

FAMILY LAW CHILD ABUSE Allegation sexual abuse where the facts do not support a positive finding of abuse having occurred where the facts do not support a positive finding that abuse did not occur. FAMILY LAW CHILDREN With whom a child lives where it is in the child's best interests to live with the mother where the child spends graduating supervised time with the father for two years. Family Law Act 1975 (Cth) Evidence Act 1995 (Cth) B & B (1988) FLC91-978 Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 M v M (1988) 166 CLR 69 APPLICANT: Ms Bailey RESPONDENT: Mr Thornton INDEPENDENT CHILDRENS LAWYER: LBK Solicitors FILENUMBER: NCC 3248 of 2009 DATE DELIVERED: 14 October 2014 PLACE DELIVERED: Canberra PLACE HEARD: Newcastle JUDGMENT OF: Faulks DCJ HEARING DATE: 29 September - 2 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Moutasallem SOLICITOR FOR THE APPLICANT: Cole & Butler Solicitors COUNSEL FOR THE RESPONDENT: Mr Bates SOLICITOR FOR THE RESPONDENT: Webb & Boland Solicitors COUNSEL FOR THE INDEPENDENT CHILDRENS LAWYER: Mr Gorton SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: LBK Solicitors ORDERS (1) All prior parenting orders are discharged. (2) The mother have sole parental responsibility for Y (the child), born ... September 2008. (3) The child live primarily with her mother. (4) Notwithstanding the provisions about sole parental responsibility the mother will authorise and direct that any school that the child attends, provide to the child's father all reports, notices and school photo order forms about the child and will authorise and keep authorised all medical, counselling and education professionals involved with the child to communicate with the father about her. The provision of any such reports (or photographs) will be at the expense of the father. (5) (a) The mother will inform the father by e-mail or by telephone or by ordinary mail or by text as soon as is practicable after any serious event involving the child's health, informing him about the incident. The mother will provide information to the father about any medicine or treatment that the child might be taking or undertaking. (b) The mother will listen to any advice the father may wish to provide about matters relating to the child's health but if there is a difference of opinion between the professionals the mother has consulted and the father's view the mother will have final determination as to the treatment or medicine to be undertaken or taken. (6) (a)

The parents will communicate with each other by e-mail about events involving the child which the father may attend if he is able to do so. This includes sporting events and concerts. (b) If the father attends any such event, he be, and is hereby restrained from saying unkind or unpleasant things about the mother to any of the other parents or other people attending such functions. (c) In addition, unless the mother should initiate such action at any such function, the father will not approach the mother and will not undertake any conduct which may embarrass the mother. (d) Each of the parents will, at such function, do all within his or her power to ensure that the child appreciates the fact that both parents are attending the function and each of the parents will provide opportunities for the child to spend time with the other. (7) (a) When the child is with her father she may communicate with her father at any reasonable time by telephone or by other electronic means. (b) When the child is with her father she may communicate with her mother by telephone or other electronic means (at any reasonable time). (c) Generally speaking, it would be normal for the child to communicate with one parent or the other - perhaps once per day - but nothing prevents the parents from agreeing otherwise or from the child communicating with the other parent more often if she wishes to do so. (d) During the course of any such communication, the parent at whose house the child is then living, or staying or spending time will absent himself or herself from the room in which the child is speaking to the other parent. (8) Each parent be and is hereby restrained from using the child as a means of communication to the other parent but each of the parents will encourage the child to discuss with the other any activities she may have undertaken in the time that she is with that parent. (9) Each of the parents acknowledges that it may not be possible for the child to be able to communicate with the other parent on each day. (10) Each parent will accept that in some cases it may take several attempts for the child to communicate with the other parent. (11) Notwithstanding the abovementioned arrangements, neither parent will ring the child except with the consent of the other parent. Each parent accepts that he or she may ring the child on each of: the child's birthday, that parent's birthday, Christmas Day, Easter Sunday - or any other time that may be agreed between the parents. (12) The child will spend time with her father as may be agreed, but in default of agreement as follows: (a) For three occasions, commencing (unless the parents otherwise agree) on

