

FAMILY LAW PRACTICE AND PROCEDURE Application for stay of interim parenting Orders pending appeal Consideration of principles set out in Aldridge & Keaton [2009] FamCAFC 106 Best interest of the child Desirability in limiting the frequency of any change in the child's living arrangements Appeal to be heard within short period of time Person who has obtained a judgment entitled to the benefit of that judgment and to presume it is correct Bona fides of applicant Application dismissed Family Law Act 1975 (Cth) Aldridge & Keaton [2009] FamCAFC 106 De L v Director-General Department of Community Services (NSW) [1996] HCA 9 Jennings Constructions Ltd v Burgundy Royale Investments Pty Ltd (No.1) [1986] HCA 84 APPLICANT: Ms Hammond RESPONDENT: Mr Hammond INDEPENDENT CHILDRENS LAWYER: Mr Naidovski FILE NUMBER: PAC 1867 of 2008 DATE DELIVERED: 21 February 2014 PLACE DELIVERED: Parramatta PLACE HEARD: Parramatta JUDGMENT OF: Hannam J HEARING DATE: 21 February 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Merkin SOLICITOR FOR THE APPLICANT: Kim Eccleston Family Law Sole Practitioner SOLICITOR FOR THE RESPONDENT: Lamrocks Solicitors SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Legal Aid NSW ORDERS (1) Order 3 of the mother's Amended Application in a Case filed 17 February 2014 seeking that the interim parenting orders dated 18 December 2013 be stayed is dismissed. (2) The application for Order 1 of the mother's Amended Application in a Case filed 17 February 2014 seeking that her Honour Justice Hannam step aside be adjourned pending the outcome of the appeal. (3) The application for Order 4 of the mother's Amended Application in a Case filed 17 February 2014 seeking that affidavit of Ms G be filed be adjourned pending the outcome of the appeal. (4) The remaining orders sought in the mother's Amended Application in a Case filed 17 February 2014 in relation to the interim order be stood-over pending determination of the appeal. IT IS NOTED that publication of this judgment by this Court under the pseudonym Hammond & Hammond 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 PARRAMATTA FILE NUMBER: PAC 1867 of 2008 Ms Hammond Applicant And Mr Hammond Respondent And Independent Children's Lawyer REASONS FOR JUDGMENT INTRODUCTION & BACKGROUND This matter concerns the child A, (the child),

who is almost 9, the daughter of Mr Hammond, (the father) and Ms Hammond, (the mother). The father and the mother (the parents) have been engaged in litigation concerning the child for much of her life. The first set of parenting proceedings in relation to the child were completed in May 2010 and the mother initiated the current proceedings in the Federal Magistrates Court, as it then was, in November 2011. These proceedings were transferred to the Family Court and in March 2013 on the first day of the Less Adversarial Trial, Johnston J ordered a Family Report, and on 17 June 2013 his Honour also ordered a Chapter 15 Expert Report in relation to any risk of harm that the father may present to the child and the management of that risk, if it existed. In June 2013 the Chapter 15 Expert, Dr E, carried out interviews and assessments for the purpose of her report, which was released to the parties on 22 August 2013. The Family Consultant interviewed various people, including the Applicant mother and the child on 11 November 2013. The Family Consultants report dated 25 November 2013 was released to the parties in Court on 17 December 2013. On 17 December 2013 the father was granted leave to bring an oral application for interim parenting orders (the father's interim parenting application), essentially to reverse the Orders then in place with respect to the child. Following an interim hearing on 18 December 2013, parenting Orders were made, essentially in accordance with the father's application. Ex tempore reasons were given for this decision. Those parenting Orders are now subject to an appeal to the Full Court, which is listed to be heard during the week commencing 17 March 2014 on a date to be specified. By an Application in a Case filed on 6 February 2014 the mother seeks orders in respect of three matters and the first of those is that the interim parenting Orders of 18 December 2013 be stayed. This decision concerns that part of the application. The mother's application for a stay of the interim parenting Orders is opposed by the father and the Independent Children's Lawyer.

