FAMILY LAW CHILDREN Stayapplication relocation of the mother where childrens carearrangementswent from equal shared time arrangement to a live with and spendtime with arrangement where it was found that the previousorders wereunsatisfactory for the children where appeal is not expected to be heardfor eighteen months not a fullanalysis of the grounds of appeal, only ajudicial impression best interests of the children Aldridge & Keaton [2009] FamCAFC106 Bryant v Commonwealth Bank of Australia (1996) 134 ALR460 Cape & Cape [2013] FamCAFC 114 Clemett & Clemett (1981) FLC 91-013 CSN & JBN (1998) FamCA 176 Sheldon& Weir [2011] FamCA 2 Trahn & Long (No. 2) [2008] FamCAFC194 APPLICANT: Mr Heaton RESPONDENT: Ms Brown (formerly Heaton) FILENUMBER: NCC 1835 of 2010 DATE DELIVERED: 1 October 2014 PLACE DELIVERED: Parramatta PLACE HEARD: Parramatta JUDGMENT OF: Hannam J HEARING DATE: 30 September 2014 REPRESENTATION SOLICITOR FOR THEAPPLICANT: Mr Dunn, Watts McCray Lawyers COUNSEL FOR THE RESPONDENT: Mr Cummings SC Mr Graham SOLICITOR FOR THE RESPONDENT: Tony & Cox Lawyers ORDERS (1) TheApplication in a case filed on 15 September 2014 seeking a stay of the Ordersmade on 5 September 2014 is dismissed. (2) The mothers application for costs in this stay application isreserved to a date to be fixed. IT IS NOTED thatpublication of this judgment by this Court under the pseudonym Heaton &Heaton (stay application) has been approved by the Chief Justice pursuant tos 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT PARRAMATTA FILE NUMBER:NCC 1835 of 2010 Mr Heaton Applicant And Ms Brown (formerly Heaton) Respondent REASONS FOR JUDGMENT INTRODUCTION Inan Application in a Case filed on 15 September 2014, the father, Mr Heaton seeksthat certain orders made on 5 September 2014 relatingto the parties twochildren, be stayed pending the hearing of an appeal. The orders sought to bestayed discharge all previousparenting orders and provide for the children tolive with the mother and to spend time with the father. Theseorders brought about a significant change in the living arrangements of theparties children, E who is 10, and J whois 9. Prior to the 5 Septemberorders the children had been living in a week about arrangement inSydney for a numberof years. Under the 5 September Orders the children livewith the mother in Town P on the Mid North Coast of NSW and spend substantialand

significant time with their father in Sydney and Town P. Immediatelyfollowing the delivery of the judgment, the orders were implemented. Thechildrens school in Sydney was notifiedthat the children would becommencing at a new school in Town P at the start of term 4, arrangements weremade for the children tobe enrolled in a new school and extracurricularactivities in Town P and the children spent time with their father in theholidayperiod as provided by those orders. Thequestion for me to determine is whether these parenting orders should be stayedpending appeal as sought by the father, or shouldcontinue as sought by themother. BACKGROUND Theparties met in Town P in 1997 and married there in 2000. Following theirmarriage they moved to Sydney. The parties separatedin about October 2009 andinitially continued living and caring for the children in the family home. Themother sought orders in earlier proceedings which she commenced in July 2010 inthe Federal Magistrates Court (as it then was)permitting her to relocate withthe children to Town P. The father sought orders that the then currentarrangement, being weekabout in Sydney continue. Interimparenting orders described as a nesting order were made by FederalMagistrate Dunkley (as he then was) in July2011 under which the children wereto live in the former matrimonial home and each parent would move into and livewith the childrenon a week about basis. Finalorders were made in March 2012 in respect of both the parenting and propertyproceedings. Under those orders the mother wasrequired to move out of the homeby July 2012 but the week about arrangement continued. Since July2012, up until thetime of the September 2014 judgment, on the week in which thechildren lived with their father they remained living in their familyhome, andduring the week that they were cared for by their mother, they lived in aserviced apartment a short distance from theirfamily home. The childrencontinued to attend the same school. Themother successfully appealed against the parenting orders made by FederalMagistrate Dunkley. The matter was remitted for rehearingto the Federal CircuitCourt and in October 2012 was transferred to the Family Court. Thesecond parenting proceedings were heard over three days in June 2014 and thejudgment was delivered on 5 September 2014. Followingthe delivery of the orders on 5 September 2014 the mother travelled from Town Pand took the children into her care on Sunday,7 September 2014, in accordancewith the previous parenting orders. The school week commencing on Monday

