FAMILY LAW CHILDREN With whom a child lives and spends time Allegations of sexualabuse finding notsought of a positive nature but rather of unacceptablerisk risk so found supervised time necessary, possible andsupported by wife allegation of rape not sustained ordersmade. Evidence Act 1995 (Cth) Family Law Act 1975 (Cth) Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 M v M [1998] HCA 68; (1998) 166 CLR 69 Moose& Moose [2008] FamCAFC 108 APPLICANT: Ms Deane RESPONDENT: Mr Deane INDEPENDENT CHILDRENS LAWYER: FILENUMBER: MLC 8505 of 2012 DATE DELIVERED: 15 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Cronin J HEARING DATE: 25, 26, 30 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Brustman QC with Ms Lane SOLICITOR FOR THE APPLICANT: Caroline Counsel Family Lawyers THE RESPONDENT: In Person COUNSELFOR THE INDEPENDENT CHILDRENS LAWYER: MsDowler SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Victoria Legal Aid ORDERS (1) Allexisting parenting orders are forthwith discharged. (2) The children Y DEANE born ... 2007 and H DEANE born ... 2011 live with thewife. (3) The husband and the wife forthwith do all acts and things necessary, signall required forms, pay all required fees and attendsuch introductory programsas may be prescribed at the contact centre nearest to the place of residence ofthe wife. (4) The children not spend any time with the husband other than as provided bythese orders. (5) Unless the parties otherwise agree, the children spend such time with thehusband under supervision at a contact centre for suchhours and on such days asthe contact centre can accommodate and such supervision continueindefinitely. (6) For the purposes of paragraph (5), the contact centre is requested toprovide all such time as the resources permit for the husbandto have timeoutside of designated weekends for such occasions as would enable the husbandand the children to celebrate Christmas,their birthdays and FathersDay. (7) For the purposes of paragraph (6), the wife deliver the children to, andcollect them from, the contact centre at the times anddays designated by thecontact centre. (8) For the purposes of paragraph (5), the husband and the wife be at liberty toprovide the contact centre supervisor with a copyof these orders and thereasons for judgment this day. (9) That save as to the mattersthat follow, the Wife has sole parental responsibility for the children. (10)

Before the wife makes any major long-term decision concerning the care,welfare and development of the children, she shall tellthe husband by email ofher proposal including details of schools to be considered and the names andaddresses of medical and otherhealth professionals to whom one of the childrenis being referred and give him at least 7 days to consider his position andrespond. (11) If the husband responds within the 7 days, the wife shall consider hisviews and advise him of either her acceptance or rejectionof his views and herrelevant reasons. (12) That the husband shall be at liberty to attend all school events andfunctions at which a parent would normally be entitled toattend unless thePrincipal determines otherwise after consultation with the wife but at alltimes, the provisions of paragraph (4)of these orders shall apply. (13) That the husband shall be at liberty to attend all medical and healthpractitioners attended by the children and to be givensuch information as aparent would normally be entitled to receive but at all times, the provisions ofparagraph (4) of these ordersshall apply. (14) That if the wife becomes aware of any significant injury or illness ofany of the children, she shall advise the husband by telephoneimmediately. (15) The Independent Childrens Lawyer provide a copy of this order andthe reasons for judgment this day to Mr P. (16) The husband be at liberty to provide a copy of these orders and thereasons for judgment this day to any psychologist or counsellorthat heattends. (17) The Independent Childrens Lawyer be otherwise discharged. (18) That save as to any issues of costs, all outstanding applications areotherwise dismissed. (19) That should any party desire to seek costs, they do so by writtensubmission filed and served no later than 4 pm on 14 November2014 and any partyreceiving such submission shall have 14 days thereafter to file and serve aresponse and the determination shallthereafter be made in chambers. (20) That pursuant to s.65DA(2) and s.62B, the particulars of the obligationsthese orders create and the particulars of the consequences that may follow if aperson contravenesthese orders and details of who can assist parties adjust toand comply with an order are set out in the Fact Sheet attached heretoand theseparticulars are included in these orders. IT IS NOTED that publication of this judgment by this Court underthe pseudonym Deane & Deane has been approved by the Chief Justicepursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER:MLC 8505 of 2012 Ms Deane Applicant And Mr

Deane Respondent And Independent ChildrensLawyer REASONS FOR JUDGMENT Inthis parenting dispute between Mr Deane (the husband) and Ms Deane(the wife), serious allegationshave been made concerning violenceand sexual abuse. The allegations involved the parties two children Yaged almost sevenyears and H aged three years. The other allegations includethat just before the separation of the parties in January 2012, thehusbandraped the wife. All allegations were strenuously denied by the husband. InM v M [1998] HCA 68; (1998) 166 CLR 69, the High Court of Australia setout the test to be applied. The court said: ...Inproceedings under Pt VII of the Act in relation to a child, the court isenjoined to "regard the welfare of the child as the paramount consideration"(s.60D)... In 2006, the relevant provisions of Part VII of the Family Law Act 1975(Cth) (the Act) were changed such that the reference by theirHonours is now contained in s 60CA. TheHigh Court went on to say: ...Thecourt is concerned to make such an order for custody or access which will in theopinion of the court best promote and protectthe interests of the child... Asfor the allegations, their Honours said: Viewedin this setting, the resolution of an allegation of sexual abuse against aparent is subservient and ancillary to the court'sdetermination of what is inthe best interests of the child. The Family Court's consideration of theparamount issue which it isenjoined to decide cannot be diverted by thesupposed need to arrive at a definitive conclusion on the allegation of sexualabuse... ... Nodoubt there will be some cases in which the court is able to come to a positivefinding that the allegation is well-founded. Inall but the most extraordinarycases, that finding will have a decisive impact on the order to be maderespecting custody and access.There will be cases also in which the court hasno hesitation in rejecting the allegation as groundless. Again, in the nature ofthings there will be very many cases, such as the present case, in which thecourt cannot confidently make a finding that sexualabuse has taken place. Andthere are strong practical family reasons why the court should refrain frommaking a positive findingthat sexual abuse has actually taken place unless itis impelled by the particular circumstances of the case to do so. Inrespect of the standard of proof of what findings the Court should make, theHigh Court said: Inconsidering an allegation of sexual abuse, the court should not make a positivefinding that the allegation is true unless thecourt is so satisfied accordingto the civil standard of proof, with due regard to the factors

