FAMILY COURT OF AUSTRALIA

DONAGHEY & DONAGHEY ***[2011] FamCA 13***

FAMILY LAW – CHILDREN – Best interests of the child – Allegations of sexual abuse of child by the father – Allegation of unacceptable risk of sexual abuse – Where allegations arose after son spent limited unsupervised time with his father pursuant to court orders – Where father's girlfriend attended each visit with the father – Whether there is an unacceptable risk of sexual abuse – Where the son lives with the mother – Where the child has spent little time with his father since the parents separated – Where the father seeks orders that the son live with him and that time between the son and his mother be suspended for a significant period – Where the mother seeks orders that son live with her and have no contact with the father – With whom a child shall live – With whom a child spends time

Evidence Act 1995 (Cth)
Family Law Act 1975 (Cth)
Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)
Family Law Rules 2004 (Cth)

B & B [1993] FLC 92-357; (1993) 16 Fam LR 353
B and R and the Separate Representative (1995) FLC 92-636; [1995] 19 Fam LR 594
Devries v Australian National Railways Commission (1993) 177 CLR 472
Donaghey v Donaghey [2009] FMCAfam 1248
Donnell v Dovey (2010) 42 Fam LR 559
Goode v Goode (2006) FLC 93-286; (2006) 36 Fam LR 422
Hardie v Capris [2010] FamCA 1046
In The Marriage of N and S (1995) 19 Fam LR 837; [1996] FLC 92-655
M v M (1988) 166 CLR 69
M & M (Unreported, Family court of Australia, Fogarty, Baker & Butler JJ, Appeal SA44 of 1992, 8 September 1993)
Marsden v Winch (N.o 3) [2007] FamCA 1364
McCall v Clark (2009) FLC 93-405
McCoy v Wessex (2007) 38 Fam LR 513
MRR v GR (2010) 240 CLR 461; (2010) 42 Fam LR 531
Mulvany v Lane [2009] FLC 93-404
Napier v Hepburn (2006) 36 Fam LR 395
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449
Partington v Cade (No 2) (2010) 42 Fam LR 401
Potter v Potter (2007) 37 Fam LR 208
Re Andrew (1996) 20 Fam LR 538

Russel v Close (Unreported, Family Court of Australia, Fogarty, Baker and Lindenmayer JJ, Appeal SA45 of 1992, 25 June 1993)
Schorel and Schorel [1990] FLC 90-144

B. Mahendra, 'Psychiatric Risk Assessment in Child and Family Law' (2008) 38 *Family Law* 569
Ceci, and Bruck, 'Suggestibility of the Child Witness: A Historical Review and Synthesis' (1993) 113 *Psychological Bulletin* 3
J. Fogarty AM 'Unacceptable Risk – A return to basics' (2006) 20 *Australian Journal of Family Law* 249
Wilson J, Atkin Lecture, *The Misnomer of Family Law,* 2002 http://www.judiciary.gov.uk)

APPLICANT:	Mr Donaghey
RESPONDENT:	Ms Donaghey
INDEPENDENT CHILDREN'S LAWYER:	Julie Fotheringham
FILE NUMBER:	LEC 85 of 2007
DATE DELIVERED:	19 January 2011
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Brisbane
JUDGMENT OF:	Murphy J
HEARING DATE:	13, 14 & 15 December 2010

REPRESENTATION

COUNSEL FOR THE APPLICANT:	Mr Johnston
SOLICITOR FOR THE APPLICANT:	Christopher Hughes & Associates
COUNSEL FOR THE RESPONDENT:	Ms Carew
SOLICITOR FOR THE RESPONDENT:	Parker Kissane & Gibson

COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER:	Mr Selfridge
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER:	Legal Aid Queensland

ORDERS

The following parenting orders are made in respect of the child the subject of these proceedings, **J** born … August 2004 ("the child").

Parental Responsibility

1. That the father shall have sole parental responsibility in respect of all major long term issues (as that expression is defined in the *Family Law Act 1975* (as amended) ("the Act")) in respect of the child, save that the father shall, prior to making the sole ultimate decision about any such issue:
    a. Advise the mother in writing of the decision intended to be made;
    b. Seek the mother's written response in relation thereto;
    c. Consider, by reference to the best interests of the child, any such response prior to making any such decision;
    d. Advise the mother in writing as soon as reasonably practicable of his ultimate decision.

Live With

2. The child shall live with his father.
3. So as to give effect to paragraph 2 of these Orders, the mother shall present the child to the Manager, Child Dispute Services, or such Family Consultant as he might nominate, at the Child Dispute Services, 3rd floor, Brisbane Registry, Family Court of Australia at **10.00am on Friday 21st January 2011,** at which time and place changeover into his father's care shall take place.

Time with the Mother

4. The mother shall spend no time, nor communicate, with the child before 4.00pm on **Friday 11th February, 2011**.
5. As and from **Saturday 12th February 2011** until **Saturday 3rd December 2011**, time between the child and his mother shall be supervised by a person

agreed upon in writing by the father, mother and Independent Children's Lawyer and, failing such agreement, at a contact centre and shall occur as follows:

a. From **Saturday 12th February 2011** until and including **Saturday 23rd April 2011**, between 9.00am and 11.00am each alternate Saturday;

b. From **Saturday 7th May 2011** until and including **Saturday 3rd December 2011** between 9.00am and 5.00pm, or such lesser period of time between those hours as can be accommodated by the agreed supervisor or contact centre as the case may be, on the **first, second** and **fourth** Saturday each calendar month;

6. As and from **Saturday 10th December 2011**, time between the child and his mother may be unsupervised and shall occur at all such times as the mother and father may agree in writing and failing any such agreement:

a. From 9.00am on **Saturday 10th December 2011** until 5.00pm on **Saturday 17th December 2011;**

b. From 5.00pm on **Saturday 24 December 2011** until 12 noon on **Sunday 25th December 2011**;

c. From 9.00am on **Saturday 14th January 2012** until **Saturday 21st January 2012**;

d. Thereafter:

i. From after school on the first Friday of the school term until before school the following Monday and between those times on those days on the first, second and fourth weekend of each calendar month thereafter with such time extending to before school Tuesday in the event that any such period of time coincides with a Monday public holiday;

ii. For the first half of each period of school holidays in 2012 and each alternate year thereafter and for the second half of each period of school holidays in 2013 and each alternate year thereafter;

iii. On the child's birthday for a period of four hours after school if on a school day and such that each of his parents spend one half of the period between 9.00am and 5.00pm if on a weekend;

iv. From 12 noon Christmas Day until 12 noon Boxing Day in 2012 and between those hours on those days each alternate year thereafter and between 12 noon Christmas Eve and 12 noon Christmas Day in 2013 and each alternate year thereafter.

Section 65L Supervision

7. Pursuant to Section 65L of the *Family Law Act 1975*:

    a. Compliance by the parties with changeover arrangements ordered pursuant to paragraph 3 of these orders shall be supervised and facilitated by a Family Consultant nominated by the Manager of Child Dispute Services;

    b. Compliance with these parenting orders is to otherwise be supervised by such Family Consultant of the Family Court of Australia Brisbane Registry as might be nominated by the Manager of same;

    c. The said Family Consultant shall give any party to these parenting orders such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the parenting orders;

    d. The parties shall do all such things, sign all such documents, attend all such appointments, and ensure the child attend all such appointments, as are reasonably necessary for the purposes of same.

Communication

8. As and from **Saturday 10th February 2011** the mother may communicate with the child at such times and via such means as the parties may in writing agree and failing agreement, the mother may communicate with the child only by sending to him such cards and/or letters and/or photos as she may choose, but only via Australia Post sent to the residential address of the father and child.

9. As and from **Saturday 10 December 2011**, the mother may communicate with the child at such times and via such means as the parties may in writing agree and failing agreement:

    a. By e-mail, but not earlier on any occasion than 8.00am and not later on any occasion than 8.00pm and not more than two per day;

    b. By Skype, or other similar computer communication, or by telephone twice in any week in which she does not spend time with the child and once in any week in which she spends time with him, but not earlier on any occasion than 8.00am and not later on any occasion than 8.00pm.

10. So as to give effect to paragraph 9 of these Orders, the father shall, by not later than 4.00pm on 27 November 2011:

    a. Provide to the mother an e-mail address for the child;

    b. Purchase and install such equipment and/or logistics as might be necessary so as to permit communication by email, Skype or similar computer communication system.

Specific Issues

11. The father shall:

    a. Advise the mother and keep her advised of the child's residential address, school, usual treating general practitioner, any specialist medical practitioner and any counsellor or therapist upon whom he attends;

    b. Do all such things and sign all such documents as might be required so as to authorise any and all of the persons or school referred to in paragraph 11a above, of these orders so as to facilitate the mother receiving any and all such information (including written reports provided in the usual course by any such person) relating to the child's progress, health, treatment or course of counselling or therapy as the case may be SAVE THAT nothing in this order shall be construed so as to require the father to authorise the provision of any information which, in the written professional opinion of any doctor, counsellor or therapist is contrary to the child's best interests;

    c. Notify the mother as soon as reasonably practicable of any significant injury or serious illness suffered by the child and, in any event, any injury or illness which requires specialist medical treatment or admission to hospital.

Publication

12. Pursuant to s 121(9)(g) of the Act, the father or the Independent Children's Lawyer is authorised to publish an account of these proceedings, namely these Orders and the Reasons for Judgment delivered herewith, to:

    a. Professor Q;

    b. Mr A;

    c. The father's former wife E Donaghey and adult daughter L Donaghey;

    d. The mother's sisters and brother;

    e. The Manager, Child Dispute Services, of the Brisbane Registry of this Court or any family consultant nominated by him;

    f. Any of the persons or school referred to in paragraph 11a of these Orders;

    g. The Department of Communities (Child Safety), the police or any person or organisation of a similar type charged with responsibility for the investigation of complaints of child abuse;

    h. Any supervisor or contact centre charged with the responsibility of supervising time pursuant to these Orders.

AND IT IS FURTHER ORDERED THAT

13. The Independent Children's Lawyer is discharged on a date three months from the date of these orders.

14. All extant applications be otherwise dismissed and removed from the list of cases awaiting finalisation.

15. Following the expiration of the Appeal period, all subpoenaed documents be returned to the persons or institutions from which they emanated and all exhibits are returned to the person or persons who tendered the same.

16. Pursuant to s 65DA(2) and s 62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders.

IT IS NOTED that publication of this judgment under the pseudonym *Donaghey & Donaghey* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth)

FAMILY COURT OF AUSTRALIA AT BRISBANE

FILE NUMBER: LEC85 of 2007

MR DONAGHEY
Applicant

And

MS DONAGHEY
Respondent

REASONS FOR JUDGMENT

1. When the parents of J, born in August 2004, separated on 29 September 2005, J was about 16 months old. The time spent between the child and his father subsequent to that separation was, until 13 February 2010, supervised by the mother at her insistence. Those short supervised periods were the only time the child spent with his father during that period of more than four years.

2. At a parenting trial which took place over two days before Slack FM just over 12 months ago in November 2009, the mother sought orders that, in effect, would have had this arrangement continue. The father sought orders that the child live with his mother and have increasing amounts of time with him, resulting ultimately in him spending the whole of each alternate weekend and half school holidays with his father.

3. Orders broadly in accordance with the father's proposal were made by Slack FM on 28 January 2010 and Reasons delivered.

4. On 13 February 2010, the father exercised time with the child pursuant to those orders for the first time. Alleged events on that day (and subsequently) are the catalyst for these proceedings in which the mother seeks an order that there be no time between the child and his father. The father seeks an order that the child live with him and that time between the child and his mother be suspended for a significant period.

5. During the trial before Slack FM, the mother asserted that the father presented an unacceptable risk of sexual harm to the child. The essence of that assertion came from observations made by the mother of the father with the child when the child was a baby. Those allegations, and his Honour's findings in respect of them, need to be referred to in some detail below.

6. The same type of allegations are at the centre of the current proceedings, emanating from what is asserted in respect of events said to have occurred during one or more of the four (and only) occasions upon which the father has spent time with the child pursuant to Slack FM's orders.

7. The mother's asserted fears for her son's safety if exposed to his father have, it seems plain, increased significantly in their severity and intensity since the earlier proceedings. They are based, she says, on the child's reports of words and behaviour by his father during those four visits.

8. The mother contends in these proceedings that, on the very first occasion when the father exercised time with the child pursuant to Slack FM's orders, the father perpetrated acts of sexual impropriety upon him. The incidents on that and/or subsequent visits are, as the mother says the child reported them, very serious; they involve, for example, penetration of the child's anus with the father's penis, a pointed stick and a hand or fist.

9. Since the earlier trial, the mother asserts that the child has reported that his father has threatened to kill him. When in the witness box in these proceedings, the mother asserted that she believes the father made the threat as she says the child reports and, much more significantly, she believes that the father would in fact murder his own six year old child.

10. Apart from the current allegations of sexual impropriety to the child, she makes no allegation of family violence by the father – either to her or the child – during cohabitation or since. (One incident of alleged verbal abuse is now made in respect of the pre-separation period and will be referred to below).

11. The mother also contended at the initial trial (and contends again now) that the child has been psychologically and emotionally abused by his father and is at risk of same in the future.

12. The initial allegations of same are said to arise from events during the time that she was supervising that time (and despite that supervision). (Hence, she says, she cannot now contemplate supervised time, even if she was to be the supervisor). Again, the details of those assertions and the findings made by Slack FM in relation to them will be referred to later in these reasons. An example manifested in these proceedings is the mother's assertion that the child has reported to her statements by the father to the effect that he (the child) should 'hate himself'.

13. The mother reports the child as being extremely frightened of his father; he has, she says, been experiencing nightmares, has wet and soiled himself and, the mother says, consistently tells her of his fears and that he wishes to spend no time with his father.

14. As will later be referred to, these proceedings have, as a matter of principle, at their centre, a determination of J's best interests, as distinct from, for example,

a determination of whether any, or all, of the alleged conduct occurred. Clearly, though, where allegations are made of a threat to murder a child, or anal rape of a child, the determination of the central issue of best interests must involve the examination of forensic issues central to those very serious allegations.

15. That is rendered all the more so because of a number of matters central to the father's case. First, he denies any sexual impropriety of any type at any time. Secondly, he denies saying the things which the mother alleges the child has reported. Third, he asserts (as he did before Slack FM) that the mother has fabricated the statements she attributes to the child. Fourthly, he says that the statements emanating from the mother allegedly initiated by the child are indicative (implicitly whether fabricated or not) of significant emotional abuse of the child at his mother's hands. The father says in the latter respect that the picture of the child painted by the mother of a highly anxious, troubled and fearful child, is completely at odds with the manner in which the child presents when with him. That, too, has resonance in evidence before Slack FM.

16. The polar opposite positions of the parties just outlined occur within a context bounded by the initial proceedings, the factors earlier referred to, and a number of other factors applicable to the four occasions upon which the father spent time with the child from 13 February 2010.

17. Although Slack FM's orders contained no requirement for supervision, the nature of the allegations made in the proceedings before his Honour, and the mother's asserted belief system referred to in those proceedings, saw the father ensuring that the time with the child was supervised by his current girlfriend, Ms W. Each of the father and Ms W depose that, not only did nothing whatsoever occur that was, or might be construed as, sexually improper behaviour, but, further, during the whole of the time that the child spent with his father (and Ms W) he was happy, buoyant, related warmly and appropriately with his father, and showed no signs of distress whatsoever (apart from one incident where he fell over while playing).

18. The father further contends that the mother's attitudes, or her asserted belief system/s, will not change. Of this, there is no doubt - in so far, at least, as the mother's statements to that effect are accepted at face value. The mother stridently said in the witness box that her asserted beliefs (and attitude to the father) will *never* change. So much is this so, she says, that she will not even countenance counselling or psychotherapy if the purpose, or one of the purposes, of that psychotherapy or counselling is to have her alter her beliefs that the child has been abused and that the father is capable of the sexual and homicidal actions she attributes to him.

PRINCIPLES IN PARENTING PROCEEDINGS INVOLVING ALLEGATIONS OF ABUSE

19. Part VII of the *Family Law Act* 1975 (Cth) ('the Act') mandates the framework within which parenting orders must be decided, including specifying matters that must mandatorily be taken into account by the Court.

20. That framework has now been discussed in numerous decisions of the Full Court. Examples include: *Goode v Goode* (2006) FLC 93-286; (2006) 36 Fam LR 422; *Donnell v Dovey* (2010) 42 Fam LR 559; *Marsden v Winch* (No 3) [2007] FamCA 1364; *Mulvany v Lane* [2009] FLC 93-404 and, recently, the High Court in *MRR v GR* (2010) 240 CLR 461; (2010) 42 Fam LR 531. Other decisions have considered aspects of those requirements including, for example, the expression "meaningful relationship".

21. Recently, I attempted to collate the principles flowing from the authorities, as I understand them, in *Hardie v Capris* [2010] FamCA 1046. I do not propose to repeat those passages here, but I make it clear that I am here applying those principles, as understood by me, as set out in that decision (at [44] to [86]).

22. The court's central task - the determination of orders that best meet the best interests of the particular child or children in his, her or their particular circumstances – and the mandatory process which governs that task – do not change because allegations of abuse are made.

23. In that respect, it is important to reiterate part of what the High Court said in *M v M* (1988) 166 CLR 69 (at 76) which, in my respectful view, is no less true consequent upon the passing of the *Reform Act* which introduced significant changes to Part VII of the Act:

> Viewed in this setting, the resolution of an allegation of sexual abuse against a person is subservient and ancillary to the court's determination of what is in the best interests of the child. The Family Court's consideration of the paramount issue which it is enjoined to decide cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegation of sexual abuse…

24. Further, the High Court pointed out that:

> In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in a child's interests to maintain the filial relationship with both parents.

25. Now, just as when *M v M* was decided, the resolution of an allegation of the potential risk of harm ought not replace or divert attention from the central task of assessing the child's best interests. The identification of the need to protect children from specified harm as a Primary Consideration does not, in my view, alter that position; that Primary Consideration occurs in the context of a broad assessment with an ultimate focus on best interests. So much, in my view, is

clear from a number of sections within Part VII, for example, s 65CA and s 60CC(3)(m).

Unacceptable Risk

26. In *McCoy v Wessex* (2007) 38 Fam LR 513, Brown J refers to a number of decisions where the place of "unacceptable risk" is considered. In particular, her Honour refers to the decision of the Full Court in *In The Marriage of N and S* (1995) 19 Fam LR 837; [1996] FLC 92-655. There, Fogarty J said (at 82,713-4):

> Thus, the essential importance of the unacceptable risk question as I see it is in its direction to judges to give real and substantial consideration to the facts of the case, and to decide whether or not, and why or why not, those facts could be said to raise an unacceptable risk of harm to the child. Thus, the value of the expression is not in a magical provision of an appropriate standard, but in its direction to judges to consider deeply where the facts of a particular case fall, and to explain adequately their findings in this regard.

27. In her Honour's reasons in *McCoy*, Brown J also refers to the judgment of Warnick J in *Napier v Hepburn* (2006) 36 Fam LR 395, (subsequently cited with approval by the Full Court in *Potter v Potter* (2007) 37 Fam LR 208 and *Partington v Cade (No 2)* (2010) 42 Fam LR 401). Warnick J says:

> [114] I also wish to add some comment on what I perceive as a further goal of fulsome discussion by a trial Judge of the component aspects that may, in any given case, lead to a conclusion of "unacceptable risk" of harm to a child. That goal is to provide a platform, for any future consideration of the family circumstances. Once a finding of unacceptable risk is made, imperfect though the process that leads to that result may be, the finding can come down between parent and child like an iron gate, that no subsequent efforts can raise. At least a close examination of the steps leading to a finding of "unacceptable risk" can eliminate paths by which a family (or court making decisions for a family) might subsequently explore options for change.

