

FAMILY LAW CHILDREN the time the child shall spend with the father where the father has previously suffered from significant mental health issues but his mental health has significantly improved where the father continues to attend upon a treating psychiatrist where the father agrees to allow his treating psychiatrist to contact the mother in the event his mental health deteriorates in a manner which impacts on his capacity to care for the child where the mother asserts the child is at an unacceptable risk if in the father's care overnight where the child has been diagnosed as having significant separation anxiety with school refusal Family Law Act 1975 (Cth) ss 60CA, 65AA, 60B, 65DAB Vigano & Desmond [2012] FamCAFC 79 McCall & Clark [2009] FamCAFC 92; (2009) FLC 93-405 Mazorski v Albright [2007] FamCA 520 MRR & GR (2010) 240 CLR 461 APPLICANT: Mr Essex RESPONDENT: Ms Essex FILENUMBER: BRC 5697 of 2011 DATE DELIVERED: 3 October 2014 PLACE DELIVERED: Brisbane PLACE HEARD: Brisbane JUDGMENT OF: Hogan J HEARING DATES: 30 & 31 July 2013 and 1 & 2 August 2013 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms McArdle SOLICITOR FOR THE APPLICANT: Phillips Family Law COUNSEL FOR THE RESPONDENT: Mr Linklater-Steele SOLICITOR FOR THE RESPONDENT: Rice Naughton Buckley ORDERS IT IS ORDERED BY CONSENT ON A FINAL BASIS THAT (1) The child B, born ... 2005, (the child) live with the mother. IT IS FURTHER ORDERED ON A FINAL BASIS THAT (2) The Father and the Mother have equal shared parental responsibility for the major long term issues of the child including in respect of: (a) the child's education; (b) the child's religious and cultural upbringing; (c) the child's health; (d) the child's name; and (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with or live with either parent. (3) The parents consult with each other about decisions to be made in the exercise of their equal shared parental responsibility and make a genuine effort to come to a joint decision. (4) Each party has responsibility for decisions about the day to day care, welfare and development of the child while he is in that party's care. (5) The child spend time with the Father at all times as may be agreed by the parties in writing but, failing agreement as follows: (a) commencing with the next visit in accordance with the schedule of time operative under the previous parenting Order and until Friday 28 November 2014: (i) from 9.00am Saturday until 4.00 pm Sunday each alternate weekend; and (ii)

from afterschool or 3.00 pm until 7:30 pm each Wednesday, (b) from Friday 28 November 2014: (i) from afterschool or 3.00 pm Friday until 4.00 pm Sunday each alternate weekend; (ii) from afterschool or 3.00 pm until 7:30 pm each Wednesday; (c) during the December 2014/January 2015 school holiday period: on three (3) non-consecutive blocks of two (2) nights and, unless otherwise agreed between the parties in writing, such time shall occur: (i) from 3.00pm on 17 December 2014 to 4.00 pm on 19 December 2014; and (ii) from 3.00pm on 31 December 2014 to 4.00 pm on 2 January 2015; and (iii) from 3.00pm on 14 January 2015 to 4.00 pm on 16 January 2015. (d) from 3.00pm Boxing Day 2014 until 4.00 pm Sunday, 28 December 2014. (e) from the second weekend after school commences in 2015: (i) each alternate weekend from after school Friday until 4.00 pm Sunday with father to collect the child from school at the commencement of time and the mother to collect the child from the fathers residence at the conclusion of time; and (ii) from afterschool or 3.00 pm each Wednesday until the commencement of school on Thursday with the father to collect the child from school at the commencement of such time and return him to school at the conclusion of such time. (f) during the 2015 Easter school holiday period: (i) from 9.00am on Good Friday (3 April 2015) until 9.00 am on Easter Sunday (5 April 2015); and (ii) for two (2) non-consecutive blocks of three (3) nights and, unless otherwise agreed between the parties in writing, such time shall occur: from 9.00 am on 7 April 2015 to 4.00 pm on 10 April 2015; and from 9.00 am on 14 April 2015 to 4.00 pm on 17 April 2015; (g) during the 2015 June/July school holiday period: for five (5) consecutive nights and, unless otherwise agreed between the parties in writing, such time shall commence at 9.00 am on the Saturday immediately after school ends for the term and shall conclude at 4.00 pm the following Thursday with the father to collect the child from the mothers residence at the commencement of such time and the mother to collect the child from the fathers residence at the conclusion of such time. (h) for the first half of the 2015 September/October school holiday period with such time to commence at 9.00 am on the Saturday immediately after school concludes for the Term and to conclude at 5.00 pm on the second Saturday after school concludes for the Term with the father to collect the child from the mothers residence at the commencement of such time and the mother to collect the child from the fathers residence at the conclusion of such time. (i) for

the first, third, fifth and seventh week of the December 2015/January 2016 school holiday period (or such of these weeks as fall within the child's school holiday period) and, unless otherwise agreed between the parties in writing: (i) from 9.00am on the Saturday immediately after school concludes for the Term until 5.00 pm on the second Saturday after school concludes for the Term with the father to collect the child from the mother's residence at the commencement of such time and the mother to collect the child from the father's residence at the conclusion of such time; and (ii) from 9.00am on the third Saturday after school concludes for the Term until 5.00 pm on the fourth Saturday after school concludes for the Term with the father to collect the child from the mother's residence at the commencement of such time and the mother to collect the child from the father's residence at the conclusion of such time; and (iii) from 9.00am on the fifth Saturday after school concludes that Term until 5.00 pm on the sixth Saturday after school concludes that Term with the father to collect the child from the mother's residence at the commencement of such time and the mother to collect the child from the father's residence at the conclusion of such time; and (iv) from 9.00am on the seventh Saturday after school concludes that Term until 5.00 pm on the eighth Saturday after school concludes that Term with the father to collect the child from the mother's residence at the commencement of such time and the mother to collect the child from the father's residence at the conclusion of such time. (j) commencing with the school holiday period at the conclusion of first Term in 2016 and, unless otherwise agreed between the parties in writing: (i) for the first half of the school holiday periods, other than the Christmas school holiday period, in odd numbered years; and (ii) for the second half of the school holiday periods, other than the Christmas school holiday period, in even numbered years. (6) Commencing with the Easter 2016 school holiday period: if the child is not otherwise, pursuant to the terms of this Order, spending time with the father, the child shall spend time with the father: (a) from 9.00am Good Friday until 4.00 pm Easter Saturday in odd numbered years; and (b) from 9.00am Easter Sunday until 4.00 pm Easter Monday in even numbered years. (7) Commencing with the Easter 2016 school holiday period: if the child is not otherwise, pursuant to the terms of this Order, spending time with the mother, the child shall spend time with the mother: (a) from 9.00am Good Friday until 4.00 pm Easter Saturday in even numbered years; and (b) from

9.00am Easter Sunday until 4.00 pm Easter Monday in odd numbered years. (8) Commencing with the Christmas school holiday period in December 2016 and, unless otherwise agreed between the parties in writing, the child shall spend time with: (a) with the father for the first two weeks, fifth and seventh weeks in odd numbered years; and (b) with the mother for the second two weeks, sixth and eighth weeks in odd numbered years; and (c) with the mother for the first two weeks, fifth and seventh weeks in even numbered years; and (d) with the father for the second two weeks, sixth and eighth weeks in even numbered years. (9) That change over for the purpose of Clause (8) of this order shall occur at 9.00 am on Saturdays. (10) From the start of Term 1 in 2015, the operation of Clause (5)e. shall be suspended during any school holiday period and shall resume with weekend time commencing: (a) on the first weekend of school Term if the child has spent time with the father in the first half of the holiday period; or (b) on the second weekend of school Term if the child has spent time with the father in the second half of the holiday period. (11) In the event that, because of the operation of other terms of this Order, the child would not otherwise be spending time with the mother on the weekend on which Mothers Day occurs, the child shall spend time with the mother on Mothers Day from 9.00 am Sunday until 4.00 pm with the mother to collect the child from the father's residence at the commencement of such time. (12) In the event that, because of the operation of other terms of this Order, the child would not otherwise be spending time with the father on the weekend on which Fathers Day occurs, the child shall spend time with the father on Fathers Day from 9.00 am until 4.00 pm with the father to collect the child from the mother's residence at the commencement of such time and to return the child to the mother's residence at the conclusion of such time. (13) From December 2015 onwards, irrespective of the operation of other terms of this Order, the child shall spend time with the father: (a) from 3.00pm Christmas Eve until 3.00 pm Christmas Day in odd numbered years; and (b) from 3.00pm Christmas Day until 3.00 pm Boxing Day in even numbered years. (14) From December 2015 onwards, irrespective of the operation of other terms of this Order, the child shall spend time with the mother: (a) from 3.00pm Christmas Eve until 3.00 pm Christmas Day in even numbered years; and (b) from 3.00pm Christmas Day until 3.00 pm Boxing Day in odd numbered years. (15) If, because of the operation of other terms of this Order, the child is not otherwise living or

