. The parties had by September 2011committed themselves to a shared life. They had the careand support of Z fromat least 1 September 2011 and the child from April 2012. Their relationship waspublic. I am satisfied thatthe parties lived together in a de factorelationship for those two periods of time. I find that the father and motherwere livingtogether on a genuine domestic basis for each of those periods. Whilstthe de facto relationship did not subsist, on the mothers case for twoyears or more, the birth of the child empowersthe Court to make orders pursuantto s 90SB(b) of the Act. Havingfound that the parties lived in a de facto relationship (within the meaningdefined in s4AA of the Act) it is not in issue that that de facto relationshiphas broken down. The Family Court therefore has jurisdiction andpower to makeorders in relation to the property of the parties. Thelaw regarding the treatment of property has been clarified following the HighCourt decision in Stanford vStanford.[20] Prior to thatdecision the preferred approach was the four step process as reflected by theFull Court in cases such as Hickey v Hickey and the Attorney General for theCommonwealth of Australia (Intervener) [2003] FamCA 395; (2003) FLC 93-143. FollowingStanford v Stanford (supra) the approach is that a Court must firstly besatisfied that before making any order it is just andequitable[21] to do so. Thenconsider what orders, if any, should be made having regard to s 79(4) of the Actor as in this case s 90SM(4). Thisapproach was later adopted in Bevan &Bevan,[22] where Bryant CJ andThackray J noted that the Stanford v Stanford (supra) decision:- ... serves to refocus attention on the obligation not to make an order adjustingproperty interests unless it is just and equitableto do so.[23] InChapman v Chapman[24]the Full Court considered the independence of ss 79(2) and 79(4) andconfirmed that Bevan v Bevan correctly stated the law in relation to theCourts consideration of s 79(2), whether the making of an order is just andequitable. At paragraph 19 of their joint reasons Strickland and Murphy JJsaid:- Section 79 demands a consideration, separately, of all of its requirementswithout conflation. However,their Honours disagreed with any intention of plurality in Bevan v Bevan(supra), in that the Court must consider the matters in s 79(4) whenaddressing s 79(2) of the Act in terms of what order is to be made. To clarify,Bryant CJ said in a separate judgment:- Whatever differences

mayexist as to the meaning of [84] and [85] of Bevan, I am in agreement withStrickland and Murphy JJ that itis not a requirement to take account of thematters in s 79(4) when considering the question of whether it is just andequitable to make any order under s 79(2). But as long as they are seen asseparate and not conflated, the factors in s 79(4) have the potential to informthe decision under s 79(2) ... Accordingly,in this case pursuant to Part VIIIAB of the Act, and having establishedjurisdiction, the approach I will adopt, when determining a division ofproperty, is:- Identify,in the context of ordinary legal principles, the existing legal and equitableinterest of the parties in the property; Considerwhether in the circumstances of the parties it is appropriate and just andequitable for any order to be made having regardto s 90SM of the Act;and Toconsider and take into account any contributions and other matters, as arerelevant, having regard to the provisions of s 90SM(4) of the Act and make suchorder as is appropriate. It is the function of the court to consider thoserelevant factors in the contextof what is appropriate in all of thecircumstances, provided always that it is just and equitable to do so. Identify, in the context of ordinary legal principles, the existing legal andequitable interest of the parties in theproperty Theparties are agreed as to much of the property, thatis:- Mothers Westpac ... account $6,300 Mothers household contents $2,000 Mothers motor vehicle $21,000 Fathers Westpac saver account $186,882 Fathers Westpac choice account $450 Household contents of father $2,000 Fathers motor vehicle $11,000 Fathers finance on motor vehicle $19,281 Fathers Westpac visa $160 Loan from fathers mother and brother determined 0 Mothers car loan (-$27,000) Total $222,073 Superannuation Fathers BT super $67,309 Mothers NGS super $12,000 Total $79,309 Therewere some issues about the property. The first was whether the loans from thepaternal grandmother and the childs paternaluncle ought to be included. There was some discussion about whether they are statue barred or not. Howeverthe evidence of thematernal grandmother was asfollows:-[25] When [the father] was buying his unit in [Suburb L], he said to [my husband]and me, I am going to be short $15,000.00 forthe unit. Could you giveme a hand. I spoke with [my husband] and then said your fatherand I will give you $15,000.00,you dont have to repay it until a timewhen you have the spare money. [The father] has not paid any of thatmoney. Itis not a loan repayable on demand. It is an advance which his repayable by thefather,