either 18 or 19 October 2014) a fortnight apart, for a day, either a Saturday or a Sunday, at the home of Ms F and in the full-time presence of Ms F. (b) Thereafter, for a further three periods, again two weeks apart, from Saturday morning until Sunday evening at the home of Ms F, with Ms F being present for the whole of the time that the child is with her father. (c) Thereafter for a period of three weekends (again a fortnight apart) from Friday night until Sunday night with the mother being responsible for the delivery of the child to Ms F's house on the Friday evening and the father, or Ms F or Ms Thornton, being responsible for the return of the child to her mother's house on the Sunday evening, not later than 6:30pm. In the alternative provided the father gives adequate notice, if the father wishes to do so, he may collect the child or may cause either Ms F or Ms Thornton to collect the child from her school on the Friday afternoon. (d) Thereafter, the time that the child spends with her father need not be in the presence of Ms F nor Ms Thornton on each weekend. However, in accordance with the recommendation of the Single Expert Witness (and accepted by the father) she will spend overnight time at the home of Ms F or Ms Thornton. Such time will be from the Friday afternoon, in accordance with the arrangements set out in the last suborder and will end on the Sunday evening. (e) Nothing in these orders prevents the parents from reaching an alternative arrangement. (f) These arrangements will continue for a period of two years. Thereafter unless there is a further order of the Court or the parents otherwise agree, the child will be collected by her father after school on Friday in each fortnight and returned to school on the Monday morning. From this time on it is noted that she may spend time with her father at her father's home although nothing precludes the father having Ms F or Ms Thornton present during all or some of the time that the child spends with him. (13) It is to be noted that for the first two years there will be no holiday time that the child spends with her father, unless the parties otherwise agree, but the fortnightly arrangements will continue through the school holidays, unless the parents otherwise agree. (14) Starting from the June/July New South Wales school holidays in 2017 the child will spend half the school holidays with the father, or such time as otherwise agreed between the parties. (15) (a) The mother will take such steps as may be necessary to ensure that the child receives such counselling or support as may be necessary to enable her to develop protective

capabilities and also to enable her to have someone to whom she can speak if she wishes to do so, other than her parents. It is noted that the school counsellor may be an appropriate person for this purpose but in default of that person being available, the parents, and in particular the mother, will consult with the manager of Family Consultants at the Newcastle Registry of the Family Court of Australia and will accept advice and recommendations as to an appropriate person. (b) A copy of this judgment and a copy of Dr R's report may be made available to any such counsellor to assist in the time that she spends with the child. (16) By consent, the father be and is hereby restrained from bathing the child, applying any cream or ointment to the child's genital area, dressing the child, permitting the child to sleep in his bed and sleeping in the child's bed. (17) I direct that arrangement be made with the manager of Family Consulting in Newcastle for a Family Consultant to speak to the child, possibly in Town B, as soon as is practicable to explain to her the orders that have been made and to inform the child that the Court had listened carefully to what she had said and that the orders that had been made were orders that the Judge considered in the circumstances to be best for her. She might also be informed that both of her parents were of the view that it was appropriate that she should spend time with both her father and her mother. (18) The Independent Children's Lawyers application for costs is dismissed. IT IS NOTED that publication of this judgment by this Court under the pseudonym Bailey & Thornton has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT CANBERRA FILE NUMBER: NCC 3248 of 2009 Ms Bailey Applicant And Mr Thornton Respondent REASONS FOR JUDGMENT FOREWORD The respondent father in this matter is a farmer who lives on a property called Property C, about twenty kilometres out of Town D in New South Wales. He lives by himself. The applicant mother lives in Town E in New South Wales with her son, G, from another relationship, and the child the subject of these proceedings Y (the child). The child is five years of age. There were proceedings between the parties in the past which culminated in the making of orders by consent by Federal Magistrate Foster (as his Honour was then) on 22 June 2011. As a result of those orders the child was to live primarily with her mother and spend time with her father, but that was to change when she went to school. The ordered arrangement of nine nights or days with her mother and

five with her father was to change to a week about arrangement when she began to attend school. In September 2012 it appears that the child first made a disclosure that her father had touched her inappropriately. These allegations were reported but the Joint Investigation Response Team (JIRT) declined to take any further action. In November 2013 the child again made a statement (which I accept as apparently spontaneous) asserting that her father had touched her inappropriately. As a consequence of this disclosure the mother again reported the matter and again JIRT did not obtain such evidence as they needed to proceed. The father was not interviewed on either occasion although there is some confusion about whether that was at his instigation or that of the police. The father has always asserted that he had not engaged in the activities complained about. WHAT EACH OF THE PARTIES WAS SEEKING In this matter the mother sought orders that the child live with her, that she have sole parental responsibility for her, and that the father only see her for a very limited time under direct supervision of a professional supervisor. The father sought orders that the child should live with him primarily and see the mother on every second weekend and for half of the school holidays. His position was that the child could not have a proper relationship with him if she continued to live with the mother. The Independent Children's Lawyer initially sought orders substantially in accordance with the recommendations of the Single Expert, Dr R. The recommendations in Dr R's report are set out as an appendix to these reasons for judgment. Over the course of proceedings, which occupied some three days in the Court, there was a shift in the final position of each of the parties and of the Independent Children's Lawyer. At the conclusion of the proceedings counsel for the Independent Children's Lawyer produced a further set of minutes which appear as a second appendix to these Reasons for Judgment. These Minutes substantially adopted the revised recommendations of the Single Expert when she gave evidence in the witness box. At the conclusion of the hearing (during submissions) counsel for the father adopted those Minutes. Initially, counsel for the mother advised me that his instructions were to persist with the application originally made which involved very limited time for the father with the child. After discussion, and a short adjournment, counsel for the mother advised that his client would accept one of the potential programs outlined by me for the resumption of the time that the father would