spending time with the mother on her (the mother's) birthday, the child shall spend time with her: (a) if her birthday falls on a non-school day: from 9.00 am until 4.00 pm with the mother to collect the child from the father's residence at the commencement of time and return the child to father's residence at the conclusion of time; (b) if her birthday falls on a school day: from after school until 7:30 pm with the mother to collect the child from school at the commencement of such time and return the child to the father's residence at the conclusion of such time. (16) If, because of the operation of other terms of this Order, the child is not otherwise living or spending time with the father on his (the father's) birthday, the child shall spend time with him: (a) if his birthday falls on a non-school day: from 9.00 am until 4.00 pm with the father to collect the child from the mother's residence at the commencement of time and return the child to mother's residence at the conclusion of time; (b) if his birthday falls on a school day: from after school until 7:30 pm with the father to collect the child from school at the commencement of such time and return the child to the mother's residence at the conclusion of such time. (17) If, because of the operation of other terms of this Order, the child is not otherwise living or spending time with the father on his (the child's) birthday, the child shall spend time with him: (a) if his birthday falls on a non-school day: from 9.00 am until 2.00 pm with the father to collect the child from the mother's residence at the commencement of time and return the child to mother's residence at the conclusion of time; (b) if his birthday falls on a school day: from after school until 7:30 pm with the father to collect the child from school at the commencement of such time and return the child to the mother's residence at the conclusion of such time. (18) If, because of the operation of other terms of this Order, the child is not otherwise living or spending time with the mother on his (the child's) birthday, the child shall spend time with her: (a) if his birthday falls on a non-school day: from 9.00 am until 2.00 pm with the mother to collect the child from the father's residence at the commencement of time and return the child to father's residence at the conclusion of time; (b) if his birthday falls on a school day: from after school until 7:30 pm with the mother to collect the child from school at the commencement of such time and return the child to the father's residence at the conclusion of such time. (19) The parent with whom the child is then living or spending time shall ensure that the child telephones the other parent each Tuesday and Saturday

between 6.00 pm and 6.30 pm, or at such other time as may be agreed in writing between the parents, and for this purpose: (a) the parent with whom the child is not then living shall initiate the telephone call to a mobile telephone or landline telephone number provided by the other parent; and (b) the parent with whom the child is then living shall ensure the child is available to receive the telephone call; and (c) the parent with whom the child is then living shall ensure the mobile telephone is charged and in a mobile telephone reception area; and (d) the parent with whom the child is then living shall ensure the child is afforded privacy whilst the telephone calls take place. (20) The child shall be at liberty to call either parent at all reasonable times and the parent in whose care he then is shall assist him to make any telephone call he reasonably requests. (21) Unless otherwise specified in this Order, the father will collect the child at the commencement of his time with him: (a) from school if such time occurs on a school day; or (b) from the mother's home or other location agreed between the parties in writing if such time occurs on a non-school day. (22) Unless otherwise specified in this Order, the mother will collect the child at the conclusion of his time with the father from the father's home or other location agreed between the parties in writing. (23) Each parent is at liberty to arrange for a person other than themselves to undertake any changeover provided that: (a) such person is known to the child; and (b) prior written notice, including by text communication, is given to the other parent of the intention to have a nominated person other than themselves perform changeover. (24) The father shall continue to attend upon Dr M, or such other appropriate alternative practitioner, and shall continue to comply with the treatment regime (including by taking any recommended and prescribed medication as directed) recommended by Dr M or such other appropriate alternative practitioner. (25) By this Order, the father authorises Dr M, or such other appropriate alternative practitioner upon whom he attends to contact the mother in the event that that practitioner has any concerns about the father's capacity to provide an appropriate care environment for the child. (26) The father shall immediately inform the mother should he have any concerns about his capacity to provide appropriate care for the child. (27) The parties shall ensure that the child continues to attend for confidential counselling and/or supportive therapy (whether provided by a psychiatrist, psychologist, or other qualified therapist) as recommended by Dr

Kand/or any other psychiatrist, psychologist or other qualified therapist upon whom the child attends, with such confidential counselling and/or supportive therapy to occur for no less than twelve (12) months after the making of this Order unless otherwise recommended by the child's treating psychiatrist, psychologist or other qualified therapist. (28) Each parent is at liberty to be involved in such counselling in the manner determined by the child's treating psychiatrist, psychologist or other qualified therapist. (29) Each party is at liberty to provide a copy of the reports prepared by Ms C and Dr H during the course of these proceedings to any psychiatrist, psychologist or other qualified therapist upon whom that party or the child attends. (30) Neither parent denigrate the other or their family to, or in front of, or within the hearing of, the child. (31) Each party shall direct any third party to refrain from denigrating either party or their family to, or in front of, or within hearing of, the child and, failing, compliance with such a direction, shall remove the child from that environment immediately. (32) During the time the child is with either parent, that parent shall: (a) respect the privacy of the other parent and not question the child about the personal life of the other parent; and (b) speak of the other parent respectfully. (33) Each party shall inform the other parent as soon as reasonably practicable of any medical condition, significant health issue or significant illness suffered by the child. (34) Each party shall keep the other informed of the details of any doctors, health care and other treatment providers upon whom the child attends. (35) By this Order, any medical practitioner, health care and other treatment provider upon whom the child attends is hereby authorised to provide to each parent, at that parent's request and cost, all information lawfully able to be provided about the child's attendance and treatment. (36) Each party shall keep the other informed of any day care, school, educational facility or extracurricular activity provider upon whom the child attends. (37) By this Order, any day care, school, educational facility or extracurricular activity provider upon whom the child attends is hereby authorised to provide to each parent, at that parent's request and cost, all information lawfully able to be provided about the child's attendance, progress and participation, with such information to include, but not be limited to: copies of any school reports, newsletters, applications for class photographs and the like and any information in relation to the child's educational and social progress. (38) The parties are at liberty to

provide a copy of this Order to any school or other educational facility at which the child attends. (39) Each party shall keep the other parent informed at all times of their residential address, contact telephone numbers (mobile and landline if available) and an email address and shall notify the other party at least 48 hours before any change to the residential address and within 48 hours of any change to the contact telephone numbers or email address. (40) Subject to the conditions imposed by the child's school, these Orders authorise both parents to attend school functions to which parents are ordinarily invited including, but not limited to: carnivals, sports days, fetes, concerts, plays and parent/teacher interviews. (41) The parties shall keep one another informed of matters such as schooling, extracurricular activities, medical issues and any other issues that may arise with respect to the child. (42) Neither party shall enrol the child in any activity nor arrange for the child to participate in any activity which occurs during time the child is with the other party without first obtaining the written agreement of that party. (43) Each parent shall ensure that the child attends at agreed extracurricular activities and sporting events during the time the child is in that parent's care. (44) Both parents do all things necessary and sign all documents necessary, within seven (7) days of any request for the same, to ensure that a passport is obtained and maintained for the child. (45) In the event that either party refuses to sign any document or do anything necessary to obtain a passport for the child within 14 days of receiving a written request to do so from the other party, a Registrar of the Family Court of Australia at Brisbane is appointed pursuant to s 106A of the Family Law Act (1975) (Cth) to execute all documents in the name of non-signing party. (46) The mother shall be entitled to possession of the child's passport. (47) Unless agreed between the parents in writing, neither parent shall remove the child from the Commonwealth of Australia before 3 October 2015 and, thereafter, each parent is at liberty to remove the child from the Commonwealth of Australia for the purpose of holiday travel. (48) In the event that a parent wishes to remove the child from the Commonwealth of Australia pursuant to Clause (47), that parent shall provide the other with no less than sixty (60) days notice of the intention to travel overseas and shall provide details of the proposed departure and arrival dates, destination and contact details whilst overseas. (49) No less than thirty (30) days before the proposed date of departure from the Commonwealth of Australia, the travelling



