

FAMILY LAW CHILDREN With whom a child spends time Orders Family Law Act 1975 (Cth) JG & BF (1994) FLC92-515 Jones & Dunkeld [1959] HCA 8; (1958-1959) 101 CLR 298 Re F: Litigant in person guidelines [2001] FamCA 348; (2001) FLC 93-072; 27 Fam LR 517 APPLICANT: Mr Buckwater RESPONDENT: INDEPENDENT CHILDRENS LAWYER: Ms Perry Harris Lieberman FILENUMBER: MLF 1109 of 2005 DATE DELIVERED: 29 November 2007 PLACE DELIVERED: Albury PLACE HEARD: Albury JUDGMENT OF: Justice Cronin HEARING DATE: 22, 23 & 26 November 2007 REPRESENTATION COUNSEL FOR THE APPLICANT: In Person COUNSEL FOR THE RESPONDENT: Ms Boyle SOLICITOR FOR THE RESPONDENT: Robb & Associates COUNSEL FOR THE INDEPENDENT CHILDRENS LAWYER: Mr O'Shannessy SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Harris Lieberman ORDERS That the orders made in the Family Court of Australia dated 28 June 2005, 26 February 2007 and 23 March 2007 be discharged. That the wife have sole parental responsibility for D born ... February 2000 ([D]), M born ... June 2001 ([M]) and G born ... October 2005 ([G]) (the children). That the children live with the wife and the wife have sole responsibility for decisions regarding the children's day to day care, welfare and development. That the wife advise the husband via email and keep the husband advised of all significant issues in relation to the children's (a) health; (b) education; (c) residence; and (d) extracurricular activities. That the wife do all such things and sign all such documents as may be necessary to authorise the children's school to discuss the children's progress at school with the husband and to provide copies of all school reports, school newsletters and school photographs to the husband, at the expense of the husband. That the wife shall do all such things and sign all such documents as may be necessary to authorise any treating medical practitioners, hospital or medical practice and/or counsellor that the children shall attend upon from time to time to provide to the husband any information regarding the children's attendance upon them. That each party notify the other of any medical emergency or significant medical treatment that is required for the children or any of them whilst they are in their care. That the child G spend time with the husband as follows: (a) for two hours (or such other period of time) that may be accommodated by the Albury/Wodonga Children's Contact Service (the Service), such time to be supervised by the Service and to coincide

with the weekends when the husband collects/returns M and D from/to the Service pursuant to paragraph 9 herein; (b) at any other times as the parties may agree upon in writing or via email. That D and M spend time with the husband as follows: (a) during school term every fourth week from 4.00pm Friday until 4.00pm Sunday; (b) during the New South Wales gazetted school term holidays as follows: (i) from 4.00pm on the last day of school in Term 1 to 4.00pm on the Sunday occurring immediately before the first day of Term 2; (ii) from 4.00pm on the last day of Terms 2 and 3 to 4.00pm on the middle Sunday of the holidays. (c) That for the Christmas school holidays 2007/2008 the children spend time with the husband as follows: (i) if D's plaster is removed prior to Christmas Day, from 12 noon Boxing Day to 4.30pm 16 January 2008; (ii) if D's plaster is removed after Boxing Day 2007 but before 4 January 2008 from 12 noon on the day following D's plaster being removed to 4.30pm on the 21st day thereafter; (iii) if D's plaster is removed after 4 January 2008 from 12 noon on the day following D's plaster being removed to 4.30pm on 25 January 2008. (d) At any other times as the parties may agree upon in writing or via email. That the husband collect and return M and D at the commencement and conclusion of the spend time periods pursuant to paragraph 9 herein at the Albury/Wodonga Contact Service. That the husband's time with the children pursuant to paragraphs 9 and 10 herein is subject to the following: (a) the husband doing all acts and things and signing all such necessary documents to comply with all necessary intake procedures as may be required by the Albury/Wodonga Childrens Contact Service; (b) the availability of the Service to facilitate changeover in relation to M and D and to facilitate supervised visits with G; (c) the husband confirming with the Service his intention to attend at the Service for the purposes of changeovers pursuant to paragraph 9 herein no later than 12.00pm on the day of changeover if it is a Friday and by 4.30pm on the Friday if the changeover is on a Saturday or Sunday and if the husband does not confirm his intention to attend at the Service, then his time otherwise commencing on that day be suspended; and (d) the husband complying with all requirements and directives of the Albury/Wodonga Childrens Contact Service. That in the event the Albury/Wodonga Contact Service withdraws its use of service then the spend time with arrangements pursuant to Order 8 and Order 9 herein be suspended. That in the event the husband fails to return the children to the

Albury/Wodonga Childrens Contact Service as provided for in paragraph 9 herein on one occasion, then the spend time arrangements pursuant to paragraph 9 herein be varied as follows: (a) if the next spend time visit was due to be a weekend, from 9.00am to 5.00pm Saturday and 9.00am to 5.00pm Sunday, with changeover at the Albury/Wodonga childrens Contact Service; (b) if the next spend time visit was due to be a term school holiday visit, from 4.00pm on the last day of term to 4.00pm the Wednesday immediately following, with changeover at the Albury/Wodonga Childrens Contact Service; (c) if the next spend time period was due to be a Christmas school holiday visit, from 12.00pm Boxing Day until 4.00pm on the first Sunday in the New Year, with changeover at the Albury/Wodonga Childrens Contact Service. That in the event the husband returns the children to the Albury/Wodonga Childrens Contact Service in accordance with paragraph 13 herein, on two consecutive occasions, then the spend time arrangements pursuant to paragraph 9 herein be reinstated. That in the event the husband fails to return the children to the Albury/Wodonga Childrens Contact Service pursuant to paragraph 13 herein, then the spend time arrangements pursuant to paragraph 9 be suspended until further order of the Court. That the parents communicate with children when they are not in their care by initiating a telephone call to the other parent between 7.00pm and 7.30pm on each Wednesday and Sunday and the other parent shall ensure that the children are available during this time to accept the call. That the wife provide to the husband on at least one occasion each month a recent photograph of the child G, an original artwork by G and an update on G's developmental progress. That both parties be and are hereby restrained from discussing the spend time arrangements or variations thereto with the children. That the parties maintain a communication book regarding important issues in relation to the children, such book to be exchanged at the times of changeover. That the husband be and is hereby restrained from removing the children from N Public School or any other school that the children may attend without the written consent of the wife or further order of this Court. That within 7 days, the parties provide each other with details of their residential address, telephone number and email address and keep the other advised as to any changes thereto. That the wife forthwith arrange for D and M to attend a childrens group as nominated by the Family Relationships Centre or Parenting Orders Program

