

RICHTER v RICHTER

FAMILY COURT OF AUSTRALIA

WILSON J

16–19, 22 July, 2 August 2019 — Melbourne

[2019] FamCA 507

Parenting orders — Relocation — Where three intellectually disabled children, all with autism spectrum disorder, one severely intellectually disabled — Where mother seeking relocation order — Where mother seeking sole parental responsibility for severely intellectually disabled child — Whether best interests of child to make order for sole parental responsibility in relation to child — Whether best interests of children to make relocation order — (CTH) Family Law Act 1975 ss 60CC, 61DA, 65DAA — (CTH) Family Law Amendment (Shared Parental Responsibility) Act 2006.

The trial of this proceeding focused on two main issues. The first was the application by the mother (M) for an order for her to relocate with the three children to Town B from Town C in regional Victoria. The second was M's application for orders conferring upon her sole parental responsibility in relation to X, born in 2009. Other orders relating to X as well as Y (born in 2007) and Z (born in 2012) were also sought.

All children have special needs. X's needs are very significant. He is currently under the care of an array of specialists. Since M and the father (F) separated in August 2016, M has assumed responsibility for meeting all of X's special needs. That has required her to attend upon a large number of medical practitioners with great frequency. M contended that the number and frequency of her interactions with a large body of medical experts means it is in the best interests of the children to be nearer to those experts so that the children can obtain the best care in an expeditious matter. F contended that it was not in the best interests of the children to make a relocation order nor for an order for sole parental responsibility to be made in relation to X.

M is 44 years of age and F is 46 years of age. They met in early 2006 and commenced cohabitation in late 2006. They married in 2007, separated under the one roof in October 2015 and M and the children vacated the former matrimonial home in August 2016 to live in a rental property in Town C. M is a qualified health professional. F owns and operates two farming businesses based in Town D. M is not presently working as a health professional. M is a full-time mother and carer to the children.

M submitted that the frequency of the ongoing involvement of a large number of medical practitioners indicated the likelihood that the needs of the children were better served by proximity to those medical services in Town B rather than in regional Victoria.

Held, making the orders:

(i) The presumption recorded in s 61DA(1) of the Family Law Act 1975 (Cth) that both F and M should have equal shared parental responsibility for X has been rebutted and that it is in the best interests of X for M to have sole parental responsibility for X: at [119].

(ii) When asked to take into account the nature of the relationship between a child (here X) and each of his parents, the assessment of that relationship does not begin and end with the love between parent and child. It includes whether the parent sets boundaries for the child, whether the parent imparts life skills, whether the parent is in truth a mentor. X may well love both of his parents and they him, but M's approach to the requirements of her role as one of X's parents has been more dutifully discharged by M than has F dutifully discharged his role as one of X's parents: at [126].

(iii) The evidence showed that M made a larger effort in taking the opportunity to spend time with X or to communicate with X. She has persisted over the whole of X's life to get to the very root of all of X's medical and behavioural problems. M was so perceptive to X's style of communication that she was able to identify that X was having a seizure of one variety or another that F failed to pick up: at [130].

(iv) Both parents will be affected by the relocation proposed. M will leave her family in the Town D area. She will need to find suitable rental accommodation. When she travels to her family she too will incur a long drive, at her expense. By no means is the relocation an event that will orchestrate wholesale benefit to one parent while concurrently occasioning wholesale detriment to the other: at [152].

(v) The characteristics of X as formulated by M are undeniable. His ASD and his disorder will not abate. His behavioural problems are as acute as ever. His sleeping issues may lessen in time depending on the steps M makes over years to come. X's ear problems and his dental issues may abate over time but any prognosis in those areas cannot sensibly be made by the court. His need for constant supervision is being met by M as his full-time carer: at [159].

(vi) M's contentions that F did not possess an in-depth knowledge of X's health issues and needs and F placed X (as well as the other children) in unsafe situations exposing them to physical and psychological risk while they were in his care were correct. F's contentions omitted the grapple with the proposition that F does not possess an in-depth knowledge of X's health issues and needs and he has placed X in unsafe situations: at [164].

(vii) A relocation order should be made. In reaching that conclusion the court has carefully considered the detailed and complex matters that bear on an assessment of that question, underpinned as they are by the best interests of all children. X's needs and requirements predominate in the consideration of that issue although the needs of Y and Z are also highly relevant: at [220].

(viii) The relocation will impact on F's time with the children. Equal time is not reasonably practicable having regard to the four hour drive that will separate F in Town D from his children in Town B. The question is whether the orders proposed by M represent substantial and significant time for the children with F. And they do for the purposes of s 65DAA(3): at [221].