mentioned inBriginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336, at p 362.There Dixon J. said: The seriousness of an allegation made, the inherent unlikelihood of anoccurrence of a given description, or the gravity of the consequencesflowingfrom a particular finding are considerations which must affect the answer to thequestion whether the issue has been provedto the reasonable satisfaction of thetribunal. In such matters 'reasonable satisfaction' should not be produced byinexact proofs,indefinite testimony, or indirectinferences. ... Turningto the task of the Court, their Honours said: Inresolving the wider issue the court must determine whether on the evidence thereis a risk of sexual abuse occurring if custodyor access be granted andassessing the magnitude of that risk. After all, in deciding what is in the bestinterests of a child, theFamily Court is frequently called upon to assess andevaluate the likelihood or possibility of events or occurrences which, if theycome about, will have a detrimental impact on the child's welfare... Indetermining what is in a childs best interest, s 60CA referred to abovedirects the Courts attention to s 60CC. The risk of harm referred to hasbeen clearly encapsulated in s 60CC(2)(b) which reads: the need toprotect the child from physical or psychological harm from being subjected to,or exposed to, abuse, neglect or familyviolence. Assenior counsel for the wife put to the husband in cross-examination, in respectof the sexual abuse allegations, there were onlythree people who knew whathappened; the husband and the children Y and H. In this case, I am notconfident that the Court can findthat the husband perpetrated the sexual abusealleged by the children. However, because of the totality of the facts, I dofindthere is an unacceptable risk of harm to the children unless thehusbands time is supervised into the foreseeable and indefinablefuture. Sadly,the husbands family, who perhaps understandably have an unshakeable faithin the husbands truthfulness, are sopartisan that I have no confidencethat they would be objective if a significant role such as that of supervisorwere granted tothem. They have had that opportunity in the past but theevidence provided by the husband about what role they did fulfil was notsatisfactory. Itis also important to observe two things about the wife. First, the husband andhis father expressed the view that the wife maliciouslymade up the allegationseven to the extent that there was a denial that the children were said to havemade the statements attributableto them. I reject that. Secondly, despite herexplicit belief in her daughters, the wife still

desired that the children havearelationship with their father. To that end, she wanted them protected fromharm. I accept her evidence about that as being reasonablebecause, absent therisk of abuse, the husband and the children seem to enjoy a relationship whichhas strength and enjoyment. Thechildren do not fear the husband yet theallegations continue. Thebackground facts of the marriage were uncontroversial until its very end atseparation. Thehusband was born in 1968 and is therefore now 45 years of age and the wife wasborn in 1979 and is aged 35 years. They marriedin December 2000. Byoccupation, the husband is a manager and the wife, although a professional, isengaged in home duties. In2007, the child Y was born and in early 2011, thechild H was born. Untilthe close of the 2011 year, it would seem that the parties lived as a family inharmony. As the year ended, the husband indicatedthat he felt down,unappreciated, unloved and was trying to come to terms with the loss ofhis mother who had diedthat year. He conceded the relationship with his familyhad fallen away but he indicated that was really about a problem over theChristmas period in which there had been a dispute arising from hismothers death. It was his view that it was more aboutwhat was to happenat Christmas rather than the death of his mother. He thought that it was arelatively short term problem morerelated to contacting this extended familyover that period of time. However, he felt on Christmas Day that he could justwalk outof the lives of his family including his wife and children and no-onewould notice. He conceded that the wifes family hadnot been involved inputting him down or contributing to this particular problem. Indeed, heconceded that the wifes parentswere decent people. He felt that he hadbeen bottling up his grief and to use his words, his marriage was going down thegurgler. There was no sexual relationship with his wife and hisonly solace lay with his two children. As for his relationship with hiswife,he said that she had been going crook at him for not doing variousthings. It was hard to get a sense of justhow the husband perceived the causeof his problems at that time. I find he was a troubled man. Ina curious question that he asked (because there was no indication of the problemin his affidavit) he put to the wife that duringthat same 2011 year, she hadrung him at work numerous times requesting that he come home to look after thechildren. To that end,the wife agreed. The husband then asked whether thiswas due to her incapacity to cope. The wifes unequivocalapproach was that that was absolutely

incorrect and the only reason that he hadbeen called at work was because she had a need tocall an ambulance or there wasan injury to one of the children needing his assistance to care for the otherchild. It must be rememberedat that stage that H was just a baby. Havingreceived that answer from the wife, the husband did not pursue the issue. Thewife took the issue up in re-examination andgave a number of elaborate examplesall of which were plausible. Rather than indicating that she had been unable tocope, they showedthe exact opposite. To the extent that the husband had wishedthe Court to draw an adverse inference against the wife, I would dothe exactopposite. All of this seemed to indicate that the husband was the one havingthe problems consistent with those to whichI have earlier referred. Whenthe husband gave evidence, he did not elaborate on the problem. I am left witha clear picture of the wife managing two youngchildren and, as 2011 drew to aclose, the husband was anxious, sad and not contributing much to family life. It was in that settingthat Christmas Day came and went and very quicklythereafter, the relationship between the parties ended. That gave rise to anumberof issues over the ensuing days after Christmas that led to the physicalseparation. I deal with each of those issues in turn. Theallegations of the wife are serious. They fit into three categories asfollows: (a) That thehusband assaulted the child Y by throwing her against a wall; (b) That thehusband raped the wife; and (c) That thehusband sexually abused both Y and H. SeniorCounsel for the wife opened the case on the basis that, save for the assault onY mentioned in (a) above and the rape of thewife, this was not a case in whichthe Court was being asked to make positive findings about sexual abuse. Hesubmitted that theCourt should find on the evidence that in respect of thoseallegations, there was an unacceptable risk of harm to the children. Fordifferent reasons, the Independent Childrens Lawyer agreed with thatapproach. The husband maintained a denial in respectof all three categories ofcomplaint. Counselfor the Independent Childrens Lawyer submitted that there was a need forsupervision of the husbands time withthe children because the wife wasutterly convinced of the childrens versions of events and as they were tocontinue to residewith the wife, more allegations would likely come. SeniorCounsel for the wife submitted that there was an unacceptable risk because ofwhat had happened to the children and what wouldpossibly happen if there was nosupervision. Littlewas said about the burden of proof and

the requisite standard of theCourts satisfaction about the allegations. Thehusband seemed tounderstand the standard of assessing the unacceptable risk to the children andthat the allegations were to beproved on the balance of probabilities. That isa well-worn phrase and it requires consideration in a case as serious as this. Thehusbands understanding arises because, although without legalrepresentation, he had been through (or partly through) twocriminalprosecutions where the Crown did not proceed because they could not prove theirallegations based on the limited evidenceavailable. Section140 of the Evidence Act 1995 (Cth) provides that in a civil proceeding,the court must find the case of a party proved if it is satisfied that the casehas beenproved on the balance of probabilities. There is a caution to thatstatement found in subsection (2) which provides that withoutlimiting thematters that the court may take into account in deciding whether it is sosatisfied, it is to take into account: (a) the natureof the cause of action or defence; and (b) the natureof the subject-matter of the proceeding; and (c) the gravityof the matters alleged. Thenature of these proceedings is an inquiry into whether certain events occurredwhich affect the welfare of children and whether,based on those findings, thereis an unacceptable risk of harm to them. There are grave consequences for thechildren as well astheir parents arising from these findings about behaviourwhich is completely inconsistent with the very nature of a parent and childrelationship. A finding of sexual abuse but also a finding of unacceptable riskhave damaging consequences for parents and theirreputations but also forchildren whose relationships with the affected parent must be limited andmonitored. A natural and freerelationship is often not possible. This is sucha case. Buthow should the Court approach the determination of these findings in the lightof those consequential and significant restrictionson a parent and childrelationship? InBriginshaw which was the forerunner of s 140 of the Evidence Act, (andmentioned in paragraph 5 above) the Justices of the High Court of Australiadiscussed the concept of the distinction betweenthe criminal law standard andthe lesser burden in civil cases. They agreed there was a difference because ofthe words used in thelegislation they were contemplating. Those words were:it shall be the duty of the court to satisfy itself, so far as itreasonably can. The current standard of balance ofprobabilities can be seen in those words. LathamCJ said there was no mathematical scale according to which degrees of