BACKGROUND TO THE APPLICATION In addition to the matters set out in the introduction there are some other following matters that are relevant to the determination of this stay application and these are as follows. Both Dr E, the Chapter 15 Expert, and the Family Consultant, albeit that those reports are untested, expressed concern about the emotional harm to the child arising from the conflict from these proceedings themselves. The mother's most recent affidavit also refers to the child expressing her

own concern about having to go to Court. So far as I understand it, it is not in dispute between the parties that the proceedings themselves, have occasioned the child some considerable distress. The mother's application for parenting orders, that is, her substantive application before the Court, is based to a large extent on her contention that there is an unacceptable risk of harm to the child when in the care of the father. It appears that the mother continues to maintain that there is an unacceptable risk that the father has sexually harmed the child himself and that he has sexually harmed her with the paternal grandmother. It is also the mother's contention that the father has deficits in his parenting as the child has been sexually harmed by her half-brother whilst both children were in the care of the father. It seems to be suggested that the father is in some way responsible for his son's sexual abuse of the child, that he failed to protect the child from it, that he failed to respond appropriately to it and that there is a risk that it will happen again. So far as I understand the father's case, any and all allegations of sexual harm allegedly perpetrated by himself and his mother are denied. In relation to his son P, who was aged 10 at the time of the alleged sexual abuse, as I understand it, the father does not deny that an incident, which had sexual overtones, occurred, but he does not accept that it amounted to sexual assault, that he was responsible for it, that he behaved inappropriately in any way or there is any risk that it will happen again. In the father's application, so far as I understand it, he is concerned about the risks posed to the child by the mother's volatile and unpredictable behaviour and parenting capacity, and in particular in failing to meet the child's emotional needs. The interim parenting Orders made on 18 December 2013 followed an application made upon the release of the Family Report. The father also relied upon his own affidavit, though it was accepted and understood that this almost completely contained matters which are in dispute. He also relied upon the report of Dr E. The mother at the hearing of the interim parenting Orders not only placed great emphasis on the fact that the Family Consultant's report was uncontested, but also submitted that the report was fundamentally flawed in that the Family Consultant was not an expert and it was submitted that the report was itself inadmissible. There was also a challenge to some incidents which were reported by the child, and upon which the Family Consultant relied to some degree, such as the suggestion by the child

that her mother had broken windows at the home, the maternal grandmother had deliberately broken a DVD player and that the child locked herself in a cupboard for comfort. These specific challenges were taken into account and some of them, such as the issue of the broken windows, was referred to in the Judgment. It was made clear in the Judgment that it appeared that the Family Consultant relied on the allegations made by the child as only one of a number of sources of information upon which she made her assessment. THE SUBMISSIONS The mother's submissions in relation to the application to stay the interim parenting Orders made on 18 December 2013 are based on the High Court decision in *De L v Director-General Department of Community Services (NSW)* [1] where his Honour Gummow J quoted with approval another High Court decision in *Jennings Constructions Ltd v Burgundy Royale Investments Pty Ltd (No.1)* [2]. The mother's submissions in relation to the stay application are as follows:- that the stay ought to be granted to preserve the subject matter of the proceedings; that although it is well established that discretionary decisions are difficult to overturn on appeal, two of the grounds of appeal relate to, as I understand it, alleged errors of law and the possibility of success cannot be excluded given the nature of the matter that had to be determined; that the father in these circumstances is not entitled to the presumption of the correctness of the decision as it was based on uncontested evidence; that the mother is bona fide in bringing the appeal; that it is in the best interests of the child for the stay to be granted as if the interim Orders remain, the child will have to endure the deficiencies in her father's parenting, being exposed to her father's coaching her with respect to the proceedings and the risk of being assaulted by her half-brother P; and that the matter is listed for hearing in the week commencing 17 March 2014, which is just over three weeks away, during which time the child is exposed to the risks associated with her current living arrangements. So far as the best interests of the child are concerned, the mother made submissions that:- there is a need to protect the child from physical harm in the sense of being exposed to the risk of further behaviour on P's behalf, which she describes as sexual assault; that the Court should have regard to the nature of the child's relationship with her maternal grandparents, which is being damaged by the father's approach taken to the current Orders and the Orders themselves; and that the father's parenting capacity is impaired in that the alleged sexual assault by P