15September, was the lastweek of term 3. On8 September the mother sent an email to the father (which is the parentsusual mode of communication) seeking to discusshow the parties were to tell thechildren of the changes and their future schooling arrangements. The fatherresponded the followingday saying that he was considering his right of appeal,as the mother had done so previously but did not say that he was appealingthedecision. On 8 September, the mother also made enquiries and arrangementsconcerning the childrens enrolment in a localprimary school in Town Pfor term 4, which was due to commence after a two week holiday. Themother responded to the fathers email on 9 September and restated that inher view, the children needed to be told aboutthe orders, and that if she didnot hear from the father by the end of the day she would tell them herself. Themother did not hearfrom the father and informed the children that day of theoutcome of the matter and that they were going to move to Town P with her.Themother says that the children showed a positive reaction to the news of theirmoving. OnWednesday 10 September 2014, the children told their friends at school that theywere moving to Town P. On the same day, the motherinformed the childrensschool that they were moving to Town P with her, pursuant to the court ordersand that their last dayat school would be the following Tuesday, 16 September. On11 September 2014 the father filed his Notice of Appeal, which was served on themothers solicitors the following day. OnFriday 12 September the mother was advised that there were no vacancies at anyof the three Catholic Primary schools in Town Pcommencing in term 4 2014. Themother placed the childrens names down for consideration to start in2015. The mother receiveda letter from the Catholic schools administration on15 September confirming this advice. On15 September 2014 the father filed his application for a stay. Themother travelled with the children after school on Tuesday 16 September 2014 toTown P. On Wednesday 17 September the mother andthe children attended aninterview with the Deputy Principal at B Primary School in Town P. The motheralso enrolled the childrenin extracurricular activities in Town P. On this daythe mothers solicitors were served with unsealed copies of the stayapplication. OnFriday 19 September, the mother drove the children to the changeover locationunder the previous and current orders, where thefather collected the childrento commence the start of the fathers time with the children over theschool holidays. The

timethe father is spending with the children in thecurrent school holiday period is in accordance with the 5 September orders. Thechildren have an expectation that at the end of the time with their fatherduring the holidays, they will commence living withtheir mother and attendingschool in Town P. This is due to occur the week following the hearing of thisapplication. THE LAW TO BE APPLIED & DISCUSSION Thelaw as to the general principles applicable to a stay pending appeal is wellsettled. InCape & Cape[1] the FullCourt considered orders permitting the mother to relocate to Germany, and therefusal to stay the relocation orders pendingthe appeal. The Full Court referred to the approach taken by the First Instance Judge as accurately relyingupon the statement ofprinciples in Tranh & Long (No.2)[2]. These principles are thesame as those referred to by the Full Court in Aldridge &Keaton[3]. Theprinciples from Trahn & Long (No. 2) (supra) or Aldridge &Keaton (supra), which govern the determination of a stay applicationconcerning a child are[4]:- the mere filingof an appeal is insufficient to ground a stay; the onus toestablish a proper basis for the stay is on the applicant for the stay however it is not necessary for the applicantto demonstratespecial or exceptional circumstances; a person who hasobtained a judgment is entitled to the benefit of that judgment; the person whohas obtained a judgment is entitled to presume the judgment is correct; the bona fidesof the applicant; a stay may begranted on terms that are fair to all parties this may involve a courtweighing the balance of convenience andthe competing rights of theparties; a weighing ofthe risk that an appeal may be rendered nugatory if a stay is not granted this will be a substantial factorin determining whether it will beappropriate to grant the stay; some preliminaryassessment of the strength of the proposed appeal whether the appellanthas an arguable case; the desirabilityof limiting the frequency of any change in a childs livingarrangements; the period oftime in which the appeal can be heard and whether existing satisfactoryarrangements may support the granting of a stayfor a short period of time;and the bestinterests of the child the subject of the proceedings. Iwill now consider the factors relevant in this case. The bona fides of the applicant Thereis no suggestion in this matter that the appeal brought by the father has beenmade in bad faith or for any improper reason. Balancing the parties competing rights whether a stay shouldbe granted on terms fair to all parties Itis not submitted by either party that the stay should or