certaintyof intellectual conviction could be computedor valued but there weredifferences in degree of certainty which were real. The Chief Justice cautionedthat: No court should act upon mere suspicion, surmise or guessworkin any case. In a civil case, fair inference may justify a finding uponthebasis of preponderance of probability. The standard of proof required by acautious and responsible tribunal will naturally varyin accordance with theseriousness or importance of the issue. Ihave already referred to what Dixon J said but it bears repeating morefully: The truth is that, when the law requires the proof of anyfact, the tribunal must feel an actual persuasion of its occurrence or existencebefore it can be found. It cannot be found as a result of a mere mechanicalcomparison of probabilities independently of any beliefin itsreality. Except upon criminal issues to be proved by the prosecution, it is enoughthat the affirmative of an allegation is made out to thereasonable satisfactionof the tribunal. But reasonable satisfaction is not a state of mind that isattained or established independentlyof the nature and consequence of the factor facts to be proved. The seriousness of an allegation made, the inherentunlikelihoodof an occurrence of a given description, or the gravity of theconsequences flowing from a particular finding are considerationswhich mustaffect the answer to the question whether the issue has been proved to thereasonable satisfaction of the tribunal. Insuch matters "reasonablesatisfaction" should not be produced by inexact proofs, indefinite testimony, orindirect inferences. RichJ said: The nature of the allegation requires as a matter of commonsense and worldly wisdom the careful weighing of testimony, the closeexamination of facts proved as a basis of inference and a comfortablesatisfaction that the tribunal has reached both a correct andjust conclusion. StarkeJ added that civil causes may, not must, be decided on a balance ofprobabilities. That description has now been overcome bythe Evidence Act. Therefore,the important considerations in approaching the balance of probabilities testare that the Court must be comfortable beyondmere suspicion, surmise orguesswork and the correct and just conclusion can only be arrived at after aclose examination of factsproved by direct testimony and reasonable inference.As the outcome urged by the wife has very serious consequences for the children,particularly having regard to s 60B of the Act, the level of satisfaction shouldalso be produced by clear evidence and plausibleinferences. I am satisfied inthis case that

what follows satisfies those requirements. THE HUSBAND THROWS THE CHILD Y AGAINST A WALL Ofthe three categories of incidents, the first was perplexing. Because there werefinal parenting orders agreed between the partiesin 2013, some of the issuesthat occurred prior to those orders were not included in the wifes trialaffidavit in 2014. Thehusband said generally, in relation to allegations bythe wife, that in so far as allegations were made against him about Y, thepolice withdrew the charges. When cross-examined, the husbanddenied tossing Y but acknowledged thathe was interviewed by thepolice who charged him with an offence of assault but that they ultimatelydropped it. Seniorcounsel for the wife put to the husband thathis view was that this allegation was all made up and the husbandagreed. It was then put to him that it was ridiculous to say thathe had ever acknowledged having assaulted Y and again heagreed. Heacknowledged that when interviewed by the police, he made a nocomment record of interview. It seems thatas the matter progressedthrough the Magistrates Court, a summary case conference was held atwhich he attended representedby a lawyer. To senior counselscross-examination, the husband denied ever making any admissions but was unableto explainhow police records showed that during the pre-trial conference, hehad conceded that he threw his four year old daughter after shejumpedonto his testicles while playing. He was said to have told the policethat he had no intention of assaulting his daughterand the police reported thatas a consequence of that, there were minimal prospects ofconviction. The police authorisedthe charge to then be withdrawn. Incross-examination, the husband was adamant that he had not said those words andmore importantly,that he had not changed his story. On the balance ofprobabilities, I find he did and he has. Asignificant piece of evidence about what occurred that day came from the wife. The husband asked her in cross-examination why,if she saw him throw Y, she hadnot gone to the doctor. She gave the plausible explanation that they eachdiscussed what had happenedat the time and that Y seemed fine. The husbandcross-examined no further. However, when he completed his evidence, hevolunteeredthat there had been an incident in which Y had jumped on histesticles and he had rolled with her and she hurt her shoulder. Throughouttheproceedings, he was at pains to point out that Y had made references to hittinga wall and a fireplace but maintained that noneof that had

occurred. Thechild Y was interviewed by the Department of Human Services and the evidencefrom that interview was contained in the Magellanreport admittedinto evidence by virtue of s 69ZW of the Act. In the interview which took placeon 13 January 2014 in theabsence of her mother, Y told the interviewer that thehusband had thrown her in the wall, fire place and the TV cabinet.The writer of the report who was not required for cross-examination said thefollowing: [Y] was spoken to further about this and she spoke atlength about the incident in which she was thrown against the wall but she couldnot remember any details of the other incidents. (My emphasis) Theonly inference open to me is that Y was clear and unequivocal about the incidentof being thrown against the wall even thoughshe may not have remembered othermatters. In a subject that I shall return to below, there was no indication inany evidence fromany expert that Y had been coached, manipulated, enticed orinappropriately cross-examined by any person to obtain the statementsshe made. There was no evidence that Y, in January 2014, was not able to remember anincident that occurred in January 2012. Theapproach that the husband took to the criminal law proceedings at the time ofpolice intervention was to simply make no commentin circumstances where he musthave known that the only person who would otherwise have given evidence was thewife. He did notexplain his position other than that he had had legal advicebefore he was interviewed. If it was as simple and plausible as heproffered inre-examination, why did he give such an explanation as the one that he gave inre-examination? Having said no suchincident occurred, why make reference inre-examination to Y jumping on him in a way that was consistent with the deniedpolice report? I am very conscious that the husband had every citizensright of silence but it must have occurred to him that if he ultimatelyhad togive evidence about what did occur, his silence would provoke an accusation ofrecent intervention particularly where he hadhad legal advice at the time. Whenconsidering the evidence of the police withdrawal report, I accept that theofficer who took part in the conversation and anyrelevant lawyer who may haveappeared for the husband, were not called for the purposes of cross-examinationon that evidence. Thehusband was unable to explain how that report could havebeen so inaccurate having regard to his version that he never made a statementto that effect. The probative value of the statement, based on its admissioninto evidence because of s 69 of the

Evidence Act, lies in the fact that it wasthe husband who volunteered in re-examination that Y had jumped on histesticles. In his re-examination,the husband went on to acknowledge that Y hadhurt her shoulder but that had occurred when he rolled with her. Ifind that an incident did occur in which Y was thrown by the husband and theprecise details of what occurred do not matter. Thetruthfulness of the husbandand his reticence to tell the whole truth about what occurred puts histruthfulness in doubt. Bearingin mind the unprompted statement of Y to theDepartment of Human Services, I find that the wifes version of whathappenedto the child that day is the more probable one. THE RAPE OF THE WIFE Itwas the wifes evidence that in this difficult period between Christmas2011 and the separation in January 2012, the husbandraped her in the masterbedroom of the family home. He was charged by police and committed for trial. The wifes evidencewas tested in the Magistrates Court committalhearing but that evidence was not put before me nor did the husband endeavourtouse it in cross-examination of the wife. The husbands response to thewifes allegation was that he denied everbehaving in an aggressivemanner towards the applicant. He incorrectly said that the applicantlaid a charge of rapeagainst him but I understood him to mean that it waspolice who had done that. The proceedings were ultimately discontinued afterhis committal to the County Court of Victoria. In his affidavit, he said:The charges were in fact withdrawn because of lackof evidence. As was observed by senior counsel for the wife in final address, the absence ofevidence does not mean thatthe incident did not occur. I agree with thatsummation. As with all prosecutorial matters, the Crown has to decide whetherornot it can establish its burden of proof beyond reasonable doubt. Noexplanation was given other than the fact that the discontinuanceoccurred andthe husbands statement has to be viewed with some scepticism. Whilst hesaid there was a lack of evidence, thisCourt certainly had the evidence of thewife. Whenthe husband was cross-examined, he responded vehemently that he did not rape thewife. He said that had not been in the bedroomon that day because he was onthe couch with H trying to settle the child who had just been breastfed by thewife. This was an unusualanswer because in the committal proceedings at whichthe wife was cross-examined, it would seem that that question was never puttoher. At least the husband could not remember it but senior counsel for the wifecross-examined