occurred in his home when the children were under his care and that he failed to respond to it appropriately, and because of his coaching of the child with respect to the proceedings. The mother's submissions in relation to the preservation of the subject matter of the proceedings is also related to the likelihood of the appeal being upheld and, of course, to the ultimate matter in issue and that is what is in the best interests of the child, which on her case is for the child to reside primarily with the mother. The father's submissions in response to this application adopt the approach taken by the Full Court in *Aldridge & Keaton* [3] in which it is said at [18] that the authorities relevant to an application for stay of orders both in the general law and in respect of parenting proceedings include 11 principles set out in that paragraph. In addition to the matters raised by the mother, the father refers to and relies upon the principle that a person who has obtained a judgment is entitled to the benefit of that judgment and is entitled to presume the judgment is correct. The mother submits that a person in the position of the father in these circumstances is not entitled to the presumption of correctness of the decision where it was made on uncontested evidence. In my view, there is no basis for this submission and any authority which distinguishes a stay in respect of interim proceedings from a stay in respect of final orders has not been referred to, and in these circumstances, those principles do apply. A number of matters referred to in the 11 principles identified in *Aldridge & Keaton* (supra) are not relied upon by either party. For example, it is not suggested, nor do I find, that there is a risk that the appeal in this matter may be rendered nugatory if the stay is not granted. The principle that the onus is on the applicant to establish a proper basis for the stay but that it is not necessary for the applicant to demonstrate any special or exceptional circumstances, and that the mere filing of an appeal is insufficient to grant a stay, are noted. Although both parties referred to the principle that a stay may be granted on terms that are fair to all parties, which may involve a Court weighing the balance of convenience and the competing rights of the parties, all parties agree that in a case such as this fairness to the parties must yield to the best interests of the child. So far as the bona fides of the Applicant in bringing the appeal is concerned, I am of the view that, notwithstanding the submissions of the mother, there are some concerns as to whether the appeal is bona fide, which was raised by the father. The matter relied upon by the father in suggesting that the mother may not

bebone fide related to additional orders that the mother is seeking in the appeal,being orders that the child spend time with the father at a contact centre,which is an entirely new suggestion, in circumstanceswhere on two occasionspreviously the mother had consented to Orders including for time with the fatherto be unsupervised. Submissionswere made by the mother and responded to by the father in relation to a preliminary assessment of the strengths of theproposed appeal, that is, whetherthe mother has an arguable case. The mother conceded that most of the mattersupon which the appealis based are discretionary and it was conceded thatmatters of discretion are difficult to overturn on appeal, though there weretwogrounds of appeal which were said to relate to errors of law. Thefirst is ground five in the Notice of Appeal which states: HerHonour erred in making interim orders reversing residency of the child contraryto the High Court authority that Custodyor access will not be granted toa parent if it would expose the child to an unacceptable risk of sexualabuse. I understand the mothers case to be that the unacceptable risk ofsexual abuse refers to conduct by the child P. Although theissue of whetherPs conduct towards the child amounts to sexual abuse is contested, inlight of Ps age at the time(10 years), the nature of the allegationseven taken at their highest, and considering the evidence of Dr E, an expert insexualoffending, and the Family Consultant, a psychologist with experience insexual assault, it is unlikely, in my view, that this conductof P could beregarded as sexual abuse in the sense used by the High Court. The issue of thereliance by me on the Family Reportwhere it was submitted by the mother thatthe author was not an appropriate expert, was considered by me in that decisionand I standby that decision. Thenext matter referred to in Aldridge & Keaton (supra) upon whichsubmissions were made related to the period of time in which the appeal can beheard and whether existing satisfactoryarrangements may support the granting ofthe stay for a short period of time. This appeal will be heard in the weekcommencing 17March 2014, that is just over three weeks at the earliest orexactly one month at the latest. In my view, this is a short periodof time inwhich the current arrangements must be considered. The existing arrangementscame about after the interim Orders, whichare the subject of appeal, were madeand are, in my view, satisfactory. This is not a matter which involves a fundamental changesuch as the reintroduction of a parent with whom the childhas had little