to assist the children deal with the parties separation and conflict. That each party attend a post-separation parenting course which addressed the childrens developmental needs and the effect of family conflict within six months of the date of these orders. That leave be granted to the parties to provide any counsellor/psychiatrist that they or the children attend upon, a copy of the Family Report dated 24 October 2007. That both parties be and are hereby restrained from: (a) denigrating the other party or permitting a third party to do so in the hearing of the children; (b) consuming alcohol to excess or using illicit drugs whilst the children are in their respective care. That the wife forthwith do all such things as may be required to obtain individual counselling for D, such counsellor to be as nominated by Ds school counsellor or the Independent Childrens Lawyer. That the husband make a contribution of \$3943 towards the costs of the Independent Childrens Lawyer, such costs be paid to the Director, Legal Aid NSW. That all applications be otherwise dismissed and all proceedings be removed from the list of cases awaiting a hearing. That pursuant to s.65DA(2) and s.62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders. IT IS NOTED that publication of this judgment under the pseudonym Buckwater & Perry is approved pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth) FAMILY COURT OF AUSTRALIA AT ALBURY FILE NUMBER: MLF1109 of 2005 MR BUCKWATER Applicant And MS PERRY Respondent And INDEPENDENT CHILDRENS LAWYER REASONS FOR JUDGMENT I shall refer to the parties in this case as the husband and the wife for the sake of convenience. The husband lives in Melbourne and the wife in the Albury/Wodonga region. The tyranny of distance complicates the husbands relationship with his three children. The other complicating factors are that: (a) the third child is a two year old born after separation and with whom the husband has no relationship; (b) the husband is easily frustrated about not being able to have the sort of relationship he wants with his children; (c) the husbands financial capacity to contribute towards not only the support of the children but to the travel for the purpose of seeing them, is vague; and (d) the oldest child has serious behavioural problems particularly at school which the husband

says are not recognisable difficulties when he has the children in his care. Throughout the proceedings, the wife was represented by experienced counsel. The husband was not represented by a lawyer. I explained the process to the husband and am satisfied that he understood what was happening and he was not disadvantaged. I have endeavoured to follow the requirements of Re F: Litigant in person guidelines [2001] FamCA 348; (2001) FLC 93-072; 27 Fam LR 517. I also had the additional benefit of an experienced, diligent and I may say patient Independent Children's Lawyer who was represented by helpful and experienced counsel. The parties negotiated a number of matters under difficult circumstances and I was left to determine the following issues: (a) whether there should be an order for the wife to have sole parental responsibility for the children; (b) how much time and under what circumstances, the husband should spend with the two year old child; (c) whether the changeover of the children should occur at a handover centre or not; (d) a default position suspending or cancelling the husband's time with the children if he was not compliant with orders; (e) whether, and if so who, should attend one or more health professionals and under what circumstances to endeavour to alter personal relationships; and (f) what specific holiday orders should be made because of the oldest child's arms being in plaster as a result of a recent serious fall.

THE CHILDREN The three children are D who was born in February 2000 and is therefore seven years of age, M who was born in June 2001 and therefore aged six years and G born in October 2005 and therefore two years of age. G was conceived and born after separation. D and M both attend N Public School. D is in Year 1 and M is in the kindergarten grade.

BACKGROUND The wife is aged 38 years and the husband 37. The wife is engaged predominately in home duties but does do some work at a pre-school. The husband is in the building trade. He described himself as unemployed but in reality, he is a self-employed contractor. At various times, he employs workmen. The parties married in February 1998 and separated in June 2004. The parties seemed to initially sort out the relationship each of them had with the children. In about March 2005, the wife moved from R to the Albury/Wodonga region, a distance of about 70 kilometres, and rented a four bedroom home. The parties had lived together in R and in late 2005, the husband moved to live in Melbourne. It was the husband who began the litigation. According to the wife and this was not challenged, on 15

March 2005, the parties met at a hotel to discuss a parenting plan and reached agreement. The husband was to have the children each alternate weekend and he was to do the travelling. It was at that time however, the wife told the husband she was pregnant. The very next day, the husband made an application on an ex parte basis for interim orders that the children live with him based on the fact that he said that the wife told him she was contemplating suicide. The wife denied that conversation ever occurred. She also denied that she had ever been suicidal or suffered from depression. There was no evidence before me that there had ever been any such problem. Accordingly, on 16 March 2005, the husband filed the urgent application apparently with the assistance of a pro bono lawyer. That day, the matter came on before Young J and the proceedings were adjourned to enable the matter to be drawn to the attention of the wife. The husband's subsequent behaviour towards the wife precipitated an application by the wife for an apprehended violence order in the Local Court and the order was made on 2 May 2005. On 6 May 2005, the wife filed her application for the children to live with her as well as property settlement. On 28 June 2005, the parties reached agreement and orders were made that the children live with the wife and the husband have regular time with them. Matters remained quiet then until the birth of G in October 2005. The matters however were unresolved because the case was proceeding through the system. On 13 December 2005, the parties again reached agreement in respect of property matters and orders were made. On 28 November 2006, almost a year later, the husband made an application for G to spend two days out of every 14 with him and other orders as well. By this time, the relationship between the parties was non-existent and the wife sought orders for the changeover of the children to occur at a contact centre. Other orders including injunctions about alcohol and non-denigration were also sought. On 26 February 2007, Watt J made orders for the appointment of an Independent Children's Lawyer and for G to have time with her father at the contact centre. One month later, Senior Registrar Fitzgibbon made orders by consent of the parties concerning G. On 25 June 2007, the husband filed a contravention application against the wife but he failed to attend on the return date before Young J on 12 July 2007 and the proceedings were dismissed. Ultimately, a pre-trial conference in the case was held on 1 November 2007 at which point in time the wife filed an