the husband on the basis thathe was reading from the transcriptand the husband did not deny it. The husband told the Court after being warnedabout his privilegeof confidentiality, that he told his lawyer on that day whatoccurred that night. He was adamant that he did not have sex with thewife onthat night and it appears that there was no sexual intimacy thereafter. Iam very conscious that this case is about the welfare of children and the focushas and continues to be on the question of any riskto the children in thehusbands care. The question of any sexual impropriety can only berelevant to the issue of credibilityof both parties and the question ofviolence between them. Family violence is a relevant issue for the purposes ofs 60CC to whichI turn below. Whilst the wife bears the onus of proof and thestandard is the balance of probabilities, for the reasons I set outearlier, Iam not prepared to surmise or guess as to exactly what happened that night whenthe wife said she was raped. The partiescontinued to live under the one rooffor some time thereafter and it was not until July 2012 that any application foran interventionorder was sought by the wife. Notwithstanding my concern aboutthe wall incident, this is not a case in which I would be preparedto make ageneral finding of lack of credibility by either party such that I coulddetermine the wifes allegation simply basedon the preference of oneversion over another. In respect of this incident, I am not prepared to make afinding that the husbandraped the wife. THE ALLEGATIONS OF SEXUAL ABUSE InJune 2012, by which time the parties had been separated for six months, the wifesaid that Y demonstrated to her what she calledexercises that thehusband did with her when in his care. The wifes description was of thechild gyrating grointo groin whilst lying on top of her. Inquiries by the wifeof the child indicated that some of these exercises occurred at thehusbandshome but that they had also been done prior to separation. Ysaid that they occurred when the wife was at church. Thewife took Y to the police where she was interviewed and later that night, thewife said that the child told her that the husbandhad put his hands in thechilds pants and inserted his finger into her vagina. This resulted infurther contact with thepolice who then arranged for a forensic examination atthe Victorian Forensic Paediatric Medical Service at the Royal ChildrensHospital the following day. There is a conflict in the evidence about thefindings of that examination. The wife said that therewas no physical evidencethat the husband had digitally raped Y but they did identify a scratch or cut

inher mouth consistent withYs statement that the husband had hurt hermouth with his finger. The conflict arises because the Department of HumanServicesstatement indicates that the examination did not revealany abnormalities and the allegations could not be supported or refutedby the forensic examiner. The wife was not challenged aboutthis particularincident so it seems probable that her version is correct. Added to thathowever, the police then followed up theinterview with Y and arrested thehusband. That occurred the very same day as the examination of the child. Throughout his evidence,the husband indicated that at no stage had he eversexually or physically assaulted either of his children. Whenthe cross-examination of the husband began, he maintained that his children hadnot made the statements alleged. He alteredthat moments later to indicate thatif they were saying it, he had to accept that that was so. That must be thecase bearing inmind that statements have been made to other sources includingthe wifes mother who gave evidence in support of her daughter. Thematernal grandmothers evidence was not challenged by anybody. Consistently,the husband was unable to give any plausible explanation as to why the child Ymight say what she did. He made no denialof the wifes evidence that theforensic examiner saw a cut in the childs mouth from which the wifeconcluded that itwas consistent with the allegation that the child made. Whenthe husband was interviewed by the police, he said that the incident could nothave happened because the children were in theone room and as a consequence,they would have either been aware of each other or, at least have said somethingto each other. Itwas put to the husband that the children were not in the oneroom until Christmas Day immediately prior to separation. It was thewifes case that Ys sleeping arrangements were altered on ChristmasDay and she was moved in with H but up until thattime, the children were inseparate rooms. It was put to the husband that he had been conscious of thefact that an allegation hadbeen made by his daughter that he had sexuallyassaulted her in her bed and that he was looking for an alibi to show that thatcouldnot have happened. The husband maintained that the children were not inthe one room from December 2011 but earlier. He thoughtthat it was October. There could be little confusion about that simple event because of the referenceto Christmas Day. I takeinto account the vagueness of the husbandsevidence about the date but also the fact that around this time, he wasdistracted,unwanted

and not himself. I accept on the balance of probabilitiesthat the wifes version about the bedroom changes is morelikely. Duringthis time, proceedings were on foot in the Federal Magistrates Court and inSeptember 2012, further allegations were made bythe wife (said to have beenmade by Y) that the husband had kissed and sort of lickedYs vaginal area with histongue. Ultimately, the police chose not to doanything about any prosecution and the husbands position was that allallegationsagainst him made by the police had either been discontinued orwithdrawn. The husband seemed to take some comfortfrom the factthat there was, in his view, no evidence against him but I accept that havingregard to the ages of the children andthe lack of corroboration of any of theseevents, the police had little choice but not to proceed. Inthe middle of 2012, because of the allegations relating to the children, thewife was granted an intervention order against thehusband and both childrenwere listed as affected family members. That order was granted for one year on6 October 2012 and waslater extended for a further year and is soon to expireor has already expired. The husbands position was that he was verysuspicious about contacting the wife with that intervention order extant but inany event, senior counsel for the wife made clearthat the wife intends to seekan extension. Theproceedings begun by the husband in the Federal Circuit Court were transferredto this Court in October 2012 because they weredeemed to be part of theMagellan assessment. As a consequence, in addition to the benefit that theCourt then had of the Departmentof Human Services involvement, there were alsoexaminations of the husband by Dr E and also the involvement of psychologist MrPto whom I shall turn later in these reasons. Dr E assessed the husband asunlikely to have sexually abused Y and Mr P felt the sameway. That culminatedin orders being made by this Court by consent of the parties. The wifesexplanation for the consentto those orders in 2013 was that the time was tocommence on a graduated basis and build up until eventually the children were tospend four nights a fortnight with the husband in July 2014. Orders were alsomade for the wife to attend counselling with Ms Sand to follow herrecommendations. Toall intents and purposes, those orders were final and the parties should havethen moved on with their lives. However, furtherallegations then surfaced. Onlyweeks after the final orders were made, the child H told the wife that thehusband had touched her bottom. Thewife