contact, though there is no doubt that changing the residence of this child was significant. The fundamental areas upon which it appeared that the mother's case is based, and that is risks associated with sexual harm, did not include (at the interim hearing or, indeed, at the trial, on the basis of the affidavit filed,) a challenge to evidence about matters such as the nature of the child's relationship with her father. So it appears that that is unchallenged evidence that she has a good relationship with her father, and I take that into account, in particular, in concluding that the current arrangements are satisfactory. The most significant matter, in my view, arising from Aldridge & Keaton (supra), which is also a significant consideration with respect to the child's best interests, was not addressed by the mother, and that is the desirability of limiting the frequency of any change in the child's living arrangements. This is a matter that is heavily relied upon by the father and the Independent Children's Lawyer. It is submitted by the father that this child had one significant change in her circumstances as a result of the interim Orders in December 2013 and that the mother's position that the stay be granted, at best, would result in a second change in her living arrangements if her appeal is upheld, or at worst could result in two more changes in living arrangements within a further three to four weeks if the appeal is dismissed. The Independent Children's Lawyer urges that I act with caution and do not run the risk of further instability for the child by granting the stay. Both the father and the Independent Children's Lawyer also placed significant weight, which in my view is an appropriate matter to place significant on, the particularly high level of conflict in these proceedings and the uncontested evidence that the proceedings themselves have had significant impact upon the child. The Independent Children's Lawyer submitted that the Court gave consideration to each of the best interest considerations in the interim parenting application and that there is nothing in the material filed by the mother that would suggest a change as against those considerations. In my view, much of the material filed by the mother is in fact not new in that it was taken into account at the interim hearing, such as issues in relation to the mother's characterisation of P's conduct as sexual abuse, and the father's parenting capacity relating to this issue. Other new material, in my view, goes to very peripheral matters, which were also to some extent argued at the interim hearing. For example, although it was made clear in the interim decision

that, in my view, the Family Consultant did not attach a significant degree of weight to matters asserted by the child, (such as that her mother had broken windows,) and that her assessment was based on a range of other matters, (such as her own observations about the mother's behaviour and corroborating documents,) the mother seemed and seems to be unduly focussed, both at the interim hearing and in obtaining the further evidence that is now before the Court, on refuting particular matters said to have been asserted by the child, and in particular whether she did or did not break windows. In the interim decision I considered all of the relevant best interest considerations, including a number which have not been addressed by the mother even though they are, in my view, very weighty. In particular, the major concern in this matter, in my view, is the need to protect the child from harm, in particular psychological harm and emotional abuse on behalf of the mother. It does not appear to be in dispute, and indeed is reinforced in the way in which this application has been argued, that the mother has a significant focus on her belief that the child has been the subject of a serious sexual abuse from P in the past, that the father behaved inappropriately with respect to that abuse, that the child continues to need some form of psychological support in respect of the abuse, and that she remains at risk of being further abused. As was noted in the interim decision, it was interesting that it was put forward by the mother as an example of the fact that she is emotionally available to the child and able to offer her comfort and talk to her about matters of concern, that she relates an incident which she says occurred on 18 November 2013. According to the mother on this date the child is said to have revealed more extensive and certainly more concerning features about the alleged incidents of sexual harm at a time when the expert said that the child's current descriptions of her relationship with P indicate she no longer feels troubled by the incidents of 2010 and where the Family Consultant says the child did not appear to have any memory of the incident relating to the sexual harm. On 18 December 2013, after considering the evidence available to me and all of the submissions made and after applying each of the relevant best interest factors, I was of the view that it was in the best interests of this child to make those interim Orders. None of the material filed since that date changes my view of any of the best interest factors. Having regard in particular to the principle that a person who has obtained a judgment is entitled to the benefit of

the judgment and is entitled to presume the judgment is correct, and in attempting to limit the frequency of any change in the child's living arrangements, together with the fact that this appeal will be held shortly and in having some concerns about the bona fides of the appeal, and most importantly, having regard to the best interest factors, which, in my view, remain the same, the application is dismissed. I certify that the preceding thirty(30) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Hannam delivered on 21 February 2014. Legal Associate: Date: 25 February 2014 [1] [1996] HCA 9 [2] [1986] HCA 84 [3] [2009] FamCAFC 106 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/90.html>