28. The reference by Warnick J to the process leading to the result is, in my respectful view, extremely important. Frequently, (I would respectfully venture, too frequently) "risk" is referred to as an all-embracing term, a "general" finding of which can (purportedly) be seen to have some form of "ipso facto consequences" for the orders made. Yet, "risk" is, without more, but a convenient description; orders must, surely, address its constituent components, which must, axiomatically, vary according to the circumstances of each case. It is interesting, and in my respectful view instructive, to refer to what has been said about this issue first by the Honourable John Fogarty AM, and, secondly, by Mahendra, an English author qualified as both a psychiatrist and a barrister.

29. The latter said:

> Risk assessment in any situation involves, in essence, the asking of the following questions:
>
> (1) What harmful outcome is potentially present in this situation?
>
> (2) What is the probability of this outcome coming about?
>
> (3) What risks are probable in this situation in the short, medium and long term?
>
> (4) What are the factors that could increase or decrease the risk that is probable?
>
> (5) What measures are available whose deployment could mitigate the risks that are probable?
>
> (B. Mahendra, 'Psychiatric Risk Assessment in Child and Family Law' (2008) 38 *Family Law* 569).

30. The multiple emphasis on "probability" is in my view important for the very reasons identified by the Honourable John Fogarty AM writing in the *Australian Journal of Family Law* ('Unacceptable Risk – A return to basics' (2006) 20 *Australian Journal of Family Law* 249). He said this (at 254-5):

> …the reality is that all courts deal with issues of "risk" and degrees of risk (however described) in various situations and that concept is increasingly used in legislation.
>
> Risk is difficult to define in a way which is not ultimately circular. But it is an inevitable part of life at all its levels. It is inherently risky to breathe, eat, drink, walk, drive, work, invest and play. The world is full of different risks and consequences and everyone is prone to dangers. We confront varying levels of risk everyday. People frequently face potentially dangerous situations; not many live at home in complete isolation to avoid getting in harms way. Most people try to avoid what they perceive to be risk; some willingly take on high risk activities.
>
> Risk involves two components; the degree of "likelihood" of the happening of an event, and the possible consequences (good or bad) if it does [cases and citations omitted]. Individuals in their assessment of some risks may focus more on one than the other of these components.
>
> But at some point it usually becomes necessary for that person to make a judgment of the risk and whether it can/should be taken. Where the risk relates to a third person to whom one owes a responsibility, it is likely in the nature of things that the estimate will be conservative.
>
> Risks are relative and usually involve trade-offs. Crossing the road with oncoming traffic to catch the last connection to the airport involves the risk of being hit by a car or the risk of missing the plane. Very much a

> balancing exercise of facts, experience and intuition, but essentially which risk carries the greater detriment (usually the car).
>
> Then there is the common experience of a mother watching her child cross a road to go to school. The risk is seen as greater (although it may not be) because the consequences may be death or injury to the child and because the responsibilities of the mother will be seen by her as greater than for herself or another adult….
>
> At times the courts and the legislature have attempted to give an indication of the content or quality of the risk – otherwise "risk" may mean any risk, however small or unlikely. Hence the use of adjectives such as "serious", "grave", "real", "appreciable" and "unacceptable". [paragraphing added to the original for ease of reference]

31. I respectfully agree, as I also do with this statement by Mr Fogarty (which also has echoes in Mahendra's statement earlier quoted):

> … unacceptable risk in the High Court's formulation [in *M v M* (1988) 166 CLR 69] requires two separate steps. Is there a risk, and is it unacceptable? The concentration by the High Court is upon both the nature and the degree of risk in the particular case. Its formulation is all about balance. In some cases a risk is "acceptable" when balanced against other factors and other orders. The object of safeguards is to convert an unacceptable situation to an acceptable one where that is feasible and is of "benefit to the child". It is, as I suggested earlier, calibrated to its use in individual cases. It is unrelated to the exoneration or otherwise of the alleged abuser; it is all about the bests interests of the child and protection from risk". (at 261)

32. Subject to a consideration of the presumption of equal shared parental responsibility and, consequently, s 65DAA (reference to each of which will be made in a moment), the weighing of relevant Primary and Additional Considerations in the context of the Act's Objects and Principles, seems to me to require, in cases of this type, a careful balancing exercise similar to that referred to by the Full Court, prior to the 2006 amendments to the Act, in *B & B* [1993] FLC 92-357; (1993) 16 Fam LR 353. There, the Full Court said (@ 365-366):

> The High Court in *M v M* referred to the "imposing array" of tests which had been formulated by the Family Court to determine whether access to a child should be denied in such cases. The court held that the various tests expressed endeavours by the Family Court "to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access".
>
> The test propounded by the High Court in *M v M* and which is authoritative in this jurisdiction, is: "That a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse (at Fam LR 611; FLC 77,081)".

> The "unacceptable risk" test is therefore the standard used by the Family Court to "achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access". In other words, where the court makes a finding of unacceptable risk it is a finding that the risk of harm to the children in having access with a parent outweighs the possible benefits to them from that access.
>
> Such a conclusion however may be a finding in relation to unsupervised access only. This is demonstrated by the High Court's further statement in *M v M* that: "In access cases, the magnitude of the risk may be less if the order in contemplation is supervised access".
>
> Thus, a finding that access should not be granted because there is an unacceptable risk to the child of abuse, does not of itself preclude a finding that there is no unacceptable risk to the child if supervised access is ordered. However, the High Court made it clear that an unacceptable risk does not relate exclusively to the risk of sexual abuse occurring. Referring to supervised access, the court stated: "Even in such a case, however, there may be a risk of *disturbance* to a child who is brought into contact with a parent who has sexually abused her or whom the child believes to have sexually abused her. (emphasis added)".
>
> Therefore, if supervised access poses an "unacceptable risk" of harm (or "disturbance"), whether physical, emotional or psychological, it should not be granted.
>
> It should be noted that the *M v M* "unacceptable risk" test is employed within the context of "resolving the wider issue", namely the determination of what is in the best interests of the child, to which principle the unacceptable risk test was said by the High Court to be "subservient and ancillary". The overriding consideration in all custody and access decisions is the welfare of the child: see s 64(1)(a) of the Family Law Act and *Brown v Pederson* (1992) 15 FamLR 173; [1992] FLC 92-271.

Parental Responsibility

33. I also attempted to distil the principles emerging from earlier authorities in respect of this issue in *Hardie & Capris*, above, specifically at [59] to [64]. Again, I do not propose to repeat them here but, again, I make it clear that, in this judgment, I rely upon those principles as there discussed.

34. Here, the two parents cannot conceive of the other as anything other than a malevolent influence upon the child. Each sees the other as an abuser of the child. There is no likely prospect of change in either parent. I cannot see that there is even a remote possibility of the parents co-operating in the future about anything, let alone in the manner contemplated by s 65DAC.

35. Further, even if attempts were made by one parent to communicate with the other about major long term issues (the likelihood of occurrence of which I

think is, in any event, nil) I consider that it would be attended by conflict and, likely, barely concealed contempt. It need hardly be said that such a situation is wholly contrary to what might be in J's best interests.

36. As will be clear from the outline earlier given, a finding of "abuse of the child" (s 61DA(2)) is (on the contentions of either party) a distinct possibility. However, even in the absence of any such finding/s, it seems to me plain that the presumption of equal shared parental responsibility (and all it must entail for parents – see s 65DAC) is, in the circumstances of this case, rebutted in J's best interests.

37. It does not follow, however, that the exclusion from decision making (which might be thought implicit as a result) is, or should be, complete. First, if the presumption is rebutted then, absent a relevant parenting order, each of the parents has parental responsibility for J (s 61C). Thus, each of the parents has the duties, responsibilities and authority which that implies (s 60B). By reason of the matters just discussed and the matters to be referred to below, the potential for very significant conflict to J's detriment, continues to exist if that was to remain the position. J's best interests require parental responsibility to vest in one of his parents.

38. Yet, even in that situation, it is not necessary that the other party is completely excluded and doing so is in my view an unwarranted interference with the other parent's rights. That can, in my view, be a relevant factor (s 60CC(3)(m)) and is in this case. But, orders can be shaped so as to meet concerns arising from the likelihood of parents not co-operating or competing assertions creating conflict likely to embroil the child, while at the same time paying regard to the rights of the "other" parent which I, at least, regard as fundamental. I propose to make an order of this type in this case and I will discuss same in more detail later in these reasons.

39. For present purposes, however, the result of the finding is that the statutory presumption is rebutted and, to use the words of the Full Court in *Goode*, above, "…the question of [J's] best interests is at large".

40. The question "in the nature of a jurisdictional fact" (see *MRR v GR* above) required to be answered by s 65DAA does not arise; the pre-condition to the operation of that section is not engaged because an order will not provide for equal shared parental responsibility.

SEXUAL ABUSE, EVIDENCE AND THE PRESENT CASE

41. The notion that children might be used (directly or indirectly) for the sexual gratification of adults is repugnant to any sane person. To the extent that it is possible to identify or quantify degrees of repugnance, it might be argued that particular repugnance attaches to a parent of a child using or exposing their

own child in that manner. Expressed in terms familiar to the Act, the conduct is as complete and repugnant an abdication of parental responsibility as can be imagined. Similar comments apply, of course, to other forms of child abuse. So, too, genuine repugnance attaches – and plainly should attach – to all forms of family violence; it, too, has potentially profound ramifications for children and the potential to harm them on many levels.

42. As has frequently been commented upon, the number of cases in this court involving allegations of child sexual abuse has, in recent years, increased exponentially. Opinions can be ventured as to why this is so. Included among them is the suggestion that what was once "a taboo subject", little appreciated or understood - and very rarely talked about - is now significantly less so. Other explanations also exist. Be that as it may, the proliferation of this type of parenting case (and, indeed, all parenting cases where allegations of any abuse or family violence are a central issue) presents significant challenges for this court. Not the least of those challenges – and one evident in this case – is the nature, extent and quality of the evidence from which the court is asked to make findings relevant to those central difficult issues.

43. In that respect, it is not to the point that the decision is not, at heart, about whether abuse has occurred or not; the degree of probability that abuse has occurred, and/or might occur in the future is, it seems to me, directly relevant to each of the two matters which the High Court says must be addressed: (1) whether there is a risk of abuse occurring, and (2) assessing the magnitude of the risk.

44. This case possesses characteristics that are remarkably common in so many cases of this type that come before this court. An outline of those characteristics and their applicability here, provide, in any event, a useful background to this particular case:

- The allegations are in respect of a very young child. (In this case, allegations of improper conduct extend back to a time when the child was a baby aged about 15 months (and, perhaps, before – the timeframe for the "bouncing on the stomach" incident is unclear). More recently, the alleged behaviour was perpetrated when he was about 5½ years of age);
- There is no physical evidence in support of the allegations. (Here, despite medical investigation, there is no evidence to support alleged statements by the child that he has been anally penetrated by an adult penis, a stick and an adult hand and/or fist. Further, a police investigation, during which the child was interviewed, resulted in no action being taken);
- The allegations rest, primarily, upon statements made by a child. (Such is the case here.);

- The primary source for reports of what a young child is alleged to have said is a parent or close relative of the child. (Here, it is the mother.);
- The primary source for reports of what a child has said historically is a person who either then, or since, believes strongly that the child has been abused. (Here, the mother's belief has already been referred to. It is shared by her sister with whom she and the child live and by other family members, principally the mother and brother.);
- Alleged statements which, on their face, are asserted to be indicative of sexual abuse have increased in their frequency and intensity and refer to behaviour of increasing severity and seriousness. (Reference has already been made to the seriousness of the behaviour alleged and to the fact that there are said to be statements by the child reporting his father's threat to kill him);
- Several behavioural indicia are said to accompany or surround the alleged statements. (In this case, the child is said to be experiencing nightmares and wetting and soiling, associated, it is asserted, with thoughts of his father and, in particular, the idea of the child having to see his father);
- The child is said to be frightened of the alleged perpetrator parent (the child is said to be in real fear of his father);
- There is a stark contrast between the accounts of behavioural characteristics observed by the alleged perpetrator parent and those observed by the other parent. (In this case, the accounts of the child's reports to the mother of his reactions to the father and accounts of the father and Ms W of those reactions could not be more different);
- The alleged perpetrator parent asserts that the child exhibits no fear with him or her and, indeed, asserts a warm and loving relationship. (Here, the father makes this assertion. The mother asserts that J, aged not yet 6 at the time, "puts on an act" out of fear of his father. In short, she asserts that the child, out of fear of being harmed if his "true feelings" are revealed, is able to fool his father (and Ms W) into believing that he is affectionate and loving toward them);
- The child has seen one or more "therapists" or "counsellors". (Here the child has seen a psychologist, Mr A, on 22 occasions, recently, weekly);
- Sexual abuse (or, at the least, the possibility of sexual abuse) has been the focus of such counselling or therapy. (Such is the case here);
- The counsellor or therapist conducts the therapy in the belief he or she is dealing with a child who has been sexually abused. (Here, Mr A says he became concerned that the child had been sexually abused during the sessions);

- The consultations have been arranged by a parent who says that they implacably believe that the child (patient) has been sexually abused. (This is the case here – the mother arranged the therapy (on the recommendation of a GP));
- The child has given at least one, and frequently many, accounts said to be indicative of abuse prior to the therapy sessions taking place. (So, too, this is the case here; a complete account of what the evidence reveals the child has said, when, and to whom, will be given later in these reasons);
- Statements by the child to an independent, trained person occur after many statements said to indicate abuse have occurred. (Once again, this is the case here).

45. It should be emphasised that, while the focus of those factors might be seen to be related to the probability, and degree of probability, of abuse having occurred – matters central, in my view, to assessing risk – it should not be thought that those same matters pertain only to that issue (or, indeed, solely to the Primary Consideration of protection from harm). It will, I think, be plain that those same matters find reflection in both Primary and Additional Considerations.

46. For example, a child's fear of a parent is plainly related to the "benefit of a meaningful relationship" and to the "nature of the relationship" between the child and his parents. Similarly, the child's "views" – at least in the broad sense – can be seen to be relevant. A parent's asserted belief that abuse has occurred and, reciprocally, a belief by a parent that a co-parent has fabricated an allegation of sexual abuse (and the potential for child homicide) must plainly be relevant to the "ability" and "willingness" of each parent to encourage and foster a relationship between the child and the other parent.

47. No less important, each of the party's proposals provide, in their different ways, for a significant change in the child's life. If the father's proposal is accepted, he will move from the care of someone to whom he is, without doubt, strongly attached and who has, undoubtedly, been his primary nurturer throughout his life. He will also be removed from daily contact with his aunt to whom, it would appear, he is also attached. The child will, on the father's proposals, not see his primary nurturer for some time. If the mother's proposals are accepted, the child will have no relationship with his father.

48. While many findings central to the Primary and Additional Considerations can be made (and will be addressed in more detail below), difficulties nevertheless remain in cases of this type. First, and this case is a stark illustration, is a dilemma central to parenting cases in family law not found in other areas of the law. Findings about central factual issues do not *necessarily* dictate the result; proof of the elements of a "cause of action" do not necessarily lead directly to a

"remedy". For example, it is entirely possible here for a finding to be made that the child is not at risk of sexual (or other) harm from the father. That central finding might be thought to dictate orders productive of (at the least) the child enjoying a fulsome, regular (indeed, "meaningful") relationship with his father of a type which the Act envisages. But, that result does not necessarily follow; the proceedings are not about what is "fair" to the father, or what is "morally right or wrong" about each parent's respective behaviour, but about what result is ultimately best for J (given that the circumstances in which he finds himself dictate that *any* result is likely to be a long way short of what is truly in a child's best interests). Other factors (Considerations) that have J as their central focus are also directly relevant in determining that central issue.

49. While, as referred to above, this case can be seen to have characteristics shared by so many cases of this type, it also has features by which it differs. Frequently, in cases of this type, statements made by children said to be indicative of abuse (or the risk of abuse) are not capable of being related to specific occasions or timeframes or, indeed, to any other evidence separate from the statements of the child, often reported predominantly by a person or persons who believe abuse has occurred, together with the observations (alleged to be sinister) of those same people.

50. While those features are present here, by way of contrast with that situation, here, if the child is, in his various statements, describing acts of sexual abuse (and other abuse including emotional abuse), then, as the mother herself accepted in the witness box, and as her counsel conceded in submissions, it can only be abuse which has occurred on the four occasions between 13 February 2010 and 3 July 2010 when the child saw his father pursuant to orders made by Slack FM. Here then:

- The alleged incidents have a time frame;
- The alleged incidents are confined to four identifiable occasions;
- Each of those four occasions is of short duration (four hours);
- Each of those four occasions occur during daylight hours;
- Each of those four occasions saw time take place in public places;
- On each of those four occasions, a person other than the father (Ms W) was present for the whole of the time (subject to interludes of, about ten minutes and 20 minutes, of which more will be said below).

51. In addition, the four occasions which mark the only possibilities of abuse occurring, took place after a process of litigation and a trial as a result of which the father says, and I accept, he was under no doubts that his every word and action would be scrutinised by the mother. He says, and I accept, that it was specifically for that reason that he asked Ms W to be present for the whole of each occasion. Those four occasions also occurred after the mother had, in the

proceedings before Slack FM, made it abundantly plain that she implacably believed that the father was capable of sexually abusing his son and was likely to do so in the future. Indeed, her whole case before Slack FM was effectively based on that premise.

52. Some or all of those matters can be seen to be potentially relevant to a finding of whether abuse occurred. But, relevant to the present central issue, they can also be seen to be crucial in arriving at findings about each of the two matters which the High Court says must be addressed in proceedings of this type.

53. But, even if greater clarity might be brought to allegations, by, for example, findings about opportunity or probability, other issues emerge. For example, if it was found that what the child is reported as saying occurred did not, in fact, occur, or was extremely unlikely to have occurred, what ought be made of the fact (if accepted) that the child has not only said these things but also that they are accompanied by what the mother describes as troubling regressive behaviours. If, for example, it is found that the mother is not fabricating the things that the child has said to her and has accurately described his behaviours when in her presence, what other findings might be made, or should be made, as a result? The answers to those, and other, questions have the potential to say much about the child's best interests.

54. That these (and many other similar) questions can arise, illustrates readily enough the earlier expressed concern about the nature, quality and extent of evidence by which findings are to be made. Further, in that respect, if "common knowledge" or "notoriousness" (see s 144 *Evidence Act 1995* (Cth)) has significant limitations when, for example, issues of "aboriginality" lie at the heart of a parenting case and appropriate expert evidence is to be preferred (see *B and R and the Separate Representative* (1995) FLC 92-636; [1995] 19 Fam LR 594 @ 624; *Donnell and Dovey* (2010) 42 Fam LR 559), then, when the assessment of the risk of serious, reprehensible conduct to a child is the central issue, the need for appropriate evidence, and appropriate expert evidence in particular, is, too, surely to be required.

55. In *McCall v Clark* [2009] FLC 93-405, the Full Court said (in a parenting appeal with a context different to the present):

> 126. There is no suggestion in this case that the Federal Magistrate was referred to any matter which would fall within the purview of s 69ZX(3) to inform himself of matters relevant to establishing a meaningful relationship for a three year old child with a parent, where the child has experienced a significant period of time with little interaction with that parent. Neither party tendered to the Federal Magistrate any of the well-recognized peer reviewed research on the establishment of primary and significant attachments of infants and young children, nor did the Federal Magistrate raise with the parties that he could have recourse to such material. Absent such evidence the Federal Magistrate could not have informed himself of

such matters since the type of research required would not, in our view, fall within the term 'common knowledge' in s 144(1)(a) of the *Evidence Act 1995* (Cth). It may have been admissible under s 144(1)(b) after giving the necessary notice prescribed in s 144(4) of that Act.

56. In (at least) cases of this type, "well-recognised peer reviewed research" is, in my respectful view, a concept which should cause significant pause for thought. As but one example of the concerns to which I refer, Ceci and Bruck, presenting the Amicus Brief for the case of *State of New Jersey v. Michaels*, compiled by the Committee of Concerned Social Scientists (2007), say: "It is important to understand that this is a rapidly expanding area of inquiry. Reviews of the literature that were published only a few years ago, are now out of date". The concern is exacerbated significantly when regard is had to the (notorious) fact that, since the Full Court in *B and R* made reference to data "… partly constituted by readily accessible public information of which it would be expected that a trial Judge would inform himself or herself…" the sources and volume of "readily accessible public information" have each increased enormously, indeed exponentially. There is no doubt about the volume and accessibility of information on the Internet; the issue is its reliability or, perhaps more accurately, how to assess its *relative* reliability when compared to other pieces of information also emanating from the same public resource.