amended responses seeking various orders to which I shall refer and the husband was ordered to file his material which he did as late as 21 November 2007. It would be obvious that the litigation has done absolutely nothing to assist in the parties resolving their personal relationship. THE EVIDENCE OF THE WIFE In the proceedings, the wife was the respondent. She was calm, articulate, child-focused and thoughtful. Even allowing for the husband being not represented by a lawyer, I could not find any fault not only with her evidence but also with her approach to parenting. In his final address, the husband endeavoured to point out that the picture painted by the wife was flawed but there was no evidence to support his assertions. Just to be clear, I did warn the husband about how the evidentiary process worked and explained the rule in Jones & Dunkeld. Hence, there is no basis for me to determine the matter other than on the evidence. The wife's evidence was that there was no basis for the application being made by the husband on an ex parte basis in March 2005 and I have to concede that I have some serious concerns about how it occurred. However, what then began, I can only describe as a disastrous relationship between the husband and the wife. I use the word disastrous because the impact directly and indirectly on these three children has been obvious even if the husband could not see it. Whether that continues into the future depends on the husband. It is time he thought about the children and got over his failed relationship with his wife. He would disagree with the assertion that the relationship is still causing problems. In my view he is wrong. Between the issue of the ex parte application and one month later, the husband sent numerous text messages to the wife sometimes over thirty times a day. The messages are set out in her affidavit but they are at worst, sinister and threatening and at best, unhelpful and unpleasant. I shall set out in some detail in the following passages some of the behaviour of the husband which would test the patience of any person let alone any parent. However, in cross-examination, the wife acknowledged that she has now got to the point where she does not take seriously many of the things that the husband says. However, back in March 2005, bearing in mind that the wife had just told the husband that she was pregnant, I am satisfied that on the unchallenged evidence, the husband threatened to assault the wife if she did not have an abortion. That precipitated the apprehended violence order to which I have referred. Notwithstanding all of that,

on 10 March 2006, the parties attended a mediation session and reached agreement. There is some dispute about what was agreed but I am satisfied on the evidence that: (a) the husband was to spend time with G supervised by the contact centre for one hour per fortnight for a period of three months; (b) the husband was then to spend two hours per fortnight for a period of nine months supervised by the contact centre; (c) thereafter, the parties were to attend mediation to renegotiate the time between the husband and G. What was disputed but I accept the wife's version was that this arrangement was not to start until the husband had formalised the agreement in consent orders. That did not happen. Thereafter, the wife set out a litany of actions by the husband which he did not challenge. In fact, he seemed rather unconcerned about them because they occurred as a result of what he described as his health or his inability to comply. I reject those explanations but even if I accepted that there was some foundation for them, there are two strident criticisms I must make that are warranted. They are: (a) the husband did not communicate properly or at all with the wife about these problems; and (b) the children were either embroiled in the parenting dispute if they were with the husband at the time or were badly let down by the husband if they were not with him. Looking carefully at the way that the wife gave her evidence and the husband's cross-examination of her, added to which I have had the advantage of observing the husband, I can only say that the wife is a person of extraordinary patience. The litany to which I have referred is as follows. Between November 2005 and February 2007, the husband on numerous occasions delivered the two boys back to the wife as much as a day late, took the children to the local police station on 30 April 2006 at around midday rather than return them as he was supposed to have done so at the contact service at 4.00pm causing the police to require the wife to come and collect them. The husband even returned the children to the wife at a court hearing in relation to the apprehended violence order rather than fulfil his obligations at the contact centre. The involvement of the police meant that their resources were unnecessarily put under strain because they attended at the husband's Melbourne residence to find out why he had not returned the children and the husband was not to be found. The following day, at the court, the husband returned the children to the wife. On 8 October 2006, the husband did not return the children as required and the following day, the wife applied for a recovery order from the

Local Court. Rather than proceed with the application, a court staff member telephoned the husband and upon that being done, the husband returned the children on the following day, Tuesday, at 1.30pm. On 12 November 2006, again, the husband did not return the children to the contact centre. As the centre was not open on Monday or Tuesdays, in discussions with the husband who I accept on the wife's evidence had effectively delivered the wife an ultimatum, returned the children to her at the centre when it was open on the Wednesday. I shall turn to the husband's explanation about this in a moment but his response was unacceptable and bizarre. On 10 December 2006, the husband again did not return the children to the contact centre. He delivered them to the wife at 11.00pm that night simply dropping them off and allowing the children to come into the house unattended and without explanation. On 28 January 2007, contrary to the rules of the contact centre, the husband dropped the children off at the car park across the road from the centre telling them to head into the centre. Apart from being contrary to the rules, the contact centre was very critical of the husband for that. That precipitated the contact centre refusing to allow the husband to access the centre any further. All of this culminated in orders made by Watt J on 26 February 2007. His Honour there ordered that the husband's time with the boys was suspended until he engaged the services of the contact centre. The husband was required as a condition of the order to telephone the service to confirm that his intention was to collect them at the appropriate time. During all of this time, there was a significant problem with the husband having any time with the child G because he was not complying with the orders for attendance at the centre. In the husband's own words, he had no relationship with the child. One of the orders that was made by Senior Registrar Fitzgibbon on 23 March 2007 was for the wife to travel to Melbourne whereupon supervision of the time between the husband and G would take place with his family members. It was conditional upon the husband providing \$100 for the wife's travel. Even that seemed to be a problem. The husband very much disputed the wife's version of all of this but I am satisfied that at the urging of the Independent Children's Lawyer, the wife opened a separate bank account to ensure that the money would be received and records kept but nothing had been paid. Her obligation to travel was therefore obviated. Similar problems seemed to have arisen in relation to telephone time between the