spend with the child. Counsel confirmed the mother's very brave (and proper) decision that she proposed from this day to go forward and to try to make the best of the situation. The proposals eventually accepted by the mother (although not by the father) involved an initial period of three day visits a fortnight apart with either Ms F or Ms Thornton (the father's older daughter) present, followed by three fortnightly visits from Saturday morning until Sunday evening, again with one of the two women referred to above present, and with the child sleeping at the home of Ms F. The proposal then graduated to three weekends in which the child went from Friday afternoon until Sunday evening, with either Ms F or Ms Thornton present with her sleeping at Ms F's residence. Thereafter the child would spend every second weekend with the father, sleeping at Ms F's residence without the necessity for Ms F or Ms Thornton to be present. There will be no school holiday time during that period, unless the parties otherwise agreed. The sleepover arrangements on the recommendation of the Single Expert were to continue for a period of two years. This was accepted by the father.

PRELIMINARY COMMENTS Before looking at the evidence in this matter it is important to focus on what the Court is obliged to do in matters relating to children. Under the Family Law Act 1975 in matters relating to children the Court's paramount consideration must be the best interests of the child. It is easy to lose that focus in circumstances where there are allegations which potentially are of a criminal nature. Understandably the parties are fixed on what might be a fair result for them without necessarily taking account of the best interests of the child. That is not to suggest in this case that the parents were self-fixated but the nature of proceedings inevitably brings about such a situation to some extent. In determining what is in the best interests of the child, the Court is obliged to take account of two primary considerations and within those two primary considerations to give primacy, if necessary, to that which requires that the Court ensure the safety of the child. The second primary consideration is the importance to the child of having a relationship with both parents. Thereafter follow in the Act what are described as Additional Considerations and I shall turn to those in due course although, they were not the subject of significant attention specifically by either of the parties or the Independent Children's Lawyer. Naturally enough much of the evidence was taken up with the allegations of child abuse. In my opinion, in matters relating to children, (or for that matter

any matter before a court) the parties who have raised an issue which is relevant are entitled for the Court to come to a decision on that issue if the Court is able to do so. In this matter, as I explained to the parties during the course of the latter part of the proceedings, I was unable to reach a conclusion on the evidence in accordance with the appropriate standard of proof^[1] that the abuse alleged had occurred. I further explained that on the evidence before me I could not find, again to the appropriate standard of proof, that the abuse had not occurred. I will return to this matter shortly. It should be noted that counsel for the mother opened by acknowledging that it was unlikely that the Court would be able to make a positive finding but he sought that the Court should determine that for the father to spend time other than as suggested by the mother with the child would impose an unacceptable risk of harm to the child.

UNACCEPTABLE RISK The concept of unacceptable risk in the context of child abuse cases is difficult. It arises from the High Court decisions in *M & M*^[2] and *B & B*^[3]. The most quoted and relied upon principle from those judgments is as follows: ... the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse. This is sometimes interpreted as providing what amounts to a third standard of proof beyond reasonable doubt, on the balance of probabilities and unacceptable risk. In my opinion their Honours in the High Court were not creating a third standard of proof but rather emphasising the importance of safety in relation to orders made by a Court. By way of example even if the Court were to find positively that abuse had occurred, an order might be made which involved the other parent being present at any time when the child was with the abusing parent. In such circumstances it is difficult to imagine that there could be any physical risk to the child.^[4]

I explained to the parties that imposing protective arrangements or not imposing protective arrangements really involved consideration of a spectrum. At one end of the spectrum are circumstances in which there could be no possible risk to the child and at the other, an acceptance of the fact that something almost certainly would not recur and preparedness in effect to allow the

child unsupervised time and unrestricted time with the alleged abusive parent. The test as I interpret it, is to determine where on the spectrum in relation to such matters the line might reasonably be drawn to provide what the High Court described (a situation where there was not an unacceptable risk).