57. At the very least, as it seems to me, when issues as serious as child abuse arise, the introduction of such research as evidence should come about (as the Full Court effectively suggests in *McCall)* by the means of an independent expert who possesses requisite training, expertise and experience in dealing forensically with cases in which sexual abuse of young children is alleged, and who, crucially, as part of that expertise, is also familiar with relevant peer-reviewed research. Crucially, that training, expertise and experience should permit them to properly posit particular pieces of research within the scientific mainstream. Caution is needed on the part of the Court when reference is made to a particular study or studies – even by a properly qualified expert. Such a reference can be of little assistance unless it is known where the study, or studies, sit within the accepted body of knowledge. As the Honourable John Fogarty AM said above (@ 272), "You could fill a library with articles on this topic arriving at differing conclusions".

58. It is for that reason, together with the very rapid rate of development in that body of knowledge, that greater comfort is given to judges if regard can be had to meta-analyses – that is, the product of a highly-qualified researcher in the relevant area examining the entire respected and recent literature and attempting to synthesise the findings. (See, as an example Ceci and Bruck, 'Suggestibility of the Child Witness: A Historical Review and Synthesis' (1993) 113 *Psychological Bulletin* 3. Note, though, that by reference to Ceci's comments above, this particular 1993 study is now well out of date).

59. While noting the provisions of s 144 of the *Evidence Act* and the provisions of Division 12A of the Act, including s 69ZX(3), the concerns I have in cases of this type extend beyond, I think, those alluded to by the Full Court in *McCall*. For example, I would, in the absence of direct expert evidence of the type I have just referred to, need to be convinced that a piece of research contained in a document sought to be tendered was either "capable of verifying" "knowledge" within the meaning of s 144 or that the document contained "knowledge" that was "not reasonably open to question". So, too, in the absence of accompanying expert evidence, the value of "research" sought to be tendered (even if admissible by reference to the provisions of Division 12A) is, in my respectful view, of dubious value to a court.

60. Of course, in making these comments I am, as I must be (see e.g. s 69ZN(3); (7) and s 69ZX(1); (2)) acutely aware of the demands of proportionality and the need for litigation to be conducted, and be brought to an end, expeditiously in the best interests of children. No less is this so for J who has already had to endure (indirectly) one trial process. I am also acutely aware of the practicalities of organising appropriate evidence and the significant costs involved; each are very important and very real for the parties involved.

61. Yet, the issues in cases of this type are profound; a wrong decision about risk could result in a parent who has done nothing wrong not seeing their child, or, a wrong decision about risk could place a child at risk of current, and likely future, harm of very significant proportions. It is plainly neither sufficient nor appropriate for a court, charged with the responsibility of doing justice according to law, to avoid the difficult decisions involved, axiomatically fallible though the process obviously is. But, like most difficult tasks, the process should be facilitated by use of the best tools, relevantly, the evidence upon which the decision can be made.

62. Deep and real questions surround what is, and what is not, genuine expertise in addressing issues surrounding allegations of sexual abuse and, more particularly, the timing of, and processes employed by, persons who assert "expertise". A crucial problem in that respect is the expression of opinions about the likelihood of past or future abuse by therapists or counsellors who are consulted (even if with the best or "purest" of parental motives) on the basis that overt behaviours of a child said to need treatment are said to be indicative of abuse, or are accompanied by a parental belief that the cause of the behaviours is sexual abuse.

63. Here, Mr A, as part of his "treatment" or "therapy", wrapped J up in sticky tape at the child's request. This will be considered in some detail later in these reasons. In the context of the present discussion, however, it is to be noted that, when I asked Professor Q, a single expert psychiatrist, about this part of the "therapy", she said, "I think most clinicians would be very careful about how they handled a child, particularly a child who had ideas of having been harmed

by adults, you would be very careful about any contact with the child". I consider that Professor Q was being very careful – or "diplomatic" – in her response. It may not be for me to comment on what may, or may not be, appropriate *clinical* practice (although I confess to being stunned that such a practice would form part of any "counselling" or "therapy" where there is alive the possibility that a 5 or 6 year child has been sexually abused). But, in a forensic context, those actions highlight starkly the concerns which I have expressed about the nature, type and extent of "expert" evidence in cases of this type.

64. That is all the more so in this particular case when reference is had to the evidence of Mr Q in response to questions by me (in a couple of different contexts) which sought from him the literature to which he had reference in the context of referring (as he did in his oral evidence) to "the general indicia of sexual abuse". Mr Q was unable to refer me to any literature at all but went on to tell me that he had reference to "booklets produced by the sexual assault service". Mr Q suggested that I could find the information myself by going to the Internet and "looking up 'signs of sexual abuse'". When I raised my concerns about knowing which material "I would find on the internet [which were] reliable, scientific sources" properly researched and peer reviewed, Mr Q responded:

> It's the quick way for me. I've read a lot about sexual abuse and the signs of and so if I refresh myself by going to the Internet I can recognise again the same things there. It's not really rocket science in my mind.

65. Further concerns raised in the instant case by the matters just discussed, will emerge below. First, though, I turn to a number of central findings adopted from Slack FM's earlier judgment.

CONSIDERATIONS AND FINDINGS

Findings in Earlier Proceedings – the Law

66. Each of the parties relies upon evidence in the proceedings before Slack FM and upon aspects of his Honour's Reasons for Judgment.

67. Slack FM dealt in reasons after a trial with the central issue of whether the father presented an unacceptable risk to the child. Neither party, nor the Independent Children's Lawyer (ICL), seeks to persuade this court that any estoppel applies in respect of that issue. The concession was, in my view, properly made (See *Schorel & Schorel* (1990) FLC 90-144 especially @ [29]).

68. In having recourse to the evidence before Slack FM and to his Honour's findings, reference needs to be made to s 69ZX(3) of the Act which provides:

> "The Court may, in child-related proceedings

a) receive into evidence the transcript of evidence in any other proceedings before:

(i) the court; or

(ii) another court; or

(iii) a tribunal;

and draw any conclusions of fact from that transcript that it thinks proper; and

b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a) (i) to (iii).

69. The Explanatory Memorandum to the Bill introducing the section provides (pp 70-72):

> 29. Subsection 69ZX(3) inserts a modified version of section 86 of the Native Title Act 1993. It provides that the court may, in child-related proceedings, receive into evidence the transcript of evidence in any other proceedings before a court or tribunal and draw any conclusions of fact from the transcript that it thinks proper. The court may also adopt any recommendation, finding, decision or judgment of any court or tribunal.
>
> 30. This amendment implements recommendation 5 of the Family Law Council's December 2004 Report, Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze. The Report found that such a provision could provide a court with the flexibility to draw on relevant evidence adduced in other proceedings in other courts to inform decision-making in the best interests of the child pursuant to subsection 68F(2). It suggested that, in the case of an Aboriginal or Torres Strait Island child, such an approach would assist a court in informing itself of the content of the relevant kinship obligations and child-rearing practices wherever such reliable information exists. In this regard, the provision is relevant to new section 61F (inserted by item 14 in Schedule 1) which requires the court to have regard to the kinship obligations and child-rearing practices that are relevant to an Aboriginal or Torres Strait Islander child.
>
> 31. This provision does not apply only to proceedings concerning an Aboriginal or Torres Strait Islander child. It applies to all child-related proceedings. In this respect, the provision implements recommendation 48 of the LACA Report. The Committee was of the view that extending the provision to all children would be helpful and may assist in addressing issues surrounding claims of family violence and abuse. The note to subsection 69ZX(3) clarifies that the subsection may be particularly relevant for Aboriginal or Torres Strait Islander children.

70. That a court should adopt findings by another judicial officer in respect of issues currently contentious before the court and which were contentious before that other court is, at least to me, somewhat "counterintuitive". Nevertheless, the section is in plain terms. Subparagraph (a) appears on its face unrestrained in terms of the conclusions of fact that may be drawn from transcripts in other proceedings. So, too, the permission afforded by subparagraph (b) refers to the adoption of "any" of the named matters including, relevant to this case, any "finding" or "judgment" of "any court". The language is, then, permissive and unrestrained. The section can also be seen to be consistent with an overall legislative purpose evident in Division 12A of Part VII, in which s 69ZX(3) is contained. (See, eg, s 69ZN(7); s 69ZQ; s 69ZT(1) and s 69ZX itself).

71. The section (and the underlying legislative purpose) can be seen to have particular utility in a case such as the present where similar themes and issues underlie both proceedings. Ms Carew, counsel for the mother submits that the incidents said to have occurred since 13 February should be seen "globally" (or, perhaps, cumulatively). In my view, that might equally apply to them being seen properly in the context of the events and allegations which preceded them. I also consider that the evidence – and, in particular, the expert evidence – needs to be put into that context.

72. My intuitive discomfort might be more acute but for the fact that, as will emerge, many of the earlier findings made are wholly consistent with evidence before me, my own assessment of the parties and their evidence, and findings to be made by me which result from that evidence.

Findings and Evidence Adopted from the Proceedings Before Slack FM

73. The mother asserted before Slack FM that she had made observations of the father during the relationship which, she said, were indicative of sexual abuse or the father's potential for same. The incidents and the mother's reactions are a precursor to the current allegations. They are described this way in Slack FM's judgment:

> [43] The mother gives the following evidence about her observations of the father during the marriage and raises concerns about the safety of the child in the care of the father:
>
> > On 17 November 2005, I was preparing an evening meal. [The father] had come out and said to me, "I am going to have a shower." At the time [the child] was 15 months old and was walking and I had noticed that he had gone up the hallway with [the father]. A short time later, I heard a laugh from [the child], then a cry and then silence. It was the silence which made me wonder what was going on. I walked up the hallway and observed [the father] with [the child] in the second bedroom in the home. [The father] was holding [the child], with both his hands around his waist on either side. [The child] was faced towards the middle of the bed away from [the

> father], and [the child] was bent at the hips and his legs were positioned down the side of the bed. [The father] had his jeans unzipped and his underpants were still on. [The child] had his nappy on. [The father] was thrusting backwards and forwards at the back of [the child's] bottom. I witnessed [the father] to make three or four of the pelvic thrusts of a sexual nature at the back of [the child's] bottom. I could visibly see that the front part of [the father's] underpants were connected with the back of [the child's] nappy that covered his anal area. (para 25 of the mother's affidavit of evidence-in-chief).

[44] At para 26:

> [The father] saw me and appeared startled. [The father] immediately stopped what he was doing and I recall the expression on his face was of somebody that had been caught doing something that they shouldn't have been doing. [The father] then said to me in a critical manner, "What do you think you're doing?" and he let [the child] go. [The child] then trotted away laughing. I was in a state of shock but I said nothing.

[45] The mother says that prior to this occasion she had observed two other incidents that caused her concern. She says:

> Both occasions involved [the father] being naked in bed and bouncing [the child] up and down on his lower abdomen. It was early of a morning after a night's sleep and [the father], [the child] and I were all in bed together. I say that [the child] had his pyjamas on, together with a nappy. I observed that [the father's] penis was erect. On each occasion I said to [the father] words to the effect:
>
> > "Just stop that, get some clothes on, what do you think you're doing?"
>
> I recall that when I said these comments, [the father] immediately looked at me with a look of disdain and I recall [the father] saying to me:
>
> > "What are you going on about?"

[46] The mother says that on 13 December 2005:

> When [the father] was walking up the hallway in his underpants. He was in the process of getting dressed to go to Noosa on his own when he said, "Come here a minute [J]." His tone for some reason alerted me. Twice [the child] came back down the hall away from [the father], and both times [the father] came out after him. I was concerned about [the father's] intentions on these occasions and can remember grabbing the broom to sweep the verandah knowing that [the child] would come over to me straight away as he loved the

broom. He did so on this occasion and [the father] just left [the child] with me and did not try and entice him to come any further.

74. His Honour found in respect of the father's evidence about these incidents:

> [50] The father's responses to the incidents referred to by the mother appear to be as follows:
>
> a) He acknowledged having a memory of one occasion when the child was in the bed that he may have been naked and had an erection. He denies that he was sexually aroused by the child and denies that he did anything inappropriate of a sexual nature. He says that the mother was also in the bed and any activity he did with the child was merely play activity.
>
> b) In his affidavit material he denied any memory of the other incidents reported by the mother (see para 76.3 of the affidavit filed 16 November 2009). In his reporting to Mr [P], the father seemed to have a memory of the incident described by the mother (see paras 46 and 47 of the report of Mr [P]). However he goes on to tell Mr [P] that "*the truth is, I can't really remember the particular incident she was referring to"* (see para 48).
>
> c) He denies any significant involvement with pornography and denies use of child pornography.
>
> d) He denies any self-stimulating sexual activity as described by the mother although seems to acknowledge that there were times that the mother may have observed his hand/s resting on his pants or inside his pants near his penis. He says that this was a long standing habit and had nothing to do with obtaining self-stimulating sexual gratification.

75. Ms Carew deals with these incidents under the heading 'Credit' at par 15 of her written submissions. According to Ms Carew, there are inconsistencies in the father's accounts of the incidents. The inconsistencies were raised before Slack FM and his Honour made the following findings, which I respectfully adopt:

> [66] The father has consistently denied that he has ever abused his son; has ever acted in a way that he used his son for his own sexual gratification; or that he has any such tendencies. The mother submits that I should not accept his denials for two reasons. He has given inconsistent evidence about the events in November 2005 and that by his actions in not requesting unsupervised contact with his son for many years, he exhibits a guilty mind.
>
> [67] The father's evidence about the description by the mother of the events in November 2005 has changed. He has, until seeing Mr [P], maintained that he had no recollection of any event described by the

mother save that he acknowledged that there were occasions that he may have been in the bedroom along with the child and he may have been playing with his on the bed but that he has no specific recollection of the events described by the mother. In his statements to Mr [P] he seems to have had a recollection of the particular incident (see paras 46 and 47 of the report). It is submitted that if I accept that the mother observed as she described the incident, then the only person who can provide an explanation for this behaviour is the father. It is further submitted that the fact that he gives inconsistent version of his memory of any such incident is very concerning. When coupled with the fact that the father seemed to have tacitly accepted supervised contact for many years supports a conclusion of a guilty mind.

[68] Whilst I acknowledge that there were aspects of the father's evidence and actions that might support the conclusion contended by the mother, I did not reach that conclusion. From my observations of the father, he was attempting to do the best he could to remember an incident described by the mother so that he could attempt to explain the incident. I accept what he told Mr [P] *but the truth is, I can't really remember the particular incident she was referring to.* The mother never discussed the events with the father until well after she says she observed them. She interpreted what she observed as abuse. The fact that the father had no real recollection of any such incident does not mean that something did not occur but is more consistent with innocent play between the father and child. [italics in original]

76. Slack FM ultimately found that the mother:

> [57] … did observe something that disturbed her [but that] does not, however, automatically lead to the conclusion that she witnessed an act of sexual abuse. I accept that she interpreted that event in that way but I am not satisfied that her interpretation and reporting of the incident is reliable.

77. Slack FM's Reasons continue to then explore the mother's beliefs and the manner in which she dealt with her observations:

> [58] *It would appear, for example, that she immediately reached the conclusion that it was a sexual act by the father.* Without even asking the father to explain his actions her response was to ring her sister and describe to her an apparent sexual act involving the child. *It would appear that she immediately jumped to the conclusion that the father was capable of sexual abuse of his son. It is not surprising that she would find other actions of the father to confirm her already held belief.* There is no doubt that the mother has a firm belief that the father is capable of sexual abuse and *there is no sign that the mother might come to accept the possibility that she jumped to a wrong conclusion. What seems clear is that the mother formed her belief more or less immediately and then found other reasons to confirm that belief. I did not detect that she ever considered that there might be other innocent explanations for what she observed.* Had she

> maintained an open mind, I would have expected her to at least ask for some explanation from the father for what she thought she observed, particularly having regard to her evidence that as she was Catholic, she regarded her marriage as life long. If that were the case, I would have expected to at least see that she would give her husband the benefit of some doubt and at the least call on him for an explanation. It was clear that after that there was no doubt in her mind (an example of that is the incident she described on 13 December 2005. Clearly by then she had determined that the father was capable of sexually abusing the child even with her in the household). [Emphasis added in each case].
>
> [59] I agree with the submission of Counsel for the father that there is significant evidence that the mother has enhanced her evidence over time. In particular I was provided with a helpful summary of the differences in the evidence given by the mother in her affidavits about the particular events to the statements that she made to Mr [P]. I was left to conclude that the mother was prepared to enhance her evidence to provide stronger evidence of a conclusion that the father had sexually abused the child.
>
> [60] Whilst I am satisfied that the mother did witness something that disturbed her, I am not satisfied that she has now reliably reported her observations of the incident and that her current reporting of the incident is skewed towards the worst possible interpretation of the incident. I note that she told Mr [P] that she made a diary entry of the incident in November 2005 (para 92 of the report) but that no diary entry has ever been produced.

78. Findings similar to those made by Slack FM should in my view be made in respect of the evidence before this court and the mother's recounting of, and reactions to, the child's statements. The mother is, in my judgment, implacably committed to finding reasons to confirm her already held, allegedly genuine, belief. Not only is it again here not "possible to detect that [the mother] ever considered that there might be other innocent explanations" for what the child has said, but, in my view, the mother is avowedly committed to closing her mind to any such possibility. The mother has not only rejected the notion of any counselling or therapy directed to challenging her beliefs and ideas, but has also made it very clear that nothing said in this judgment would affect in any way her asserted belief or her position. Again, the foundations of that position can be seen in Slack FM's findings: "…there is no sign that the mother might come to accept the possibility that she jumped to a wrong conclusion".

79. I earlier made reference to the father's awareness that his every word and action would be watched by the mother. Slack FM made specific reference to this issue (para 98(i)(v)) including a prediction of the future, the prescience of which is exemplified starkly by the fact that the first (new) allegation by the mother that the child had been sexually abused by his father arose after the very first period of time spent with his father. Slack FM said:

> I have given consideration to making orders that the father's mother be present during at least initial contact visits if only to protect the father. I have decided against such a course. The father must surely be aware that he will need to be cautious in his interactions with the child. *He will be aware that the mother may interpret statements or behaviours by the child after contact visits adversely.* I have though satisfied myself that there is not an unacceptable risk to the child from being sexually abused by the father. I do not consider it appropriate to impose restraints upon the father in order to protect himself and that is a matter for him. I have assessed that he is also an intelligent man and is well aware of the difficulties he may face in the future in his relationship with the mother. I consider that he is likely to be very cautious in his interactions with his son. [Emphasis added]

80. Other findings made by Slack FM can be seen to have direct relevance to the statutory Considerations. I adopt the following findings which relate to the nature of the relationship between the child and his parents:

> [15] … For whatever reason, [the child] did not have significant interaction with his father during the time the parties lived together and the child was approximately 16 months old when the parties separated.
>
> …
>
> [38] … [the Family Consultant's observation and opinion accepted by Slack FM that] "… [the child] was observed to welcome his father lovingly in the presence of his mother" and [at [39]] "… I assess that [the child] is attached to his father and loves him"
>
> [40] … "[The child] is securely attached to his mother who has been his primary carer in his life to date"

81. A number of findings were made by Slack FM specific to the statutory Considerations (@ pars [72]ff of his Honour's judgment). I adopt the findings at paragraphs [78] to [81], [84], [85] and [87]. I also specifically adopt the finding at [26] that, "Although the parties acknowledge that the marriage was never very happy or successful, neither party accuses the other of violence in the relationship". This is also largely true of the evidence before this court, excluding the following statement made by the mother in her Affidavit filed 15 November 2010:

> After [the child's] birth, [the father] was verbally abusive to me informing me on a regular basis that I was a "lazy bitch" and saying to me regularly to "go back under the rock you came from".