parents shall provide the other with: (a) a copy of a return ticket for the child, evidencing the date of departure and date of return to the Commonwealth of Australia; and (b) a copy of an itinerary which contains sufficient contact details to enable telephone communication between the non-travelling parent and the child to occur in the manner provided for in this Order. (50) Upon the father's request, the mother shall provide the child's passport to the father no less than seven (7) days before any notified proposed date of departure from the Commonwealth of Australia. (51) In the event the father removes the child from the Commonwealth of Australia for the purpose of holiday travel, he shall return the child's passport to the mother within seven (7) days of the child's return to the Commonwealth of Australia. (52) That in the event of any dispute in relation to the interpretation or implementation of this Order, the parties shall first attend family dispute resolution at the Family Relationship Centre, Suburb A if available or such other Family Dispute Resolution Practitioner as may be agreed between them in writing. IT IS FURTHER ORDERED THAT (53) Pursuant to s 65DA(2) and s 62B of the Family Law Act 1975, 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 to adjust to and comply with an order are set out in the Fact Sheet attached and these particulars are included in these orders. AND IT IS FURTHER ORDERED THAT (54) All outstanding applications are otherwise dismissed and removed from the list of cases requiring finalisation. (55) After the expiration of the appeal period, all subpoenaed documents be returned to the persons or institutions from which they emanated or destroyed and all exhibits are to be returned to the person or persons who tendered the same. IT IS NOTED that publication of this judgment by this Court under the pseudonym Essex & Essex 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 BRISBANE FILE NUMBER: BRC5697 of 2011 Mr Essex Applicant And Ms Essex Respondent REASONS FOR JUDGMENT I commence these Reasons with a sincere apology to the parties for the delay in finalising this matter. I assure them that I have had particular regard to the contemporaneous notes taken by me during the hearing. I have, of course, revisited and reread these notes, the affidavit material, the exhibits, the various reports prepared by persons with

professional expertise for the Courts assistance and the contents of the parties respective Summaries of Argument, however described. These proceedings[1] concern, B (the child), born in 2005. The child's parents married in April 2003 and separated finally in January 2011. There is no dispute between the parties that the child will continue to live primarily with the mother. Rather, their dispute involves the allocation of parental responsibility, the time the child will spend with the father and the conditions which will properly attach to such time. These issues fall to be determined in circumstances where the child's father suffers from a mental illness: he has been diagnosed with a treatment resistant major depressive disorder and has been hospitalised - both during the relationship and after separation. On occasions, he has undergone electroconvulsive therapy (ECT). His last period of hospitalisation occurred in about March 2011, a couple of months after separation. The impact on the father of his illness has been such that, in about April 2006, he took leave from paid employment for a period of about 12 months. In about June 2007, he commenced a graduated return to work program his part time employment as a healthcare worker was structured to enable him to recuperate from the subjective stressors of his return to work[2] between each shift. When the father transitioned to regular shifts in about July 2007, the work stressors resulted in an increase in the somatic symptoms associated with his illness. Consequently, he was placed on project work which continued - interrupted with occasional periods of sick leave - until about mid-2009. At this time, the father was noted as being extremely vulnerable to external stressors.[3] The father ceased working for remuneration in about late August 2009. He is yet to return to paid employment but intends to do so once these proceedings are finalised. The parties are in dispute about the level of care the father provided to the child during the relationship: the father asserts he was the child's primary carer, particularly after illness forced him to take leave from work and the mother became the primary breadwinner; the mother disputes this assertion on the basis that, for much of the time, the child was in day care for most of the day. Given the agreement that the child will continue to live primarily with the mother and the parties previous agreements that he spend unsupervised time with the father, resolution of such dispute matters little in the context of determining the extent of the child's future unsupervised time with the father. It is immediately apparent that much of the father's ill-health

occurred during the parties relationship. Clearly, the opportunity to witness the impact of his ill-health on his functioning has had a significant impact on the mother, her perception of the father and her view of his capacity to parent the child. It is also, I think, clearly established that, because they separated, the mother has not had the opportunity to witness the father's treatment assisted improvement. She remains understandably in one sense focused on how he was when he was labouring under the significant impost of illness; she has, I think, struggled to move past these memories and to accept that the father now may well be different to the person he was when first called on to live with his condition. An unfortunate consequence of the mother's perception of the father and his ability to provide safe and supportive care for the child has been the father's reaction to the same: he sees the mother as deliberately undermining his relationship with the child, deliberately inventing or exaggerating her account of the child's behaviour whilst in her care and as deliberately exposing the child to unnecessary and over-intrusive interventions. It is within this environment of reactive mistrust that consideration of those orders which are in the child's best interests occurs. Such assessment must also, of course, take into account the inherent features of the child: those matters of personality and functioning which combine to make him who he is unfortunately, a further matter about which his parents have, at least historically, disagreed. Whilst perhaps unduly optimistic, I retain the hope that now that the parents have both had the opportunity to hear the evidence during the trial in particular that given by Dr H - and to reflect on the same, the future may hold an improved prospect of a more understanding, accepting and co-operative parenting regime for the child. So much would certainly be to his benefit. The proposals The father seeks that [4]: the parties have equal shared parental responsibility for the child; the child live with the mother; after a graduated increase in time [5], the child spend time with him: i) each alternate weekend from after school Friday until 4.00 pm Sunday; and ii) from after school each Wednesday overnight until 7.30 pm Thursday; the child continue to attend upon his psychologist, with appointments to be increased in the fortnight before and after overnight time commences; the child spend time with him for half of the designated school holiday periods: on a week about basis in the Easter, June/July and September school holidays and for two consecutive weeks and two further

separate weeks in the Christmas school holidays; the child spend time with each parent on special days; the child communicate with him by telephone at all reasonable times and at any time he instigates; the child continue to attend at the school at which he is currently enrolled, with the costs of such schooling to be met by the mother; his psychiatrist be authorised to contact the mother in the event his mental health deteriorates to the point which the psychiatrist believes his capacity to provide appropriate care for the child is affected; there are standard orders made in relation to: information sharing between the parties, restraint of denigration by each party of the other and authorising the child's medical practitioners, schools and other relevant agencies to provide information to the parties; and the parties be able to provide a copy of Ms C's Family Reports and Dr H's reports to their and the child's treating psychiatrists, psychologists or counsellors. The mother seeks that: she have sole parental responsibility for the child; the child live with her; the child spend time with the father each alternate Wednesday from after school until 6.30 pm, and for a period of twelve months, each alternate week on both Saturday and Sunday from 9.00 am to 4.00 pm; after this twelve month period, and with the written confirmation by the child's psychiatrist, Dr K, that the child's anxiety levels have decreased, his weekend time with the father occur each alternate weekend from 9.00 am Saturday until 4.00 pm Sunday; the child spend time with each parent on special days; the child's time with the father be conditional upon the father's continued attendance upon his psychiatrist, Dr M, or another appropriate practitioner and his compliance with their recommended treatment regime; the father be at liberty to communicate with the child by telephone every Tuesday between 6.00 pm and 6.30 pm and each alternate Saturday (when the child is not spending time with him) and at any reasonable time as requested by the child; she be permitted to suspend the child's time with the father for a holiday of up to 14 days, three times per calendar year and for an additional 30 days every three calendar years with this suspension to be conditional upon her providing the father with 30 days notice in writing of such intention; she be permitted to take the child overseas for holidays on providing the father with no less than 30 days notice in writing of such intention; there are standard orders made in relation to: information sharing between the parties, restraint of denigration by each party of the other and authorising the child's medical and psychological practitioners, schools and

other relevant agencies to provide information to the parties; the father's psychiatrist, Dr M, or any other treating professional be authorised to contact her if such persons hold any reservations about the father's capacity to provide adequate care for the child; the father inform her if he has any concerns in relation to his capacity to appropriately care for the child; the father not consume alcohol in excess of the legal limit and not consume any medications for which he does not hold a prescription whilst the child is in his care; the father not consume more than a single dose of Valium whilst the child is in his care, and in the event he has been prescribed more than 10mg per day of Valium, he ensure he has alternate support for his time with the child - failing this, the mother will assume responsibility for the child's care; and the father not take more than one dose of analgesia containing codeine when concurrently taking Valium and, if such concurrent medication is prescribed, the father shall arrange alternate support for his time with the child - failing this, the mother will assume responsibility for the child's care.