husband and the children and the wife has now got to the stage where she has a specific mobile telephone so that the children can be contacted and the husband is the only person who would be telephoning that number. The husband accused the wife consistently of not having that telephone on and in cross-examination, the wife indicated that there would be various times where she may have forgotten to put it on at the appointed time around 6.00pm when the husband would call but it was not far from that time when she turned it on. Her explanation was plausible and in my view acceptable. She went on to say that whenever the husband had the boys in his care, the mobile phone was on all of the time. Throughout 2007, the problems to which I have referred above continued. This is all in the face of orders that were quite precise. Notwithstanding the orders had been made in March, the husband did not return the children on Sunday 25 March as he was required. He delivered them on midday on the following day to the local police station. The obvious consequence was that the children missed a day of school. More importantly, the husband had no opportunity to spend time with G. Equally importantly however, the late return of the children could only have given them the impression that the way their father did things was what mattered regardless of the benefit that they would have received in attending school and also being a part of the disciplined household of the wife. In May 2007, the husband indicated to the wife that he was not going to go to the contact centre and see G because of a particular supervisor that he didn't like. When the wife urged him to comply with the conditions of the court orders, she said and this was unchallenged: The husband replied I'll do what I like. No-one's going to tell me what to do. She's my daughter and I'll do what I want. Only days later, the husband telephoned the wife and said that he was going to be in the Albury/Wodonga area and that he would pick the children up from school. Again very sensibly in my view, the wife required the husband to comply with the orders and collect the children from the contact centre. It transpires that notwithstanding that, the husband went to the school at lunch time and spoke to M. The husband then had someone at 3.45pm attend the wife's premises, asking to pick up the children because he was a friend of the husband. The husband did not seem to get the message. The wife took the children to the contact centre and they were collected by the husband at 4.30pm as required. On Mothers Day 2007, the wife returned to the contact centre to collect the children at the end of the

day to find that the husband had left a message that he was not going to return them but that he would come to the local police station the following day. They were and the wife missed out on seeing the children on Mothers Day. This was the subject of some cross-examination but I am satisfied that the husband missed the point. When the wife attended at the local police station on the day after Mothers Day, she was met with a message from the husband via the Australia Federal Police to say that he was not driving all of the way to the Albury/Wodonga region because of his poor eyesight. He said he would drive halfway and that the wife should meet him half way. The wife had to approach her solicitor to respond to that and ultimately, the children were returned by the husband to the local police station on the next day. The children had then missed two days of school and again, were embroiled in a parental dispute caused by the husband. I shall not set out all of the incidents that occurred throughout 2007 but it is hard to see any specific period of time where things went smoothly. As late as August 2007, the husband on two periods which were 14 days apart, arranged for a person in the local area to pick up the children from the contact centre on the basis that they were then to be delivered to the husband in Melbourne. On each occasion, that person did not arrive and consequently, the wife and the children were left waiting and wondering. During August, as a result of a telephone conversation between the husband and the children, the wife said that the children approached her to inquire whether their father could collect them from school on the following Friday. The husband reiterated that subject during a conversation with the children in the middle of the week but this time he had moved from a question to a statement. According to the wife, and this was unchallenged, the children said: Dad is picking us up from school tomorrow because we are going camping with him this weekend. Contrary to the orders, the husband attended school on the Thursday and unilaterally took the children out of school for the Friday. Even with the most obvious protest, the wife could do little with two very excited boys. It appears on her evidence that so excited were they, that D in particular was poorly behaved all day at school. D has problems of a behavioural nature at school and does not need that sort of whip hand. In September 2007, the husband had the children. The wife was away with her family. At about 1.00pm on the Sunday, the wife received a call from the husband indicating that he would drop the children back at her house in

about 1 hour. This again was contrary to the orders. According to the wife, and this was not challenged by the husband, she told him that she was not in the area and could not arrive at the time that he expected. At about 2.30pm, the wife received a call from the contact service to say that the children had just walked into the centre by themselves. It was obviously fortuitous that the contact centre knew who the boys were and probably more importantly, who they were dealing with. Of real concern however, is the fact that the husband did not go into the centre with the children. He just dropped them and left. A week later, there was a further incident but this time involving the local police who had attended responding to a call from the husband. The husband had complained that on the weekend before when the children were with him, they had alleged that their maternal grandfather hit them and hurt their little sister. Where that complaint had come from, one can only speculate but in any event, the subject at no stage was raised with the wife. The husband is to be criticised for such an approach. The wife referred to an incident on the last day of Term 3 of school. In the days preceding that, the children told the wife that their father was going to collect them from school. No discussion took place with the wife. The wife spoke to the school principal. According to the wife, the principal did not want his staff embroiled in a dispute and the wife resignedly accepted the inevitable. The husband collected the children about 2.00pm. At the conclusion of the holiday period, the husband went to the contact centre despite telling the wife he would deliver the children to the police station. Notwithstanding the lack of entitlement to do so, the husband just left the children at the centre expecting their staff to make arrangements with the wife. The husband's only cross-examination of the wife was about why she wanted to limit his role. He asked what she saw as that role and she replied for him to be a responsible father, a male figure for the children and a willingness to comply with orders. Ironically, the husband asked the wife about an incident over two years ago where D left the wife at a shopping centre and walked home by himself. Despite D being missing, the wife had not called the police. The inference was clear; the wife was an irresponsible parent. If that was the intention of the husband, his audacity is breathtaking. The wife's basis for seeking sole parental responsibility was the husband's lack of cooperation, his capacity to create conflict and his obstructive behaviour. In respect of these issues, the wife pointed to