(ix) So far as there being no overnight time while X is in F's care, such a proposal is proper in the circumstances. F has trouble coping with the three children at once. The proposals put forward by M for the children to spend substantial and significant time with F satisfied s 65DAA(5)(b): at [222].

(x) The evidence revealed nothing adverse by way of impact on the children in the relocation proposed and in the substantial and significant time proposed by M. Relocation is in the best interests of the children, that consequent upon relocation F's time with the children will confer upon the children substantial and significant time and that the regime proposed by M is reasonably practicable: at [224], [232].

G Dickson instructed by *Moore*s for the applicant.

B Geddes instructed by *Coote Family Lawyers* for the respondent.

Wilson J.

Introduction

[1] The trial of this proceeding focused on two main issues. The first was the mother's application for an order for her to relocate with the three children to Town B from Town C in regional Victoria. The second was the mother's application for orders conferring upon her sole parental responsibility in relation to X, born in 2009. Other orders relating to X as well as Y (born in 2007) and Z (born in 2012) were also sought.

[2] All children have special needs. X's needs are very significant. He is currently under the care of an array of specialists. Since the mother and father separated in August 2016, the mother has assumed responsibility for meeting all

of X's special needs. That has required her to attend upon a large number of medical practitioners with great frequency. The mother contended that the number and frequency of her interactions with a large body of medical experts means it is in the best interests of the children to be nearer to those experts so that the children can obtain the best care in an expeditious matter. The father contended that it was not in the best interests of the children to make a relocation order nor for an order for sole parental responsibility to be made in relation to X.

Synopsis

- [3] For the reasons that follow I make orders —
- a) for the children to relocate to Town B;
 - b) for the mother to have sole parental responsibility for X;
 - c) for the mother and father to have equal shared parental responsibility of Y and Z;
 - d) for the father's time with Y to be agreed;
 - e) for the father to otherwise have substantial and significant time with X and Z but no overnight time with X.

Some formal particulars

[4] The mother is currently 44 years of age and the father is currently 46 years of age. They met in early 2006 and commenced cohabitation in late 2006. They married in 2007, separated under the one roof in October 2015 and the wife and children vacated the former matrimonial home in August 2016 to live in a rental property in Town C.

[5] The mother is a qualified health professional. The father owns and operates two farming businesses based in Town D. The mother is not presently working as a health professional.

[6] Y turns 12 in 2019. X turns 10 in 2019. Z will turn seven in 2019. The mother gave evidence that she is a full-time mother and carer to the children.

[7] In order to put the determinations in this case in context it is necessary to make various observations about the children and the health issues that have and will influence them as well as their parents when parenting them. In making the comments that follow I have done my best to narrate events in a neutral and objective manner. The source of evidence differed, depending on the child under consideration. The comments that follow proceed based on the ages of the children rather than on the seriousness of their conditions.

The child Y

[8] Unsurprisingly, each parent gave evidence about Y with observations beyond the way each parent interacted with Y. The mother described Y in paragraph 149 of the mother's affidavit sworn 3 May 2019 as "*an intelligent, sensitive young girl who has a desperate need to please people*". So far as behavioural issues were concerned, the mother stated as follows —

- a) Y has an anxious nature with demonstrated difficulties socialising with her peers;
- b) Y struggles in crowds;
- c) a psychologist, Dr F, who the mother consulted in relation to Y prior to the separation of the mother and father, raised the possibility that Y may be on the Autism Spectrum Disorder spectrum;
- d) in a report dated 9 May 2017 Ms G of MM Clinic expressed the view that Y met the criteria for an autism spectrum disorder diagnosis;

- e) Y's behaviour includes anxiety, aggression, frustration and fixation, she suffers from low self-esteem and finds it difficult falling asleep;
- f) between December 2016 and September 2017 the mother consulted Ms J a counsellor; and
- 5 g) Y currently attends upon Dr H, a clinical psychologist.

[9] Dr H made an affidavit on which she was not cross examined. Dr H was not required to attend court to formally prove her report made 20 June 2019. In that report she addressed clinical psychological issues relating to both Y and Z. For the purposes of this section of these reasons I have examined the report of Dr H in relation to Y only. In making her observations about Y Dr H was provided with a report from Ms J dated 5 April 2017 (that did not go into evidence), a report from Dr K dated 9 January 2018 (that did go into evidence) and a report by Ms G dated 9 May 2017 (that did not go into evidence). Dr H stated in her report made 20 June 2019 that she had seen Y between September 2017 and June 2019 on 32 separate occasions.