Brief overview: history of proceedings, previous Orders and the child's time with the father

Between January 2011 and May 2011, the child spent supervised time with the father: each Wednesday afternoon from 2:30 pm to 5:30 pm; and each Sunday from 9.00 am to 3.00 pm. Between May 2011 and June 2011, the child spent time with the father: on a supervised basis: each alternate Saturday and Sunday from 9.00 am until 5.00 pm; and each Wednesday from 2:30 pm to 6:30 pm, with the first 30 minutes supervised. Between July 2011 and 1 November 2011, the child spent time with the father: each Wednesday evening from 4:30 pm to 7:30 pm, supervised at the home of a mutual friend; and each Friday afternoon from 3:30 pm to 5.00 pm at D Contact Centre; and each Sunday from 1:30 pm to 3:30 pm at E Contact Centre. In September 2011, Ms C, a psychologist, completed her first Family Report. She recommended a significant increase in the amount of time the child was to spend with the father<sup>[6]</sup> and that the parties have equal shared parental responsibility for him. In about October 2011, Dr H, a psychiatrist, completed an initial report. He concluded there was no clear psychiatric reason why the father should not be able to spend time with the child and that the child's time with the father should be substantial, predictable and reliable. After the release of these reports, the parties agreed the terms of an interim parenting order - on 1 November 2011, an Order was made by consent which provided that: the child live with

the mother; the parties have equal shared parental responsibility for the child; and the child spend time with the father two evenings each week and during the day every alternate Saturday and Sunday. At the time the November 2011 Order was made, the father lived in a self-contained flat at his sisters property. The child spent time with the father in accordance with the terms of the November 2011 Order until 25 November 2012. On 30 November 2011, Orders finalising the parties property dispute were made by consent. As the November 2011 Order did not provide for overnight time between the child and the father, the father filed an Application in a Case in about August 2012 seeking, primarily, that the child's time with him increase to include overnight time. The mother was not supportive of such an increase. On Saturday 24 November 2012 when the child was in his care the father moved from living at his sisters property to his own independent premises. He did not tell either the mother or the child he intended to do this before he moved. An issue subsequently arose about whether the fathers independent living arrangements were contemplated by the November 2011 Order: that is, did the November 2011 Order contain an (implied) provision to the effect that the child's time with the father occur only at the fathers sisters property at Suburb F? The mother thought so and the father did not. When she learned of the fathers change of living arrangements, the mother withheld the child. Consequently, he did not see the father from 25 November 2012 until 20 December 2012 when, in order to maintain and facilitate his relationship with the child, the father agreed to spend time with him at the Suburb F property. Consistent with her view that the child's time with the father only occur at the Suburb F property, the mother filed an Application in a Case<sup>[7]</sup> seeking, amongst other things, orders to that effect. On 20 December 2012, the Principal Registrar dismissed the fathers application for overnight time with the child and ordered that Dr H prepare an updated psychiatric report. When the mothers Interim Application was heard on 18 March 2013, the mother agreed to the child spending time with the father at his own property. Whilst no express order was made (other than one dismissing the mothers Application in a Case), the child's time with the father thereafter occurred at and from the fathers own property in the manner prescribed by the November 2011 Consent Order. Thus, since 18 March 2013 the child has spent time with the father at his residence from after school each Wednesday and Thursday until 7.30

pm; and from 8.00 am until 4.00 pm each alternate Saturday and Sunday. The Principles In these proceedings, being proceedings for a parenting order (s 64B of the Family Law Act 1975 (Cth) (the Act)) in relation to the child, I may, subject to s 61DA (presumption of equal shared parental responsibility) and s 65DAB (parenting plans) and Division 6 of Part VII of the Act, make such parenting order as I think proper: s 65D of the Act. I must have regard to the Objects of Part VII of the Act and the principles which underpin those Objects: s 60B of the Act. In deciding whether to make a parenting order, I must regard the child's best interests as the paramount consideration: s 60CA and s 65AA of the Act. I must consider whether there is a benefit to the child of a meaningful relationship with both parents: an affirmative finding does not, of course, depend simply on there being a lack of danger of physical or psychological harm to him arising from time or communication with either parent.[8] A prospective approach is preferred when considering the benefit to the child of a meaningful relationship with both of his parents.[9] Neither parent disputes that the child will benefit from a meaningful relationship with the other parent. I am satisfied that, subject to finding that spending overnight time with the father does not expose the child to an unacceptable risk of harm, he will benefit from the ongoing opportunity to continue to develop and maintain a meaningful relationship namely, one that is important, significant and valuable to him[10]- with both of his parents. The mother advances that the child's time with the father should occur to use the phrase taken from her Updated Summary of Argument[11] - on a comparatively limited basis because she is concerned he may be subjected or exposed to psychological, emotional and potentially physical harm if he spends more time with the father than provided for in her proposal. The father advances that increased and overnight time with him does not pose any unacceptable risk to the child. He says that, with appropriate graduations and support (including from treating professionals), the child will benefit from having the opportunity to spend overnight and holiday time in his care. He further seeks to reassure the mother about his functioning by proposing that his long-standing treating psychiatrist (Dr M) continue to be authorised to contact the mother if he forms the opinion the father's functioning has deteriorated to an extent that it impacts negatively on his capacity to parent the child. Given that each parent criticises the other's management of the child's anxieties the father

saying the mother is responsible for the same and the mother saying the father is incapable of managing the same - it is logical to commence with an overall consideration of this issue. Who is the child: his anxiety, his school refusal and what this means for him and his time with the father? As the parties each assess the child's mental health in a markedly different manner, it is, perhaps, pertinent to note Ms C's observation in the 2011 Family Report - when she was assessing the major issues between the parties - to the effect that the difference in their positions relates to different interpretations of the facts by virtue of their individual experiences.[12] The mother maintains the child has displayed symptoms of anxiety and obsessional behaviour since he was 2 years old.[13] She told Ms C in 2011 that the child was very sensitive and a bit on the anxious side.[14] Dr G, a child and adolescent psychiatrist, saw the child on five occasions from 2009 until 2011 and, again, for a single session in late December 2012. Whilst the mother's material does not contain any suggestion that either party or the child had any difficulty with Dr G's therapeutic recommendations, the father asserted that, at some time before the proceedings commenced, Dr G advised the mother to quit her job, separate from him, move to Town I (where her extended family live), register for Centrelink benefits and have the child baptised Catholic in order to obtain access to cheaper education.[15] He says the mother was displeased with this advice. Whilst neither Dr G's affidavit nor the report of Ms J, the mother's psychologist, refer to these alleged recommendations, it is obvious that each of their reports provides only a brief overview of the history of matters dealt with during the course of their engagement with the parties. On about 25 January 2011, the mother sought a psychological referral for the child from Dr L, his general practitioner. The purpose of the referral was to assist in reducing his anxiety, obsessional behaviour, and volatile mood[16] after the parties' recent separation. As a consequence of the completion of a Mental Health Treatment Plan, the child attended upon Mr N, a psychologist. Mr N saw the child 22 times in the period from 21 January 2011 until 23 June 2011. On 24 June 2011, Mr N wrote to the mother's solicitors outlining his conclusion that although [the child] displays subclinical features, he does not meet criteria for any mental disorder....[17] Consequently, Mr N did not diagnose the child as suffering from any mental disorder.[18] The child continued to attend on Mr N who was made aware of the mother's concerns about his behaviour and his comments