82. At paragraph [87] of his judgment, Slack FM said this:

> For the reasons I have already expressed, I am satisfied that both parties have demonstrated by their attitude that they would want to be involved in the long term care, welfare and development of the child. I am not satisfied

> that the mother's view that the father has no real interest in pursuing a relationship with his son is a correct view. I consider that, given a proper opportunity, the father would consistently spend more expansive time with his son and that the child would receive positive benefits from that contact.

83. The "strong element of exclusion" to the mother's parenting is certainly evident in these proceedings; the mother makes it abundantly plain that she seeks to exclude the father completely from the child's life. Informed by events which have occurred since Slack FM's judgment was handed down, I am, though very concerned that there *is* an unhealthy enmeshment in the relationship between the child and his mother. Further, his Honour considered (@ [98(h)]) "whether there is a likelihood that the mother's anxiety will become the child's anxiety particularly due to the closeness of the relationship between the mother and the child". I am of the view that this concern by Slack FM has come to pass; I think it highly likely that the mother's anxiety has become the child's.

84. To the extent that six year old J's "views" are a relevant consideration – in the sense that his inner attitudes and feelings might manifest themselves in words or actions – their consideration bears upon a central assertion by the mother that the child is in great fear of his father. That issue needs to be examined within the broader issue of the risk of abuse. The same is true of Considerations such as the parenting capacity of each of the parents, the capacity to facilitate a relationship with the other, the nature of the relationships between the child and his parents and the responsibilities of parenthood.

THE ISSUE OF UNACCEPTABLE RISK

Preliminary Observations on the Mother's Submissions

85. I reject the submission of counsel for the mother, Ms Carew that:

> …to reject a finding of unacceptable risk would require an absolute acceptance of the father's denials of any inappropriate conduct. Such a finding could only be based upon an assessment of his demeanour for even on his own case he had opportunity.

86. Ms Carew supports that submission in part by reference to the following passage from the joint judgment of Deane and Dawson JJ in *Devries v Australian National Railways Commission* (1993) 177 CLR 472 (@ 480):

> Judges are increasingly aware of their own limitations and of the fact that, in a courtroom, the habitual liar may be confident and plausible, and the conscientious truthful witness may be hesitant and uncertain. In that context, it is relevant to note that the cases in which findings of fact and assessments of credibility are, to a significant extent, based on observation of demeanour have possibly become, if they have not always been, the exception rather than the rule. Indeed, as Kirby ACJ pointed out in *Galea v Galea (2)* (1990) 19 NSWLR 263, at p 266), in many cases today, judges at

first instance expressly "disclaim the resolution of factual disputes by reference to witness demeanour".

87. In so far as the passage quoted is indicative of principle, it is crucial to note that the passage quoted by Ms Carew appears in the middle of a paragraph of the judgment and is preceded and succeeded by the following statements which, in my view, place the quoted statement – and the principle - into its proper context:

> An appellate court which is entrusted with jurisdiction to entertain an appeal by way of rehearing from the decision of a trial judge on questions of fact must set aside a challenged finding of fact made by the trial judge which is shown to be wrong. When such a finding is wholly or partly based on the trial judge's assessment of the trustworthiness of witnesses who have given oral testimony, allowance must be made for the advantage which the trial judge has enjoyed in seeing and hearing the witnesses give their evidence. The "value and importance" of that advantage "will vary according to the class of case …If the challenged finding is affected by identified error of principle or demonstrated mistake or misapprehension about relevant facts, the advantage may, depending on the circumstances, be of little significance or even irrelevant. If the finding is unaffected by such error or mistake, it will be necessary for the appellate court to assess the extent to which it was based on the trial judge's conclusions about the credibility of witnesses and the extent to which those conclusions were themselves based on observation of the witnesses as they gave their evidence as distinct from a consideration of the content of their evidence.
>
> [*The passage cited by Ms Carew then appears. But, their Honours then go on to say immediately thereafter, in the same paragraph*:]
>
> However, this does not deny that in many cases a trial judge's observation of the demeanour of witnesses as they give their evidence legitimately plays a significant and even decisive part in assessing credibility and in making factual findings. Indeed, as will be seen, the present was such a case. [Emphasis added by underlining, citations omitted].

88. Plainly, as the passage quoted by counsel makes clear, judges should always be circumspect about the use of "demeanour" where assessments of credibility are "*to a significant extent*" based upon it. Indeed, as their Honours point out, this has always been the case. However, *even then*, as the passage, seen in the entire context of what their Honours there said makes clear, its use, and the extent of its use, must depend upon (among other things) the "class of case" and "a consideration of the content of [the] evidence". In my view, parenting cases, where emotion is high, and often raw emotions are on display, can be a "class of case" where demeanour is important in assessing credibility. The United Kingdom's Justice Wilson's comments in describing unrepresented litigants are apposite:

> … I have reluctantly to admit that there are benefits for the judge in the appearance in person of a parent, let us say for convenience, a father. One sees him in action throughout the case, not just when produced by the advocate for his performance in the witness box. One sees him when he is tired and under stress and whether he fails with good humour to cope with minor irritants such as the mislaying of a document. Furthermore, one sees him cross-examine the mother. Although the problem must be more acute in prosecutions for sexual offences, family judges have to guard against barbarity which sometimes effects the exercise. But, even if he is misusing the cross-examination in order to harass the mother, the father provides the judge with a valuable insight. There is no better way to discern the quality of their dealings outside court, for example, whether handovers of the child between them would proceed sensibly, and to study their language including of the body, towards each other in that unenviable situation.
>
> (Wilson J, Atkin Lecture, *The Misnomer of Family Law*, 2002 http://www.judiciary.gov.uk)

89. The last of the emphasised passages from Deane and Dawson JJ's judgment above acknowledge the "significant and even decisive" part that assessments of demeanour can play in assessing credibility. I consider that they play a very significant role here.

90. Secondly, in respect of Ms Carew's submission, it is not in my view correct to submit that a finding that there is no unacceptable risk "could only be based upon an assessment of [the father's] demeanour for even on his own case he had opportunity". An assessment of demeanour is but part of the matrix of considerations upon which any such finding is based. Thirdly, whilst it is true, that, on the father's, and Ms W's, evidence, the father had opportunity in the sense that conduct was possible, that is not an end of itself. Many things are possible; whether they are realistically likely is another issue. Opportunity involves an assessment of possibility *and* an assessment of probability; it might be theoretically possible, for example, for something to occur in a matter of minutes, but that timeframe might make it extremely improbable. It might be possible, for example, for an act of anal penetration to have occurred on a crowded public beach; but that context might make it extremely improbable or unlikely.

91. Fourthly, any finding that there is no unacceptable risk in this case will not have as its sole components the two matters referred to in the submission (i.e. assessment of demeanour and opportunity). Rather, findings as to whether there is risk and, if so, its quantification, are based upon a consideration of a number of components, including demeanour, and opportunity, but conclusions are ultimately drawn from the whole of the evidence.

The Parties, Their Witnesses and Assessments of Credibility

(a) The Mother

92. I have already referred to the finding by Slack FM that the mother "enhanced her evidence over time"; to his Honour's conclusion that "the mother was prepared to enhance her evidence to provide stronger evidence of a conclusion that the father has sexually abused [the child]"; and the further finding that the mother had not "reliably reported her observations" but rather "her current reporting of the incident [was] skewed towards the worst possible interpretation of the incident".

93. Those findings, which I adopt, provide important context to the observations of the mother and to the findings ultimately made about her by me.

94. Professor Q said in her report:

> [The mother] has fixed ideas about sexual abuse of [the child] that do not seem realistic. Thus, she does not appear to see any inconsistency in her ideas that sexual abuse is occurring, even though the father has never been alone with the child. The idea that at the February visit, the father anally penetrated [the child] both with a stick and with his penis, presumably in the presence of Ms [W] and leaving no physical signs, seems accepted by [the mother]. *Notably [the mother] reports conversations that [the child] has had with his father as if she were a witness at the time, indicating that these matters are very much realities in her mind and that psychologically there is a blurring of the boundaries between her and the child*.
>
> If it is the case that [the mother's] ideas of sexual abuse do not have a basis in reality, then in my view *it is likely that they are 'fixed' or 'overvalued ideas'. These are ideas that are rather less than delusional but that are not entirely realistic or rational.* [Emphases added]
>
> …
>
> [T]here is a spectrum of disturbance with frank delusion at one extreme and in my view [the mother's] ideas put her towards the end of that spectrum – well past the normal range but somewhat less than the ultimate point…

95. Professor Q's oral evidence saw her, perhaps, even less concerned about frank psychiatric disorder (including delusional disorder) in the mother. But, her comment that the mother has "fixed ideas about sexual abuse of [the child] that do not seem realistic" is wholly consistent with my own conclusions. The observations about the mother's manner of relaying the child's alleged conversation/s also has particular resonance for me and is consistent with my own conclusions.

96. I assess the mother to be a highly anxious person with fixed ideas about the father having sexually abused the child. Her presentation in the witness box

confirmed that. Appearances in court are stressful. People react to that stress in different ways. A mother who considers her child is sexually abused can, properly, be seen to be under particular, and very severe, stress. Agitation, anger, upset and other emotions are to be expected. Yet, even within this spectrum of expected, heightened emotions, I found the *intensity* with which the mother expressed her views to be both surprising and worrying. It was evident in the volume and manner of her answers and in the adamant formation of her position. (The adamant refusal to countenance any form of counselling or therapy that challenged her belief about abuse is a good example).

97. The mother exhibited a single-minded focus on the issue of the child being abused. She has not (effectively on her own admission and, in any event, in my assessment) contemplated any explanation or conclusion other than that the child has been abused by his father and believes implacably that *nothing* will protect him from that – not even supervision by her. I agree with Dr Q's comment in her report that:

> [the mother's] ideas of risk of harm to the child are so strongly held that she is prepared to go to great lengths to ensure that [the child] has no contact with his father.

98. I wondered whether the mother was being intentionally over-dramatic in telling me that she believed the father would murder the child – for example, with a view to impressing upon me the depth and/or intensity of her feelings about the father and the depth or intensity of her belief. Indeed, I asked her more than once about the sincerity of her clear statement that she believed that this is what the father would do. After long and careful thought, I have come to the conclusion that there was no intended dramatisation on the mother's part; she has convinced herself, in my view, that this is the sort of man the father is and that he is capable of murdering his son.

99. As will emerge, I am convinced that she has attempted to convince the child of this also.

(b) <u>The Father</u>

100. The father presented as a loving and caring father who was desperate for a meaningful relationship with his son. He has initiated, and paid for, two sets of parenting proceedings and two trials. He agreed to time supervised by the mother for over four years. I utterly reject (as did Slack FM) the suggestion by the mother made before his Honour that complying with her insistence that time be supervised by her was a "sign of guilt" or such like. In my view, it was the "path of least resistance" agreed to by the father as a means of spending time with the child. I accept as true what he said to Professor Q, that he did so in the hope that the mother's attitude would change and that his relationship with the child would grow accordingly. Similarly, I note Slack FM's finding that there was nothing about the father's "demeanour in the witness box; or his

evidence that would cause me to conclude that I should be reluctant to accept to his evidence" and I record that this is entirely consistent with my own impressions and observations in the trial before me.

101. The father presented as a man stressed at the situation in which he found himself. I observed him closely both when being cross-examined and when seated behind his counsel during the mother's evidence. He wore an almost constant frown and the stress was evident in his face. He struck me as a man who was both distressed and perplexed by the allegations made against him. When exasperation got the better of him on occasion in the witness box, I assessed his reactions as entirely congruent with his situation. When his exasperation occasionally found voice, his comments seemed to me to be entirely appropriate, congruent with his situation, and the comments of a man weighed down by the allegations against him and what he saw as a long battle to see his son. I detected no attempt to evade questions nor did any of his answers strike me as incongruent.

102. Doctor Q is of the view that the father "does not present with any indications of any psychiatric disturbance". I have already referred to the fact that, outside of the allegations of sexual abuse, no allegations of physical family violence have ever been levelled against him.

(c) <u>The Evidence of Ms W</u>

103. Ms W is an important witness in this case - particularly in the context of findings of unacceptable risk.

104. Doctor Q described her as "a forthright person" and that seems to me an apt description of the person I saw in the witness box. She is a mother herself with four adult children. The relationship with the father can, I think, be described as being in its formative stages. The relationship endures against the background of these proceedings and the allegations at their core. Each of the father and Ms W gave a description of the relationship which eschewed rash decisions. Neither gave a description of the relationship that might be seen as "convenient" to the father's case that the child should live with the father.

105. Against that background and my general highly favourable impression of her as a witness, I find that she would not – through action or omission – do anything which would place the child in any form of danger. She has, in my view, little reason to fabricate or exaggerate anything which occurred during the times she was present with the father and the child. I certainly do not consider that she would lie, obfuscate or exaggerate in circumstances where she had any concerns that doing so might mask any untoward behaviour perpetrated by the father – or, indeed, any *concerns* she had about any untoward behaviour. Furthermore I do not accept that she would lie, obfuscate or exaggerate so as to paint a picture of the child as happy and spontaneous in his father's company (which is the effect of her evidence) if that was not the case or so as to mask

any upset or unhappiness experienced by the child during any time spent with his father (her evidence is that there was none).

106. I consider Ms W to be a witness of truth unaffected by any psychological or emotional issues (for example her relationship with the father) which would cloud her evidence so as to impact upon its veracity in respect of any issue where the child's physical, psychological or emotional safety or well-being was at stake.

107. I have already referred to the written submissions on behalf of the mother by Ms Carew where (par 15iii) counsel makes reference to the transcript of the proceedings before Slack FM in listing alleged inconsistencies in the father's evidence. As earlier stated, I agree with Slack FM's findings and neither the demeanour of the parties or any of the evidence before me persuades me otherwise. Secondly, Ms Carew makes reference to a number of specific matters (pars 15i and ii) The first relate to an assertion that there is no mention in the affidavits of the father or Ms W that the father "had opportunity" and asserts that this was done because they were "keen to give the impression that [the child] was at no time left alone". I propose to examine those matters in detail when dealing with the issue of "opportunity".

108. In respect of the current proceedings, it is submitted by Ms Carew that adverse findings as to the credit of the father or Ms W should be made, in part, by reference to 12 inconsistencies specified in written submissions as follows:

1st	Door v curtain (in surf shop change room);
2nd	[Ms W] present during purchase of swimmers v [Ms W] trying on clothes in another change room with a spare change room in between;
3rd	Lunch next door to surf shop v take away and not eaten
4th	Father changed into shorts [in order to swim] v father in underpants
5th	[Child] kept underpants on v did not
6th	[Child] went home in wet underpants v did not
7th	Water [in lake where swimming] commenced 2-3 metres from where [Ms W] seated v lapping water no distance
8th	Both changed [child] on first occasion v can't remember changing [child] on first occasion and can't remember where change occurred;
9th	Booster seat in middle v never in middle;
10th	Not much of beach v 800 metres each way;

11th 10 minute jog [by Ms W] v 20 minute jog;

12th Returned ball because [child] wanted a different type of ball v returned ball because of a leak.

109. I regard the inconsistencies as nothing more than differences that would be expected of honest witnesses doing their best to recall, under cross-examination, the minutiae of past events. There is, in my assessment, nothing surprising or forensically interesting about the identified inconsistencies. None of them, nor the totality of them in combination, impact adversely on my favourable assessment of the credit of either the father or Ms W (or the combination of their evidence). Variations in honest estimates of time and distance are common and accord with common experience. That recollections of events vary among witnesses is a common - and expected - occurrence. So much is a matter of common experience even in respect of significant events; it is all the more so in respect of the minutiae involved in significant events.

110. The accounts of each of the father and Ms W are, in my judgment, logical, coherent, consistent in their significant components, and persuasive. I do not consider that the inconsistencies between Ms W's evidence and the father's evidence, are reflective of dishonesty, obfuscation or exaggeration on the part of either of them. Nor do I consider that any such evidence by either of them was designed to paint a false picture of what actually occurred on those occasions. I consider that any such inconsistencies are of the type that might be expected in the accounts of two people attempting to give honest independent accounts of details occurring some time ago.

(d) <u>The Father's Former Wife and his Adult Daughter</u>

111. There is, in this case, as there was in the proceedings before Slack FM, evidence from the father's former wife ("E Donaghey") and his adult daughter of that relationship ("L Donaghey"). Each filed an affidavit in these proceedings on 12 November 2010. Neither was cross-examined in these proceedings; the former was cross-examined in the proceedings before Slack FM. Slack FM found "a loving and appropriate relationship between the father and [L Donaghey]…".

112. I consider the evidence of each of them provides an important context for assessing the evidence of the father, and to these allegations more generally.

113. E Donaghey deposes that she has known the father since "he was 12 years of age" and "the allegations of improper behaviour towards his son would be completely out of character with everything I know about the man". In the context of the father's relationship with L Donaghey, E Donaghey said:

> I recall after our separation [the father] continued to pick [L] up from school and take her to swimming lessons and tennis lessons. They would go riding together, sometimes for 3 or 4 hours at a time. [The father]

> attended school events such as school concerts and [L's] graduation. They have always spoken on the phone and been in regular contact. [The father] has always been attentive with [L]…
>
> ….
>
> [L] has spent a lot of time with [the father]. I have no concerns whatsoever that [L] would be anything other than well taken care of be her father, let alone that he would do anything wrong.

114. In her Affidavit, L Donaghey said the following in relation to the allegations made against her father:

> I cannot imagine that any such allegations could possibly be true. Dad has always been a wonderful father to me. Dad has never in anyway behaved inappropriately towards me…

(e) The Evidence of the Mother's Sisters

115. Both BF and NF provided affidavits in the mother's case and were cross-examined. Each plainly believes that the child has been sexually abused by his father.

116. Reference was made by the mother of photographs of the lake. These demonstrated to her, she said, that Ms W could not have been sitting where she said she was and, thus, as close to the father and the child as she asserts. The inference sought to be drawn is that untoward behaviour could have been perpetrated while in the water and out of Ms W's sight and/or hearing. It transpired that the photographs were taken by Ms BF, with whom J and the mother reside.

117. It seems that, having taken account of five year old J's description, Ms F decided she knew the part of the lake that the child was talking about and took photos to establish the falsity of the father's and Ms W's account. When taking the photo, Ms F spoke to a man playing with his child in the lake (depicted in one photo) in order to ascertain the depth of the water. This, too, was used (in a way which, I confess, I couldn't grasp) to establish that the father (and Ms W's) account was somehow false. I regard the garnering of this "evidence" in this way to be decidedly unusual. It is based on, what seem to me to be entirely unclear, hearsay statements from a five year old. The photographs have no probative value for their intended purpose, but the manner of their taking is indicative of the nature and extent of Ms F's shared belief about abuse.

118. I readily acknowledge that appearing as a witness and being cross-examined is a stressful and sometimes distasteful experience. All the more so when allegations of the type here lie at the heart of the proceedings. And, of course, people react in a variety of different ways to that stress and unpleasantness. Yet, even allowing for all of those factors, and allowing for the fact that, by

personality, Ms F appeared to be very deliberate and cautious, I found, as I said to the mother's counsel during submissions, Ms BF's demeanour in the witness box some of the oddest I have ever encountered. A particularly telling example occurred when I asked Ms F whether, like the mother, she considered that the father was likely to murder the child. Ms F was facing counsel when I asked the question. She slowly turned her head to me and stared at me. She did not avert my gaze and remained silent, and in a fixed stare, before giving a one-word answer, "No".

119. During submissions, I asked counsel for the mother what I should make of those observations. Counsel submitted that I could, ultimately, make very little of them. In one sense, that is correct – they do not, directly, lead to any particular conclusion. I am, though, left with a sense of disquiet given that Ms F is a daily presence in the child's life; that she is a person who shares the mother's belief system and is a person to whom the child has made statements apparently indicative of abuse at the hands of his father and has involved herself in the proceedings in the manner just described.