when and if he decides to do so, it isentirely voluntary and I do notregard it and will not treat it as a loan. Thefather had a serious illness in 2000 which required surgery. His brother, Mr S,advanced to him $21,700. The evidence of MrSwas:-[26] ... I then had a conversation with [the father] in which I said I canorganise for Professor [M] to perform your surgeryand he can start straightaway. It will cost about $23,000.00. [The father] said Idont have the money. I said I can pay you. You can consider it a loan and pay me back when you have themoney. The costof the operation, hospital and other expenses was$21,700.00. To date [the father] has not paid any of the$21,700.00. Thisagain was an advance which was repayable by the father when he chose to do so. It is not a loan and I will not treat it as such. Iwas asked to treat the mothers car and loan as equal. I have not doneso. The mother has a liability in respect of thecar and gave evidence inrelation to that. I accept her evidence as to the car and theliability. SUPERANNUATION Eachof the parties has superannuation. The mothers superannuation is nowabout $12,000 however she wants to pay, at present,about $850 per month tomaintain her superannuation benefits from France. Itis clear that the father in particular had accumulated his superannuation overmany years and the mother has accumulated significantsuperannuation since shecommenced work in Australia in about August/September 2012. Neitherparty seeks a splitting order in relation tosuperannuation. Consider whether in the circumstances of the parties it is appropriate andjust and equitable for any order to be made having regardto s 90SM of theAct Giventhe factual circumstances of these parties and the findings made by me, it isopen for this Court to make an order for adjustmentof property pursuant to s90SM of the Act. There was a relationship to which the provisions of the Actapply, that relationship has ended and the parties are unlikelyto reconcile. There is property (both superannuation and non-superannuation) available forconsideration of orders altering theinterests of the parties in such property,according to law. Whatis left is to consider and take into account are contributions and othermatters, as are relevant, having regard to the provisionsof s 90SM(4) of theAct and make such order, if any, as is appropriate. Itis the function of the Court to consider those relevant factors in the contextof what is appropriate in all of the circumstances,provided always that it isjust and equitable to do so. CONTRIBUTIONS Itis not in issue that the parties were in a de facto relationship within themeaning

prescribed under the Act. Theparties lived together in South America for a period of about five months. Theparties recommenced cohabitation in a marriagelike relationship from 1September 2011 and separated in July 2012. I accept the evidence that at thecommencement of cohabitationin both South America and in Australia the fatherhad overwhelming property in the form of real estate, superannuation and otherassets. Iaccept the evidence of the mother that she came to Australia with upwards of$15,000. During the course of the relationship themother was financiallysupported by the father although she received some assistance from her ownsavings and from her family. Duringthat time it is clear that the father also financially supported the child Z. At the time of separation the father providedfinancial support to the mother tothe extent of at least $5,000 to enable her to re-house herself. He has paidchild support forthe child since that time. Havingregard to the contributions before and during the periods of relationship I amsatisfied that each contributed at least equallyin terms of home making andparenting and if anything the aggregate of the fathersfinancial/non-financial contribution wasslightly greater than that of themother. SECTION 90SF(3) MATTERS Thefather is in good health and is able to support himself. The mother is aged 35and is in full time employment and earns an incomegreater than the father. Thefather pays child support in accordance with his child support assessment andthere is no evidence that he has been in arrearsof child support or that he hasmade payments otherwise than in accordance with any assessment. Themother is highly qualified and is able to continue her employment, particularlygiven the parenting orders that have been made. Eachof the parties have incurred debts in relation to these legal proceedings, thefather having disposed or incurred expenses tothe extent of about $117,000, themother to about $27,000 or $28,000. Themother seeks an order for $30,000. She provided little evidence as to thedetail of the contributions and other factors. Thismakes the task ofassessment somewhat more difficult. Given the relative contributions, thefuture needs, the financial resourcesof the parties before and after theperiods of the relationship commenced. Insummary, there was minimal contribution over the periods and in between andsubsequent to those periods of time. Further, suchcontributions as were madeby the mother were in the context of the father providing accommodation,financial support and other supportfor her and for the child.

Theother factors are not such as would in the circumstances warrant an adjustment. Havingconsidered and taken into account the relative contributions and other factorsand having regard to the provisions of s 90SM(4) of the Act within the whole ofthe context of s 94SM, I am not satisfied that it is appropriate to make ordersaltering propertyinterests as to do so would not be just and equitable. Assuch regard to application for orders to adjust interests in property it is tobe dismissed. I certify that the preceding two hundred and fiftysix (256) paragraphs are a true copy of the reasons for judgment of theHonourableJustice Benjamin delivered on 17 October2014. Associate: Date: 17 October 2014 [1] Mothers consolidatingaffidavit filed 13 August 2014. [2]At paragraph 16 of the Family Report top of page11. [3] Transcript of Proceedingsdated 22 November 2012 page 40. [4]Ibid at page 41. [5]Ibid. [6]Ibid. [7]Ibid. [8] ExhibitM1. [9] At paragraph22 of the Family Report dated 6 May2014. [10] Ibid. [11] Ibid at paragraph37. [12] At paragraph 22 of theFamily Report dated 6 May2014. [13] Paragraph 114 andannexure A. [14] Ihave discussed the childs English language development elsewhere in thesereasons. [15] Lynn D Wardle The Useand Abuse of Rights Rhetoric: The Constitutional Rights of Children,Loyola University Law Journal vol 27p332. [16] Page75,185. [17] Annexure toaffidavit of the father filed 25 August2014. [18] Mothers trialaffidavit paragraphs 101 and102. [19] (1979) FLC 90-725. [20] [2012] HCA 52, (2012) 293ALR 70. [21] Section79(2). [22] [2013] FamCAFC 116; (2013) FLC93-545. [23] Ibid at para65. [24] [2014] FamCAFC91. [25] At paragraph 28 of theaffidavit of Mrs S filed 2 July 2014. [26] At paragraph 28 of theaffidavit of Mr S filed 2 July 2014.