to her.[19] Dr G's involvement in the child's treatment was discussed by Dr H in his first report dated 14 October 2011. He concluded that given the polarisation around the opinion/s ascribed to Dr [G] in the past, it might be better if it were a different psychiatrist upon whom the child attended.[20] Despite Dr H's recommendation, her own expressed reservations in relation to Dr G and the father's desire for the child not to attend upon her, the mother took the child to see Dr G on 22 December 2012. After this, Dr G told the mother she did not believe it necessary to continue the child's attendance. The mother does not provide an explanation for why, after almost five weeks following the recommendation being made, it was necessary for the child to attend upon a psychiatrist about whom there is significant disagreement, other than to indicate that there had been a cancellation at the doctor's office. Dr G prepared two reports: dated September 2011 and 16 April 2013. Her April 2013 report summarises the child's sessions and contains her assessment that, [The child] has a significant constitutionally anxious temperament, that at times has likely reached clinical threshold for being a disorder.[21] Whilst the mother asserts the child's behaviour deteriorated - in the manner outlined in her affidavit material in significant detail - after he started to spend unsupervised time with the father following the November 2011 Order, the mother's current proposal is that such unsupervised daytime time continue for a further 12 month period whilst the child continues to be supported by his treating psychiatrist. The father urges that I adopt a sceptical assessment of the mother's evidence about the child's behaviours before and after spending time with him. Whilst I am not prepared to reject the mother's description of the child's behaviour on occasions, I do not accept that his behaviours or anxieties are attributable solely to his time with the father. Rather, I consider it highly likely that at least some of his recounted behaviours may well be reactive to, and reflective of, her own anxieties about this time with the father. Some may also be, simply, a manifestation of his own anxious personality. The mother gives evidence of the child's comments to her on occasions. She says, for example, that at the end of September 2012, when about 7 years of age, he became distressed before changeover and, on returning home, said things like I wish I was dead and it would be so much easier if I was dead.[22] He reacted hysterically in early October 2012 when a blood test was ordered, saying things like just kill me or I'll kill myself. He has complained of physical symptoms

including feeling really sick, again in his chest, headaches and tummy pains. He has had difficulty settling to sleep at night on occasions. She describes that, toward the end of 2012, when his attempt to collect rainwater overnight failed, he became distressed to the point of sobbing and pushing furniture over and yelled things like: none of my ideas are ever any good... I hate myself, I am so stupid, I just want to die.[23] The mother described the child asking her will you kill me mummy? and telling her when she told him she did not want him to die - it doesn't matter, I know how to do it anyway, I just have to get a knife and stab myself, I just want to die and be in heaven. When the mother asked how often he felt like this and the child said, all the time... I am stupid... I am no good, none of my ideas work out, I am so stupid, I hate myself.[24] From the mother's perspective, the father has not taken these reported comments and behaviours seriously. From the father's perspective, the mother has exaggerated and over-emphasised these comments and behaviours and, in such manner, perhaps, escalated them. Whatever the cause of the child's comments as reported by the mother, there is no evidence to suggest he has ever acted to harm himself deliberately. Further, despite being advised in mid-November 2012 (after seeking assistance following the event referred to above) that the child required urgent psychiatric assessment, [25] the mother did not seek out the same for him until she took him to Dr G in late December 2012. After this consultation, Dr G told her she did not believe it necessary to continue to see the child again. I consider it highly likely that, at least in the past, the child has reported things to the mother in a manner that is not entirely accurate. A clear example of this can be found in the occasion, in late November 2012, when the father moved from his sister's premises to live in his own premises. The child was spending time with him on that day and was involved in the move. The mother's evidence is that when the child returned home that evening, he sobbed for about an hour and a half and said: It has been such a hard day for me, too much for me, I had no idea that was going to happen, I was panicking all day. She said he was withdrawn and unusually clingy and wet his bed that night something he had not done in almost a year. However, the child's paternal grandfather, who helped the father and the child to move that day, provides a starkly different account of what actually happened that day: he says the mother's report of the child's description to her of what happened that day is completely

inconsistent with his observations. He says[26] the child never panicked, never showed any anger, showed no distress whatsoever throughout the day, happily packed his things for the move, appeared excited about the father's apartment, his bedroom and bathroom and was playful throughout the day. The paternal grandfather says the child told him words to the effect that he could come here every day. I accept the paternal grandfather's evidence, noting that video recordings of the child on that day support his contentions. The recordings capture the child and the extended paternal family happily packing up his bedroom and the child and grandfather playing and laughing at the new house. Throughout the day the child can be heard to say things like it's a nice place, I have a really nice bathroom, I can come here every day. Despite this positive interaction and attitude to the father's new premises, the mother's evidence is that, after he spent time with the father the next day, the child told her he was concerned about spending time with the father in the absence of his aunt. If the child told the mother he was worried as she reports I am not persuaded that such comment accurately recounted his own experience of the father's new home the day before. Rather, I accept that he was excited and happy when taken to see his father's new home. I also accept that it is entirely possible that, for whatever reason, the child told the mother something close to the exact opposite. The mother's evidence is that, after the child's time with the father recommenced, he continued to complain to her about being in his father's care. He demonstrated highly reactive behaviour in early February 2013 about an upcoming dentist appointment, screaming things like: I can't do it, I want to die[27], grabbing a butter knife from the kitchen drawer and running out the front door. She describes him exhibiting distress after spending time with the paternal family. Again, the account she provides of his recounting to her is contradicted by the paternal grandfather's evidence of the child's behaviour whilst with them. Rather than being distressed, the child was, I accept, excited about playing tennis with the family and was happy all day.[28] The mother said the child continued to make comments to her like: he wanted to die and go to heaven, that this life and this world were too hard, asked her if she would kill him and stab him, asked whether the father had ever wanted to kill himself. She sought assistance from Mr N who provided the child with certain strategies. It appears that, from about February 2013 at the very latest, the child's comments and threats of self-harm

then started to become associated with his school refusal. Again the mother sought help from Mr N.

[29] I conclude that the mother did not really think that the child's comments and/or threats about harming himself were casually related to his time with the father because, when the matter was before the Court on 18 March 2013, she agreed his time with the father could occur at the father's home. After the child continued to complain to the mother in a manner that seems to me to be closely connected with his desire not to have to go to school he started to see Dr K, a child psychiatrist, on 24 April 2013. Despite Dr K's involvement and the mother's attempts to implement her suggested calming strategies, the child's difficulties with and refusal to attend at school has continued. I am satisfied that his expressed anxieties about school and leaving the mother to attend at school are not related to his interactions or time with the father. I accept the mother's evidence [30] of the numerous occasions on which the child has become distressed: at the thought of going to school; in the process of getting to school; and when the mother leaves him at school. In the circumstances briefly summarised above and accepting Dr H's evidence about the child's school refusal referred to in greater detail below - it is unsurprising he has been absent from school for about 74 days in the period between the 2011 academic year and March 2013. [31] It is also pertinent to note that, despite these absences, the child's teacher reports [32] he is a quiet, delightful child who is willing to learn and accepts responsibility for his own learning. The father is critical of the mother's failure to facilitate the child's attendance at school. While I accept that consistent absences from school may well have future significant negative consequences for the child, I am mindful of the evidence given by Dr H which I accept to the effect that it can be very difficult for a parent to manage a child such as this child who displays such significant anxiety at, or around, or associated with, school attendance. I accept that, on occasions, the mother has been told by the school guidance officer she must pick her battles and sometimes allow the child to stay home from school. I also accept the mother has made significant attempts to facilitate the child's attendance at school in very difficult circumstances. I further accept that, while, in particular instances, the mother may well have been able to use different techniques or approaches to encourage the child to attend school, such assessment is easy to make with the benefit of hindsight and almost impossible to achieve in

the heat of the moment. In this respect, I also accept Dr H's evidence to the effect that there is a tension between the instinct of many parents to rescue their child and implementing strategies which cause distress but may serve to reduce the anxiety that, whilst retrospectivity may clarify strategies which may have been more effective at any particular instance, it ought not be used to criticise a parent who, at that time, attempted a different strategy. In 2011, Dr H [33], whose evidence I accept, concluded that the child: ... has a strong biological family history of anxiety and depressive symptoms. He has demonstrated significant anxiety from an early age. These appear to be persistent and ongoing. All significant sources of clinical data suggest that he has a significant level of anxiety... he probably does not at the point in time meet criteria for a formal anxiety disorder because his level of function is not affected enough by his symptoms. However he is on the cusp and is at high risk of developing a future anxiety disorder. [34] In 2013, Dr H assessed the child as having: ... developed a clinical anxiety disorder in the form of Separation Anxiety Disorder (with school refusal). He has symptoms of anxiety in other domains as well. [35] The father does not accept that the child has displayed the behaviours described by the mother. He has never seen the child act in such a manner. Further, he asserts the mother did not raise any of her concerns about the child's mental health with him before she made them in the Summary of Issues statement submitted to Ms C during the preparation of the updated Family Report. [36] He also alleges that, in the period between when the Updated Family Report which recommended the child spend time with him overnight and increasing to four nights per fortnight - issued in June 2012 and when she filed her affidavit on 8 October 2012, the mother did not raise any issue about the child's mental health with him. I accept Dr H's evidence, given when he was asked to elaborate on his clinical diagnosis made in 2013, to the effect that: typically, the behaviour of children, who suffer from the disorder he assessed the child as suffering from, may be manifestly different between the house of the parent with whom they have their primary attachment and the house of the parent with whom they do not have their primary attachment; the behaviour described by the mother will likely desist once the child is at school with the result that the school may not, in fact, see indications of such behaviour; many of the behaviours described by the mother are consistent with the pattern of the disorder; and the absence of their own observations