could be granted onterms which are fair to each of the parties. The fatherseeks the stay on thebasis of other factors which are dealt with in these Reasons and the motheropposes it similarly on other grounds. Is there is a risk that the appeal may be rendered nugatory if a stay is notgranted? Itis submitted on behalf of the father that if a stay were not granted that hisappeal would be rendered nugatory. It is submittedon the behalf of the motherthat it is not open to the father to make this argument in thesecircumstances. Anappeal would only be nugatory if it were futile in the sense that it would beimpossible or impracticable to restore the previousweek aboutparenting arrangements if the father were successful on his appeal. The fathercontends that if the stayis not granted and the arrangements under the 5September orders continue, the childrens relationship with him and thepaternalfamily may be so compromised and the detriment in moving the childrenagain may be such that the arrangements that the father seeksto have restoredon appeal would be contraindicated at that time. Inmy view, the father is essentially contending that if the stay is not grantedhis prospects of successfully appealing the ordersmay be reduced as a newstatus quo will have been established at the time of the hearing of the appeal.However, the history of thismatter itself demonstrates that despite theprevious status quo being maintained, that is the equal shared weekaboutarrangement, pending the rehearing, the court still found thatalternate orders were in the best interests of these children. Ina similar way,if there is merit in the appeal it is possible that an appeal court couldrestore the previous orders. In this casethere is no basis to find that itwould be impossible or impracticable for an appeal court to make the orderssought by the father.In other words, the fathers appeal would not befutile or nugatory if the stay were not granted. A preliminary assessment of the strengths of the appeal Thereare ten grounds of appeal contained in the fathers Notice of Appeal.Rather than addressing each of them, submissionswere made on behalf of thefather in relation to three of them in particular, which were suggested as beingthe fathers strongestgrounds. Counselfor the mother submitted that the appropriate approach to be taken when makingan assessment of the strengths of the appealis that taken in Sheldon &Weir[5] by Justice Ryan. HerHonour adopted the approach to a family law context, which had been taken byKirby J in Bryant v Commonwealth Bank ofAustralia[6]. In Bryant hisHonour said that a decision on a stay

application should not become anoccasion for a detailed analysis of the issuesthat will arise in the specialleave application and, if granted, the appeal. Instead Kirby J said thatthe prospectsof success will necessarily involve a matter of judicialimpression. Inthis matter, although counsel for the mother submits that the appeal has noprospects of success and lacks merit, my considerationof the proposed groundsare that I could not conclude that there is no merit in them. However,considering the grounds in the contextof my knowledge of the evidenceand the analysis of those issues in myreasons[7], I am of the viewthat the prospects of success are not high. Manyof the grounds of appeal relate to the exercise of discretion and weight whichwas given to particular matters. Others are predicatedon an assumption that thecourt must have misunderstood the fathers case because, had it beenunderstood then the orders thatthe father sought, ought to have been made. Anumber of the grounds are general and vague, such as that the trial judgemistakesthe evidence and the fathers case, and that thetrial judge erred in the findings made from 111 and elsewhere.One of thegrounds of appeal which complains of an error in failing to provide reasons foraccepting a substantial and significanttime regime overequal time regime contains a misstatement of the law. Anotherground shows a misunderstandingof the context in which a particular expression(diminution of the quality of the relationship) was used, being acitationfrom a Full Court decision. Myimpression in light of my knowledge of the matter is that the appeal is notbased on substantial grounds. The desirability of limiting the frequency of any change in a childsliving arrangements Itis generally desirable to limit the frequency of change in childrensliving arrangements so long as this is consistent withtheir best interests. Inthis case in the short time between the making of the orders appealed againstand the hearing of the stayapplication, a number of steps had been taken by themother to change the childrens living arrangements. Although she wascriticised by the father for making these arrangements, I am of the view thatthe steps she took were reasonable in the circumstancesshe faced, where a newschool term was to commence within a couple of weeks of the orders being made. Thenew arrangements in my view are not as dramatic as those which involve forexample a change in primary residence or a cessationin time spent with aparent. Under the orders appealed against the children are to live with themother who they were

previouslyliving with on an equal shared basis, they willbe living in an area with which they are familiar and near the extended maternalfamily and they will spend substantial and significant time with their father.This time will commence as soon as the father makesarrangements to travel toTown P to see them. Inrespect of maintaining the status quo, a number of cases, starting withClemett & Clemett[8], referto the desirability for the frequency of any changes in custodial arrangementsrelating to the child being limited as muchas possible. In that case, Nygh Jsaid at 76,175: If the appeal appears to be based on substantialgrounds and is not a mere delaying tactic, if it can be dealt with within areasonabletime and the present circumstances of the child are satisfactory, itwill be appropriate to grant a stay of proceedings for at leasta short periodof time. Subsequentcases, including the Full Court decision of CSN &JBN[9], make it clear that inorder for the Court to attach weight to the status quo, the aspect of thepresent circumstances of the childbeing satisfactory is critical. Itis central to the fathers position that the circumstances if the staywere granted would be satisfactory for the children.The mother submits thatthese circumstances would be unsatisfactory as the children would continue toexperience uncertainty as totheir future which has been the case for the lastfour years, and which may continue for another year to 18 months. Within 18months,the eldest child, E, will commence high school and it is particularlyimportant for her to be settled in this period. At the heartof the decisionconcerning these childrens circumstances was their subjective experienceof the shared care arrangement towhich I attached great weight which includedtheir feelings of dissatisfaction about the constant change in the carearrangements. Itwas submitted on behalf of the father that the adjustment for the children totheir new circumstances has been difficult and willcontinue to be difficultbecause of the actions of the mother and that for this reason, the circumstancesof the children, if thestay were not granted, would not be satisfactory. It issubmitted by the mother that there is no evidence that the transition hasbeendifficult for the children. Since the children have been in the care of thefather for one and a half weeks prior to the hearingit would be expected thatthe father would have included evidence of these difficulties for the purposesof this application. Inthese circumstances, it is submitted that the court candraw the inference that there are no problems for the children with the newarrangement.