the husband's refusal to sign a birth certificate, his threat to cancel any school enrolment that did not suit him and his behaviour about the orders. The wife's guarded approach to the husband was understandable. She referred to the fact that he scared her. There is still a concern about whether the husband will be civil and respectful at the contact centre. These matters affect the question of the default position of the orders. In respect of the husband's demand for the wife to assist him by travelling, she pointed to the absence of child support. I found the husband's attitude puzzling because he told me he could contribute \$100 towards the wife's petrol yet he described himself as a Centrelink recipient who paid \$12.76 per fortnight child support. According to the wife, not even these payments were responsibly made. As for the husband's parenting capacity, the wife pointed to a number of incidents. The children told her that they drove in the back of a van without seats let alone seat belts. The husband dismissed this as not significant because it was only a distance of about a kilometre. The wife referred to the children telling her they had been driven in a police car when the husband's girlfriend was apprehended on a camping trip whilst driving affected by alcohol. The husband's response was that his girlfriend was only driving to a public toilet at a camping ground. The wife referred to the children telling her that they watched at least one movie called Evil Dead and it subsequently affected their sleeping. The husband's response was that they watched that with some neighbouring children and children being what they were, he could not monitor all of these sorts of things. The children were also severely sunburnt despite being provided by the wife with rash vests and sunhats during Christmas 2005. The wife complained that she sent clothing with the children only to not have it returned. One example was that she had bought football boots and the husband did not return them. When questioned about it, the husband said that it was he who took the boys to football practice so he would be the one to use the boots regardless of the fact that he saw them on such a limited number of occasions. The wife also pointed to the husband's approach about passports and holidays in which he indicated he would take the children overseas yet his professed financial position would belie his capacity to do so. The husband did not dispute the many complaints of the wife. When these matters were put to him, he acknowledged the incidents but gave a very clear impression that he saw no basis for the wife's complaint. THE HUSBAND'S EVIDENCE

I have pointed out that the husband was ordered on 1 November 2007 to file his material by 8 November 2007. As with most matters requiring time constraints, the husband seems to either have no understanding or deliberately does what he feels like. He filed his affidavit on 21 November 2007. I indicated that apart from many of the paragraphs being irrelevant, they epitomised how the husband really felt about the wife. Before setting out what he said in that affidavit, it is important to note two observations. In cross-examination by Mr O'Shannessy for the Independent Children's Lawyer, the husband conceded that he thought himself a blunt person who spoke his mind. I used the expression that he often put his brain in neutral and his mouth in first gear. That resonated with the husband. He agreed he had fired off a bit but in so doing, he failed to see the impact he was having on various people. The second observation is that the husband can at times appear amiable, humorous and respectful. He telephoned the Court on the first listed day to say that he had started out from Melbourne and it was too hard on his eyes and so he turned back. He contacted the Court to request permission to go into the Melbourne Registry and have the case heard by video-link. I declined. I gave him the opportunity to get to Court but his tardiness meant that he lost his place in the queue. Rather than being concerned about the inconvenience and cost to other parties and practitioners, his only concern was that his friend had worked night shift and had driven him up and had to return to Melbourne. His lack of concern for others even allowing for the tyranny of distance, was something I found hard to accept. Turning then to the husband's affidavit, the following statements appear: [The wife] is a woman that has been spoilt by her family her whole life who lives in a fictional land. I stayed with [the wife] for what reason to this day I do not know. [The wife]'s mother was gravely ill with breast cancer and later died of cancer. I stuck it out with [the wife] in the hope that she would change or even not be so jealous of my female friendships. [The wife] is a very strange person in a lot of ways as she craves affection and cannot function without it. [The wife] would often ask to get married to me and I rejected her on many occasions. I do not hate [the wife], I just don't want her in my life as I have moved on and found a better life with someone else who I call normal. In relation to her making all these accusations that I am this and that well I strongly suggest [the wife] does not know me at all so I find her thoughts wrong in many ways. I had had

enough of her and could not stomach the sight of her or to be with her any longer. [The wife] then proceeded when we separated to be a vindictive person in the sense that she would not let me see [M] and [D] at all for a period of about eight weeks. [The wife]'s lies and past are no longer prevalent in my life now. To sum up my background with [the wife] is to say I made a terrible mistake by staying with her and wished I had not met her. The husband then set out some facts such as that M broke his leg and D broke his wrists. These were under the heading Mothers(sic) care. In relation to the broken wrists incident, the child was seriously hurt. When the ambulance was contacted immediately and had arrived, the wife immediately telephoned the husband to tell him of the injury. Notwithstanding all of those matters, the husband in his affidavit went on to say: At some stage I may look at going for custody of the two boys so that discipline can be put in place and some respect for others learnt. The only comment that I can make in respect of those last few words is that perhaps the husband should have some introspective examination of his own position. The husband then went on in the affidavit to say: I am sick of it being a constant battle with [the wife] in regards to the access of these boys. Court orders are there to be fair and reasonable but there are times when I need the boys for sports events I have organised for them. I would like them to ride in the [...] motor cross race and needs weekends alternated at times. It is hard not to see that last comment as describing a person who fails to acknowledge his responsibilities as a parent and who is very parent-focussed rather than child-focussed. The husband filed a financial statement as ordered. He made no mention of his new partner and her financial position. He said his only income was Newstart. He described having no assets. Apart from the fact that when cross-examined, he gave disarmingly honest answers in a candid way, the impression the husband otherwise gave was that the requests of the wife were an unreasonable imposition on him. For example, when the husband visited D in hospital as a result of his broken wrists, the husband's concern was to be able to take D away on his weekend. The husband disputed that saying he was just inquiring about the child's capacity to travel. I reject that. The wife gave evidence about the fact that the medical staff were concerned about what the husband was doing and I have no reason to disbelieve her. I invited the husband before being cross-examined to assist me with some evidence about the issues that I had to determine. He thought carefully about