120. Ultimately, however, I attach little weight to the evidence of either sister in terms of the central issues facing the court. As will emerge in a moment, the child has said things to them, but they succeed statements made to others and their content does not significantly differ. Neither sister was, of course, present during any visit between the child and the father. Their evidence is that they share the mother's belief that the father has abused the child and is likely to do so in the future (noting that NF, like BF, does not think the father would murder his son). They are completely supportive of the mother and, as NF told Professor Q, they are a very close family.

(f) <u>Expert Evidence from Mr A and Professor Q</u>

121. As has been referred to already, evidence was received from a consultant psychiatrist, Professor Q and from a psychologist, Mr A. As observed above, Mr A is the child's treating therapist and has seen him now 22 times. Professor Q prepared a report as a single expert pursuant to an order made by me upon the father's application and over the mother's objection. Ultimately, Professor Q prepared both a report and an addendum and gave oral evidence.

122. In her oral evidence, the Professor said, in part:

> HIS HONOUR: … if you were exposed to a child and hypothesis A was that the child had been sexually abused, and hypothesis B was that the child had not been sexually abused, what sort of indicia would be running through your mind as indications that the child might not have been abused?
>
> PROFESSOR [Q]: I would give the child – I would be likely to err on the that the child has been abused, especially when there's so much preoccupation with sexual things. I'd be inclined to be running that as the

most likely explanation. But in order to consider the possibilities that it hadn't occurred, I would be contemplating ways in which the child might have been exposed by adults to sexual ideas or materials.

123. Later, during further cross-examination by Ms Carew, the Professor said:

> MS CAREW: If the mother is told by professionals and by literature that she's referred to to believe the child, do you think that that is sound advice?
>
> PROFESSOR [Q]: I think – yes. I think that one's first approach to a child making disclosure is to, at least, be open to their disclosures, if not totally accepting of them, but certainly open to them.
>
> MS CAREW: Right?
>
> PROFESSOR [Q]: It's uncommon for children to make false disclosures, so one would err on the side of accepting a child's disclosures.
>
> MS CAREW: And it certainly wouldn't be the correct thing to do, would it, to dismiss the disclosure as something that couldn't have happened?
>
> PROFESSOR [Q]: No. You wouldn't do that with a child. You'd keep an open attitude toward the disclosures and you'd have to investigate in some other way what was happening.
>
> MS CAREW: And the fact that a child in the course of making – I'll use the term loosely – disclosure, but in that I'm referring to a statement that may indicate sexual abuse, in the context of making a disclosure, if the child also includes some fanciful statements, for example, that when the abuse occurred he was in a scuba diving suit and it only had two eye holes in it. They were the only holes. Can you reliably dismiss the disclosure by reason of the fact that, included as part of the disclosure, are statements that are fanciful?
>
> PROFESSOR [Q]: No. You wouldn't dismiss it on that basis. You would still maintain an open attitude to the disclosure even so.

124. Statements that there should be a starting point of erring on the side of acceptance of a child's statements is, in my view, not – at least without more – a proper starting point for a court. Let me emphasise that this is *not* the same thing as saying that children's statements should not be respected and carefully examined. But, from a forensic point of view, any such contention, seems to me to put the cart before the horse. In a forensic environment, it must be the evidence which dictates the conclusion. Indeed, the use of a child's statement by, for example, a psychiatrist and by a court might be seen to be quite different; the clinician's work is done on what is said, the court's work is done by assessing what is likely to be true.

125. Be that as it may, even if such a bald proposition is accepted for forensic purposes, it seems to me to beg more questions than it answers. Expressed in that way, the statement appears to give, as it were, automatic credence to something called "a disclosure". Indeed, the experience of this court is that the word "disclosure" should be treated with great caution. It is so often a "loaded" expression, often used as if it has, of itself, probative weight. Yet, what is a "disclosure" (or, preferably, "statement") without a context? (To whom was it made, what circumstances - both temporally and more generally - attend the making of it and precede it; what do we know of the psychological imperatives operating upon the child making the statement; and, of course, how reliable is the report of what was said and its context).

126. Common experience dictates that stories can, and do, change in the telling; the common parlour game "Chinese Whispers" is a crude, but nevertheless telling, familiar example. A media report during the recent Brisbane floods has a meeting being told that the wall of Wivenhoe Dam was cracking; what in fact had occurred (to the extent that the statement could be construed as having <u>any</u> connection with real events) was that the floodgates had been intentionally opened further. And, that common experience pertains irrespective of what any research might tell us about the reliability of children's accounts, whether children make errors of commission as well as omission, and the like. The fact that the central issue is something as hideous as child sexual abuse does not mean that common sense or "an open attitude" should be abandoned.

127. Thus, there seems to me to be – from a forensic point of view – a very significant difference between, on the one hand, the statement that "it is uncommon for a child to make false disclosures" (here, Professor Q is being taken out of context, but I use her statement as an illustration) and, on the other hand, a statement expressed as, for example, "it is uncommon for an appropriately co-nurtured child, otherwise previously unaffected by psychological issues, to make a reliably-reported false statement about the occurrence of abuse".

128. I emphasise that I do not mean any particular criticism of Professor Q, whose reports and evidence I find very helpful; the full context in which the Professor's statement makes it clear that there are more shades of gray to the statements than what the above discussion might accord to it. My intention is to highlight that great caution should attend any use of bald statements to that effect. I note that, in Professor Q's report here, notwithstanding the evidence just referred to, she concludes in respect of J that "it would seem unlikely that sexual abuse could occur". Professor Q's evidence will be referred to in more detail below.

129. I have, as will already be clear, grave reservations about the evidence of Mr A. I stress that I do not call into question Mr A's integrity. But, for the purpose of assessing risk, I consider his evidence affected by a number of considerations,

not the least of which is (as is already clear) that I hold real reservations about whether he has the experience, training or knowledge to be expressing, at least, his ultimate opinion about the child having been sexually abused. I reiterate: I do not suggest that the child's statements should be treated with anything other than respect and in a manner that looks at those statements carefully; I have not the slightest doubt that his statements are indicative of *something* that has, or is, happening to him, or inside him – the issue is what it is. Mr A's evidence will also be referred to in more detail below.

Opportunity

130. As referred to earlier, counsel for the mother, at paragraph 15i and ii of her written submissions, asserts that the omission from the affidavits of the father or Ms W of periods of time within which the father "had opportunity" is significant. It is submitted specifically that this was done by the father and Ms W because (presumably each and together): the "impression [they were] keen to give is that [the child] was at no time left alone". Reference is made thereafter in the written submissions to:

- the father taking the child to the toilet and Ms W "expressed surprise at how long they were gone – Father says it was 10 minutes in cubicle alone with [the child]";
- "[Ms W] took a 20 minute jog along the beach leaving [the child] with his father";
- "[Ms W] went twice to the toilet on the last visit which was about 70 metres away from father"

131. In terms of assessing the credit of the father and Ms W, and the veracity of their evidence generally, I reject the submission; I attribute no significance to these omissions from their respective Affidavits. They each assert, in essence, that they attached no importance to those omissions; that is, they did not attribute to them at the time the importance that they occupied in cross-examination within the trial. The omissions need to be seen in the context of the seriousness, and traumatic nature, of the central allegations to which the Affidavits were addressed – something to which, in my view, Ms W was alluding when under cross-examination she referred to leaving the child with his father on a beach where 'there were so many people around'.

132. It is important to give more background to the four occasions upon which the child saw his father. It will be recalled that Ms W was present on each occasion and that each visit was for four hours during the daytime.

First Visit: 13 February 2010

133. The child first visited with his father after Slack FM's orders on 13 February 2010. The father picked the child up from a supermarket car park and took him back to a local Bunnings (a trip which the father estimates takes less than five

minutes) where they met Ms W. After walking around Bunnings for a short while, the three then drove together to a local tourist attraction. At some stage during their time at the tourist attraction, the father took the child to the toilet for approximately ten minutes. When asked during cross-examination by Ms Carew why they were in the toilet for so long, the father replied that the child had "needed to do a number two".

134. Following the tourist attraction, the three went to a lake for a swim. As the child didn't have any swimmers, the father, Ms W and the child went into a surf shop close to the Lake to purchase something for the child to wear swimming. There is no mention of Ms W trying anything on in the shop in either her or the father's Affidavits. When cross-examined, Ms W stated that she did try on some clothing. She said she was in either the change room directly beside that which was being used by the child and his father or the next one down. When further cross-examined by Ms Carew, Ms W stated that she was "very quick" when trying on the clothing and she could hear everything that was said between the child and the father and was constantly "popping" her head in and out of the room to check sizing and so on.

135. After purchasing a "rashy" and some board shorts for the child, the child and his father went for a swim in the Lake whilst Ms W remained on the shore. She says they were in her sight and hearing the whole time. Ms W was present when the father and the child washed themselves off at a nearby public shower and when the child was changed into his dry clothes. Ms W and the father then took the child back to his mother.

Second Visit: 13 March 2010

136. The father and Ms W took the child to the beach on the second visit. Whilst the father and the child went swimming at what the father described as a 'crowded' beach, Ms W went for a run, which, during cross-examination, she conceded, may have taken 20 minutes. Both the father and Ms W sought to emphasise that the beach on this day was very busy and there were a number a people around whilst the child and his father went swimming.

137. After they finished swimming, Ms W helped the child to take off his wet clothes and change into his dry clothes and all three of them returned to the handover point and dropped the child back with his mother.

Third Visit: 5 June 2010

138. On the third visit, as with the two preceding visits, the father collected the child from the supermarket car park and returned to Bunnings to collect Ms W. After purchasing timber at Bunnings, the child, his father and Ms W drove together to the tourist attraction. After playing there, the child was taken back to the supermarket car park by both the father and Ms W.

Fourth Visit: 3 July 2010

139. Both the father and Ms W met the child and his mother at the supermarket car park and Ms W gave the child a ball to play with. According to Ms W, once in the car, the child noticed that there was air leaking from the ball and the three went to Target to return the ball and purchase a new ball. The child selected a new ball and a toy gun at Target and the three went to a park to play with the child's new toys.

140. It was drizzling with rain at the park and Ms W, during oral evidence, stated that due to the rain, she visited a toilet that was located between 50-100 metres from where the child and his father were playing, twice during their time at the park. During cross-examination by Ms Carew, Ms W estimated that she was gone no longer than 5 minutes on each occasion that she went to the toilet.

141. After playing at the park, the father had an appointment with Mr A. Whilst the father attended this appointment, the child stayed with Ms W. The father and Ms W then returned the child to his mother at the supermarket car park.

142. The child made statements indicative of serious, and physically traumatic, sexual abuse by the father after the first, second and fourth visits. After the third visit, the mother observed the child sucking on his finger and, as she has it, when asked why he was doing so, the child stated that the father had told him to 'suck my penis and eat my poo'.

143. The child's statements will be recounted in full below. To the extent that those statements (as reported) are clearly, on their face, indicative of sexual abuse at his father's hands, they reveal the following descriptions of behaviour having occurred during one or more of the three visits with his father:

a) "Weed in my bottom" and "his penis went in this far"

b) "… put his hand up my bottom"

c) "… rubbed my penis"

d) "… squeezed my penis and told me not to tell"

e) "…[did] yucky kisses … sucks skin into his mouth"

f) "put a stick up my bottom" (in another statement the child said put a stick up his bottom and put his penis in his bottom "two times" and, apparently about the same incident, that it "happened one time at the beach and two times at the lake; to the JIRT officer said that the stick was put through his swimmers into his bottom hole")

g) "spat in my mouth"

h) "told me to suck you penis"

i) "piddling in my face"

j) "touched me" (pointing to the genitals);

k) "put his whole hand up my bottom hole"

144. If the evidence of the father and Ms W, including that which emerged in cross-examination, is accepted in its entirety there was certainly no realistic opportunity for the behaviour apparently described in paragraphs a), b), f), i) or k) to have occurred. Unless Ms W is telling conscious and deliberate lies (a proposition I completely reject) it is completely impossible for at least some of the things the child has said to be correct (for example the father "pulling off into a road bay to perpetrate abuse and taking the child to a "caravan stop" and [at that time] "pulling his pants down and weeing in his bottom). On her account no such events happened, or could have happened during any absences to which Ms W (and the father) refer.

145. Professor Q said in her Report:

> Since [the father] has in effect never spent time alone with the child, it would seem unlikely that sexual abuse could occur, certainly not penetrative abuse as is alleged…

146. When Mr A was made aware in cross-examination of the time frames that the child was alone with his father as just outlined, he commented, "it seems unbelievable that [the child] would be abused in such short spaces of time".

147. Whilst narrow windows of opportunity facilitated by Ms W's absences make it (perhaps almost axiomatically) *theoretically* possible for at least some of the abuse indicated by the child's statements to have occurred, the whole of the evidence convinces me that there was, in fact, no realistic opportunity for that abuse to have occurred. (An example is the apparent assertion of anal rape occurring "in the lake" or via a branch from a tree with a 10cm radius being inserted into his "bottom hole" during a game.) It goes without saying that there was at least *some* opportunity for the father to have *said* the things which the child alleges (including the threat to kill him). But if the child is reporting things that his father has done when there is no realistic opportunity for the father to have done them, then, at the very least, significant questions are raised about whether those things were in fact said by the father as reported.

148. Further, though, if the evidence of the father and Ms W is accepted in its entirety:

- No untoward behaviour of any type or description occurred;
- There were no signs of any unhappiness, upset or anxiousness of any type on the child's part save for when he fell over while playing on one occasion);
- There were four occasions of, respectively, 10 minutes (toilet at the tourist attraction); 20 minutes (jog on the beach) and two occasions of

about 5 to 10 minutes (toilet breaks by Ms W), during which the father was alone with the child. On another occasion, Ms W tried on a pair of board shorts at a surf shop "really quickly" whilst the father helped the child try on swimmers in another cubicle. On her evidence, which I accept, Ms W was able to hear all interactions between the child and his father whilst she was trying on the board shorts;

- The child was directly observable, and observed, by Ms W at all other times.

149. I accept the evidence of the father and Ms W in its entirety in all salient respects.

The Child's Statements

150. The child's statements are important for a number of reasons. First, as I indicated earlier, they deserve respect and analysis. Secondly, the mother plainly uses them (together with associated behaviour) as the basis for the allegations of very serious abuse and potential for abuse that she currently makes. Thirdly, those same statements are used to found, or fuel, beliefs held by the mother's sisters, including the sister with whom the child and the mother lives. Fourthly, the child has repeated at least some of those statements to each of Mr A and Professor Q.

151. Mr A was confronted in cross-examination with a dilemma: if there is no realistic opportunity for abuse of the serious type indicated by the child's statements to have occurred, how can the child's father have abused him. Mr A's "solution" to this dilemma was, effectively, to postulate abuse at the hands of someone else. But, as has been referred to, two insuperable difficulties stand in the way of this conclusion. There has, as the mother accepts, simply been no opportunity for anyone other than the father to be the perpetrator of abuse and the child nominates his father (and only his father) as the person who has done (and said) things to him. Moreover, as will shortly be seen, the child has repeated – and repeated constantly – those statements which implicate the father and only the father.

The Child's Statements – What Was Said, To Whom and When?

152. The following tables set out the statements said to have been made by the child as revealed in the evidence.

Direct Evidence from the child as Reported By Others – Sexual Abuse

Statements made by the child as Reported by the Mother	
Date	**Statement**
13 February 2010	(Following contact visit) 'Dad gave me a bottom hug…in the swimmers shop'.
18 February 2010	The child and his father 'played tag on the beach and dad used a stick playing tag and poked it up my bottom hole. It made my underpants go up my bottom hole. When we went for a swim in the lake I said to myself "Oh, here we go I'll have blood on my swimmers'.
23 February 2010	The child said his father had told him he would get in trouble with the police if he said no to someone poking a stick up his bottom.
27 February 2010	'Dad said…he'd make me cry till the walls fall down…for not giving him a bottom hug…'
28 February 2010	'It was so tight I thought I couldn't breathe…when I did a bottom hug. Dad's arm was so tight around my waist…It was in this much (showing a measurement with his fingers of approximately 6 cms in length)'.
1 March 2010	'[I'm] greasing you up for a mummy hug. Dad did it to me' (said after mother asked why the child 'lent over from his chair and ran his hand along the fork of [the mother's] jeans from one leg across the fork of [the mother's] jeans to the other leg').
2 March 2010	'Dad weed in my bottom mum and it went for ages mum and his penis went in this far (indicating a distance between his fingers of approximately 4cm) and it hurt. He rubbed my penis and he told me to rub his'.
3 March 2010	'Dad said to put my arm down behind me and get poo on it'.
4 March 2010	'Dad said to ask everyone to wipe my bottom'. (Said to Dr U at Lismore Hospital in presence of mother) 'Dad put his hand up my bottom…he had a Chux'.
13 March 2010	(Following contact visit) 'Dad put his hand up my bottom'.

4 May 2010	‘Dad said to play with the poo like it was a toy’. ‘And I dream about the bad things dad did to me – oh yeah’.
18 May 2010	‘When dad put his hand up my bottom (he motioned his fingers together into a point) then he went like this (moving his fingers) he put a Chux over his hand to keep it clean’.
5 June 2010	‘Dad said to suck your penis and eat your poo’.
7 June 2010	‘Dad rubbed my penis’.
19 June 2010	Said by the child in front of his father ‘I don’t want to go with you. You put your hand up my bottom and you put your penis in my bottom’.
3 July 2010	(after contact visit) ‘[The father] touched me on the penis’.
4 July 2010	The mother states ‘[the child] likened the ears [on the tank loaf toast] to the pull off bay on the road where Dad stopped and put his hand up his bottom’. When his father rang that evening, the child said ‘I don’t want to talk with you because you squeezed my penis and told me not to tell’.
6 July 2010	‘Mum Dad does yucky kisses, he sucks my skin into his mouth…’
19 July 2010	‘Mum, dad did the bad things’.
12 August 2010	Mother first mentions ‘Book ov Dad’ which was annexed to the mother’s Affidavit filed 15.11.10 and in which the child had written ‘You poct a stik up mi bottm. And you wed in mi botm. You puoold mi pents down then you wed in my botm in the lak and you told me bad thinz you took me foo a iscremm you diddt tak me foo a iskrem you took me to a cara vand stop and you poold mi pants down and you wed in mi botm’.
27 August 2010	‘Why did you let me go with Dad after he did bad things to me?”
14 September 2010	‘Dad spat in my mouth’.

11 October 2010	The mother forgot to take the child's original 'Book ov Dad' to Sydney for session with Professor Q so the child wrote a new 'Book ov Dad' which read: 'You poct a stik up my botm and you wed in my botm. You poot uor hand with chux ofer uor hand. You told me to suk yor penuss. And I did. And I hatd it'.

Statements made by the child as Reported by Mr A (contained in three 'Reports' attached to three Affidavits filed 3.6.10, 10.11.10 and 9.12.10 and notes from therapy sessions tendered as Exhibits)	
Date	**Statement**
14 April 2010	I asked [the child]…if he could think of something nice about his Dad. His mood became sad and he leaned on me and said "He told me to play with your poo"…When I asked [the child] for 3 wishes he said replied "Dad to be a good Dad and not do silly things and make sure he don't do other naughty things". I asked what was the most naughty thing. He responded "poked a stick up my bum". His 2nd wish was "I hope he never does naughty things again".
30 April 2010	'Dad weed in my bottom' (Exhibit ICL 3, p 2).
14 May 2010	'[The father] told me to play with your poo' (Exhibit ICL 4, p 1). 'Poked stick up my bum' (Exhibit ICL 4, p 1).
20 May 2010	'[The father has to stop] poking his hand up my bum'.
20 July 2010	The child brought the 'Book ov Dad' to show Mr A. The child told Mr A that 'he was writing it to Dad "to remember what he's done"'. '[the child] brought his book to another 3 sessions. He had added – "weed in my bottom at the caravan stop", and a picture of the lake where "Dad put his hand up my bottom".
27 October 2010	Mr A asked the child '[the father] did rude things to you?' and the child replied 'Yeah, like piddling in my face'.