From the childrens perspective it is submitted they havealready moved to a new phase in their lives in thatthey have said goodbye totheir Sydney friends and school, have visited Town P and are ready to start thenew school in a matterof days. The period of time in which the appeal can be heard Thereis no evidence about the likely time in which an appeal will be heard. It wassubmitted by the mother that in the usual coursethat it may take up to 18months for the appeal to be heard by the Full Court and the father has notsought for the matter to beexpedited. This is a substantial period ofuncertainty for these children, especially as proceedings involving theirparenting havebeen ongoing for over four years. The best interests of the child Thefinal matter to consider is the best interests of the children. Many of the bestinterest factors have been touched upon earlierin these Reasons, but some whichare particularly salient will be reiterated. Thefather relies in particular on the primary consideration of the childrenreceiving the benefit of a meaningful relationship withboth of their parentsand submits that if the stay were not granted then that relationship with thefather may be jeopardised. Havingregard to the meaning attached to theexpression meaningful relationship in the authorities, I am of theview thatthe childrens meaningful relationship with their father willnot be jeopardised if a stay is not granted and that the childrenreceive thebenefit of a meaningful relationship with both parents under each of thealternative arrangements. Thefather also attaches significant weight to the childrens views expressedthrough the Family Consultant that they wouldlike the current parentingarrangement (that is the equal time arrangement in Sydney) to continue.However, the Family Consultantwas also of the view, which was not challenged inthe proceedings, that the children were careful to present both parents in anequallyfavourable light and were attempting to broker a peace between theirparents and did not wish to be disloyal to either of them. Forthis reason Iattach less weight to this aspect of their views and greater weight to theirviews concerning their experience of sharedcare regime. Both of the children,who had experienced this regime for a number of years expressed the difficultyof being part oftwo households and having to repeatedly adjust to a differentpattern of care each week. E said that the constant moving back andforthbetween the two households sometimes leaves her feeling like she has no home andexpressed very descriptively that she is veryvery very very very sick ofit, (the week about

arrangement). J described feeling like being in awashing machine going backand forth. Thereis also significant weight attached by the father concerning the likely impactof the change in circumstances in the event thatthe stay is not granted and thechildren relocate to Town P. This issue has been dealt with earlier in theReasons though furthersubmissions were made, in particular, in relation to thenon-availability of a Catholic school in Town P, which is contrary to themothers evidence at the trial. Although it is unfortunate that a positionin a Catholic school is currently unavailable inTown P, as it is important tothese children and has been supported by the parents decision to raisethem within the Catholicfaith, this is in my view an insufficient reason ofitself for the stay to be granted. Havingregard to each of the best interests considerations that are relevant in thismatter, which were closely examined in the 5September judgment and in theabsence of any evidence to suggest that my views regarding those considerationsare no longer correct,I am of the view that it is in the best interests ofthese children for the parenting regime instituted by those orders tocontinue. Conclusion Althoughit is not necessary for the applicant to demonstrate any special or exceptionalcircumstances, he still bears the onus toestablish that there is a proper basisfor the stay in this matter. The mother is entitled to the benefit of thejudgment given on5 September and is entitled to presume that judgment iscorrect. As explained, I am of the view that the fathers appeal willnotbe rendered nugatory if a stay is not granted and I am of the view that althoughthe appellant has an arguable case on appealit is not a strong one, aspresently drafted. It is desirable that the frequency of change in thechildrens living arrangementsis limited as much as possible, but in thiscase a number of the changes brought about by the orders have already occurred.Further,having regard to the likely period that will elapse before an appeal isheard, the unsatisfactory features of the previous arrangementand the future ofthe children remaining undetermined, together with my view that the arrangementunder the current orders is inthe best interests of the children, theapplication for stay is dismissed. Themothers application that the father pay her costs in relation to theapplication is reserved to a date to be fixed. I certify that thepreceding forty eight (48) paragraphs are a true copy of the reasons forjudgment of the Honourable Justice Hannamdelivered on 1 October2014. Legal Associate: Date: 1 October 2014 [1] [2013] FamCAFC

114 [2] [2008] FamCAFC 194 [3] [2009] FamCAFC106 [4] Ibid at[21] [5] [2011] FamCA2 [6] (1996) 134 ALR460 [7] Ryan J in Sheldon &Weir [2011] FamCA 2 [8] (1981)FLC 91-013 [9] (1998) FamCA 176 