what I had asked him and commented that he wanted to have a role in all aspects of the life of his children and to be able to help them with various issues. He said that maybe in the future, he and the wife could go to mediation to work something out about such things as schooling. I asked the husband whether there was a problem about communication and he said that the parties did communicate although sometimes it was not the best. I asked him to give an explanation as to why he had not picked up and/or returned the children as alleged by the wife. He said that he spent a lot of time with a friend whose children were killed in an accident and he had thought about these things. I presumed he was referring to the fact that on one occasion, he had spent time with this grieving parent rather than returning the children. He then went on to say that other explanations for his tardiness were that he was too tired or he was working. In cross-examination, the husband gave details about his partner of eight months. No mention was made of her because in his view, the case had nothing to do with her. That was notwithstanding his partner cared for the children when he worked during holiday times for example. The husband acknowledged that he was behind in child support and said that that no doubt would affect the wife. He was asked about an application he made to Centrelink for a share of the family tax benefit and he readily acknowledged that he had done that because his accountant told him to do so. This was a man who was apparently unemployed yet had an accountant. It was put to the husband that his correspondence to the wife at times was insulting. He said in reply: No, not always. Having said that, he acknowledged having referred to the wife as it and the witch. He used words to describe the wife as mad. I had the opportunity to watch the wife's demeanour and I can only say what I have earlier said about her patience. The demeaning language was said in the presence of the children but the husband's explanation was that he was running late to get back to Melbourne to the football because the wife had kept him. As for parenting, the husband was asked whether he felt it was important for the children to see him as supportive of what the wife was doing as a parent. His response was That's your assumption. The husband acknowledged tardiness about letting the contact centre and the wife know about his movements. He seemed oblivious to the fact that other people were trying to work around him. In another bizarre incident, the husband reported the wife to the police concerned about

her mental state because she had allowed him to retain the children longer than he should have. He failed to understand the wife's resigned responding behaviour. He said he found it strange that the wife did not want to see the children back. The husband took the children to the Federal Police to ensure that he would not get into trouble. Fundamentally, he failed to see that his failure to contact the wife was the issue. He passed responsibility for his actions to other people. In one telling piece of cross-examination, it was put to the husband that he varied arrangements to suit himself. He denied that saying he varied them according to his health. When asked about an incident in which he dropped the children outside the contact centre, he retorted that he had watched them walk inside. I have no doubt in finding that the husband used the contact centre to get what he wanted. He spoke to them on the telephone and created a fait accompli putting the wife in a position where she had little choice but to agree with what he was doing. A clear difficulty has been in the husband creating any relationship with the child G. Despite the orders of the Court, he has not availed himself of the opportunity. I accept it would have been difficult if not inconvenient but his dedication to the parenting task was lacking. When asked about an occasion when he arrived at the contact centre where G was with the wife, he ignored her and bundled the boys in the car because he was running late. When asked why that had always occurred, his response was that ten minute time with his child was insulting. It is appropriate to remember that in the proceedings before me, the husband has been seeking to have G all day on both a Saturday and a Sunday. G is a child with whom he acknowledges he has no relationship. He offered some supervisors but they equally have no relationship with G. In relation to the incident where the husband had arranged for someone else to pick up the children to which I referred earlier, he was asked about how the wife should view her children going off in a car with someone she did not know. His response was that the children knew this woman. According to the husband, the woman did not attend and therefore let him down. She apparently was going through her own separation problems. The husband also acknowledged that he put the wife and children in an invidious position because he said that unless the wife came to the half way point, he would not be able to see them. Asked about whether he saw anyone at fault about that sort of concept, he replied it was 50 per cent his fault and 50 per cent her fault. The husband was challenged

about the fact that the children watched his behaviour and consequently had no respect for their mother. His response was almost unbelievable when he said: I don't treat their mother with a lack of respect. The same lack of respect is apparent in the husband's behaviour towards the Independent Children's Lawyer. I found his correspondence insulting, unnecessary and offensive. Counsel for the Independent Children's Lawyer challenged the husband about his financial position. He conceded he did work for himself and on some jobs, employed people as part of a team. I find it hard to accept that the financial statement accurately reflects his financial position. That obviously affects not only his obligation to pay child support but also his capacity to travel. Finally, the husband made much of the fact that the travel had affected his eye sight and it was that that he blamed for his inability to attend at times to collect and return the children. I reject that. The husband was invited to produce medical evidence and nothing was forthcoming. When he described his problems as poor eye condition, he was really talking about tiredness. That gives rise to my concern about the amount of travel involved for these children over a weekend. At the end, the husband conceded that once a month was all he wanted and I suspect, that is all the children can handle. The husband's position was that he and the wife should alternate the monthly travel. I reject that on the basis of the wife's finances, the husband's financial contributions and the husband's unreliability. As for the contact centre, the husband was opposed to that. Having regard to the way he has behaved, I have every reason to accept the basis of the wife's fear and concern. I think the police station is an inappropriate place because it gives the children the wrong impression. At least the contact centre environment is a place where they can be distracted. As for the joint decision making, the husband articulated a desire to work things out cooperatively but his actions speak louder than words. I could not expect that any decision relating to the major decisions in the children's lives will be approached by the husband on the basis that he would respectfully and seriously consider the wife's position.