GENERAL DIFFICULTIES IN RELATION TO CHILD ABUSE ALLEGATIONS In almost every case involving child abuse there are only two witnesses: the alleged perpetrator and the child. Almost invariably, the alleged perpetrator denies on his or her oath or affirmation that anything untoward has occurred. That was the case in this matter as well. The other witness, the child, generally has his or her side of the case put before the Court by those to whom the child has reported in one way or another. The child may or may not be aware of the implications of what has happened or understand the physical activities which may or may not have occurred. The child may lack the language to express himself or herself adequately about the nature of the things done to him or her. For example in this case, reference was made (not by the child) to vagina when what may have been intended was vulva. This is complicated by the euphemistic names given to genitals by parents with their children private bits, bottom, front bottom, doodle and so on. If a child reports something to another person (usually a parent and usually a mother) what the child says may not be clear and it is a normal human reaction for the person to whom the report is made to repeat and possibly rephrase the child's complaint or report. The child may adopt the new phraseology or may be surprised at the reaction of the person to whom they have reported and become introspective and or defensive. Frequently a parent will then report the matter to somebody else whether it be the police, the Department of Family Services, a priest, a counsellor, a Child at Risk Unit, a friend, a grandmother or mother, a doctor, a nurse or all of these. The nature of the human memory seems to be that, in many cases, after a time what is reported is a recollection of what was said on a previous occasion or occasions rather than a direct recollection of the events themselves. In addition, it is entirely artificial to expect that parents (particularly) in such circumstances will abide by the niceties of asking open questions rather than leading or closed questions. As a consequence a child who is either shocked, hurt or emotionally distraught at a breach of trust (if something has actually happened) or alternatively a child, who is now shocked at the reaction of the parent to whom the child has spoken, is likely to be

alarmed and to want to find a way to appease a distraught parent or to justify in some way an earlier comment. Those statements are not intended to be a comprehensive analysis of what happens with children's evidence in abuse cases. In some cases the complaints are clear and immediately believable. In other cases, they are fantastic and unbelievable. In a case such as this the difficulty is that the complaints in themselves are not fantastic (in general terms, and I will return to be more specific in due course), the complaints are reasonably specific and relate to conduct which could have happened in the circumstances.[5] All of these factors are things which have to be weighed in making a determination. Without wanting to make this a case exclusively about child abuse it is probably appropriate at this point to consider and evaluate the evidence about this matter in this case. I indicated to counsel and to the parties, that this was not a matter in which the evidence was such that, in my opinion, I could make a positive finding that the abuse occurred. The primary evidence that such abuse occurred were the disclosures of the child. The primary disclosures, if I may call them such, were in November 2012 and September 2013. In each case those primary disclosures appeared to be relatively spontaneous and related to daddy touching me in my private bit, or playing with my private bit or putting his finger down there. There were other disclosures made to doctors, to JIRT and contained in a video recording of the child made by her mother, which almost certainly, if analysed, are so tainted by the circumstances in which the alleged disclosure was made as to be totally unreliable. This is not to criticise any of the people involved including the doctors or the mother, but rather to say that the evidence could not possibly have any weight in circumstances where objectivity on the part of the person receiving a report could not be relied upon. I have already made comment that the video was almost entirely composed of leading questions. As a consequence the responses were as might be expected. I commented to the parties however that the video itself showing the delightful little girl the child is, was to some extent, and to some extent only, corroborative of the allegations in the naturalness with which she demonstrated on two occasions what she said her father had done. I indicated to counsel and to the parties that the two (possibly three) disclosures referred to above were troubling, and troubling to the extent that notwithstanding the father's sworn denial of any wrong doing, I could not, as a finder of fact, be