took the allegationseriously but acted cautiously and rather than go to the police, went to the MsS. She deferred to Ms Ssadvice. During that period of time thehusbands contact with the children was to have been undertaken witheither of hissister Ms C or his sister Ms N being in substantial attendance upuntil 31 August 2013. The wife said that Y told her that on anumber ofoccasions she was uncomfortable because she was alone with the husband. Thechild expressed concern that the husband wouldgo into their room at night andhurt her sister H. Again, the wife went to see Ms S to discuss those issues andtook her advice. Bythe end of November 2013 there were behavioural problems with H which the wifewas unable to explain and on 3 December 2013, Hsaid that the husband had puthis finger inside her genitals. The wife asked when this had happened and thechild said that it hadoccurred whilst Y had gone to the toilet at the home ofthe husband. The wife then described H simulating what had occurred andtherewas a remarkable similarity between the conduct described by H and that whichhad been described by Y a year or so before. Y was present during thisdiscussion and commented that it could not have happened because Y had only beenin the toilet and awayfrom H for a short period of time. According to thewife, Y then asked: Did he use his tongue too? The wife said that H replied No, just his finger. Thisdiscussion took place only in the presence of the wife. There was nocorroboration of it by any other source. Albeit that thehusband was withoutlegal representation, he did not challenge the wife at all about this particularincident. However, he saidthat in response to the wifes allegationwhich he had read in her affidavit, he maintained a diary of events and that ontheday referred to by the wife, H had a big day playing with cousins andhad become irritable. Apart from denying thathe would ever behaveinappropriately with his children, he simply referred to the diary entries. Thus I am left with the perplexingproblem of trying to work out whether he wasdisputing the particular facts that might have given rise to the situation asallegedby the wife. He did not say that there was any situation in which thechildren were separated while Y went to the toilet. He didnot say that therewas no occasion on which he was alone with the children. He did not say whetheror not his sister was presentand undertook the responsibilities of thetoileting of Y and/or H. Whenhe was cross-examined by senior counsel for the wife, the husband acknowledgedthat he did not see the wife as a person proneto lying. In fact, he

describedher as a religious person. His mantra throughout the proceedings was that hecould not explainwhy it was that the children were saying what they were. Mostimportantly, he did not point to any evidence from any expert to indicatethatthese children had been coached, manipulated or bribed in such a way that such astatement might be made. The significanceof this event is that on the basisthat I accept that the wife accurately reported what was said, I must find thatboth childrenparticipated in the discussion. Something happened but justexactly what, remains a mystery. Inhis affidavit to which I have referred, he made reference to the childrenplaying with their cousins. No evidence was led by thehusband about whatoccurred that day that might give some insight as to why this all occurred. Asa consequence of the statements of the children, the wife terminated thehusbands time and an application was filed in thisCourt to suspend theorders that had been made in June 2013. The hearing came before SeniorRegistrar FitzGibbon on 18 December2013 at which time the husband wasrepresented by counsel. Pragmatically or otherwise, on that day, the husbandconsented to ordersthat his time with the children be supervised (as distinctfrom requiring the persons to be in substantial attendance). The supervisorwasto be a professional person. Shortlyafter the allegations had been made in early December 2013, the wife attended onpolice to indicate what the child H had said. The Department of Human Servicesreported that the wife told uniformed police that she had taken H to the generalpractitioner wherethe child was examined and the doctor had discovered thatHs hymen had been ruptured. The Department expressedconcern that the wife had not mentioned that to the specialist police squadundertaking the investigation. The allegation of thewife having made thatstatement to uniform police was put to her in cross-examination by counsel forthe Independent ChildrensLawyer. The wife denied ever making such astatement. Importantly, no evidence was led of any examination by a doctorunder whichsuch a statement was made nor was any evidence called from a policeofficer or any file produced under a subpoena, to indicate thatsuch a statementhad been made. Absent the leading of such evidence, I am very cautious aboutmaking any adverse finding againstthe wife in circumstances where she bluntlydenied having said it. TheDepartment of Human Services involvement in December 2013 occurred on moreoccasions than one. At no time did the child Y makea statement that gave riseto

any concern by the Department. In January 2014, Y was interviewed by theDepartment of Human Servicesand it was at that time that Y volunteered theevidence about being thrown by her father. The Department was not able toelicitany details of any other incidents. However, the worker from theDepartment then asked Y whether there as anything not sogood withDad and the child reported: He did something disgusting. Hedid some exercises without clothes on and he quickly put his clothes on when heheard a car thatsounded like Mums. Theworker endeavoured to ascertain from the child just what these exercises wereand Y demonstrated by holding herself by the waistand wriggling her hipsbackwards and forwards while sitting on the chair. The remarkable andconcerning aspect of that demonstrationwas that it was consistent with theevidence of the wife of what had occurred to her with Y quite a long timebefore. The childtold the worker that the husband had thought he heard a carand went back to his room and put his clothes on. Y then described thatthisincident occurred when the wife was at night church and H was asleep so it musthave occurred prior to the time of separation. Undeterred,the Department of Human Services worker then sought further indications from Yas to whether there was anything else thatconcerned her about her father andshe made reference to the fact that H had said that there was somethingdisgusting that had beentold to her and her mother whilst sitting on hermothers bed but she was unable to remember exactly what it was. Thedisconcerting part of this evidence is the use of language. The child L agedsix was describing disgusting things. Again, no evidence was putbefore the Court to indicate that the child had been manipulated or that she wasnot old enough to beusing the language described. The Department of HumanServices certainly did not indicate that they thought Y had beenmanipulated. TheDepartment of Human Services officers then spoke to Ms S who confirmed that thewife had contacted her about the allegations thatH had made and she had advisedthe wife to slow down and not overreact and to put things intocontext. Ms S told theDepartment that she thought that the wife hadchallenged Y about whether or not things said by Y had indeed occurred and thatthewife was following her advice. TheDepartment then spoke to the husband who denied the allegations and could notgive any explanation as to why Y might say thathe was naked in her bedroom. TheDepartment of Human Services file shows that when the husband wasinterviewed, he

indicated that at the time that the lastcontact occurred inNovember 2013, he was never left alone with H but at the same time, he did saythat he had taken the childrentogether shopping. He produced no detailedevidence about all of this. Theuncharacteristic behaviour of H in December prompted the wife to attend hermedical practitioner. According to the wife, thechild made statements aboutwhat her father had done but the doctor simply said that the matter should beinvestigated by the police. In the meantime, the doctor ordered tests to assesswhether H had a urinary tract infection. The discussions with Ms S were intheknowledge that the tests had been taken but their outcome was not then known. It was Ms S who suggested that the wife wait forthe outcome of those tests. Ultimately, they came back clear. Throughout2014, further statements were made by the children including relating to periodswhen the children were with the husbandat a time when, under the orders, theyshould have been supervised. The wife queried the children and was told thatneither thehusbands sister nor father was present. On a subsequentoccasion, Y told her mother that she had fallen outside the housewhilstclimbing on a slide and had hurt her arm. The child told the wife that thehusband was there with them but that her grandfatherwas inside cooking. Thechilds aunt was not there according to Y because she was at work. Thehusband responded to theseallegations by insisting that his time with thechildren was always supervised by either his father or either of his sisters. Hethen asserted that the words used by the wife were afabrication. He again denied that he had been sexuallyinappropriatewith the children. However,in relation to Y being hurt on the slide, the husband agreed that she was hurtas she described and in relation to his father,the husband said that he waswatching the girls through the kitchen window overlooking the backyard. Thisis another example of the disconcerting accuracy of the reporting by thechildren. Throughout his evidence, the husband saidthat the wife had made thestatements up or fabricated things and that included the complaint by the wifeof lack of supervision. However, there is no doubt that Y reported the slideincident, hurting herself and her grandfather being inside cooking. Theaccuracyof these statements as reported to the wife, combined with what seemsto be a very clear recollection by Y of a variety of events,is veryconcerning. Inrelation to the accuracy of Y, whilst investigating the protective issues, theDepartment of Human Services expressed concern aboutthe inconsistency