[10] Dr H made a collection of observations about Y as well as providing certain recommendations about her. So far as her observations were concerned, Dr H said the following of importance —

- 20 a) Y is friendly, warm, humorous, chatty and articulate yet she struggles when describing emotional experiences;
- b) Y's overall intelligence falls within the average range;
- c) to the knowledge of Dr H no specialist tutors are in the region where Dr H works to help children with dyslexia with literacy;
- 25 d) Dr H proceeded on the basis that Y had been diagnosed with dyslexia;
- e) Dr H found that at times Y communicated in writing when addressing topics Y found emotionally laden including any discussion about the father or about her violent outbursts towards Z (Dr H described these as "*controlling strategies*" the frequency of which increased or diminished according to the stress Y felt under);
- 30 f) Y was anxious when the father brought her to swimming late and when the father refused to allow Y to attend horse riding events when those events clashed with the father's time with Y;
- g) Y told Dr H that Y expressed sadness about Y's relationship with her father, especially that Y took the view the father did not love Y;
- 35 h) Y finds it difficult to be assertive about her needs with many important adults in her life;
- i) over the time Dr H had been working with Y she had not identified any positive aspect of the father or her relationship with the father;
- 40 j) Y is reliant upon the opinion of the mother on matters ranging from whether to continue swimming to the colour to choose for a craft project;
- k) Y's anxiety decreased for a time after she chose to cease overnight visits with the father; and
- 45 l) Dr H hypothesised that Y longs for a positive relationship with the father.

[11] Dr K made observations about Y. Taking first Dr K's 9 January 2018 report, Dr K devoted over three pages of her report to observations based on documentation Dr K read and an interview with Y on 5 October 2017. Dr K recorded —

- 50 a) Y was open, articulate and chatty;
- b) she exhibited features suggestive of poor self-esteem;

- c) Y struggled to describe her feelings and experiences;
- d) Y was keen to discuss horses;
- e) that she accepted IQ testing conducted by Ms G that revealed Y tested between 91 and 103 in the average range; and
- f) that Ms G concluded that Y likely met the criteria for an ASD diagnosis.

[12] Dr K's report dated 9 January 2018 contained a significant narration of responses to questions Dr K posed to the mother as well as to the father. Dr K addressed Y's responses to questions about the father stating that Y found spending time with the father difficult. Dr K reported that Y told her the father would not take Y to horse events and that the father did not like taking her to swimming events.

[13] On page 22 of her report Dr K offered a psychological assessment of Y. It included the following —

- a) Y was a vulnerable young girl showing evidence of poor self-esteem, some of which was attributable to her exposure to her parents' conflict and separation;
- b) Y was despondent showing signs of hopelessness and pessimism about her future;
- c) Y was aligned with her mother; and
- d) Y says she does not feel safe with her father and perceives her father's alleged behaviour towards her mother as unfair and unwarranted.

[14] Dr K provided a second report. It was dated 24 June 2019. Slightly earlier, on 26 April 2019 Dr K had interviewed Y and Dr K had telephoned Dr H on 15 May 2019. Some of the more important issues that were mentioned in Dr K's June 2019 report included the following —

- a) Y was more confident in her presentation than in the previous interview;
- b) Y did not present with poor self-esteem;
- c) she was happier by reason of less time spent with her father and more time spent riding her horse;
- d) Y spent more time with her mother and was less involved with the conflict between her parents;
- e) from the start of 2019 Y reported she had stopped spending time with her father;
- f) Y did not approve of the way the father parented Y's older brother X;
- g) Y told Dr K that Dr H was assisting Y; and
- h) Y told Dr K that she (Y) would adjust after a while to a move to a new location.

[15] Y's progress in school was the subject of evidence. Her 2019 semester 1 report was put into evidence. It revealed that she was at standard, meaning she was neither above or below standard in all subjects she studied. No adverse comments were made by any of her teachers.

The child X

[16] X is the middle child. In this portion of the reasons I have focused on his physical and behaviour issues as elsewhere in these reasons I have addressed issues concerning his interaction with each parent and his siblings. As the mother pointed out in paragraph 34 of her 3 May 2019 affidavit, X loves being outdoors, he is constantly on the move and he loves his family.

[17] It was not disputed that X has been diagnosed with a disorder that causes benign tumours to grow throughout the body, especially in the brain requiring lifelong medical management. The mother described the medical experiences X

has encountered to date. They include brain tumours, severe epilepsy, brain surgery resulting in significant parts of his brain being removed and uncontrolled seizures. X's treating neurologist, Dr L of M Hospital has indicated to the mother that X's development will decline. He has the intellectual development of a two
5 year old. The mother stated that X has autism spectrum disorder that limits X's development of social and interpersonal skills.

[18] The mother stated (and no challenge to the statement was offered) that X will never be able to live independently and will always require boundaries.

10 [19] X has encountered severe behavioural problems regulating his emotional state resulting in aggression towards his siblings and people around him, medication for which has been largely unsuccessful.