satisfied to the requisite standard that nothing untoward had occurred. An unacceptable risk? In this matter, given that I believe that the evidence did not justify my making a positive finding and that I was unable to be satisfied that nothing had occurred, the orders I might reasonably make must not impose an unacceptable risk of harm on the child. The mother indicated on a number of occasions that she wanted to be 200 per cent certain that there would be no risk to the child. Nothing in life is 200 percent certain. I interpreted the mother's comments in this regard as being indicative of her commitment to her daughter and to her daughter's safety. It might be easy to interpret such comments as indicating an unwillingness ever to concede that there might be some mistake. Such a view might have been reinforced by the fact that the mother conceded that on a number of occasions the child had in fact not told the truth (for example in relation to the dog being bitten by the snake). However, it was to the credit of the father and his lawyers that they did not assert any coaching or deliberate and malevolent manipulation by the mother. When I had explained to the parties in the presence of their counsel that my findings would not allow me to reach a definite conclusion, after a time of consultation with her counsel the mother adopted a different approach, indicating that she was prepared to move forward. This was an enormously courageous act on her part and I accept both its courage and its sincerity. I was impressed with the father's evidence that there was not much point in making orders that proscribed his having overnight time with the child either permanently or for a time, because it was obviously feasible that (if he were so inclined) something untoward could be carried out during the day. He interrupted what I did describe otherwise as a stolid performance in the witness box to express this view with a degree of animation. I think his logic is unimpeachable. It is clear that there may be a higher level of risk in, for example, night time circumstances as opposed to hay baling or some other physical daily activity. Nevertheless, it seems to me that to impose a long-term night time restriction would not be necessary to minimise the risks of harm being occasioned to the child. Harm in the context I have just mentioned relates mainly to physical harm. Harm may also be occasioned to the child emotionally or psychologically. Harm may also be occasioned to the child if her mother is affected by stress as a consequence of her believing that something might happen to the child during the time she is with her father. The mother's attitude

may then in turn impact upon the wellbeing of the child. For these (somewhat convoluted) reasons it seems to me that it is necessary for there to be a transitional period in which the child can reacquaint herself with her father and with Ms F. It is necessary for the child to be used to spending time with her father again and for her father to get used to spending time with her. Importantly in this context there should be a gradualness which allows the possibility at least of the building up of some trust on the part of the mother about the process and about the arrangements. It is easy to see that such trust or confidence may be indefinitely postponed by the mother in an effort to thwart or frustrate the orders of the Court. I have pointed out to the mother in this case that it cannot be that she does not comply with orders of the Court. The consequence of her failing to comply with the orders may bring about the thing which apparently she fears most at present. That thing is of course the possibility that the child would live primarily with her father. These are factors which were recognised by the Single Expert Witness, Dr R, who suggested the program that appears in annexure I. I indicated to the parties, and in particular to the mother, that I had in mind a slightly different program with a different introduction and I outlined that program in my comments. The father was prepared to accept Dr R's proposals as they were amended to some extent by the Independent Children's Lawyer (see annexure II) and preferred those arrangements to those which I had outlined to the mother and to counsel. Before evaluating those proposals and considering the form of the orders I propose to make, it is important that I give attention to the other matters that I must take into account under the Family Law Act 1975. Relationship between the child and her parents The father's basic proposition was that the chances of there being a relationship between him and the child, if the child were living primarily with her mother, were small. While that may have been a reasonable interpretation of the situation at the beginning of the trial I believe that by the end of the proceedings the mother's position had altered sufficiently that I could have a degree of confidence that would not necessarily be the case. The mother's original position was based on the proposition that no circumstances could ever provide the total security she felt was important for the child. However, in her oral evidence she confirmed that nothing could keep the child away from her father in the end and that provided that she was satisfied about the child's safety she acknowledged that the child would derive benefit from being

with her father. Notwithstanding the antipathy between them it was to a degree refreshing to see the fact that both parents were prepared to acknowledge some of the good things that the other parent might do and in particular to acknowledge that the other parent did love the child. Examining the matter from that perspective the restrictive nature of the original proposal of the mother would not permit either a good, or possibly any reasonable relationship to be developed between the child and her father. The orders that I propose to make in this matter will, I believe, provide a measure of opportunity for that relationship to develop satisfactorily. Taking account of the other matters that I am obliged to take into account I should first look to the fact that the Independent Children's Lawyer recommended initially that there should be equal shared parental responsibility. This was the subject of some discussion. Some qualifications to that concept were introduced in dialogue. Counsel for the father very properly, after consultation with his client, indicated that his client conceded that sole parental responsibility should be with the mother and that he should be the subject of consultation as was proposed in some draft orders put before the parties. Those proposals are in large measure reflected in the orders I make. That determination relieves me of the primary obligation to consider that there should be equal shared time between the parents or substantial and significant time. In the end, counsel for the father on the instructions of his client agreed that equal shared parental responsibility was not necessarily in the child's best interests - at least as a result of defended proceedings before this Court. This was a concession properly and reasonably made. Even if it had not been made, there are practical considerations. The parties live about 100 kilometres from each other. There is the likelihood that as time goes by, the child would be more involved with school and friends and sporting activities. (She already plays football.) There are the relatively restricted circumstances of the father (although he claimed they were in fact flexible, I do not accept that assertion on his part). Additional factors The child is of an age where it might be difficult to evaluate what her wishes or views might be. This is particularly so in this matter given the overlay of the difficulties both as to her mother's attitude to the father and her father's attitude to her. What was encouraging however was to see the report of the Single Expert Witness about how she got on with her father after the initial difficulties in greeting him. While he may not be the most intuitive, sensitive