inYs statement about the exercises. The child reported thatshe was told at kindergartento do the exercises so she could be in thekindergarten concert at the end of the year. The child reported that she andher fatherhad their clothes on when they did the exercise. TheDepartment was concerned that the complaint by Y was that the exercises wereoccurring at a timewhen the child was with her father under court orders butshe also seemed to be referring to the incident I have earlier mentionedthatwas said to have occurred at the home where the parties lived together. Y toldthe Department that the exercises were somethingthat she had learned fromkindergarten. The Department raised concerns as to what the child had reportedwas valid having regardto the inconsistencies. Ultimately,the Department of Human Services said that the repeated nature of thesestatements caused concern. They were unable tosubstantiate any concerns. Whatthat does not explain is why the statements were consistently made. MR P MrP is a clinical psychologist who was engaged to provide an expert report to theCourt. He filed his affidavit through the IndependentChildrens Lawyerin April 2014. No party required him for cross-examination. MrP had prepared a report for the earlier proceedings which culminated in theorders of June 2013. He spoke to the wife who gavea vivid description of allof the problems including the allegations. When the husband spoke to Mr P, heindicated his dismay atthe allegations particularly having regard to the factthat he had taken the precaution of always having a family member presentandone of his sisters was always present at times of toileting and bathing. Noneof those sisters gave evidence in these proceedings. Indeed, one of the sistershad, no doubt at the request of the husband, filed an affidavit on his behalf inwhich she was very supportiveof him. On the first day of the hearing, thehusband indicated that he was not relying on that affidavit. It became asubject ofsome controversy. It transpired that the husband had not spoken tohis sister about not giving evidence but had unilaterally chosennot to callher. No adequate explanation was given for that. The husbands statementwas that he had been conscious of thehelp that he had received from his familyincluding his sister. The sister had apparently only recently joined theVictoria Policeand he felt it inappropriate to impose upon her to come away andattend court. It was put to the husband that the statements byhis sister to MrP and the Department of Human Services were all supportive but the wife

wasmaking an allegation of the absenceof the sister despite her responsibilitiesto supervise. The wife made the allegation and the husband well knew it was acontroversialissue. It is hard for me to accept that the sister would not havebeen able to be called away from a training program in such aserious matter asthis. Atthe time that Mr P saw the husband, he was contemplating proposing that thechildren live with him. He made clear to Mr P thathe thought the wife had noawareness of the enormous trauma she had imposed upon the children and thedamage that was being causedto them emotionally. That statement is entirelyinconsistent with the husbands concession in evidence that the wife wasnota person prone to lying and his further statement that he thought perhapsthe children were making all of this up. That too wasinconsistent withparagraph 17 of the P report in which the husband said that he genuinely doubtedwhether H had said anything ofa sexual nature to her mother at all and therewas nothing about Hs behaviour to suggest even remote discomfort. All ofthatnow has to be seen in the context of the wife being the unchallenged futurecarer of these children. When asked why the husbandhad changed his position,he indicated that he had to work. MrP saw no reluctance on the part of the children who approached their father withease, confidence and certainty. They showed himan abundance of physicalaffection and conveyed no hesitation around him. The husbands behaviourtoo towards the childrenwas unremarkable. WhenMr P interviewed Y, the child told him that while she saw her father on Saturdayand Wednesdays, her aunts and her grandfatherwere always there watching to makesure that her father did not hurt them. The child had a very clear understandingof what was beingsaid about her father. That said, Mr P noted that Y was notworried or concerned about her father but that the child understoodthat hermother was concerned. Mr P clearly examined whether or not Y had been coached. He said: [The child Y] seemed aware of some of the details,explaining that her mother did not tell her or [H] what had happened because thepolice had told her that she was not allowed to. Gentle probing around thesematters produced nothing of significance; in reality,[the childs]presentation was unremarkable. Mr P then said that one could only ponder what was communicated to the childrenabout their parents and their respective families. MrP opined that it was extremely important to corroborate whether the supervisionas described by the husband his family occurredat the level of

diligence theyclaimed. It is with reluctance that I find that it has not been as diligent asit could have been. I make that finding on the basis of a number of mattersincluding that the evidence of the husbands sister Ms C was not availableto be tested. It was not so much that she as unavailable or unwilling, I findshe was not even consulted about the issue. For someonewho no doubt isentering into a career in law enforcement, one would have thought that she wouldhave been very keen to be involved. Further, I find that whilst thehusbands father was certainly looking through the window whilst cooking,I am left with theimpression that there may have been other occasions when thecloseness of the supervision was not great. That is particularly sowhen therelationship between the paternal grandfather and the wife is poor. Hedescribed her in evidence as evil. He made clear to the Courtthat he did not accept that there was any foundation for the allegations againsthis son. It is understandablethat families would stick together and would findthe allegations against one of their own as revolting. But the grandchildrentooare part of that family. The lack of objectivity and the absence of thesister makes me unsure as to whether the supervision wasdiligent. MrP was referring particularly to the diligence of supervision around thechildrens toileting and general hygiene but theallegations of thechildren persisted during that period of time and there is the very unusualdescription of Y relating to the eventsthat may or may not have occurred priorto the separation when her mother was at church. The preciseness of the detailabout herfather being naked and hearing a car and scurrying away to redress,adds to the intrigue. MrP found no reason to believe that the wife was not reporting accurately what herchildren had said. Obviously, Mr P was not ina position that I have been inwhere the evidence has been tested. MrP said that when dealing with very young children it was difficult to assess theaccuracy. He saw nothing to support the concernsof the wife. He noted therewas nothing particular about the childrens behaviour other than thatwhich had been reportedby the wife which was of concern. What concerned Mr Pwas that the allegations continued to be raised and because of the ages ofthechildren, it gave rise to the very real risk of them being consolidated as facteven if they were not true. It concerned MrP that the children may come tobelieve that their father was the perpetrator of the abuse that they believedhad happened to themand that there was commensurate emotional and psychologicalfallout as well as