EVIDENCE OF THE FAMILY CONSULTANT MsB did a report on 26 October 2007 which I received into evidence. She was cross-examined by telephone. MsB observed the wife and the children but had to be content with discussion with the husband by telephone. That was entirely the husband's own doing. MsB made an appointment to meet the husband in Melbourne but he could not even keep that. The report

sets out many of the concerns which I have already recorded above. MsB said: [The husband]'s presentation (albeit being restricted to telephone calls) was contradictory. He seemed capable of being both charming and convincing yet also verbally intimidating and rather abusive. He made some plausible statements about the dispute and his difficulties; and invited me to drop into his home in [...] for a coffee and to stay for a roast dinner after his non-attendance at interview. MsB went on to record some concerns particularly about the way the husband did not seem to have any insight into his behaviour. She said: This finding arouses concerns about the children's emotional welfare, regarding [the husband]; although undoubtedly he loves the boys and they love him. His immense antagonism towards and avoidance of [the wife] and his non-compliance with negotiated arrangements may unsettle and confuse the boys; model anti-social behaviour to them; damage their self esteem; place them in an impossible division of loyalty between their parents; and undermine their respect for their mothers parental authority. He seemed unable to realise that making life difficult for [the wife] also harms the boys. No similar concerns were expressed by Ms B about the wife. She said: The children's observed behaviour was typical of their ages and states of development; and they each appeared healthy, mentally bright and physically active. In her evaluation, the family consultant said: [G]'s tender years and associated needs for care and comfort, when combined with [the husband]'s track record with her brothers, indicates that it is not in her best interests to spend time with [the husband] away from [the wife] and in unfamiliar settings. ... The boys enjoy their visits with [the husband] and these visits should continue, consistent with appropriate changeover arrangements and [the husband]'s availability and psychological capacity to care for [D] and [M]. Finally Ms B about the children: Their relationship with [the husband] is very important to [D] and [M]. They also live in [the Albury/Wodonga region] and it would help if [the husband] took an active interest in spending time with his sons in their home city, as well as his own. [The husband] is strongly urged to think carefully about what messages his conduct to date gives the boys. I propose to determine the matters on the basis of all of this material which in my view is overwhelming. At the conclusion of the case, counsel for the Independent Children's Lawyer indicated that he had been given instructions by Legal Aid NSW to make an application for costs against the husband on the

basis that the wife had completed the necessary paperwork and obtained a waiver. The husband's response was simply to oppose the application but if I was against him, he said that he needed time to pay it off. Before looking at the parenting orders that I propose to make, I propose to deal with the cost issue. Section 117 of the Family Law Act 1975 (Cth) (the Act) requires that each party bear their own costs unless the situation justifies a departure from that position. In my view, the unreasonable behaviour of the husband has protracted these proceedings and had he behaved other than he has, the proceedings would not have been as difficult. This is a very clear situation in which the normal rule should be departed from. Section 117 however goes on to say that I am obliged to take into account the factors set out in that section. One of the most important factors is the financial position of the party against whom the costs are sought. I have no doubt that I have not been given an accurate picture of the husband's financial position. Notwithstanding the fact that he avows he is unemployed and receiving Centrelink benefits, he has an accountant acting for him in relation to his business interests and he conceded that at times he had workmen employed as part of a team. He seems to have no obligations in his home life and he pays minimal child support so I can only presume that any money that he otherwise earns as a self-employed contractor is for his own benefit. He was very quick to offer to pay \$100 towards the petrol costs of the wife if she was prepared to contribute towards the travel. On that basis, I am satisfied that it is appropriate to make an order for costs of the amount sought namely \$3943. As to the payment of those sums, it is a matter entirely for the Director of Legal Aid NSW to recover them but it will be the husband's responsibility to make arrangements with the Director in relation to how that sum is to be paid.

DISCUSSION Because I intend to make parenting orders, s 61DA requires that I apply a presumption that it is in the best interests of the children for their parents to have equal shared parental responsibility. This exercise needs to be undertaken before the determination of any parenting order. The presumption however may be rebutted in one of two circumstances. The first is if there has been family violence. The evidence in this case is not entirely clear and in many ways, that does not matter. More importantly, s 61DA(4) says that the presumption need not apply if it would not be in the best interests of the children for the Court to apply it. In my view, this is a classic example of

a situation where it would not be in the best interests of the children for the presumption to be applied notwithstanding the fact that the husband is not seeking equal time or even substantial and significant time. Accordingly therefore, I find that the presumption is rebutted.

PARENTING ORDERS

As to what parenting order I should then make, it is important to look firstly at the objects and principles of Part VII of the Act. The objects and principles from which the provisions of Part VII are to be applied are set out in s 60B, which provides: (1) The objects of this Part are to ensure that the best interests of children are met by: (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children. (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests): (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and (d) parents should agree about the future parenting of their children; and (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture). Section 60B also makes provision for an Aboriginal child or Torres Strait Islander child being able to enjoy their culture but in this case, that provision does not apply.