[20] The evidence revealed that X had previously suffered heart, eye and skin tumours along with kidney cysts and sinus infections. He presently takes seizure control medication in various forms. Some of those medications have side effects
15 that in one instance caused damage to his eye sight, in relation to another medication it reduced tumour growth and in relation to yet another medication it provided emergency relief for cluster seizures.

[21] X constantly requires medical attention for procedures, scans or therapy.
20 To date he has undergone —

- a) four procedures in the nature of brain surgery;
- b) a skin lesion resection;
- c) penile correction;
- d) dental surgery to remove four teeth;
- 25 e) a procedure to insert a chest drain
- f) adenoid and tonsils removal surgery; and
- g) grommet procedures.

[22] On 17 October 2018 X underwent surgery for the insertion of a seizure control device relating to vagal nerve stimulation ("VNS"). The uncontested
30 evidence showed that VNS reduces the frequency and severity of epileptic seizures in some children. The procedure that he underwent involved the insertion of a pulse generator, similar to a pacemaker, under the skin on the chest. The pulse generator sends intermittent electrical signals to the brain by stimulating the left vagus nerve in the neck. The pulse generator can be
35 programmed to automatically stimulate the nerve or it can be manually activated by the placement of a magnet over the pulse generator then removing the magnet.

[23] The mother described in detail, yet in an objective and unemotional way, the steps that she has adopted when preparing X for a surgical procedure. Those
40 steps have been necessary because of the violent reaction X exhibits in anticipation of the surgery. In one event X kicked hospital staff as well as the mother causing the hospital staff to ask whether security was required. Prior to anaesthetic being administered ahead of a medical procedure the mother said X usually develops a state of extreme panic requiring the mother to adopt a variety
45 of strategies to enable X to then undergo the relevant procedure.

[24] Dr L made an affidavit dated 30 April 2019 yet he was not required to give *viva voce* evidence in this proceeding. Dr L exhibited his curriculum vitae to his affidavit demonstrating his commanding expertise in the field of consultant
50 paediatric neurology and in epileptology. He stated in his affidavit that as at April 2019 he was employed at M Hospital with special expertise in epilepsy surgery, EEG and neuro imaging. His report was dated 29 April 2019. In cross

examination of the mother, further reports were introduced into evidence thereby improving the state of the evidence from Dr L. It is necessary to segment the information offered by Dr L in order to properly address the approach that was taken to Dr L's evidence by counsel for the father, Mr Bruce Geddes QC. The nature of the expert evidence given by Dr L was such that for the purposes of these reasons it was desirable to record substantial aspects of it, although not verbatim.

[25] Dr L stated in his report that he has managed X's condition since January 2010. Dr L stated he was a paediatric neurologist with special expertise in the disorder, uncontrolled epilepsy and in epilepsy surgery. He said he had been closely involved with the family over nine years given the complexity of X's condition. He said numerous other paediatric specialists have been and continue to be involved in X's case including specialists in autism, intellectual disabilities, language disabilities and behaviour disturbance. In response to a request for him to describe the precise nature of X's medical condition and the emotional, psychological, physical functioning and neurological impact of it, Dr L offered a lengthy statement which it is desirable to record. He said —

X has [... sclerosis], a genetically-determined "neurocutaneous disorder" in which multiple organ systems in the body are affected by benign and sometimes slowly growing lesions. The condition varies considerably in disease severity, organ extent, and impact on people. X has the common, severe form of [the disorder] presenting in infancy and manifesting throughout childhood and later life with seizures and developmental impairments. X commenced having seizures at age six months, those being infantile spasms which are associated with subsequent developmental impairments. Apart from brief periods of relative seizure control, X has had drug-resistant epilepsy throughout childhood. His seizures have responded partially to antiepileptic medications used in combination, brain surgery performed on two separate occasions in 2011, a relatively new drug treatment with an mTOR inhibitor, and most recently a vagus nerve stimulator. X continues to have multiple daily seizures, usually being relatively subtle episodes of behavioural change and quietening, but sometimes being associated with more obvious stiffening or twitching of muscles on one side. Fortunately, X no longer has forceful epileptic spasms, convulsive seizures or prolonged focal seizures like he used to have during early childhood, potentially an effect of the treatments over the years but also a function of increasing age.

Learning difficulties, intellectual disability, language disability, autism spectrum disorders, sleep disorders and behaviour disturbance occur in the majority of children with [the disorder] who have uncontrolled epilepsy beginning in infancy. As is hopefully outlined in detail in others' reports, X has significant cognitive, communication and behavioural impairments with formal diagnoses of intellectual disability and autism spectrum disorder. At this stage in his life, these cognitive and behavioural impairments are probably a more significant day-to-day problem than his seizures. These will not change over time, except for the possibility of increased behaviour difficulties when X is a teenager and adult.