implications for later psychological interpersonalfunctioning of the children. I accept that but it must be weighed against theissue of risk. MrP opined that the matter needed to be treated carefully and thoroughly. Much ofthe evidence of the wife has only been peripherallytested but as I observed inthe hearing, there was no indication that the allegations were not made by thechildren nor was thereany indication that the wife had manipulated thesituation in some way despite the criticisms of the husband and his father. MrP was concerned about the serious consequences if it was found that the wifecontinued to pursue false beliefs to thedetriment of the childrenif there was compelling evidence that what the children had reported to hercould not possibly have happened. It is that sentence that troubles me. On thebalance of probabilities, I find these things could have happened. CONCLUSION ABOUT THE FACTS Inaddition to the more precise matters mentioned above, there was considerableevidence that was not tested by the husband. I cautionedhim and explained thetesting process. He said he had been given legal advice and assistance butadmitted he had been told he wouldnot have to question his wife. When Idisavowed him of that view, he had some time to collect his thoughts and writeout his questions. His cross-examination was still perfunctory. Much of thetesting of the wifes evidence was left to counsel for the IndependentChildrens Lawyer. I have dealt with some of the more explicit issues butthere were others. The following observations canbe made from the evidenceincluding in addition to the matters set out above: The allegationscontinue to be made even after supervision orders were made; There is theevidence of the consistency between the description by Y of what her father didwith his fingers and the scratch insideher mouth; Thechilds description of what the husband did was age appropriate and thechilds reporting of the husband saying thatno-one was to be told becausehe would go to gaol is not something that I accept a child couldmake up. It is an adultconcept. There is no evidence that this child wasschooled and there is no evidence that I can find to suggest thatthe wife just made up these allegations; I have theevidence of the maternal grandmother which is consistent in detail with what thechild said to her mother and conceptsagain of an adult nature which areinconsistent with child fantasy; The evidence ofthe demonstration of the exercises in the absence of schooling wasconsistent with what the child toldher mother when she was asked to explainwhat she was

doing; There is theevidence of the children speaking about where each of them was relating to Ybeing in the toilet but each acknowledgingconduct on behalf of the husbandwhich related to sexualised behaviour involving the husbands tongue; There is theevidence of H telling a doctor what had happened to her; There is theconsistency in each girl of the nature of the allegation of digital penetrationfollowed by what senior counsel describedas the husband lickinghis finger. The wife gave evidence that this conduct had also been observed inher personalrelationship with the husband much earlier in their respectivelives. This too shows a pattern which, if the allegations are notmade up orcoached, must be seen to have a ring of reality about them; The consistencyof the allegations which rarely seemed to vary except in relation to thedescription by Y about conduct before orafter separation may very well beexplained by Mr Ps view that the children have come to think of thesematters as fact butthe husband conceded that he did not know how they couldcontinue to tell such vivid stories. Forthe reasons earlier articulated, it is not appropriate that a finding be madethat these events did occur but it is conceivablethat there is no otherplausible explanation as to why the children would make these things up. Nomotivation was put before theCourt as to why the wife would say these thingsother than Mr P indicated that there was some overlay betweentheseallegations and the wifes own experience of her allegation ofsexual assault by the husband. In my view that might be a plausibleexplanationto explore but the husband did not do so and there is no other evidence toindicate that the wife has some motivation. One might expect a person in thewifes position who believed that her children were being sexually abused,to strongly resistany contact at all. She was challenged about that incross-examination and I accept that she genuinely believes that absent thisconduct, the husband has much to offer the children and they enjoy his company. In her view, that time needed to be supervised andthe children would otherwiseenjoy the benefits of a relationship. Examinedfrom the opposite perspective, for the wife to perpetrate such a monstrosity onher own children would require significantplanning and almost indoctrination ofthe children. Apart from the husbands statement that the children havetold him thattheir mother says these things, there is no such evidence. Thesechildren have been interviewed by many people and Y has undergonemedicalexaminations. It would be impossible to expect that

she does not understandthere is a dilemma. She clearly told Mr P thather fathers time with herwas being supervised to prevent her being hurt. I accept senior counselssubmission thatit is not possible for the Court to accept that the wife simplymade this up. In addition, it was not the Independent ChildrensLawyers position that the wife had made these allegations up. Therewere some minor matters which add to the intrigue of how truthful the husbandwas. In brief, those were: the throwingagainst the wall incident indicated that the husband had the perfect opportunityright from the outset to indicate thatit was an accident. He did not do so andhis version only emerged in his own re-examination; there is theevasive response about his own unilateral action in not calling his sister whocould clearly have answered questionsabout just how much time these childrenwere alone with the husband; over a simpleincident relating to a text message from the wife to the husband, he waschallenged about whether or not he could producethe response he sent. He wasemphatic that he had responded but was unable to produce that response on hismobile telephone. Hebroke down in the witness box murmuring that it was notthere. He subsequently said that he found the messages but they were neveraccepted by the wife as having been received. It was not a decisive issue norone that went to the husbands credit but thestressors of the proceedingsas indicated by his distress in the witness box suggest that he is constantlyvigilant about criticismof his role as a parent. During the proceedings, whenI suggested to the husband that he needed an alternative proposal if I foundthere was an unacceptable risk, he bluntly said that he would walk away from thelives of the children. It was only after encouragementthat he thought aboutthat and changed his mind over the ensuing days but his impetuosity wasconcerning. WhilstI accept there is insufficient evidence to make positive finding that thehusband has done what has been alleged against himout of the mouths of thechildren, the totality of the facts indicates that absent some close monitoringof the children in his presence,they are at risk of abuse and I find that riskunacceptable having regard to the nature and extent of the allegations. SUPERVISION TheIndependent Childrens Lawyer and senior counsel for the wife bothpromoted future time to be supervised and in discussionwith the husband, hereluctantly accepted that it was probable. His view initially was that itshould be for six months but afterdiscussion, he conceded that H would still bevery young and vulnerable and that it

should be much longer. Sadly, the husbandcameto court (for the purposes of final address) with two women whom he hadsaid had offered themselves as those supervisors. When Istood the case downfor the purposes of some discussion between the parties about whether or notthose people were suitable, it appearsthat they withdrew their support. Indiscussion also, senior counsel for the wife indicated that his client wasprepared to do twoto three hours per fortnight but after contemplation, thattoo was withdrawn. The wifes initial position was that there shouldbesupervision by a professional agency but the reality is at the estimated cost of$80 per hour, that prospect must be seen as limited,if not unlikely, havingregard to the limited financial circumstances of the parties. The husband wascriticised at some lengthin cross-examination about the fact that he hadacquired a home in which there was no equity because of the extent of hisborrowing. The commitment to the mortgage apparently takes up a significantpart of the husbands wage. Accordingly, a professionalsupervisor seems unlikely. Theparties were otherwise unable to come to an agreement as to who should be theappropriate person. That is a matter that theycan continue to deal with in thefuture. At this stage however, limited as it may be, the only alternative I canconsider appropriateis a contact centre. THE LEGAL ISSUE Section60CA requires that in deciding whether to make a particular parenting order, theCourt must regard the best interests of thechildren as the paramountconsideration. Those best interests are determined under s 60CC of the Act. That particular provisionis a mandatory provision requiring the Court toconsider primary considerations and additional considerations. Indetermining the primary considerations, the Court is required to look at thebenefit to the children of having a meaningful relationshipwith both parents. It does not follow that a restricted, if not very limited time, between a parentand child prevents the childfrom having the benefit of a meaningfulrelationship with that parent. It must obviously be accepted that such arestriction makesit very difficult for parents to engage in many activitiesthat they would otherwise enjoy if those restrictions were not present. It isclearly understood by the Court that limited and controlled time in a contactcentre does restrict the benefit that the childcan have within therelationship. However, the second of the primary considerations relates to theneed to protect a child fromharm and subsequent to 2012, the legislationremoved any doubt about any conflict