should not cause the other parent (here: the father) to consider the observations of the primary carer as exaggerated, made up, fanciful or invented. I accept the evidence given by Dr H under cross-examination to the effect that an anxious child's presentation can be multifactorial: that is, contributed to by a genetic predisposition and environmental factors, where both parents suffer from at least some anxious tendencies. I am hopeful that, with this reminder of Dr H's evidence, the father will reflect on his opinion of the mother's reporting of the child's behaviours whilst in her care. I am also hopeful that, with the assistance of Dr M if needed, he will fully appreciate that the child's behaviours and his anxieties may differ significantly in each household through no fault of either parent and/or for no reason connected to each parent's parenting style or capacity. In a similar manner, I am hopeful that the mother will appreciate the same. I accept the father's evidence that, following the recommendation made by Dr K, he has implemented an anxiety scale at his house where the child is asked to use it to measure his anxiety and has sought to implement other suggestions such as using deep breathing techniques to help the child to control his own anxiety. His implementation of these recommendations persuades me he has the capacity to accept specialist advice about the need to assist the child to manage his anxiety and to manage this in the same way as the mother has in her household. I consider that as long as the parents have the opportunity to attend, independently, on the child's treating therapists or medical practitioners and/or to receive consistent information about how to help him to learn to manage his anxieties and behaviour, each will be able to implement similar strategies for him whilst he is in their respective care. Now that he has heard Dr H's evidence and adopted Dr K's recommended strategies, I am confident the father will, in the future, seek her advice, and that of any other specialist upon whom the child may attend in the future, to ensure, for the child, that his anxiety is managed consistently in each of his parents' households. I do not accept the mother's assertion that the father denies the seriousness of his condition and... appears to have no insight into the impact of his conduct on [the child]. [37] The father, who has lived with his condition for the better part of eight years, has not ever asserted it is anything but serious. He does, however, assert that, despite its seriousness, its effect on his functioning is not such that the child should be denied the opportunity to maintain a meaningful and involved relationship with him. As noted above,

it is uncontroversial that the fathers mental health had a significant impact on the parties relationship and the fathers functioning from about 2006. The evidence led by the mother, in relation to the fathers mental health focuses significantly on the time before the dissolution of the relationship: at a time when, according to Dr M, the fathers treating psychiatrist, the fathers mental health was significantly worse than it was at the time of trial. In the 2011 Family Report, Ms C noted as follows: ... it is of concern to me (and no doubt the mother) that he seemed to justify his actions on this occasion [a self harm attempt approximately six months prior] on the basis of a negative comment to him by the mother beforehand... It is encouraging that the fathers mental health has, for the moment, stabilized. However, there have been (admittedly shorter lived) periods of relative stability in the past which have without exception until now been followed by relapses.[38] ... The issue for [the child] would appear to relate more to neglect or lack of stimulation should the fathers condition relapse at any time and should he perhaps be sedated or again apathetic about caring for and amusing or interacting with [the child].[39] In the 2012 updated Family Report, Ms C records her opinion that she does not believe that the fathers mental health can be considered sufficiently robust for him to cope with care of [the child] for lengthy periods of time and accordingly do not believe that equal shared care is indicated for this child. Whilst I accept her evidence in this respect, the time proposed by the father or something of a similar nature, involving overnight time is not of such duration as to fall within that about which Ms C expressed reservation. Dr M, the fathers treating psychiatrist has had a therapeutic relationship with the father since early 2006. He has prepared two reports (dated 26 January 2011 and 29 January 2013) in relation to the fathers mental health.[40] I accept his evidence unless I indicate otherwise. The November 2011 Order required Dr M to notify the mother in the event he has any concerns about the fathers capacity to provide an appropriate care environment for [the child]. It is uncontested that Dr M did not contact the mother at any time after the November 2011 Order was made. Whilst the mother appeared concerned about this and seemed to place significant weight on the absence of contact, I accept Dr Ms evidence to the effect that there was nothing in the fathers presentation to him to suggest that he needed to notify her. The fathers medication was changed by Dr M in late 2012. Dr M did not tell the mother about this. I accept his

evidence to the effect that his understanding of the Order with which I agree - was that he was required to disclose to the mother if there was deterioration in the mental state of the father: not whether there had been any alteration to the father's medication. I accept that Dr M was well aware of the type or form of deterioration in the father's functioning he needed to look for: namely, a worsening in the father's depression or inability to care for the child or the development of excessive adverse effects from taking medication. I accept he had not noticed any such impact and thus there was no requirement he contact the mother. The impact of medication on the father's functioning has, at times, been an issue: for example, particularly in the early part of treatment, he previously experienced problems sleeping which may have been an impediment to care for the child. However, I accept Dr M's opinion as contained in correspondence to Ms C on 12 April 2012 - that he had no concerns from the perspective of dangerousness, either to himself or to his son.[41] Dr M reiterated this opinion in his 2013 report. I accept that, having considered the father's mental state and functioning, he has had no concerns in relation to the father's ability to respond to the child's needs appropriately. I accept Dr M's opinion that: the father's mental state had been improving in the time preceding the hearing; for most of the six years during which the father had suffered from a major depressive disorder, it had been severe in its intensity - however, during 2012, it would have been considered moderate; and at the time of hearing, the father's major depressive disorder was mild in its intensity. Insofar as Counsel for the mother asserted that such improvement was not reflected in the material - particularly the reports Dr M prepared for the father's insurance claim it seems to me that, whilst such a clear progression is not explicitly outlined in the various reports, a number of them detail improvements in the father's mental state over time. I accept Dr M's evidence that, although the father has a chronic mild state of depression, the conclusion of these proceedings and the consequent removal of a major stressor in the father's life may well see a further improvement in the father's mental health; I also accept his opinion that a full recovery is unlikely. I accept Dr M's evidence to the effect that prolonged exposure to a parent in a morose or pessimistic mood is unhealthy for a child however, the prolonged exposure is a reference to unabated exposure over months to years and not the time proposed by the father in the orders he seeks. The mother



raised significant concerns in relation to the child's assertion that the father is frequently tired, or sleeping, during his visits. She asserts this poses a risk to the child. She seeks orders that the father's time with the child be contingent upon him not consuming more than a single (10mg) dose of Valium, or a single dose of analgesia containing codeine whilst the child is in his care without first obtaining alternative support. In rejecting the submission that the child is at risk in his father's care because of this or that such an order is necessary to ensure the child is safe whilst in his father's care, I accept Dr Ms evidence that while: at times in the past, there have certainly been issues of sedation and somnolence that [the father] has had to face at times when he has been caring for his son... [he] is now sleeping in a much better fashion, with improved sleep rhythms, such that he is not sleeping approximately eight hours per night...[and] he denies any sleeping in the day, or daytime somnolence, and my mental state examinations performed over time would support this.[42] I also accept Dr Ms evidence that, as at January 2013, the medications that he [was then] taking are only modestly sedating, so he would be able to wake to his son in the night, should that be required.[43] I accept Dr Ms clarification that any expression of suicidal thought in his treating notes ought be distinguished from suicidality (including intention to act) and ought be read as disclosed within the confines of the doctor/patient relationship within which a person is likely to confide thoughts which they would not necessarily act on or relay in other circumstances. I am not persuaded on the evidence that the father lacks the capacity to care for the child during overnight time. His mental health and functioning has been and is monitored by Dr M, a psychiatrist with whom he has a long-standing and well established professional relationship. He agrees he will continue to attend on Dr M and, whatever time the child spends with him in the future, an order will be made to that effect. Whilst it may well be that, because of the limitations on his opportunity to spend extended time with the child, the father has not experienced the child behaving in the manner described by the mother, he has now had the benefit of Dr H's opinion and evidence about the disparity in the parents' respective experiences of the child's behaviours. I think it likely this evidence will help him, perhaps with Dr Ms assistance, to appreciate that any future difficulties with the child's behaviours wherever and however manifested are not the fault of either of his parents but rather, matters