X does not have significant [disorder] involvement of other organs ie he does not have a subependymal giant cell astrocytoma, he does not currently have renal cysts or angiomyolipomas, and his cardiac lesions have regressed.

[26] No challenge was made to that evidence. The more important aspects of that evidence I took to be the following —

- a) X has the severe form of the disorder which first manifested itself when he was six months of age;
- b) X has had drug-resistant epilepsy throughout childhood;

- c) his seizures have partially responded to antiepileptic medications, to two separate brain surgery procedures, an mTOR inhibitor and VNS yet he continues to have multiple daily seizures;
- d) X no longer has forceful epileptic spasms, convulsive seizures or prolonged focal seizures;
- e) learning difficulties, intellectual disabilities, language disabilities, autism spectrum disorders and behaviour disturbances occur with the majority of children with the disorder who have uncontrolled epilepsy in infancy; and
- f) X does not have significant involvement of other organs.

[27] Dr L's report also addressed the current treatment for his condition and treatment that may be considered in the future, including treatment from other specialists. Dr L's evidence was in the following terms —

X's epilepsy is currently managed with several antiepileptic medications taken orally (...), an mTOR inhibitor (...) and vagus nerve stimulation (VNS) therapy. His antiepileptic medication regimen has been stable for several years, attempts at weaning these medications associated with seizure exacerbation. There is no specific drug monitoring required for these, other than annual ophthalmological surveillance and testing under general anaesthesia for possible vigabatrin retinal toxicity. X has been on [the mTOR inhibitor] for several years, tolerating this medication well. It requires blood testing every three–four months to check blood levels and exclude any toxicity, eg depressed blood counts, elevated liver enzymes. [The mTOR inhibitor] needs to be ceased temporarily during illnesses, injuries and surgeries. A vagus nerve stimulator was implanted in October 2018, with the stimulation settings gradually increased to their current therapeutic settings. There may already be a slight response to VNS evident, with some lessening of X's usual seizure exacerbations, however VNS response can take one–two years.

In terms of potential future treatments, there may be new antiepileptic medications that X can try but it is unlikely these will improve his seizure control, given his underlying condition and the response to antiepileptic medications to date. We have considered the possibility of X having further epilepsy surgery but previous video-EEG monitoring suggested multiple seizure foci, such that further surgery was discouraged. X would not tolerate dietary therapies, such as a ketogenic diet. The hope is that VNS, combined with his current antiepileptic medications and [the mTOR inhibitor], will stabilise his epilepsy to a tolerable and manageable state, much improved on his epilepsy when younger and how his epilepsy would have been at this age if not aggressively treated during childhood.

[28] Dr L expressed his hope that with various measures having been taken, X's epilepsy will stabilise to a tolerable and manageable state. However, X's seizure control was unlikely to improve given his underlying condition and response to anti-epileptic medication to date.

[29] Dr L expressed his opinion about X's prognosis. He said the following —

I do anticipate that X's epilepsy will not worsen or improve significantly from this point. There may be a slight lessening of the seizure exacerbations and hopefully prevention of seizure worsening from the VNS. X will need to remain on antiepileptic medications, his mTOR inhibitor and VNS therapy. I don't believe that X will develop the severe form of generalised epilepsy with convulsions and drop attacks (Lennox Gastaut syndrome) that used to be a common progression of epilepsy in [this disorder].

Management of X's learning, communication and behaviour difficulties will be ongoing, at home and in educational and ultimately vocational settings. As an adult, X will be unable to live independently due to his intellectual disability, autism and epilepsy. X is at risk of developing kidney and liver lesions from his disorder when older but these will probably not cause any problems due to his ongoing treatment with an mTOR inhibitor that reduces their growth.

[30] Mr Geddes QC submitted that Dr L's opinion that X's epilepsy will not worsen or improve significantly was important to the determination of the questions in the mother's relocation application.

[31] Dr L expressed his opinion about the level of care X will require throughout his lifetime. He said the following —

X requires ongoing neurologist input into the management of his epilepsy, primarily the prescription and monitoring of antiepileptic medications and his mTOR inhibitor, but also the programming and monitoring of his VNS therapy. This would typically be at three–four monthly intervals. Additionally, X will require an MRI scan every 1–2 years until at least the end of his teenage years. Abdominal ultrasounds, ophthalmological review and potentially nephrology appointments will be needed when older, perhaps annually.

As previously mentioned, X's learning, behaviour and sleep difficulties are greater management issues and will require ongoing review by a general paediatrician skilled in these areas, and presumably also therapists and special educators. When older, X will presumably need to live at home or in an assisted residential setting.

I am unable to comment on the frequency and intensity of specific behavioural, learning or speech therapies. Several years ago, X underwent intensive ABA therapy for his autism.