between those two primary considerations. Section60CC(2A) now provides that the Court is to give greater weight to theconsideration of protection of the children over the benefitof a meaningfulrelationship. Having regard to the finding of unacceptable risk, that provisionmust apply here. Additionalconsiderations must also be considered. Those are set out in s 60CC(3). I findthe following: The children aretoo young to have a view to be given any weight albeit that they are quiteexcited about the prospect of spendingtime with their father; The relationshipbetween the children and their mother is a very sound and protective one andtheir relationship with their fatheris good save for the concern expressedearlier about protection. The husbands role in the lives of the childrenhas beenlimited since separation and unfortunately, that will have to continuein the future because of the unacceptable risk issue; There can be nosuggestion in this case that the husband has not endeavoured to continueparticipating in decisions about the childrenbut the parties cannot reachagreement on such issues as the future schooling of H. There can be no disputein this case that thehusband wants to spend as much time with the children aspossible and that will have to be curtailed because of the unacceptableriskfactor; There is littledoubt that the husband has fulfilled his obligation to maintain the children andhe seems to be au fait with the childsupport system because he takes theiradvice in relation to such issues as the dispute between he and the wife aboutprivate schooling; The Court isaware of the problems for these children who will be inquisitive as to why thereis a supervisor or a very limited areain which they can move but whilst thatimpact on the children may very well be negative, much will depend upon how thehusband addressesthose problems and ensures that there are activities todistract the children from their curiosity; There are nopractical difficulties in the husband spending time with the children save thatthere is a significant problem in gettinga placement at a contact centre butthe parties still have the opportunity to come up with alternate propositionsand absent agreement,the matter can be determined by the Court in thefuture; There is noquestion about the capacity of the wife to care for the children as her primarycaring position was not challenged. Ido not fully understand what thehusbands position is in relation to his capacity to provide for theemotional and intellectualneeds of these children. In any event, it is not asignificant determining factor in this case; In cases wherethe attitude to the children

and the responsibilities of parenthood arecontemplated, a finding of unacceptable riskmust reflect badly on a parent. Inthis case, there are too many factors of a concerning nature to ignore. Perhapsthe husbandcould have avoided some of those matters by dealing with the issuesat a much earlier time than he did and by a more responsive approachto thecriminal law charges that he was facing which might have overcome the problem ofthe cynicism of the wife in relation to hisanswers at trial about what happenedto Y at the time of separation; I have foundthat there is no specific issue of family violence in relation to the wife but Ihave serious concerns about the protectionof the children and therefore familyviolence is relevant. In addition, there is a family violence order in thiscase which is currentuntil October 2014 and I am informed that the wife intendsto seek an extension of that order. It is an order that also relatesto thechildren and it was made in circumstances where the husband conceded itsnecessity and the allegations that gave rise to theorder were those thatfounded the evidence in this case. I am unaware of any findings made by amagistrate in relation to thoseparticular issues; In this case, Ihave no real option other than to make a final order leaving the parties totheir own devices because otherwise therewill be consistent litigation and thatis not in the interests of these children. Section61DA of the Act provides that when making a parenting order of the nature that Ihave just contemplated, the Court must applya presumption that it is in thebest interests of the children for the parents to have equal shared parentalresponsibility. Thatpresumption does not apply if there are reasonable groundsto believe that a parent has engaged in abuse of the child or family violence.Whichever way the evidence is viewed in this case, there are reasonable groundsto believe that the husband has engaged in familyviolence and the presumptionmust be rebutted. Even if that was not right, s 61DA(4) provides that thepresumption may be rebuttedby evidence that satisfies the Court that it wouldnot be in the best interests for the children to have a shared parentalresponsibility. The husband conceded in final address that he has nocommunication with the wife and there is certainly no trust between the parties.As I observed, the provisions of s 61DAC of the Act require the parties who haveequal shared parental responsibility to actuallyconsult with one another andmake a decision about major long term issues. On any view, that cannot occur. One good example ofthe problem at the moment

at the moment which would delaythe question of education related to which school H should attend in thefuture.Whilst the husband endeavoured to explain that away as being his concern arisingfrom advice by the Child Support Agencyabout his future responsibilities tobear half of the costs, that had a hollow ring about it. Inmy view, the presumption of equal shared parental responsibility in this case isrebutted. Itis in the best interests of these children that they get on with their livesalbeit that their time with their father is goingto be restricted and thedecision will be difficult for he and his family to bear. I have determined onthe balance of probabilitieswith all of the descriptions I have earliermentioned that there is sufficient evidence here for the Court to be seriouslyconcernedabout the protection of the children. I indicated earlier thesubmission put by the Independent Childrens Lawyer that theextensivearray of allegations in the past leads to the conclusion that there will bemore. I do not accept that situation on thebasis that I accept that the wifeheard the allegations and reacted appropriately to them. I consider that thepreponderance ofall of the factors in this case leading to the conclusion thatthere was an unacceptable risk of harm to these children means thatthe onlysolution for the Court to enable the children to benefit from a relationshipwith their father in the future is to haveit seriously supervised. It isimpossible for the Court to contemplate the duration of that supervision at thisstage. In Moose and Moose [2008] FamCAFC 108, the Full Courtcontemplated a complaint that a trial judge had made an order which waseffectively for permanent supervision andthat such an order if notimpracticable, would become impracticable. Boland J said the following at para119: The undesirability of, and the practical difficultiesassociated with long term supervision in a childrens contact centre arereferred to in the Guideline for Family Law Courts and Childrens ContactServices January 2007, Part C 4.1.1 and 4.1.2 (published by theAttorney-Generals Department, the Family Court of Australia and theFederal Magistrates Court of Australia). In Fitzpatrick &Fitzpatrick [2005] FamCA 394; (2005) FLC 93-227, May J, having found that the evidence in thecase objectively viewed reveals the potential for an unacceptable risk tothechildren if contact with the father is not supervised..., thenreferred to the difficulty associated with long term supervisedcontact and saidthe necessity for contact to be supervised apparently indefinitely leadsto the need to finely balance whatis in the childrens bestinterests. Her Honour then

explained [w]hilst supervised contactin this case willprotect the children from any potential physical harm, theeffect on their emotional well-being cannot be ignored. (See alsoW& W [Abuse allegations: unacceptable risk] [2005] FamCA 892; (2005)FLC 93-235, (2005) 34 Fam LR 129 at paragraph 114). Thewife is supportive of a relationship with the children and the only issue isprotection. There is no other alternative and thereis therefore a clash ofideology here. For the children to get to the point in their lives where theycan have an unrestricted relationship,they have to be much less vulnerable thanthey are at the moment. The parties were unable to come up with any othersolution butI accept that the courtroom is hardly the environment for anynegotiation on that sort of issue. The fullness of time may solvethat problemand if it does not, one or both of the parties will have to come back to courtwith a variety of proposals and showthat they have been unreasonably rejectedby the other person. Accordingly, this is not a case in which the court shouldsimplysay that long term supervision is counter-productive and potentiallycausing emotional harm because it is the only way in which whatis otherwise areasonable relationship between the husband and the children can be cemented. Accordingly, I find that it is in thebest interests of the children for thatsupervision to be indefinite at this stage. Iraised the question of whether there would be any application for costs. Whilstall parties thought that that was unlikely, I shallmake provision that theparties have 28 days in which to make an application in writing and the mattercan be determined in chambers. I certify that the precedingNinety Four (94) paragraphs are a true copy of the reasons for judgment of theHonourable Justice Cronindelivered on 15 October2014. Associate: Date: 15 October 2014