Statements made by the child as Reported by Associate Professor Q during interview on 12 October 2010 **(Report attached to Affidavit filed 13.12.10)**	
Date	**Statement**

12 October 2010	'[the child] showed the letter, which he said he had written; it was headed: 'My book of dad.' It detailed an incident where dad put a stick up his bottom and had also put his penis in his bottom…Asked how often did this happen, [the child] said it happened two times. Asked how big the stick was, [the child] indicated with is fingers a size that looked to be about 1½ to 2 centimetres in diameter and about 30 centimetres in length...He then volunteered: "And he weed in my bottom with his penis. He stuck the stick in the hole in my bottom. He also stuck his penis in my bottom"'.

12 October 2010 (continued)	The child showed his father the 'Book ov Dad' during the interview and Professor Q reported the following interchange between the child and his father '[The father] said to [the child]: "You know this didn't happen". [The child] replied "Yes it did"…Asked when it happened, [the child] said: "The visits with dad. It happened one time at the beach and two times at the lake"'.

Statements made by the child as Reported by BF	
Date	**Statement**
9 June 2010	'I thought of all the bad things [the father] did to me'.
3 July 2010	'…Dad picked me up and touched me here (pointing to his genitals)…he touched my penis'.
4 July 2010	(The child referring to toast) 'This is like the road where Dad pulled off the day he put his hand up my bottom'. (Said to father when he called) 'I don't want to talk to you. You squeezed my penis and told me not to tell'.

Statements made by the child as Reported by NF	
Date	**Statement**
12 October 2010	(As reported by Professor Q in Report attached to Affidavit filed 13.12.10) '[NF] 'Ms [NF] immediately volunteered that [the child] has told them "dad wee'd" in his bottom…'. '[the child] told Ms [NF] that dad whispered: 'Mum doesn't love me and she will get married again and mum loves horses more than me and he would poison the horses"'.

Statements made by the child as Reported by Others	
Date	**Statement**
9 March 2010	(As reported by Ms O of JIRT; Exhibit F2) '[the child] described a game of tip with his father using a stick off a tree. What [the child] had described was a large branch used by his father that was allegedly 10 centimetres in radius. [The child] stated that his father had put the 10 centimetre branch into his "bottom hole"'.
9 March 2010 (continued)	In a File Note on 9.3.10 (part of Exhibit F2) Ms O states: '[the child] then said that his father had poked the stick through his swimmers. [The child] said he was wearing a pair of swimmers like the scuba divers wear – all in one piece and his swimmer shad a hood'.
13 March 2010	(As reported by the mother in paragraph 58 of her Affidavit filed 15.11.10) the child said to Police Officer in mother's presence 'Dad put his hand up my bottom'. (As reported by the mother in paragraph 59 of her Affidavit filed 15.11.10) the child said to Dr U 'Dad put his hand up my bottom…He had a Chux'. (As stated in 'Triage Form' from B Hospital) 'child states "my dad put his whole hand up my bottom hole"'.
17 May 2010	(Notes from teacher, R School) the child said 'dad put's that thing in his bum'.
18 May 2010	('Risk of Significant Harm Report' by principal of R School) 'direct disclosure of sexual abuse'.
5 June 2010	(As reported by Mr Y in Affidavit filed 17.11.10) 'Dad told me to "suck my penis and eat my poo"'.
18 June 2010	(As reported by Mr GF in Affidavit filed 15.11.10) whilst dropping the child off to father at Supermarket carpark the child reportedly refused to go with father and said to his father 'I don't want to go with you, you scare me. You put your hand up my bottom. You put your penis in my bottom'.

Statements by the child as Reported by Others – Psychological or Emotional Abuse

153. Not only has the child made statements that might be seen as indicative of sexual abuse, he has, as has been seen, also made statements that, if accepted, are indicative of psychological abuse at the hands of his father. In particular, those statements contain, on their face, statements made by the child to the effect that his father has said he will kill him on his birthday. It bears repeating that (accepting for the moment that they are recorded and reported accurately), the mother does not dismiss these statements, or attribute to them hyperbole,

exaggeration or fantasy by a five year old. Rather, she unequivocally accepts them as literally true. The mother gave clear and harrowing evidence that she considers that the father is capable of murdering his son.

154. The statements in the evidence that might be seen as assertions of psychological or emotional abuse, or threats of harm, are as follows:

Statements made by the child as Reported by the Mother	
Date	**Statement**
27 February 2010	'[The father] pinched me mum and made me cry…on the arm…and I cried and he made me drink that dirty old awful water'.
28 February 2010	'[The father] said I'll make you cry till the walls fall down'.
1 March 2010	'Dad said he'd chop my head off for doing good deeds for not being naughty'.
3 March 2010	'Dad said ghosts will come and take me out of my bed in the night'.
4 March 2010	'Dad said he'd try and kill me on my birthday'.
5 March 2010	'[The father] said he'd kill me if I didn't go (referring to visits)'. '[The father] said I have no friends and he said you've got no friends'.
6 March 2010	'[The father] said he'll kill you [referring to the mother]'.
11 March 2010	'Dad said don't say anything to the police, they are unreliable and bad'.
17 March 2010	'Dad said robbers would come and take my money'.
18 March 2010	'Dad (motions with hands across his throat) if I didn't talk to him'.
29 March 2010	'Dad said he'd crush my head open if I told anyone'.
24 March 2010	'Dad said he'll try and kill me on my birthday'.
26 March 2010	'Mum, dad said he'd burn me up in a fire on my birthday too'.
18 May 2010	'I'm scared to tell anyone for what dad would do to me. He said he'll kill me on my birthday'.

16 June 2010	‘I don’t want to go with dad, but I’m scared what he’ll do if I don’t go…He said he’ll kill me and Mum it’s my biggest day in my whole life – my birthday’.
20 June 2010	‘[The father] said I’d be in trouble with the police if I didn’t go with him’.
1 July 2010	‘Mum, Dad said I was a dirty clothes blabbermouth…’
3 July 2010	(after contact visit) After telling his mother that his father had touched his penis, the child said ‘When he did it dad said “Please don’t tell mum. Don’t be a blabbermouth”’. ‘Dad whispered to me to buy some poison and give it to the horses’.
6 July 2010	‘Dad said hate yourself’.
7 July 2010	‘Dad whispered in my ear that Mr A (his counsellor) is a bad person’.
8 July 2010	‘Mum, dad said to tell [Mr A], Mum put her hand up my bottom and Mum weed in my bottom’.
9 July 2010	‘Dad said, I hate you’.
19 July 2010	‘[The father] told me to worry about mum and worry about my mates’.
24 July 2010	‘Mum, dad said that your dad was bad but I don’t do bad things to you mate’.
1 August 2010	‘[Mum you know the bad things Dad did? There’s something worse. He tried to choke me…’.
29 August 2010	The child expressed concern about seeing his father on his birthday and said ‘[the father] said he’d try and kill me Mum’. ‘what if he comes and puts poison ion our tank and kills us all like he said?’
1 September 2010	‘Dad said he’d kill me in 2020’.
19 October 2010	‘Dad said I would die if I told you the bad things he did’.
2 November 2010	‘You know mum, dad said he’s crush my head open’.

Statements made by the child as Reported by Mr A	
Date	**Statement**
30 April 2010	'Dad said a ghost will come and take you away'.
20 October 2010	'[the child] complained that Dad said he will kill him on his birthday'.

Statements made by the child as Reported by Professor Q	
Date	**Statement**
12 October 2010	(As reported by Professor Q in Report attached to Affidavit filed 13.12.10) '[the child] told Ms [F] that dad whispered: 'Mum doesn't love me and she will get married again and mum loves horses more than me and he would poison the horses"'.

Statements made by the child as Reported by BF	
Date	**Statement**
Undisclosed	'On many occasions over the months since February 2010, [the child] has stated on many occasions words to the effect that "Dad said he'd kill me" or "Dad said he is going to kill me on my birthday".
3 July 2010	The child told BF his father had called him a 'blabbermouth' 'for telling the police about the bad things he did'.

Statements made by the child as Reported by Mr Y	
Date	**Statement**
5 June 2010	'Dad said my clothes are silly'.

The Child's Statements – Observations and Findings

155. I have accepted the evidence of Ms W and the father in its entirety in so far as it concerns the four occasions upon which abuse could have occurred. Their

reports of a relaxed and buoyant little boy participating happily in normal childhood activities with his father and enjoying his father's company and the opportunity to spend time with him, sit in stark contrast to the picture presented by the reported statements, the sheer volume of which, I find, in any event, quite extraordinary.

156. Chillingly, and of considerable significance as it seems to me, there is, it will have been seen, no report of any statement by the child in which he says anything remotely positive about his father. I find that curious and significant, and all the more so because that sits in stark contrast to the observations of the Family Consultant in the earlier trial as recorded in Slack FM's reasons; Slack FM's findings about the relationship between father and child in that trial, and the evidence of the father and Ms W in this trial which I accept. It is also accords with something which Professor Q found significant:

> [The child] remained preoccupied with these issues and again could not be deflected to play. He answered all questions with reference to his father, for example: Does he [i.e. the child] have any bad dreams? Yes, about dad. Does he ever feel sad? Yes, about dad. Does he ever feel scared? Yes, about dad. Does he ever feel angry? Yes, about dad. Asked to elaborate on these responses, [the child] had nothing more to say; all his concerns had the same stereotyped answer, without any other information or context.
>
> [The child] was not engaging but remained focused on these issues.
>
> [emphasis added]

157. The acceptance by me of the direct evidence of the father and Ms W as to the child's words, demeanour and actions during the whole of his time with his father lead to a number of findings. If the mother has reported the child accurately, the child has presented to his mother an entirely false account of his time with his father and has also presented to his mother an entirely false account of his attitude toward his father and the experience of their time together.

158. In that respect, I reject, as entirely implausible, the assertion by the mother – given predominantly in answer to questions by me – that a fearful, abused five year old was "putting on an act" of happiness and contentment for his father. I found the mother's evidence in this respect difficult to understand and much harder to accept. It seems that her contention is that a five year old, who is so fearful of his father and so traumatised by seeing him or the thought of seeing him that he wets and soils himself, manages to hide his fear and "put on an act" of happiness or of being relaxed, so as to not upset his father or invoke his wrath. On the mother's assertion, the fear is hidden, it seems, when in the presence of, and confronted by, the very person who is the source of the fear. In other words, the mother appears to suggest that the child's fear allows him to put on a charade of hiding his fear. The mother said:

> [The child] can put a show on and if he has been threatened…I could imagine that he would do everything right and behave…
>
> …
>
> The way [the child] appeared to me…he was putting on a show…because he didn't want to get killed…

159. I appreciate that the mother may have been giving an answer to a proposition which (I *think*) she rejects (i.e. she considers, I think, that the father and Ms W are telling lies about the child's demeanour and his reactions to them during the four visits) but, nevertheless, I find her postulated explanation for the child's behaviours and demeanour to be extraordinary. I find it difficult to conceive that a loving, caring mother (and there is no doubt that, otherwise, that is what she is) would countenance such an explanation in respect of their five year old child. It is, to my mind, powerfully indicative of the mother's blindness to other explanations for the child's statements and behaviours, and her single-minded adherence to the notion of his father as an abuser and potential murderer.

160. The mindset, or psychological matrix, is, in my judgment an extremely powerful factor in the child saying such things as he has (not only to the mother, but, subsequently, to others) and, importantly, the reports of what the mother says she heard. I do not believe for one second that the mother gives a complete and accurate account of what the child said; rather she gives the *end product* of what he says; the statements made after a process of cross-examination by her. To the extent she contends otherwise, I reject her evidence.

161. I have absolutely no doubt that the matter just referred to is productive of what might be described as a "family mindset" – that is, a picture of the father shared by the mother's family including, significantly, BF, the sister with whom the child and the mother reside. BF, NF and GF all expressly state, in their respective Affidavits, that they have never heard the mother discuss the father in a negative manner in front of the child nor do they ever talk about the allegations in front of the child. Similarly, Mr A was adamant, during oral evidence, that, although he had spoken with the mother whilst the child was in the room, the child was a "busy boy" and could not have heard what was said as the mother "whispered". The reference to a "family mind set" is a reference to a shared set of beliefs and attitudes about the father; the mother's views and beliefs about the father are shared almost entirely by her sisters. (The reservation arises because each sister said in oral evidence that they have doubts that the father will actually murder his son). But, I have no doubt that, at the very least implicitly and, almost certainly overtly, the child is left in no doubt at all that each of his aunts and his uncle see the father as malevolent, "bad" and/or a danger to him. I have little doubt that the child reacts to that

information from his primary carer (and other loved adults in his family) in a manner that confirms the mother's beliefs and attitudes.

162. An acute example of that – and, in my view a very good exemplar of the manner in which entrenched belief systems give the reporting of "innocent" events a different, and sinister, interpretation – is given in Professor Q's report:

> Ms [NF] immediately volunteered [implicitly at the very commencement of her interview with Professor Q] that [the child] has told them 'dad weed' in his bottom and has been fearful, not wanting to be left alone or in the dark. He wasn't like that before. They have been at camp drafts and "[The father] has suddenly appeared, like just appeared out of the blue and takes us by surprise. It's upsetting. [The child] has had episodes of soiling since unsupervised contact". One time they were in [a town]; [the father] lives there and they were careful because [the child] doesn't want to see [the father]. There was a camp draft on and about dusk the crowd had mostly moved away. [The child] was playing in the grandstand, which was mostly empty by then. "Suddenly [the father] was there and [the child] ran to him. I though it was predatory behaviour. I was aghast! [The child] ran to him. He is a very open and loving little fellow. It was a nasty and uncomfortable situation. I called [the mother] and she came over but we let it go; we let it take its course and then [the father] left". That was about June or July this year. The next day, Sunday; "we were all a bit agitated; [the mother] considered going home and [the child] soiled his pants. It is playing on [the child's] mind, some of the things [the father] has said to him.

163. A number of things, will, I think, be obvious that, as the account plainly reveals, were not apparent to Ms F nor, on her account, to the mother. There is no apparent irony seen, or surprise expressed, that a description of the child as an "open and loving little fellow" is, at least as far as his relationship with, and reactions to, his father are concerned, completely at odds with the picture presented of a terrified child who continually and remorselessly says negative things about his father. There is no apparent irony seen, or surprise expressed, at the child's spontaneous reaction (in June or July – i.e. after the alleged abuse): he "ran" to his father when compared to the picture of the terrified boy who wets, soils his pants or has nightmares at the thought of seeing his father.

164. It is also interesting to compare a description given by Ms W to Professor Q:

> Ms [W] agreed that visits with [the child] had been cancelled, sometimes at the very last minute. The handovers are very difficult too; the atmosphere is "very intense". One time they were at the [local] show and saw [the child] and he came over to say hello to [the father] but he kept looking out for his mother the whole time.

165. The incident described by the mother's sister Ms NF strikes me as a child (an "open and loving" child) running happily - and spontaneously - to his father as an expression of his joy at seeing him. How this description given of the "open

and loving" J is said to sit with the earlier-expressed need for care because "[the child] doesn't want to see [the father]" eludes me. So, too, I am completely baffled by what is said to be "predatory" about the father being at activities that are, and have been, an important part of his life (camp drafting) - and an activity of exactly the same type at which he and the mother met - at which he happened upon his son and wanted to say hello. Quite why Ms NF, or anyone else, would be "aghast" at the incident (as she describes it) also completely eludes me.

166. In light of the importance that the mother (and others) attach to wetting and soiling as an indicia that abuse has occurred, it should be noted I consider it crucially important to note what was said about this issue in respect of the incident just referred to. According to Ms NF's account, the child soiled his pants, the following day. That occurred after an event the previous day that as described, is experienced happily, and (as it seems to me, significantly) spontaneously by the child. He soiled the following day after being exposed (on Ms NF's account) to (at least) the mother and Ms NF, who were, to use Ms NF's words, "all a bit agitated" about the incident. My very strong suspicion is that the last statement is marked by its understatement.

167. It is, surely, at least as likely, and to my mind, much more likely, that the soiling is connected with the reactions, anxieties and attitudes of (at least) the mother and Ms NF than it is to the child seeing his father.

168. In further attempting to gain a proper understanding of the impact that maternal and familial attitudes are likely to have had, and have, on the child, it is in my view very important to take into account that Professor Q describes the mother as having "...led a rather insular and limited life". The child did not attend pre-school and the father asserts (and I accept) that the child has led a "sheltered life". Ms F told Professor Q that she considered the father as perceiving the mother's family as "too close". There is little doubt that they are extremely close. When the child was asked by Doctor Q to name his best friend, he nominated the mother and "he could not name friends from school".

Coaching?

169. It is common in cases of this type that when a person who denies abuse is confronted by statements from their child they, almost always, have a natural inclination to accept that the child has made the statements as reported. The response is, often, to suggest that the other parent has "coached" or "influenced" the child to make the statements. This case is no different in that respect.

170. It is a serious matter to find that a parent has consciously and deliberately set out to inculcate in a child a set of beliefs and to have them make false statements about abuse; that conduct is emotional or psychological abuse of the most serious kind.

171. Ms Carew highlighted during oral submissions that the mother had repeatedly stated throughout her Affidavit that she had not prompted the disclosures made by the child. During cross-examination by counsel for the father, Mr Johnston, the mother repeatedly denied talking about the allegations in front of the child or prompting such disclosures. But, those denials notwithstanding, I have real concerns that this may have occurred. In my judgment, though, there is insufficient evidence to find that the mother (or others) have "coached" or consciously and deliberately influenced the child in the manner just described, save in one respect. I am deeply suspicious that the mother (and/or others including her sisters) have made it very clear to the child that he should be sure to tell Professor Q, and Mr A, of what his father has allegedly done to him.

172. I am equally deeply suspicious that the child has been "rehearsed" for these interviews. For example, Professor Q records:

> [The child] had returned with Ms [F] [they had left together for a period to allow the Professor to see the mother alone] and was now insisting that he have a separate interview as well. I agreed and interrupted [the mother]
>
> [The child] did not engage in play as most children his age do; instead he was very focused on a letter he had with him and which he wanted me to see.
>
> [The child] showed the letter, which he said he had written; it was headed: "My book [? "bok"] of [? "ov"] Dad. It detailed an incident where dad put a stick up his bottom and had also put his penis in his bottom. There was a paragraph of description that was extremely well written for a child of this age.
>
> Asked how often did this happen, [the child] said it happened two times. Asked how big the stick was, [the child] indicated with his fingers a size that looked to be about 11/2 to 2 centimetres in diameter and about 30 centimetres in length. [The child] than asked: "Do you believe me?" Asked did this hurt him, [the child] said it did. He then volunteered: "And he weed in my bottom with his penis. He stuck the stick in the hole in my bottom. He also stuck his penis in my bottom".
>
> *[The child] showed an unusual lack of affect as he related this. It was very unusual behaviour; it is extremely uncommon for a child to present in this way without any preamble. [The child] was quite preoccupied with this and I did not wish to continue. I terminated the session and sent him to play with his mother.* [Italics in original]

173. A further, important, piece of evidence in this respect from Professor Q's later report (filed 13 December 2010) will be referred to below after an analysis of Mr A's therapy and evidence.

174. All of the evidence before the court, and my observations, combine to form a picture of a mother who, I find, anxiously and constantly monitors every movement and word by the child that concerns, or might concern, his father.

175. I have no doubt that the child was questioned, and questioned at length, about the time spent with his father. I have no doubt that, when the mother's beliefs about the father are "confirmed" by the child as a result of that questioning, he is left in no doubt that the "bad picture" of his father which he consequently presents entirely accords with the mother's own. I have no doubt that, as a result, the child's words and actions that are negative or construed by the mother as abuse or threats by his father are confirmed and reinforced by the mother to him.

176. I think it extremely likely that the mother's accounts of what the child has said about his father are selective or "skewed" by reason of the processes within her, and within the family, to which I have referred. Equally, I consider that the mother seeks to present them in the worst possible light. Again, I am not prepared to find that she has done so in a conscious, deliberate sense. But, she is so adamantly and single-mindedly blind to any notion other than that the father has abused the child and is a serious threat to him, that, in my judgment, she is simply unable to put anything other than a slanted, unfavourable and sinister interpretation on the things that the child has said. Further, and importantly, I consider that the selectivity employed permits of no adequate examination of the context in which the child's statements – and, crucially, his initial statements – were made.