[32] Dr L expressed his opinion on the long-term need for one or both parents to be substantially involved in X's care into the future and the extent to which Dr L believed one or both parents will need to be present or substantially present with him. Dr L said the following —

X requires a high degree of parental supervision given his intellectual disability, autism with associated communication and behaviour difficulties, and his epilepsy. At school and at home, X's carers need to be able to manage his behaviour difficulties, communicate effectively with him, and recognise his typical and atypical seizures. He needs medication administered twice daily and there is some special care required for his VNS. For prolonged seizures, which are now rare, X's parents and carers need to be able to administer first aid and emergency seizure medication (intranasal midazolam). This high level of care is typical of that needed for many of my patients, being provided by one or both parents, carers, teachers, therapists and aides.

[33] Dr L expressed his opinion about X's level of access to medical care and therapies that he requires for the long-term management of his condition in Town C where he currently lives as opposed to Town B. Dr L said the following —

X's complex medical management has been provided over the last nine years through the M Hospital outpatient clinic, the M Hospital telehealth system, occasional hospital admissions (less frequent now than when younger), public or private clinic review by his paediatrician and other medical specialists, and local services eg general practitioner, educators, therapists. Providing this care was challenging for the family several years ago when they lived in Town D and X's epilepsy was more severe. In recent years, this has presumably been easier with X residing slightly closer to Melbourne, his seizures being less severe and his admissions and investigations being less frequent. While travelling times for the family would be briefer if they lived in Melbourne, there is no specific medical reason why X needs to live closer to the M Hospital. I can see no specific advantage or disadvantage for X living in Town B, Town C or any other regional centre in Victoria.

[34] Dr L was asked to express his opinion about the likely emotional, psychological, physical and functional impact of X's condition on his siblings and those giving him care. Dr L said the following —

X's condition has undoubtedly impacted on his parents and siblings. In early childhood, his epilepsy was severe and X was being frequently hospitalised. During later childhood, the emerging intellectual disability and autism further added to family stressors. Other specialists can provide more expert opinion about the impact of developmental disabilities on the psychological wellbeing of families but it is well known that relationships, employment, psychological wellbeing, general health and overall quality of life suffer.

[35] If X's parents were forced to rely on the public health system, Dr L offered a view. It was as following —

The neurological management of X's seizure disorder is currently provided within the public system, in the neurology clinic at the M Hospital. Our clinics are bulk-billed and medications are prescribed on the PBS or through the hospital pharmacy if not PBS listed. Thus, there should be no significant out-of-pocket expenses. When admission has been necessary, the family usually elect to be admitted privately, though this does not impact on the care provided. Purchase of the VNS device by the hospital was partly offset by their private health insurance but should this not be continued, replacement of the VNS can be paid for in the public system.

My understanding is that X may access general paediatric, some other specialist paediatric, and therapy services through the private system, with some out-of-pocket expenses. Some of these services may not be as readily available in the public system, but I am not able to comment further.

[36] Mr Geddes QC for the father put into evidence through the mother progress notes prepared by Dr L in relation to consultations with X over 2018 and 2019. The first of the progress notes related to a consultation on 12 February 2018. On that occasion the father only accompanied X Dr L recorded the father's comments to Dr L that in the father's view, X's seizures were better (he used the word milder). The father said to Dr L the father rarely saw seizures, none some days. The second of the progress notes related to a consultation on 21 March 2018 which X, the father and mother attended with two others. In contradistinction to the information given to Dr L on 12 February 2018, on 21 March 2018 Dr L was told that X continued to have multiple seizures daily, the frequency of which was increasing and that X's abilities had been progressively declining in terms of play and communication. Dr L recorded that he did not think X should have more surgery due to independent bilateral seizures, among other things.

[37] The next consultation recorded by Dr L was on 25 July 2018. The mother accompanied X on that occasion. Dr L recorded that as at 25 July 2018 X was having daily seizures that took the form of staring seizures, laughing seizures and seizures with half smiles. Dr L recorded that the mother stated she observed at least four seizures per school day when at home.

[38] On 12 November 2018 Dr L saw X. The father and mother accompanied X to the appointment. Dr L reported that X's seizures were unchanged, his sleep was worse and on that occasion X presented with a limp that was not explained by trauma nor was it connected to seizures.

[39] On 19 December 2018 Dr L saw X again, accompanied by both parents. Dr L recorded that X's seizures continue but that he may have had fewer bad days and that X was brighter and speaking more. Dr L recommended reducing medication.

[40] On 20 May 2019, that is to say shortly prior to the trial of this proceeding, X consulted Dr L accompanied by both parents. Dr L recorded on that consultation that X's parents attempted to reduce X's dosage of the medication

Sabril but X's seizures increased. Dr L reported that since the VNS, X was not having cluster seizures and prior to the reduction of Sabril, X's overall seizures seemed to reduce in number.