which require attention and consistent parental management. Given the lengthy time over which the child has spent unsupervised daytime time with the father, the father's continuing engagement with Dr M - whose evidence about his functioning and engagement I accept - and my acceptance of Dr H's evidence that there is no psychiatric reason why the child's time with the father should not include overnight time and Ms C's evidence, I am not remotely persuaded the child will be at an unacceptable risk of harm of whatever nature if he is provided with the opportunity to spend overnight time with the father. Spending overnight time with the father may well expose the child to a different parenting style and way of managing and dealing with issues relating to him to that to which he is exposed whilst in the mother's care. However, I am not persuaded that this is likely to cause him any long-lasting distress or to impact negatively on his long term functioning. Dr H asserted in his 2011 report that: ... it is the father's responsibility to identify if he is sedated, tired or unwell and requires additional assistance to meet [the child's] needs. In my opinion the Court needs to determine whether or not he will do this reliably. In my opinion he has the capacity to do this reliably and it is a question of whether he exercises that capacity.[44] I accept that the father has the capacity to reliably identify if he is unwell or tired or requires additional assistance to meet the child's needs. I am further satisfied that it is more likely than not that he will exercise that capacity if required in the future. Additionally, whilst Ms C said, in her 2011 report, that the father need[ed] to take more responsibility for recognising signs of deterioration in his own mental health and the mother needs to build her trust in the father to do this[45], her report does not indicate any occasion when the father failed to identify a deterioration in his mental health. I accept the evidence of Dr M - the father's treating psychiatrist of seven years - that: [The father] has reasonable judgment, and would appropriately engage in obtaining further assistance, were he to be unwell in anyway such that it could impair his ability to care for [the child]. I have the opinion that [the father] is highly motivated to put his son's needs first, and would have the judgment to behave appropriately in this regard.[46] I also accept Dr M's conclusion in relation to the father's condition, that there has been a progressive gradual improvement, with a lessening of subjective depression over time, a greater degree of affective reactivity and hedonic tone, improvement in the neurovegetative parameters of appetite and sleep, as well as improvements in

energy, motivation and concentration.[47] Further, both parties advance that, should the father consider his mental health to deteriorate to such an extent it would affect his capacity to care for the child, he ought to inform the mother and make alternative arrangements for the child's care, the orders made will reflect this. I am not persuaded that the father is likely to fail to take appropriate care of the child if his time extends to overnight time rather than continuing as it has been thus far. Whilst the mother has criticised the father for the state in which the child has been returned to her care after mid-week time, I accept that, as the child often has an appointment with Mr N during this time with his father, the impact of travel at peak hour has, on occasion, meant that the father simply has not had the opportunity to ensure the child has done his homework. I accept that he has run out of time to meet the mother's expectations; I also record that the child will not suffer harm if fed takeaway food on such occasions or returned without a shower. I consider that whatever has not been achieved in this relatively limited time is not a reflection of a general incapacity on the part of the father to deal with such issues. I accept the father's evidence that, when he has been unable to have the child complete his homework because of the time constraints, he has emailed the school teacher, and frequently the mother as well, to let them know this, and the teacher has not raised any concerns in relation to the same. I accept Dr H's evidence that a progression to overnight time is unlikely to cause the child increased anxiety because children of the child's age, who suffer from his type of separation anxiety, do not typically suffer additional anxiety from such an event but, rather, as a consequence of school attendance. I accept Dr H's evidence that it is unlikely the child will experience the same level of anxiety associated with going to the father's for overnight time as he does in relation to attending school. I also accept that there is no psychiatric reason why overnight time between the father and the child should not be progressed. Whilst the mother has expressed her concern about both the child's capacity to cope with overnight time and her capacity to support him in this process, I am confident that, with the appropriate professional supportive assistance, both she and the child will be able to manage this next phase of the child's parenting regime. I am confident that the mother will engage with whatever external support is needed to assist her to manage and accept that it is beneficial for the child to have the opportunity to spend overnight and block time with the father. I am

also conscious that, as a consequence of the significant delay in the finalisation of this matter, the child has already had a further significant period of time during which to continue to develop his ongoing relationship with the father by spending day time with him. It is also highly likely that, to whatever extent, the child has matured a little. Parental responsibility When making a parenting order I am bound to apply a presumption that it is in the child's best interests that his parents have equal shared parental responsibility (the presumption) for him: s 61DA of the Act. Neither party submitted that the presumption is rendered inapplicable in this case. However, the mother advances that she has concerns about the father's alleged limited ability to make joint decisions in relation to the major long term issues for the child. She contends that the evidence would satisfy the Court that it is not in the child's best interests for there to be an order for his parents to have equal shared parental responsibility for major long term issues relating to him.[48] Whilst it may be suggested that the child's parents will struggle to make decisions jointly about him, I am confident that each possesses the capacity to engage in sufficient communication to make joint decision making possible. I also consider that an order for sole parental responsibility may empower one parent to the exclusion of the other, in a manner likely to maintain the acrimony which has previously existed: it may well reinforce and continue the conflict between the parties rather than focusing their attention upon the importance of working together to support and assist the child. I am confident in concluding that both parties have the child's best interests as their primary focus. Despite the difficulties of the past, I have reached the conclusion that, with effort and focus, both parents have the capacity to be able to make joint decisions about those matters necessary to be decided in the exercise of parental responsibility. I am confident that, with effort, they can discharge the obligation imposed upon them to reach decisions jointly.[49] I have concluded, therefore, that it is in the child's best interests that the parties have equal shared parental responsibility for the major long term issues relating to him. Further discussion It follows from the conclusion about the allocation of parental responsibility that, in making a parenting order, I am required to consider whether it is in the child's best interests and reasonably practicable for him to spend equal time with each parent.[50] I have concluded that it is neither in his best interests nor reasonably practicable that he spend equal time

with each parent. I arrive at this conclusion because: I assess his primary attachment is highly likely to be with the mother, his innate personality suggests he may well struggle with such a significant change to his historical primary care arrangements and neither parent suggests that such an outcome would be in the child's best interests. I also accept Ms C's evidence as outlined in paragraph [82] above. It is, I consider, in the child's best interests that, via a graduated process, he spend substantial and significant time [51] with the father and, consequently, each of his parents. The geographic distance between the parties' respective households is not such as to make it reasonably impracticable for the child to spend this increasing time. I am further confident that, as the increases in the child's time with the father will occur against a background of him having had the opportunity to spend regular all day weekend time with the father for a reasonably significant period, such increases are unlikely to cause him any longstanding difficulties. I am also confident that with the support of treating therapists (of whatever nature), for the mother and the father, the child is likely to be able to manage any likely initial upset or distress associated with his transition to overnight weekend and, later, block holiday time with the father. The combination of the matters discussed above and the evidence of Drs H and M, when taken with that of Ms C, persuades me that it is in the child's best interests for his time with the father to progress to overnight and block holiday time in the manner outlined in the Orders made today. I consider that the manner in which his time with the father will increase overtime is likely to give him the opportunity to adjust, to settle and to manage the consequences of the change for him. Whilst this change may, initially, have some unsettling impact, I am confident that the benefits to the child of the opportunity to spend additional overnight and block time with the father far outweigh any short-term disruption or upset. Whilst I take into account the evidence supportive of an order that the child attend for therapy for two weekly sessions with Mr N before there is any increase in his time with the father, such recommendation was made a considerable time ago. As I have determined that an order requiring the child's parents to ensure he attend appropriate therapy with Dr K or such other appropriately qualified professional as she may recommend for a period of no less than 12 months unless such professional recommends otherwise, I am confident that he will be well supported by such interaction if necessary. Whilst, in