177. I find it inconceivable that this highly anxious mother, who implacably and unshakeably believes that the child's father has perpetrated the most horrific acts of sexual abuse upon him and who believes that the father will murder the child, has not made those feelings abundantly plain to the child. She may not have used those words, or words like them to him; she may not have "coached" or directly influenced him. But this five year old who, like all children of that age soak up words, actions, nuances and feelings from their primary carer/s and seek to please them, is, in my judgment, left in absolutely no doubt about how his mother feels about his father.

178. I find it inconceivable that the mother's beliefs and personality traits have not influenced her conversations with the child, the questions she has asked of the child, and her reactions to his answers, including the statements that she herself records. I consider that, even if she has said nothing directly to him (which I very much doubt), it is almost certain that her reactions (and those of her sisters) to any comments by him about his father (even if benign) have, in turn, influenced the child's reactions to those questions; he has come to know the responses that accord with his primary carer's beliefs.

Trauma – Other Evidence

179. In analysing what the child said occurred to him at his father's hands it is important to bear in mind that, at the core of the allegations, are serious and traumatic events: anal penetration with a stick (described by the child as having varying dimensions, and said to at least one person as having occurred twice), anal penetration by an adult hand or fist (again some statements are at least suggestive of this happening on more than one occasion) and, anal penetration with a penis (including "weeing" in his bottom).

180. The mother took the child to be examined at B Hospital on 13 March 2010 after the child had complained that his father had put his hand up his bottom. The triage form states that on a pain scale of 0 – 10, the child gave a zero and denied pain. The mother took the child to Lismore Base Hospital where he was examined by Dr U who the mother reports as saying "The examination was inconclusive. I can't confirm or deny it happened, but I can't deny it".

181. I find it extraordinary that abuse of the type which the child says occurred (noting that he said to Professor Q that he was anally penetrated by a stick on two occasions) could have occurred without any such evidence being present. I agree with Professor Q who said in her report:

> …It is my understanding that it would be most unlikely that a violent penetration could occur and not cause physical injury and that it is necessary to groom a child in order to penetrate sexually without causing physical injury…

182. The mother took the child to the police as a result of the child's statements. After investigation, JIRT determined to take no action as the child's "disclosure was non-conclusive; the child could not offer any context to his statement that was plausible". In a document tendered by the Father (Exhibit F3), JIRT informed the mother that her case was being closed "due to there being no further child protection concerns at this point in time".

183. Further, the mother conceded that there were no signs on the child's clothing of any blood, nor any signs on him of trauma. At least one statement by the child suggests that a stick was poked into the child's bottom through his swimmers. There is, the mother concedes, no evidence of any damage to those swimmers.

Behaviour and Other Asserted Indicia of Abuse

184. The mother, in her Affidavit filed 13 December 2010, records numerous occasions, following the child's first unsupervised visit with his father on 13 February 2010, on which the child has soiled his pants and/or wet the bed. I have already referred to this issue. I consider the child's soiling and wetting to be much more likely to be associated with general anxiety created by the mother (and her family members) when the issue of the father, and in particular visits with the father, is raised.

185. In the same Affidavit, the mother also details a number of statements and actions by the child (aside from the statements tabulated earlier) from which it is suggested that it should be inferred that the child has been abused in some way by his father. Ms Carew, counsel for the mother, has detailed these in her outline of submissions (which were marked, to identify them, as Exhibit C) under the heading 'Chronology of relevant events'. Examples include the child saying to his mother:

- 'I wanted an axe to chop of [the father's] head and his arms and his legs and put them in a can';
- 'I want to be strong like [Samson from the bible] to fight Dad';
- 'I'm gonna punch Dad and then blow him up';
- 'I put Dad in this bin and tie him up and shoot him. And I'd cut him up with a knife and put him in a can of sardines'.

186. Mr A also noted certain comments and actions by the child similar to those reported by his mother. For example:

> '[The child] set up a farm with horses safe in the barn. He said they were safe from "badness". "Help help, badness is coming, it's Dad coming to kill us"' (Affidavit filed 10.11.10).

187. When Professor Q interviewed the child and his father on 12 October 2010 she made the following observations:

> … [The child] was rather restrained and was clutching a teddy bear which he hadn't been earlier. He sat next to the interviewer and within a few minutes whispered: "I don't want to be here". I reassured him and his father quite appropriately engaged him and within about two minutes [the child] seemed to be responding and possibly settling but after a minute or so he suddenly dashed out of the room. I had to pursue [the child] and then discovered that the mother was waiting outside. She encouraged [the child] to return and he did.

188. NF also stated in her Affidavit filed 15 November 2010:

> I observed [the child] tying off the back gate. I asked [the child] words to the effect, "What are you doing that for?" [The child] said, "To keep Dad out."…When I have visited the [B] home since this time…I have seen [the child] tying off the gates after someone has opened them.

189. BF also made the following statements regarding comments and actions by the child, in her Affidavit filed 15 November 2010:

> On 14 September 2010, whilst playing with his Lego set, [the child] described to me the imaginary devices that could "come out of the helicopter to get dad – red and green lights." The red lights [the child] told me, "flashed when they spotted Dad and a loud noise would come out if Dad was doing bad things". [The child] went on to describe "a rope one

> thousand metres long would come out with a hook, to hook onto Dad. A man would come out and tickle Dad until Dad saw a big plate of chips in a cage and he'd be trapped. The cage was electrified like the electric fence in the paddock".

190. I attach little weight to these statements in so far as they are said to indicate abuse. I consider that they are explicable by the factors earlier referred to relating to the impact of the mother's (and broader family's) words, actions and nuances upon the child.

191. Also, I consider, for reasons to be expanded upon in a moment, that the words and actions are much more explicable by a child suffering from general anxiety than they are of a child who has been abused. I consider the heart of that anxiety to be the concern which the mother and her family have generated in him about his father, including by their reactions when he is present or mentioned and the internal battle caused for him when those feelings conflict with the love he has for his father, and his internal perception and his experience of his father as a good and loving person who cares deeply for him.

192. Ms Carew took Professor Q through a list of specific "indicia of sexual abuse" during cross-examination. The Professor agreed that a child saying or doing the following could be seen as indicators that sexual abuse had occurred:

- Saying "I hate myself";
- Saying "I have no friends";
- Having nightmares;
- Soiling their pants and/or wetting the bed;
- Exhibiting anxiety;
- Exhibiting a sad demeanour;
- Hurting themselves or others;
- Pushing, shoving or otherwise being violent;
- Lack of or decreased concentration;
- Sexualised behaviour (such as "lying on a bed with the penis exposed and a toy under him").

193. But, when I invited Professor Q to refer to those matters which she, as a clinician, would regard as important if a child presented to her, she indicated that "sexualised behaviour is possibly the most high risk – the piece of behaviour that's considered most likely to reflect sexual abuse experiences…". Importantly, as it seems to me, Professor Q indicated that if one removed sexualised behaviours from the list of factors enumerated by Ms Carew then the remaining factors, if found to be present, were just as indicative of anxiety

generally. That is, those factors are indicative of anxiety as distinct from indicative of the cause of the anxiety.

"Sexualised" Behaviours?

194. Here, leaving aside reports by Mr A to whom attention will turn in a moment, reports of "sexualised" behaviour come, again, from the mother. They are:

a) The child "lent over from his chair and ran his hand along the fork of [the mother's] jeans from one leg across the fork of [the mother's] jeans to the other leg" and said "[I'm] greasing you up for a mummy hug" (1 March 2010);

b) The mother states that she was told by the child's school teacher that "[the child] had been sitting on glue sticks". She said she was concerned by the child's behaviour. He had been sticking his bottom up in the air when he was sitting on the floor (3 March 2010);

c) The mother observed the child in the bath "sliding his index finger in and out of his mouth". When the mother asked what he was doing, the child replied "Dad said to suck your penis and eat your poo" (5 June 2010, - said to follow a visit between the child and the father);

d) The child "sitting on one foot, rocking backwards and forwards with his foot under his bottom. He then began to drag his lower abdomen and legs across the floor backwards and forwards" (7 July 2010); and

e) The child "lying on the bed, with his penis exposed and with a toy positioned under his bottom". When the mother asked him what he was doing, the child said "Dad said to do it" (18 August 2010).

195. Ms Carew submitted during oral submissions that these behaviours should not be considered separately but rather should be looked at globally, (and, as I took it, cumulatively with those live in the proceedings before Slack FM) as indicative of the child having suffered some form of sexual abuse by his father.

196. In my view, comments similar to those made earlier in respect of "disclosures" should also be made in respect of the use of the expression "sexualised behaviours". An appropriately qualified clinician might properly regard "sexualised behaviours" as an indicator of abuse. Yet, an expert relying upon their own observations of behaviour might regard as benign or "normal" behaviour that which another observer might regard as "sexualised". So, too, what one non-expert person regards as "sexualised" might differ markedly from what another non-expert person might label as such. Again, that is all the more true, in my view, where the observer and reporter of behaviour has fixed views about abuse or its possibility and/or the character of the alleged abuser. In assessing risk, I consider it important to have this matter firmly in mind. (For example, during submissions by counsel for the mother, I applied the

question "so what?" in respect of asserted observed behaviours so as to highlight that very issue.)

197. When behaviour is not directly observed but, instead, referenced from reports of the behaviour, many if not all of the factors earlier identified apply. (Who observed it; what circumstances (both temporally and more generally) attended the making of the observation and precede and succeed it; what do we know of the psychological imperatives operating upon the person making the observation; how reliable is the report of what was said and its context).

198. In terms of behaviour that might be described as "sexualised", particular attention should be directed to the description by Mr A of a request by the child that he (Mr A) should wrap up his penis in sticky tape. A consideration of that specific matter should be seen in the context of a consideration of Mr A's processes and evidence more generally.

Evidence of Mr A

199. In his most recent "report" dated 9 December 2010, Mr A was prepared to commit to an opinion that "it is clear that [the child] has been sexually abused".

200. I repeat the matters earlier outlined in respect of Mr A's evidence and my misgivings about it.

201. Opinions can be expressed based on "specialised knowledge" where the opinion is based upon a "person's training, study or experience" (s 79 *Evidence Act 1995* (Cth)). No objection was taken to the opinion just referred to, but it is in my view plain that Mr A does not possess the training, study or experience to express any such opinion. Ms Carew cross-examined him specifically about the extent to which his 23 years of clinical practice brought him into contact with sexual abuse and children who had been sexually abused. His evidence was to the effect that the sum total of children with whom he'd had had professional contact who had been sexually abused amounted to three. Later, Mr A clarified this as being one case where abuse was "confirmed" and "a couple" where "there were suspicions". At one point Ms Carew asked Mr A to express an opinion as to whether there was a tendency for children who are sexually abused to "blame the carer and become angry". Before Mr A provided his opinion, I asked Ms Carew if she contended that Mr A "had the expertise to answer the question". Ms Carew said that she would "have some difficulty making that submission". The concession was properly made.

202. As I have outlined earlier, Mr A was unable to refer to any research on the issue (indeed, it was, according to him, "not rocket science"). When I asked him to list the factors that he had considered (and rejected) as indicative of the possibility that sexual abuse had *not* occurred in arriving at his ultimate conclusion that it had, he was unable to give me any; I asked Mr A to detail for me "all of the indicia [he] considered and rejected that supports the hypothesis

that [the child] was not abused" to which Mr A replied "off the top of my head I can't think of any".

203. Mr A had one session with the father (without the child). Mr A was at pains to say that he was not asserting that it was the father who had sexually abused the child. Yet, this created for him the dilemma to which I have earlier referred – a matter I took up with Mr A:

> HIS HONOUR: You say, based on what you have seen and observed, that [the child] has been sexually abused.
>
> MR [A]: Yes.
>
> HIS HONOUR: What I am struggling with is this, having read your reports...and the notes to which I have been referred…if I was to come to the conclusion that [the child] had been sexually abused, it is essentially as a result of the things that he has said being accepted by me.
>
> MR [A]: Yes.
>
> HIS HONOUR: And, at least in part, your observations connected with the things he has said.
>
> MR [A]: Yes.
>
> HIS HONOUR: If I accept the things that he has said as being an accurate statement of inappropriate sexual things happening, how can I accept that he has been abused by anyone other than his father because every single, solitary thing that he says, referenced to potential sexual abuse or indeed badness toward him, is connected to his father and yet that seemed to be the proposition you advanced…that I could find that he has been sexually abused but not at the hands of his father. So how do I do that, as far as you are concerned?
>
> MR [A]: I think that's the question probably a number of us face. It's clear to me that there has been sexual abuse…
>
> …
>
> HIS HONOUR: Your opinion, as I understand it, must clearly and unequivocally be that if [the child] has been sexually abused by anyone he must have been sexually abused by his father. Is that right, based on what he said to you?
>
> MR [A]: It's hard to go that far. I'd say most likely, not must.

204. Yet, if the basis for the conclusion of abuse is to be the child's statements and observed behaviour (as asserted) they cannot possibly found a conclusion that it was anyone other than the father who perpetrated the abuse. The mother clearly specifies this to be the case, so does her counsel and so, I would have

respectfully have thought, does logic. Indeed, this extremely vigilant, extremely protective mother could hardly assert anything else; the child has led "a sheltered life".

205. Mr A had no apparent regard to any collateral information in forming his ultimate opinion, including reference to what the father and Ms W assert about the relevant four visits.

206. Nor, plainly, has Mr A sought to test in any manner his hypothesis that abuse has occurred against the alternative hypothesis that it has not. I acknowledge that, as a therapist rather than a forensic reporter, it *might* not have been his task to do so. But, a written opinion was being provided to a court. When I asked Mr A about those factors he had considered, but rejected, as being indicative of explanations other than abuse, his answers indicated to me that he had never at any stage given such a proposition any thought. In the context of parenting proceedings, particularly where, according to Mr A, he was not making a positive assertion that the father was a perpetrator of abuse, that seems to me to be a remarkable omission.

207. During oral evidence, Mr A confirmed that he had concluded that the child had been sexually abused following a session with the child on 3 November 2010 in which the child made several requests of Mr A to "wrap up my penis". Mr A says that he declined to participate in what he termed as the child's "invitation to sex play" and interpreted the requests as the child "letting me know something about the badness of his penis". Contextually, it is important to note that, whilst this is the only circumstance which Mr A records the child as requesting that his *penis* be wrapped up in sticky tape, there had been at least five other, earlier, occasions on which Mr A had wrapped the child's wrists, ankles and/or knees with sticky tape and, as will be seen, those requests were accompanied by other statements by the child. No such statements, including in respect of "the penis incident" mention the father or implicate him in any way.

208. During oral evidence, Mr A was taken through notes he had made of a session with the child on 27 October 2010. He recorded that the child "wanted me to sticky tape him as a prisoner, wrist, ankle, knees" and Mr A confirmed that he had sticky taped him then. Later, in his notes from that same session, Mr A describes a game he played with the child in which the child hid from Mr A under the desk and Mr A "capture him, arrest him and stick (sic) tape him again". There was a third occasion on 27 October 2010 on which Mr A wrapped the child's wrists with sticky tape.

209. Mr A's Report attached to his Affidavit filed 9 December 2010 records that, during another therapy session on 3 November 2010, the child "was playing out concern about his own badness. [The child] told me that he was a murderer" and asked Mr A to tie him up with sticky tape. Mr A acquiesced and wrapped "sticky tape around [the child's] wrists, ankles and middle". During

oral evidence, Mr A was taken through his notes of that session. They record two events involving wrapping sticky tape around the child's hands and/or knees. The first occasion is described by Mr A as: "I have to find him, tie him up and keep him in prison…tie him up with sticky tape". On the second occasion, the child told Mr A that he had murdered a boy from school, and that he needed to be arrested. Mr A noted that he handcuffed the child with "sticky tape hands, knees". Following this second occasion, Mr A notes that the child asked him to "wrap my penis up. Wrap my penis up".

210. By reference to Mr A's notes (as distinct from his reports), it would seem, then, that of the six different occasions on which the child asked Mr A to sticky tape up various parts of his body, it was only the last which had any connection with genitalia. None of the others were described by Mr A as "sex play".

211. Importantly as it seems to me, during oral evidence, Mr A accepted that the father was never mentioned in the context of any of the six episodes involving sticky taping the child up (including in respect of his penis) nor in the context of the child wishing to harm anyone or "hate" anyone or, indeed, in the context of anyone wishing to harm him. But, there were references in the notes (but not recorded in Mr A's reports) of the child asking Mr A to arrest him using sticky tape for killing a boy at the child's school.

212. There was also reference in the notes (but not in the reports) to a denial by the child that anyone had ever been near his penis. The child's denial struck me as very important. I took it up with Professor Q:

> HIS HONOUR: Mr [A] records himself saying to [the child] 'never let anyone near your penis. Has anyone been near your penis? [The child] answered "no"?' Now in the context of the notes you have read from Mr [A], should I attach any weight to the denial in that context by [the child]?
>
> PROFESSOR [Q]: Well I think it is really important that [the child] has said no one has ever touched his penis.
>
> HIS HONOUR: Why do you say it is really important?
>
> PROFESSOR [A]: Because if a child were behaving like that in a session, obviously intensely preoccupied with his penis and having it wrapped up, it would really, for most clinicians, I think, immediately raise concern that the child had experienced sexual touching, and so it would be very relevant that the child denies it.

213. The statement that, "[the request] would really – for most clinicians, I think, immediately raise concern that the child had experienced sexual touching…" is not, to me at least, surprising. Yet, the forensic task in assessing risk is to place that concern among other evidence relating both to the observation itself and to the likelihood or occurrence of abuse more generally. In oral evidence,

Professor Q was asked to outline explanations if abuse had not occurred. She offered:

- "[the child] felt guilty about some sexual behaviour that he had committed himself";
- That "[the child] had been exposed to talk that was sexually stimulating…[the child] may…have been exposed to adults or observed adults – that some sort of sexual stimulation had occurred short of him being touched, but in some other way, by hearing or seeing";
- "[The child] had been exposed by adults to sexual ideas or materials";
- "Possibility that adults may be invested in putting ideas into the child's mind".

214. Professor Q was of the opinion that, if sexual abuse has not occurred, the child's belief that it has is a result of a "disturbed state of mind" and "the most likely explanation for this with young children is that they've experienced a number of leading questions". Professor Q was reluctant to accept that the child could be making the allegations up without having any input from other persons. She said:

> I'm reluctant to say that it could be entirely a mental disturbance in the child, because I've never seen a child with (sic) who would have this extent of mental disturbance...*In my experience, there's always an explanation in terms of ideas that have been suggested to the child in some way.* [emphasis added].
>
> …
>
> I've never seen a child that presented this much material where the conclusion is that it's all coming from within his own mind. It would be extraordinary.
>
> …
>
> It's the first time I've had a child behave the way – quite the way [J] behaved.

215. It is, as earlier referred to, important to quote fully evidence from Professor Q's addendum report exhibited to her affidavit filed 13 December 2010. I consider this evidence extremely important both to the topic under discussion and also, more generally, to the issue of the child's statements, and the potential for adult input into them, discussed above. Professor Q said:

> Regarding the letter (the book [? "bok"] of [? "ov"] Dad):
>
> As I raised in my original report, I continue to hold some concerns about whether [the child] could have written this without assistance; however,

this would need to be assessed by a much more detailed examination of his school work than what I was able to undertake.

It is of concern that [the child] has been so persistent in showing the letter (or the book); he has taken it to Mr [A] and to his teacher, or at least told his teacher about the letter. In the absence of medical evidence, it is a child's history that is the most reliable indicator that abuse has occurred (Hager, et al, 2002), but [the child's] behaviour is unusual. It is quite unusual for a child of this age to be eager to report and to detail matters of sexual abuse by a parent. Most children do not report sexual abuse (Piper et al, 2007, Lyon, 2007; Paine et al, 2003) and even where there is confirmed abuse due to medical evidence, eyewitness reports or confession by the perpetrator, up to half of abused children still fail to disclose when questioned (Lyon, 2002; Sjoberg et al, 2002) This reluctance reflects that, regardless of their obvious innocence in these matters, children are almost routinely affected by feelings of shame and guilt (Berliner et al, 1995; Finkelhor et al, 1985).