[41] X's epilepsy management plan went into evidence. Dr L endorsed it and dated it 13 December 2018. It revealed that X's seizures took one of four forms. Each was expressed as if spoken by X himself. The seizures were described as "everyday seizures," "laughing seizures," "eye blinking seizures" and "blue episodes." Everyday seizures were the most common with X having approximately 12 per day. An everyday seizure was described in the following terms in X's epilepsy management plan —

This seizure may start with me looking around. My movements become slow or I freeze. My eyes get a glassy, vacant look. I will have altered awareness and may not be able to respond to you. If you pick up my hand, there will be no resistance (floppy). I will get a 'smile' on half or my whole face when the seizure ends.

[42] Mr Geddes QC relied heavily on the evidence of Dr L in which Dr L stated that he could see no specific advantage or disadvantage for X living in Town B, Town C or any other regional centre in Victoria.

[43] Dr K expressed her psychological assessment of X. She said the following —

Psychological assessment of X found a boy with significant developmental delay and limited verbal skills. In addition, his behaviour appears to be very difficult to manage and both parents described that he does best in familiar environments with a known and regular routine. He is a boy with a large build for his age where physical restraint is likely to be a strategy in managing him.

[44] Little alteration was given to her assessment by her report made in June 2019. There, Dr K said the following —

X is a child with significant health concerns and severe developmental limitations. He will likely require care over his lifetime and currently needs considerable supervision and monitoring of his behaviour to keep himself and others safe.

[45] As at the date of the trial of this proceeding, X was a student at Town C School. His individual student report for semester 2, 2018 went into evidence. Among the more significant matters to emerge from that report were the following —

- a) X was capable of tracing over outlines;
- b) he can mimic familiar readers;
- c) with visual and verbal prompts X was able to match numbers from one to 10;
- d) X was able to count in a group;
- e) X was able to stay with a group while walking through shops;
- f) with visual and verbal prompts X was able to use a pair of scissors to cut simple shapes; and
- g) X was able to let a listener know what he wants using several words in appropriate contexts.

[46] A report from N Services went into evidence in relation to X. The author of the report was not called to give evidence. In any event, several matters emerged from that report, including the following —

- a) X can become violent when escalated leading to his hitting, spitting, scratching and biting "when in a meltdown" (those words appeared in the report);

- b) predicting X's behaviour is difficult as he has fluctuating interests and sensory needs;
- c) X had no schedule of routine;
- d) he is often non-compliant with verbal requests made by the mother or by his carers;
- 5 e) at night X ordinarily demands that the mother lies next to him until he falls asleep and the process repeats if X wakes up during the night;
- f) X is frequently violent towards his younger brother Z;
- g) X reacts violently at being told "no" to something resulting in damage to walls, shelves, curtains or items that can be thrown;
- 10 h) X's physical outbursts are not always consistent in time or place;
- i) at bedtime X continues to kick, pinch, push, hit and spit and he continues to attempt to knock over a chest of draws and to pull curtains off the window; and
- j) X wakes regularly throughout the night.

15 [47] N Services provided a report of an assessment of X done on 27 May 2019. Some of the more important issues that emerged from that report were as follows

- a) X uses single words to communicate, although he does not converse and sometimes uses signs;
- 20 b) X does not initiate interaction and randomly says lists of words having no association;
- c) he does not have friends at school because of his physical behaviour;
- d) he has high anxiety when going to school each day and when visiting his father;
- 25 e) X sometimes finds showering to be calming yet he dislikes rain and wet clothes;
- f) he often bites the mother;
- g) when toileting, X needs help wiping and then washing his hands;
- h) X urinates outside and in public and occasionally after a bowel motion spreads his faeces everywhere;
- 30 i) X's sleeping has been a big issue all his life and since his parents' separation his sleeping has worsened with the mother adopting a different approach to the father thereby confusing X;
- j) he needs help to dress properly;
- k) he needs help to brush his teeth properly;
- 35 l) X has behavioural and emotional problems that require attention with treatment; and
- m) X will attempt to harm another if he feels his personal space is being intruded upon or if he is ignored.

40 [48] In mid-June 2019 X was observed and a précis report prepared. It revealed that X's behaviour had improved based on the behaviour support plan N Services formulated. Of particular relevance was the fact that —

- a) X exercised each day;
- b) his access to his iPad was limited to 30 minutes per day;
- c) X hit out at his brother only twice;
- 45 d) X's behaviour leading to the harming of others reduced during the day;
- e) X's property destruction had reduced;
- f) his poor behaviour at bedtime continued; and
- g) he seemed to be less anxious.