THE BEST INTERESTS PRINCIPLE

Section 60CA is fundamental. It says: In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration. In determining what is in a child's best interests, s 60CC provides that the Court must consider the following matters in determining what is in the child's best interests:

Primary considerations (2) The primary considerations are: (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Additional considerations (3) Additional considerations are: (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views; (b) the nature of the relationship of the child with: (i) each of the child's parents; and (ii) other persons (including any grandparent or other relative of the child); (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent; (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from: (i) either of his or her parents; or (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living; (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; (f) the capacity of: (i) each of the child's parents; and (ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs; (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant; (h) if the child is an Aboriginal child or a Torres Strait Islander child: (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and (ii) the likely impact any proposed parenting order under this Part will have on that right; (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents; (j) any family violence involving the child or a member of the child's family; (k) any family violence order that applies to the child or a member of the child's family, if: (i) the order is a final order; or (ii) the making of the order was contested by a person; (l) 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; (m) any other fact or circumstance that the court thinks is relevant. Section 60CC(4) provides: Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents: (a) has taken, or failed to take, the opportunity: (i) to participate in making decisions about major long-term issues in relation to the child; and (ii) to spend time with the child; and (iii) to communicate with the child; and (b) has facilitated, or failed to facilitate, the other parent: (i) participating in making decisions about major long-term issues in relation to the child; and (ii) spending time with the child; and (iii) communicating with the child; and (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child. Section 60CC(4A) provides: If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred. The Court is exhorted to ensure the best interests of the children are met by ensuring that they have the benefit of their parents having a meaningful involvement in their lives and s 60CD requires the Court to regard the best interests of the children as paramount. In determining what is in the best interests of the children, the Court is obliged to turn to s 60CC. It is a primary consideration for the children to have the benefit of a meaningful relationship with the parents. Much depends on how the husband approaches that subject from now on particularly having regard to his own position as seeing the children only on a monthly basis. That relates obviously to the boys but in respect of G, much depends on what attitude the husband adopts in relation to the orders that I propose to make giving him an opportunity as well as G to develop some form of relationship on a very slow and gradual basis. It is clear from the report of the family consultant that there is a relationship of a meaningful nature between the husband and the boys and it will really be a matter for him as to how he develops that in the future. Whilst he espouses that he wants to be a significant part in their life, he must understand how destructive of the relationship with their mother his behaviour is if he fails to show her respect and courtesy. SECTION 60CC FACTORS I am quite satisfied that the mother would do anything to encourage a proper relationship between father and children. I have no difficulty with her conduct in these

proceedings. I have taken little account of the views of the children in this case because of their ages and level of maturity. Their views can carry very little weight. I have considered the nature of the relationship of each of the parents with the children and can only say that I am satisfied that the other has a good relationship with them and that the husband has much to learn. Whilst he seems to enjoy the rough and tumble of parenting, the hard yards of being a responsible parent are clearly lacking. Nothing was so evident as at the end of his final address when he was critical of the mother at a time when the finger was really being pointed at him by counsel for the Independent Children's Lawyer as the cause of most of the problems of these children. Section 60CC requires a consideration of the willingness and ability of each of the parents to facilitate and encourage a close and continuing relationship between the children and the other parent. I accept that the wife has facilitated and will continue to facilitate the relationship between the children and the husband but it is really a matter for him to reciprocate. I am quite satisfied that at this stage, he is deliberately destructive of the relationship between the children and their mother and that it is only through her patience and dedication that after the periods of time he has spent with them, she is able to get them back into a normal routine. I am comforted by the fact that the husband does not seek much more than a monthly visit with these children on the basis of which the children will have an opportunity to settle and learn life skills that they are clearly not learning from the husband. I have considered the effect on the children of separation from the husband but there is little I can do about that having regard to his chosen course of action. I have considered the question of the practicalities and the difficulties of the husband continuing a relationship with the children and the time that he wishes to spend with them and I do not accept that he has convinced me in any way of any medical condition precluding him from having a proper relationship with the children. I appreciate very much that he has a four hour drive from Melbourne to the Albury/Wodonga region but he could, should he so desire, spend time with the children in the Albury/Wodonga region as has been suggested by the family consultant. His response was that he simply hated the Albury/Wodonga region. Again, he places his needs before those of the children. A significant feature of s 60CC(3)(f) relates to the capacity of parents to provide for the needs of the children including emotional and intellectual needs. I am satisfied that the wife

has done the task well up until now and I see no reason for that to change in the future. Unfortunately, I cannot say the same for the husband. Hopefully, as a result of some of these remarks, he will get his act together and realise the damage that he is doing to the children. He desperately needs to read the remarks of the family consultant. It is interesting again to reflect upon the fact that he is the only person in this marching group who is out of step. The questions of the maturity, sex, lifestyle and background together with any cultural issues in this case do not apply. Another significant feature of s 60CC relates to the attitude of the parents towards the children as well as to their responsibilities of parenthood as they have been demonstrated. I would only be repeating myself to say that the husband has much to learn but I have no concerns about the wife's conduct. In relation to her attitude, she has adopted a patient and responsible approach to parenting. The Act requires me to examine the issues of family violence and family violence orders. There has been an apprehended violence order in this case although it has now expired. I have every reason to accept the wife's concerns about her own fears of the husband's conduct. That is a matter about which he needs to do some soul searching. It must adversely impact upon the children. It is timely to remember the words of Chisholm J in *JG & BF* (1994) FLC92-515 where his Honour said: For children to grow up in a climate of a potentially violent and dominating relationship between their parents seem to me to be an unacceptable model of family relationships and would be very likely to create a situation of stress and fear that may well be damaging over a period. It is quite wrong in my opinion, to assume that violence can be relevant only if it is directed at the children or takes place in their presence. I am also obliged to consider whether it would be preferable to make an order that would be least likely to lead to further proceedings. For the sake of the children being able to settle quickly and also to get on with their lives in the area where they live and go to school, I propose to make orders which are restrictive including to the effect that the husband will have time suspended if he fails to honour his obligations. The children do not need to be left in the lurch waiting for their father who not only fails to attend but also fails to advise anybody that he is not coming. I am also obliged under Part VII of the Act to consider what the parents have done subsequent to separation. I think I have set those matters out adequately and there is little more that I can add other than to say

that I am satisfied that the mother has facilitated the relationship between the father and the children but the father has not been diligent in this area. Accordingly, I propose to make the orders as I have indicated. In my view they are in the best interests of these children. I certify that the preceding One Hundred and Twenty Six (126) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin Associate Date: 29 November 2007 AustLII: Copyright

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