…

Conclusion

On the basis that [the child's] persistent and eager reporting of these matters and the nature of his interactions with Mr [A], it is my view that [J] is a very troubled child.

If no abuse has occurred but [the child] has been persuaded to believe that it has, then possibly this is contributing to his psychological disturbance. In that case there would be grave concerns about the distortion of his perceptions and he would need to be protected from further risk of psychological harm of this nature.

If sexual abuse, including penetrative assaults, has occurred, as alleged, then such experience may explain his disturbance, although it would have to be said that his presentation is quite unusual. Clearly in this case, [the child] would need to be protected from any possible risk of further harm.
…

216. It will be clear from all that I have said above, that I have concluded (in the manner earlier outlined), to use Professor Q's words "…adults [are] invested in putting ideas into the child's mind" and that this is far and away the most likely explanation for the behaviours described by Mr A.

217. Professor Q was asked by Mr Johnston during cross-examination, to comment on the desirability of Mr A providing the "professional supervision" which the Professor stated was "essential" if the child were to be removed from his mother and placed with his father.

MR JOHNSTON: …You can accept that [Mr A's] evidence to his Honour is that he believes the child has been sexually abused, and he cannot point to anyone else other than the father as the abuser. Should he continue, in those circumstances?

HIS HONOUR: I think, to be fair, you should also know that Mr [A's] evidence was that - and I'm paraphrasing here, Professor, but that he regards himself or prides himself, I think he said, on being impartial, that the nature of the therapy that he has engaged in is such that his belief is - and I invite your comment on this - his belief is that he could continue providing the sort of therapy that he has provided to [the child], even if there was a finding by this court that [the child] had not been sexually abused, for example, by his father. So if you add that to the premise that Mr Johnston has given to you, what do you have to say about the prospect of Mr [A's] future involvement?

PROFESSOR [Q]: Well, I think that if the court were satisfied that Mr [A] was suitable, then it would be easier for [the child], because it's someone whom he has familiarity and a good relationship already established. Otherwise, if the court was not confident that Mr [A] could maintain the neutral position, then it would have to be - yes, it would have to be a new professional to intervene.

HIS HONOUR: Can I ask you a similar question in this way: if you had been a therapist seeing a child for 22 sessions over an approximately seven-month period and had received observations and information from the child to the effect that he had been sexually abused by his father, and you as the therapist had also received collateral information from the child's mother to the same effect, would you feel comfortable in continuing your role as a therapist for the same child, post a finding that sexual abuse had not occurred?

PROFESSOR [Q]: Not if it went against my judgment of the situation. If my judgment of the situation was that the child had been abused, I wouldn't feel comfortable continuing.

UNACCEPTABLE RISK – FINDINGS

218. The horrific prospect of error in finding that a person presents no, or no unacceptable, risk of murdering their child is as grave as it is haunting. So, too, a finding that a child is not at risk, or unacceptable risk, from sexual abuse at the hands of their parent. This court deals with people in extremis, and history tells Judges horrifying tales that sick and/or evil parents can do sick and evil things to their children. Findings that a person presents no risk of harm cannot be, and are not, made lightly. Judicial fallibility does not have to be expressly acknowledged to be ever present.

219. Bearing all of those things in mind, by reason of all of the matters I have discussed, I am as convinced as I can be and with negligible doubt (and, thus convinced to a higher standard than the law requires of me – see s 140 *Evidence Act 1995* (Cth)*; Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449) that the father presents no risk of harm to J.

220. Bearing all of those things in mind, by reason of all of the matters I have discussed, I am as convinced as I can be and with negligible doubt that the father is a loving, caring and committed parent who wants what is best for his son and who, if given the opportunity, will love and nurture him appropriately.

221. The findings just expressed might be seen to go further than what is strictly required in parenting proceedings. However, here, I consider there are "strong practical family reasons", as the High Court in *M v M* expressed it, for making a finding to that effect. The mother, her family, the father, others such as schools, counsellors and, ultimately, when he is an adult or sufficiently mature to properly absorb the difficulties of his childhood, J himself, should all know that, for all its fallibility, earnest analysis by a court has led a court firmly to that conclusion.

222. Tragically, I think it highly likely (as does, it seems, the father and Professor Q) that the child has now come to himself believe that the father has abused him. I consider the mother does not permit him the emotional freedom to believe anything else. Unfortunately, I consider that the child's beliefs in that respect have, in effect, also received implicit confirmation from therapy by a person convinced that he has been sexually abused; a conclusion I respectfully consider is wrong.

223. The child's beliefs are a significant matter to be considered in arriving at orders that best meet his best interests. So, too, the mother's belief system as earlier described is very relevant to those orders and was a central component of counsel's submissions on her behalf. I wish to address specific aspects of that issue and to consider how other findings in respect of relevant Considerations combine before moving to consider the terms of orders.

THE ROLE OF THE MOTHER'S BELIEFS

224. In *Re Andrew* (1996) 20 Fam LR 538 the Full Court examined a line of authority emanating from the unreported decision of the Full Court in *Russel v Close* (Unreported, Family Court of Australia, Fogarty, Baker and Lindenmayer JJ, Appeal SA45 of 1992, 25 June 1993). The Full Court referred with approval to two statements in particular from that earlier case:

> It is established that in considering the [relevant] factors … an appropriate consideration is the custodial parent's belief that the child or children have been sexually abused whilst on access, the effect of that belief on them as the primary caregiver.

> In upholding children's rights to protection from sexual, psychological or emotional harm the court must take into account any anxiety on the part of the primary caregiver concerning the child's exposure to potential harm where such anxiety is likely to impact adversely on that parent's care-giving ability.
>
> In taking into account the belief of the custodial parent of abuse by the non-custodial parent of the children and the effect of such belief on that parent as primary caregiver of the children and consequent harm to the children, a subjective test is employed. However, it must be shown that such belief on the part of the custodial parent is genuinely held. Where it appears on the whole of the evidence that such belief is entirely irrational and baseless, the genuineness of the subjective belief of the custodial parent will clearly be open to doubt. [emphases added]

225. Some caveats on what otherwise might be seen as very broad principle are evident in the emphases added and also in other authorities.

226. In *M & M* (Unreported, Family court of Australia, Fogarty, Baker & Butler JJ, Appeal SA44 of 1992, 8 September 1993) it was held:

> The second aspect, namely the wife's genuinely held fear in any event that this may occur also requires careful attention. It is now well established that the genuinely held beliefs or concerns of the custodial parent as to access and the circumstances of access are relevant considerations in deciding what access to order: see s 64(1)(bb)(i) and (v) and the recent decision of the Full Court in *Russell v Close* (unreported, 25 June 1993).
>
> However, the relevance of that is not that it gives to the custodian a veto. The relevance is the extent to which it may have an adverse effect upon the welfare of the child. That is, its relevance is that the concerns of the custodian may affect his or her capacity as a custodian, and thus have an effect upon the welfare of the child. Those concerns, although they should be acknowledged, may have little weight where that parent's caregiving capacity will not be discernibly impaired. [emphases added]

227. In *In The Marriage of N and S* (1995) 19 Fam LR 837; [1996] FLC 92-655 the majority (Kay and Hilton JJ) held:

> The legal principles to be applied in a determination of this case are not I believe the subject of any real doubt or controversy. The matter has to be determined having regard to the welfare of the child (see s 64) … The ultimate problem of custody is brought about by the refusal of the custodial party to grant access to the other party and her inability to accept orders for access, that situation having a detrimental effect on the child. In that situation it appears to me that the following considerations are applicable:
>
> 1. In ordinary circumstances where custody of a child is granted to one parent access will be ordered in respect of the other parent. This falls to be determined having regard to the welfare of the child.

…

2. The fact that the custodial parent is opposed to access or does not desire the other party to have access to the child is in itself irrelevant. The matter has to be determined having regard to the interests of the child, not the wishes as such of the custodial parent. That is, her wishes are irrelevant but her reasons must be given proper weight.

…

3. Where the continuation of access has a detrimental effect upon the child the court must weigh that detriment against the other advantages to the child of the continuation of access. Where it concludes that, considering the whole matter, to continue access would be to the real detriment of the child the court is required in the performance of its duty to terminate or suspend access.

4. The option then open to the court is either to continue the existing custody and at the same time terminating or suspending access, or alternatively changing the custody and determining access in the light of that changed situation.

5. In many cases this problem arises because the custodial parent quite irrationally and wrongly creates such difficulties about access that its continuance has a demonstrable detrimental effect upon the child. Even in cases where the situation is brought about in this way the same considerations apply. The matter is to be determined having regard to the welfare of the child, not by considerations of either sympathy for the innocent non-custodial parent or feelings of frustration or annoyance with the custodial parent.

6. In such a case the question of the future custody of the child again must be determined only upon a test of the welfare of the child. It ought not be determined by unconscious feelings of punishing the custodial party who appears to have brought the situation about or rewarding the innocent non-custodial party. In cases where the welfare of the child dictates that that child should remain in the custody of the former custodian that must be the result even though the consequence may be that the non-custodial party, innocent of any wrong doing, is severed for at least the time from continued connection with his or her child.

7. In cases where the attitude of the custodial parent is genuinely but unreasonably held, the relevance, and in my view the only relevance, of that attitude of the custodial parent is that such wilful or irrational behaviour may indicate such a defect of personality or character as to indicate that that person may not be a suitable custodian for the child. Similarly where the non-custodial party is prepared and able to assume the duties of a custodian and is prepared to agree to access to the other party that circumstance may be of such overall advantage to the long term

> welfare of the child that it may, taken with all the other relevant factors, justify the court in altering the custodial position. [Emphasis added]

228. In my view, the principles enunciated in those cases are not a fixed code, the satisfaction of the elements of which must result in the predominance of "genuine beliefs" over other considerations. A "custodial parent" does not, by reason of asserted genuine beliefs, have a "veto" over the legitimate rights of a child to have a meaningful relationship with his or her other parent. That was, I consider, true when those cases were decided and is even more true now in the light of the Act's Objects, Principles and Considerations.

229. Further, to the extent that the comments by the Full Court should be seen as suggesting that "genuine belief" can be decisive in determining best interests, a significant distinction should, in my view be drawn between cases whose circumstances reveal what is called in those cases "a custodial parent" or a "primary caregiver" and the issue to be determined is time to be spent with the other parent. When the issue of where a child will live is very much a live issue between two parents, greater circumspection is, in my view, needed about applying strictly the words used by the Full Court in *Russel v Close* and *Re Andrew* (where that situation did not pertain). So much is made clear by the Act as it now stands and, even before its most recent substantive amendments, by what is said at points 4ff of the passages from *In the Marriage of N and S* quoted above.

230. The mother's belief is, I think, genuine. But it is also entrenched, and, on her own admission, not susceptible to change. There is, then, an element of "wilful blindness" about it. Where a finding can clearly be made that there is such an element in a belief system combined with an adamant refusal to countenance any attempt, including through counselling, that might seek to challenge those beliefs, the application of the principles relating to the role of "genuine belief" is in any event, in my view, called into question. That can be seen from the breadth and multi-faceted nature of the enquiry envisaged by the Act in determining best interests.

231. Here, given the nature of the relationship between the mother and child, the mother's entrenched beliefs that have been referred to many times throughout these reasons, are an important Consideration, but I do not regard it as decisive.

232. Similarly, I very much have in mind J's belief but, again, I do not regard it as decisive. There is no evidence to suggest that the belief is, in a child not yet six, either permanent or, indeed, entrenched. The acceptance of the evidence of Ms W and the father and Ms F's description to Dr Q of the incident above referred to, suggest to the contrary as does what I consider to be the child's underlying feelings about his father.

BEST INTERESTS: ULTIMATE FINDINGS AND ORDERS

233. I can see significant detriment for J, whatever orders are put in place.

234. I have determined that the father does not pose any risk of harm to the child as alleged against him. J deserves, and needs, to have a meaningful relationship with his father. If he lives with his mother, that will not occur at any time in the foreseeable future, and probably never. The mother has no current, or likely future, capacity (or willingness) to facilitate any substantive form of meaningful relationship between the child and his father. I am completely convinced that, if the child lives with his mother, he will, for all practical purposes, grow up without a father. That is a very significant detriment to him in both the short and long term.

235. If the child continues to live with his mother, he will, in light of my earlier ultimate finding as to risk, suffer the psychological harm identified by Professor Q in her most recent report. This harm is, in my view, very serious. The child needs to be protected from it.

236. A move from the mother's care into the father's full-time care involves for J a series of changes of real significance (change of primary nurturer, concomitant separation from his erstwhile primary carer and nominated "best friend"; change of locality; change of school, new and possibly increased role of Ms W in his life). His relationship with his mother is very close and very involved; on the father's case he has led a "sheltered life" and his mother has been the centre of it.

237. A number of other matters are also causally relevant to the nature of the relationship the child has with his parents and others. The very close (and, I strongly suspect, enmeshed) relationship with his mother is to be contrasted with the fact that the child not only currently perceives the father as an abuser, but also that he has now not seen or communicated with his father for some months.

238. His father has never been his primary carer, nor a full-time solo carer. Yet, he is neither young or immature, nor an inexperienced parent. He has a good and very healthy relationship with his former wife and an appropriate caring and loving relationship with his daughter of that relationship. He and his former wife have, on the evidence of the respective relationships now, handled the pre and post-separation co-nurturing of their daughter intelligently and appropriately.

239. It will be obvious that seeking to balance – for J – the Considerations which I regard as relevant and important, involves a tension between them – particularly the Primary Considerations.

240. I have considered ordering the child to remain living with his mother and ordering time with his father – leaving non-compliance (which I regard as

almost certain) to the remedies of contravention. I think it very likely – indeed almost certain – that allegations would proliferate whatever supervisory methods were employed by the father (either mandatorily or, as before, voluntarily). I consider it highly likely that the child's false beliefs about his father would not only proliferate but intensify. None of those things are in J's best interests.

241. On the other hand, if the child is ordered to live with his father, I consider that the mother's initial reaction will be extreme. The father's proposal that time be suspended for a time not only has merit, but I would regard it as essential; the child should not be exposed to what I regard as likely extreme maternal (and likely familial) distress. Yet, as Professor Q says, and I agree, separation from his mother should not be for more than a few weeks – this child has led a sheltered life in which his mother (his "best friend") predominates. It will be the child's first significant separation from his mother.

242. I am worried about the prospect of the mother "holding over" both initially and subsequently, when time is ordered for the child to spend time with her. I consider that to be very likely; the depth and intensity of the mother's beliefs and feelings make this point strongly to that conclusion. In that regard, I think it highly likely that further allegations of sexual impropriety, or other potential harm, will accompany those actions. The child needs to be protected from this and, in my view, needs to be protected from being subjected to words or actions from the mother which suggest to the child that he is being harmed by his father or is at risk of that.

243. It will be clear that I do not regard either party's proposal as less likely to lead to further proceedings.

244. Ultimately, I propose by my orders to give primacy to protecting the child from the harm to which I consider he is exposed in his mother's care. Concomitantly, I also propose to give primacy to the need for the child to develop and enjoy a meaningful relationship with his father. I was struck by, and in my mind continually return to, the image of a happy, buoyant, spontaneous child in the company of his father – a "normal" 5 or 6 year old – and its comparison with the picture of a burdened, anxious, threatened 5 or 6 year old in the company of his mother and her family.

245. I am convinced that the latter picture is not caused by, or results from, any harm (sexual, physical or emotional), or any threat of harm, posed by his father. I am equally as convinced that the latter picture is caused by the projection onto the child of the mother's (and her family's) belief system and the extreme anxiety associated with it. I am convinced that it is causing the child serious harm and will do so into the future.

246. I am convinced that the former picture results from the child's desire to have, and his enjoyment in having, a full ("meaningful") relationship with his father.

I am convinced that he wants – and needs – that to develop. He needs to have the emotional freedom to develop and "own" his own experience of his father, consequent upon what, I am convinced, will be his positive experiences with his father.

247. I believe the child deserves a meaningful relationship with his father and deserves to know and experience his father, to have his own experiences which I am confident will be loving and caring and to know him as someone other than a sexual predator and potential murderer.

248. Ultimately, the seriousness of the harm which I am convinced he faces in his mother's care and his need for a meaningful relationship with his father outweighs the other important considerations (and Considerations) which I have earnestly attempted to analyse and consider.

249. In my judgment, taken together, the evidence points to the child's best interests being met by an order that he live with his father.

250. For the reasons earlier identified I consider it important that the child be relieved, for an initial period, from being exposed to the maternal distress, likely to be extreme, caused by that decision. I accept, and agree with, the opinion of Professor Q, that the separation be kept to a minimum; a period of a few weeks.

251. It will be obvious that I do not consider that the distress will abate either within that timeframe, or easily. However, the child needs to see his mother; there is no doubt that, in the long term, he will benefit from a meaningful relationship with her. That said, the child needs protection from any manifestation of the mother's belief system and consequent anxiety. He also needs time for his current beliefs to be replaced by his own experiences of his father. I consider that this should occur in an environment which is attended by satisfactory protection from the mother's beliefs and anxieties. I consider that the time between the child and his mother needs to be supervised for that reason.

252. It is notorious that the demands on contact centres are greater than what they can supply and that not very many offer more than two-hour timeslots each fortnight. It is also notorious that "commercial" supervision is expensive. I propose to attempt to meet those concerns by proposing that the supervisor be as agreed but, failing agreement, at a contact centre. My earlier findings reveal that any agreement might be a very faint hope, but in this situation, there is a real imperative driving it and the issue very confined. I make it clear that, for the reasons earlier given, unless the father agrees, members of the mother's family are not likely to be suitable supervisors.

253. J's time with his mother should be regular. The erstwhile relationship between the child and his mother points to that and the need for sufficient amounts of time as the circumstances and need for protection otherwise allow. But, the

mother's potential distress and the need for the child to develop a firm relationship with his (new) primary carer needs to predominate. For that reason, during the period of supervised time, I do not consider it appropriate for there to be communication with the child in a way that will not permit of some "monitoring" by the father. I will distinguish then, between cards, letter and photos sent by Australia Post, and other more "private" forms of communication such as e-mail, Skype and telephone.

254. Supervision should have a limit – long term, it is not consistent, in the usual course of events, with the development of a meaningful relationship. Yet, it needs in my view, to be a sufficiently long period to permit of the unimpeded development of the relationship between the child and the father.

255. As a result of the mother's oral evidence, it might be thought that any counselling process for her is contra-indicated. Yet, I consider the mother was, in fact, confining its prospective utility to such as might challenge her beliefs. Be that as it may, the mother will face a set of new challenges as a result of these Orders, not least of which will be her sense of loss and grief as a result of them and the very considerable challenge of putting into practice the regime contemplated. There is, in those circumstances, a role for s 65L.

Parental Responsibility

256. I repeat what I said earlier about the clear present inability, and likely future inability, for these parties to co-operate at all about any issues affecting J. I consider that any attempt for the parties to agree upon, or to discuss, any aspect of the child's care, welfare and development is likely to be fraught with mistrust, antipathy toward each other and conflict at every level.

257. I consider that this situation should be met by the father – the parent I have determined should be responsible for the child's day-to-day care – having sole parental responsibility for him. Equally though, as earlier referred to, that should not mean that the mother has no voice, or that her rights as a parent are not recognised in a way consistent with my overall judgment about the child's best interests.

258. I consider these matters can best be accommodated by orders which require the father to inform the mother (in writing) of all prospective decisions about "major long term issues" (as defined in the Act) and affording her the opportunity for (written) input before, ultimately, making the decision.

259. I order accordingly.

I certify that the preceding two hundred and fifty-nine (259) paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Murphy delivered on 19 January 2011.

Associate:

Date: 19 January 2011