arriving at the timeframes ordered for the gradual increase in the child's time with the father, I have taken into account the contents of MsCs reports and her recommendations, I have also taken into account the time that has elapsed since the hearing concluded. I consider that the terms of the Order made today achieves a balance between affording the child the opportunity to spend increasing overnight and block time with the father whilst acknowledging his need for such increase to occur in a moderate manner and, if necessary, supported by his treating therapist or medical professional. By way of example, overnight time during the week shall only occur from 2015, after the child has had the opportunity to settle into and experience overnight alternate weekend time with the father. Further, block holiday time will occur in an increasing manner and shall culminate in the child spending no more than a two week block with the father unless otherwise agreed between the parties in writing. The gradual increase in block time (such that the child will not spend seven consecutive nights in the father's care until the September/October 2015 holiday period), the passage of time since the hearing, the obvious consequence of the same on the child's current age and his likely increased maturity and the fact that he has now spent significant daytime time with the father also persuades me that it is unnecessary to impose on the father an obligation to have extended family members present during initial block holiday periods. I have also concluded that, in circumstances where his weekend time with the father will increase to encompass overnight time, the child's best interests will be met by removing the provision that he spend after school time with the father every Thursday afternoon. This will mean less disruption and moving between his parents during the school week as he grows older and the school imposed demands upon him increase. It will also mean that he is not required to undertake transitions between school, the father and the mother on Thursday afternoons. I have also concluded that it is in the child's best interests to maintain the alternate weekend and Wednesday afternoon time with the father during the December 2014/January 2015 school holiday period rather than suspending the same (as will occur from the start of Term 1 in 2015) because this will provide the child with an additional opportunity to continue to settle into the pattern of time with the father rather than placing him in a situation where he is exposed to a stop/start parenting regime. I am not persuaded that an order which would permit the mother to suspend

the child's time with the father for up to 14 consecutive days on up to three occasions each year and for up to 30 consecutive days on an occasion every three years is in his best interests unless agreed between the parents. I arrive at this conclusion because of the disruptive impact such suspension is likely to have on the parenting regime established by the implementation of the Order made today and my concern that to make such an order may well signal to the child, wrongly, that his time with the father is less significant and important than his time with the mother. Additionally, whilst Ms C recommended that each parent be responsible for conveying the child to half of his therapeutic sessions, I consider that their respective involvement in his therapy is a matter better left to the experience of the appropriately qualified professional entrusted with providing therapeutic support for the child. I accept the father's evidence about his abstinence from the use of alcohol. I am not persuaded that it is in the child's best interests that I make any order regulating either parent's consumption or use of alcohol. Further, I am not persuaded that appropriate or in the child's best interests that an order be made, as sought by the mother, to restrict the father's use of prescription medication or analgesia or to require him to inform her about such usage or act in the manner she proposes. I am confident that the father will act appropriately in his ingestion of medication whilst the child is in his care. I am not persuaded it is in the child's best interests that the Order require his parents to provide the other with the first right of refusal if unable to care for him for one overnight. I arrive at this conclusion because I consider that such an order may well be more likely to be productive of ongoing conflict and disagreement between the parents and also because I consider it an acceptable part of parenting and the discharge of parental responsibility that each parent be able to make appropriate arrangements for the child whilst in their respective care. The mother seeks to be able to take the child out of Australia for the purpose of holiday travel and, to accommodate this, proposes that his time with the father be suspended in the manner outlined in her proposed Minute of Order. I accept that the opportunity to travel outside of Australia is one which is likely to provide significant benefit to the child. However, the benefits of such travel must be balanced against the benefit I consider he will obtain from having the opportunity to settle into a new parenting regime in which his time with the father is increased. Given Dr H's evidence, the mother's

concerns express or implicit about the impact of change on the child's functioning, the father's concerns that the mother may not return the child to Australia and the importance of ensuring that this opportunity to settle into his new care regime of increased time with the father is optimised, I consider that any interruption to the child's ordered opportunity to spend time with the father is unlikely to be beneficial to him at this stage. At present, I consider that which is most likely to be most beneficial for the child is a primary focus on establishing his new regime of increased and overnight time with the father and on the continued development of their relationship that such increased time permits. In the circumstances, and for these reasons, I am not persuaded that it is presently in the child's best interests for there to be the disruption to his interaction with the father that would be consequent upon the mother removing him from Australia for the purpose of a holiday. I consider it likely that a period of 12 months during which there is no interruption to the child's time with the father will be of sufficient duration to ensure he has successfully transitioned into his new parenting regime. After this, he should be afforded the opportunity to travel out of the Commonwealth of Australia with either of his parents during school holiday periods or at such other time as may be agreed between them. I certify that the preceding one hundred and thirty-eight (138) paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Hogan delivered on 3 October 2014. Associate:

Date: 3 October 2014 [1] Commenced by the father in the Federal Magistrates Court in July 2011 [2] Affidavit of Dr M filed 7 May 2013, Annexure BRM- 2, page 10. [3] Affidavit of Dr M filed 07 May 2013, Annexure BRM 2 page 12. [4] Amended Initiating Application filed 31 January 2013 [5] As outlined in his Case Outline filed 7 May 2013 and his Summary of Argument filed 23 July 2013. [6] Namely, that the child spend two full days per fortnight on a weekend as well as two afternoons per week with the father before overnight time was introduced. [7] On 11 December 2012. [8] *Vigano & Desmond* [2012] FamCAFC 79. [9] *McCall & Clark* [2009] FamCAFC 92; (2009) FLC 93-405 at par [118] [120]. [10] See the discussion in *Mazorski v Albright* [2007] FamCA 520. [11] Filed 29 July 2013. [12] Affidavit of Ms C filed 30 September 2011, Family Report [11.2.8]. [13] Mother's affidavit filed 3 May 2013, [102]. [14] Affidavit of Ms C filed 30 September 2011, Family Report [6.5.1]. [15] Father's affidavit filed 7 May 2013, [128]. [16] Mother's affidavit filed 3 May 2013, annexure RME- 3. [17] Mother's affidavit filed 3



May 2013, annexureRME-3 [18] Mothersaffidavit filed 3 May 2013, annexure RME-3. [19] Mothersaffidavit filed 3 May 2013, annexureRME-5. [20] Affidavit of Dr Hfiled 25 October 2012, Annexure SH2, page24. [21] Affidavit of Dr G filed3 May 2013, Annexure JS-2. [22] Mothersaffidavit filed 3 May 2013 at[128]. [23] Mothersaffidavit filed 3 May 2013. [24] Mothers affidavit filed 3 May 2013 at par[141]-[142]. [25] Affidavit ofDr L filed 3 May 2013, annexure SAL2. [26] Affidavit of Mr Essex Snrfiled 7 May 2013, [25]. [27] Mothers affidavit filed 3 May 2013 at177. [28] Affidavit of Mr EssexSnr filed 7 May 2013, [30] [31]. [29] Mothersaffidavit filed 3 May 2013, annexureRME-15. [30] Mothersaffidavit filed 3 May 2013 at[122]. [31] Fathersaffidavit filed 7 May 2013, Annexure JAE-16. [32] AnnexureJAE-4, Fathers affidavit filed 17 December 2012. [33] A psychiatrist whointerviewed the parties and the child on two occasions: first, on 8 and 30August 2011 and, secondly, in February2013. [34] Affidavit of Dr Hfiled 25 October 2012, Report page23. [35] Affidavit of Dr Hfiled 29 July 2013, Report page29. [36] Fathersaffidavit filed 15/10/2012 at[28]. [37] Mothersaffidavit filed 03/05/2013 at[69]. [38] Affidavit of Ms Cfiled 30 September 2011, Family Report par11.2.8. [39] Affidavit of Ms Cfiled 30 September 2011, Family Report par11.2.10. [40] Affidavit of Dr Mfiled 7 May 2013. [41] Affidavitof Ms C filed 7 June 2012, at [8.4]. [42] Affidavit of Dr M filed 7May 2013, Annexure BRM6, Report dated 29 January 2013, page 7. [43] Affidavit of Dr M filed 7May 2013, Annexure BRM6, Report dated 29 January 2013, page9. [44] Affidavit of Dr H filed25 October 2012, Report dated 14 October 2011, page 24. [45] Affidavit of Ms C filed 30September 2011, Family Report par at11.2.14. [46] Affidavit of Dr Mfiled 7 May 2013, Report dated 29 January 2013, page8. [47] Affidavit of Dr M filed7 May 2013, Report dated 29 January 2013, page3. [48] s 61DA(4) of theAct. [49] Family Law Act 1975(Cth) s 65DAC(2). [50] MRR v GR (2010) 240 CLR 461,465-467. [51] s 65DAA(3) of theAct. AustLII:Copyright Policy|Disclaimers|Privacy Policy|Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/852.html>