and emotionally supportive father that a child could have, the father's love for the child was apparent and the child's love for her father was equally apparent. His persistence in these proceedings is indicative of his acceptance, at least in non-financial matters, of his obligations as a parent and his wish to be a part of the child's life will probably give her significant benefit. I am satisfied that her views are to maintain some time with her father and for that time to be both meaningful and satisfactory. The capacity of each of the parents was somewhat in question. The mother early on in the child's life had suffered from a bout of mental illness which meant that the father cared exclusively for the child for about a year. He claimed, with some justification, that this demonstrated his capacity. The mother was much more wary of the father's ability and indeed having seen him in the witness box and listened to his evidence and read his evidence, I share some other reservations. It was beyond belief for the father to assert that a change from the child's almost exclusive living arrangements with her mother to live with him on a farm, in isolation, immediately, would not cause any stress to the child. This demonstrated in my opinion an inability to consider matters beyond his involvement and his needs rather than the child's needs. I also formed the opinion that he had an inflated idea of his capacity both to be able to arrange his affairs to spend time with the child and moreover to provide enough financial and physical support for her. He seemed to suggest that on an income which the Child Support Agency accepted as being about \$26,000 he would have the flexibility to employ other people to do his work so he could spend more time with the child. Even if his income were at the level that he otherwise asserted to me on his oath (that was \$88,000) it is hard to see that a person in his situation, particularly given the nature of the work, would always be able to find someone to do the work at a price he could afford at a time when he needed it - perhaps at short notice. For her part, the mother has in recent times demonstrated a capacity properly to look after the child. Her care of the child and the child's half-brother, G, was not really in question. It was vaguely suggested that she had employed physical punishment as part of the disciplinary process. I am not satisfied that there was any excessive disciplinary activity even if she had administered some physical discipline. Counter-wise, it was asserted by the mother against the father that he had, on one occasion, shaken G and moreover laughed about it afterwards. I think this does demonstrate an

element of irresponsibility on the part of the father but not a malicious irresponsibility. The suggestion that he burnt the child's toys as some form of punishment was rejected by the father and I thought convincingly so. His explanation was reasonable and I accept it. I am troubled by the possibility that the father may not have the financial capacity to care full time for the child. His information about his finances made vagueness almost a word of certainty. It was for him to provide evidence about his arrangements. He failed to do so in any substantial way. I accept that this was probably born out of frustration and anguish that if the child were not to be living with him primarily, he may lose her altogether. While understanding the motivation, the lack of evidence would not permit me to do what the father wanted in any event. It seems unlikely that either parent would substantially encourage a meaningful relationship between the child and the other parent. This is particularly so in the case of the mother. I hope for the child's sake that the mother meant what she said when she indicated that she was prepared to move forward from these Court proceedings. For the reasons I have set out above, in my opinion it will be for the child's benefit to spend time with her father and the arrangements I am proposing to put in place will enable everyone to calm down and get used to the new situation and to work together towards what I hope will be a satisfactory conclusion. I hope both parents accept that opportunity for the child's sake. There are allegations of violence in this matter which are disturbing because if I were to accept that they were true, it would certainly indicate that on the part of the child's father there may be a problem as to the sort of role he would be modelling to her or for her. The evidence about these matters was, to say the least, vague and it is difficult, if not impossible, to come to any final and satisfactory conclusion. I am prepared to accept the evidence of the mother, that the father is a manipulative and to some extent dominating person. I accept that she may be physically afraid of his physicality. However, once these orders move into a final pattern in some months time, the arrangements for her to actually come into contact with the father will be few. I hope that if the arrangements work out as well as they might, she will in time accept that she and the father have the ability to conduct themselves in a business-like manner about the child and about her welfare. That will require an effort on the part of the father as well to ensure that he keeps his temper under control. He needs to be conscious of the fact that his actions

may be seen as overwhelming or physically threatening and to work with the mother for what is best for the child. A word about practicality. In this matter, although I accept that the parties are country people and that distances are not quite as dramatic as they might be for city folk, the physical arrangements of the parties do create some difficulties. The father's farm is some twenty kilometres from Town D and 100 kilometres, or thereabouts, from Town E. It is two kilometres from his nearest neighbour. Town E is some eight hours distance from Newcastle. It is not the case that the parties can just pop around the corner to share an experience in relation to the child or to make arrangements about the time each of them will spend with her. That being said, both parties accepted that arrangements such as I have proposed are capable of being carried out. For my part I would have found having a young person to my house to stay every second weekend for the foreseeable future (a couple of years perhaps) would be daunting and restrictive. I accept that the spontaneous and generous evidence of Ms F that she regards the child as her granddaughter and would wish to treat her accordingly. I also accept that the father in this matter, again generously, accepted the recommendation which I thought was quite restricting from the Single Expert Witness that the child should sleep other than at his place for a period of some two years. Notwithstanding the parties' acceptance of these matters I think it is important that the orders should be framed in a way which enables some of the effects of the geographical separation of the parties and the consequences of past actions to be minimised. The orders I make are designed to achieve that purpose. It is necessary to say a word or two about G. The relationship between G and the child is agreed by all to be close. This is notwithstanding there is some three years difference in their ages and G is older and a boy. It may be in part attributable to the possibility that G may be on the autism spectrum and the Single Expert had recommended that the mother ensure that is adequately investigated. No one has suggested that the relationship between the two is other than a warm, supporting and important one. One of the factors which would militate against an order that the child live primarily with her father is that that would necessarily involve her separation from G. G is important in the child's life. I am prepared to accept that Ms F has been a very important part of the child's life and in accordance with these orders will be an important part of her life. I accept for

these purposes that she regards the child as her grandchild and that that is important for the child. Ms F's generosity in this regard is in the highest traditions of people from the country and her support for the child's father is an important reference for him. The child's relationship with Ms Thornton is also important and Ms Thornton's commitment to being involved with the child in the future is encouraging as well. The child's involvement with Ms H, one of the mother's elder daughters is obviously strong and appropriate, and will continue if Ms H continues to live with her mother. These constitute perhaps not a large, but nevertheless important network of support for the child and for each of the parents. The parents are each lucky to have people to whom they can turn in their hour of need. There are no particular cultural issues that need to be considered. Section 60CC(3)(I) asks me to consider whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child. I cannot guarantee that the orders I make in this matter will have that effect. To begin with, there are some twelve years before the child becomes an adult and a lot can happen in that time. I hope that the orders that I make will put in place a situation which will enable the parties to grow to accept and trust each other enough to ensure that the child gets the benefit from both of her parents and that she grows up to love and trust the adults with whom she is associated and receives from them in different ways the values that she needs to become a proper citizen. That may mean that the arrangements will need to change from those prescribed by the orders. I would hope that in time if any changes are required the parents might reach a conclusion about those orders themselves. If they do not it appears that it would be necessary for a further decision in this Court to be made. That is not satisfactory but it may be inevitable in those circumstances. The reasons why I made the Orders Noting that the Single Expert Witness believes that there should be an earlier transition to longer time for the child to spend with her father, including holiday time, it is probably necessary for me to explain why I did not agree. Allowing for the distance between the parties, which I accept would indicate that longer periods perhaps during school holidays maybe sensible, I take account of the father's evidence about his time and the sort of work that he does and accordingly I think that it is preferable for at least the next couple of years for the child to have only weekend time. If all goes as well as it might, the parents may reach a different

conclusion and nothing prevents such arrangements from occurring. The sharing of some of the decisions about the child's future is something that might be difficult for these parents but consultation, painful though it may be, is in my opinion important and necessary. For my part, I would not necessarily have imposed a two year period for the child not to sleep at her father's home. I note that the father accepted this recommendation from the Single Expert Witness. He may be wise in doing so because it does reduce the possibilities that allegations might be made against him. Equally, if he chooses to have either Ms F or his daughter Ms Thornton present during times that the child is with him that may in itself generate confidence on the part of the mother and the child if it is necessary in the latter case to do so. The orders set out above provide a framework within which the parents can develop their mutual support for the child. It is now up to them to accept the responsibilities that became theirs when the child was born and to give to the special person who is the child the best opportunities she can have in life. ANNEXURE I [The child] continues to live with her mother. [The child's] time with her father occurs fortnightly, Friday to Monday, with [the child] sleeping in a familiar person's home (such as her sisters or babysitters) until she is around eight years old. If possible, longer periods to occur during school holidays. [The child] attends a formal protective behaviours course but not counselling focused on abuse. Any counselling should be open ended. [The mother] ensures her son's behavioural problems are assessed and addressed as soon as possible. [The mother] and Mr [J] establish consistency in their relationship and assist [the child] with the notion she will have two daddies (ie she does not have to choose between [the father] and Mr [J]). Major parenting decisions which are not finalised during these proceedings to be made as needed through mediation. ANNEXURE II All prior parenting orders are hereby discharged. That the parents have equal shared parental responsibility for the child, [Y] born... September 2008, (the child). That the child live with the mother. The child spend time with the father as agreed between the parties, but failing agreement during school terms on each alternate weekend commencing after school Friday, Thursday if the Friday is a non-school day, and concluding at the commencement of school Monday, Tuesday if the Monday is a non-school day, and such to commence on the first weekend of each school term. For one half of each of the terms 1, 2 and 3 school holidays being the

first half in even numbered years commencing at the conclusion of school on the last day of school and concluding at 5:00pm on the second Saturday of the holidays and in odd numbered years commencing at 5:00pm on the second Saturday of the holidays and concluding at commencement of school on the first day of the new term. During the Christmas school holidays being the first half in even numbered years commencing after school on the last day of school and concluding at 5:00pm on the midpoint day of the holidays and in odd numbered years commencing 5:00pm on the midpoint day and concluding at commencement of school on the first day of the new school term, excepting the Christmas school holidays at the conclusion of 2014. During the Christmas school holidays at the end of 2014 the alternate weekends continue in frequency but be from 6:30 Wednesday to 6:30 the following Monday. Notwithstanding any other order herein the child shall be with the father: On the weekend on which Father's Day falls as per order 4 a above. In odd numbered years from 5:00pm Christmas Eve until 5:00pm Christmas day. On the child's birthday if the child is not otherwise with the father from 3:00pm to 7:00pm if a school day and if a non-school day from midday until 4:00pm. Notwithstanding any other order herein the child shall be with the father [i]s suspended: On the weekend on which Mother's Day falls in even numbered years from 5:00pm Christmas Eve until 5:00pm Christmas Day. For the purpose of implementing changeover of the child to spend time with the father, if the time commences or concludes at school the father or his nominee, known to the child collecting the child from or returning the child to school. If the time commences other than to or from school the mother shall cause the child to be delivered to the father at his residence at the commencement of the child's time with the father and the father shall cause the child to be returned to the mother at her residence at the conclusion of the time. Both parents shall authorise any school which the child attends to provide each parent with copies of the child's school reports, school photographs, school bulletins or other information relevant to the child's attendance. Both parents shall authorise any treating medical practitioner or other health professional who may from time to time treat the child to provide each parent with any relevant information in relation to the child and each parent shall inform the other as soon as practical or not later than 48 hours should the child require hospitalisation as a result of any injury or illness. For the first two visits the entire visit is to occur at

the home of either [Ms F] or [Ms Thornton]. For the next four periods the child is to spend with the father the overnight component shall occur at the home of either [Ms F] or [Ms Thornton]. Thence until such time as the child turns eight years of age the child is to spend overnight with the father, is to be spent with either [Ms F] or [Ms Thornton] present. The mother ensure that within six weeks of that date of these orders she arrange for [the child] to attend a course designed assist her to develop protective capabilities, and ensure that she attend such course as soon as a place is available. Such course to be as recommended by the Manager of Court Counselling at the Newcastle registry of the Family Court of Australia. A copy of the report of Dr [R] and the reasons for judgment in this matter be provided to the person or agency providing this course. The father is restrained from: Bathing the child Applying any cream or ointment to the child's genital area Dressing the child. That the mother continue with treatment for her Bi-Polar disorder. That the father pay the costs of Dr [R]'s attendance to give evidence, noting that he has already paid the costs of the consultation [sic] and preparation of the report. The parties contribute equally to the costs of the Independent Children's Lawyer in the sum of \$5,104.00 each. I certify that the preceding eighty-one (81) paragraphs are a true copy of the reasons for judgment of the Honourable Deputy Chief Justice Faulks delivered on 14 October 2014.

Associate: Date: 14 October 2014 [1] On the balance of probabilities but in accordance with s 140 of the Evidence Act which essentially imports the *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 test. [2] (1988) 166 CLR 69 [3] (1988) FLC 91-978 [4] In many cases of course there would be psychological or emotional risk. [5] In some cases there is just not the physical opportunity to do what is asserted to have happened.

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