50 [49] Ms P's affidavit made 7 May 2019 to which she exhibited her report made 11 April 2017 went into evidence without Ms P giving *viva voce* evidence. She gave her occupation as a senior speech pathologist who had worked for over 20

years with people with disabilities. Ms P recorded a significant history that presumably the mother provided to Ms P. Of the more important matters that arose from Ms P's assessment were the following —

- a) X was capable of understanding picture communication symbols on theme boards and of using those symbols to increase the mean length of utterances, that is to say, the number of words in each sentence;
- b) with support from school and family, X may be able to use a simple multi-level communication system;
- c) X did not process all of the words spoken to him and he tended to act upon the first or the last main word in a sentence; and
- d) X needed ongoing help from a speech pathologist.

[50] The principal of Town C School provided an affidavit on which the mother relied. Ms Q, the principal, made a report dated 26 March 2018 and also a report dated 3 May 2019 that he exhibited to his affidavit made 28 May 2019. Mr Q was not a psychologist. However, he has many years of experience as a teacher (both classroom and principal) in special schooling. He was put forward as a witness who could address one of the mother's threshold applications, namely, relocation. Mr Q asserted that he was "*highly confident*" (his words) that X would benefit from a relocation to Town B because of the prevalence of a "*range of opportunities that are not currently available to him*" in Town C. That conclusion was not particularly useful as Mr Q did not explain why he reached it. But to the report of Mr Q he appended a psychological assessment report prepared by Ms R who did not prepare an affidavit or give *viva voce* evidence. Her report was dated 1 November 2016. In it she described X's teachers who had said that X had severe deficiencies in all areas of the curriculum due to his IQ. Other issues Ms R highlighted included the following —

- a) X was a very low functioning student who had difficulties in all academic areas;
- b) he has problems concentrating, he lacks social skills and he has emotional and behavioural issues;
- c) he uses one word utterances;
- d) X is unable to write at all;
- e) he has no balance;
- f) he can become aggressive in the classroom, scratching and hitting people or pulling hair;
- g) he is unaware of his environment requiring full supervision at all times;
- h) he needs help dressing and in toileting; and
- i) he was unable to complete any of the subsets required to obtain an overall cognitive functioning score due to his low cognitive abilities and functioning.

[51] In the opinion of Ms R and based on the assessment conducted by her, X presents with a severe intellectual disability. She said he would benefit from a specialised environment.

[52] Mr Q provided a more recent report dated 3 May 2019. He was asked to respond to a collection of specific questions posed by the mother's solicitors in their 9 April 2019 letter. Mr Q duly responded. Many of his responses were in the nature of general observations such as Mr Q's expectation that X will require full supervision and care throughout his life. His conclusion that X can attend school until 18 years of age may be more of an optimistic wish than reality given other evidence surveyed above about X's behavioural issues, his low cognitive functioning and his severe intellectual disability.

The child Z

[53] The youngest child is Z. He too has a collection of issues, although by no means are they as significant as X's. It is necessary to descend to the detail in examining them.

5 [54] Dr V, a consultant paediatrician made an affidavit on 29 April 2019 to which he appended a report concerning Z. On 14 March 2017 Dr V diagnosed Z as having autism spectrum disorder according to DSM-5 Z criteria. To his 14 March 2017 report Dr V attached a report of Ms S, speech pathologist dated 28
10 February 2017. In that report Ms S stated that Z did not tolerate any touch and that he became angry if touched. Ms S spoke of Z's meltdown (her word) over seemingly small issues. Ms S stated she was unable to assess Z's expressive and repetitive language as to that date in 2017 Z was unable to tolerate testing. She said Z's pragmatic communications skills revealed more obvious disorders. She
15 said he had obvious deficits in developing and maintaining social interactions, struggling to adjust his behaviour to match the social situation. Ms S supported an ASD diagnosis for Z.

[55] Dr F provided a report dated 2 March 2017 to Dr V that Dr V appended to his affidavit. Dr F's report provided a clinical psychological assessment of Z. In it she stated the following —

- a) Z displayed minimal emotion or affection and he does not respond to social interactions;
- 25 b) Z does not make eye-contact except when wanting something and even then it is directed to the corner of that person's eye;
- c) his verbal and non-verbal communications are abnormal;
- d) he does not have the skills to form friendships;
- e) when excited he flaps his arms and bounces;
- 30 f) fans, windmills and spinning lights excite him;
- g) he talks very little;
- h) he is prepared to adjust to changes to his routine so long as an explanation for the change is given;
- i) he forms obsessions with objects; and
- 35 j) he merits a diagnosis of autism spectrum disorder.

[56] A sensory profile report prepared by Ms T in relation to an assessment of Z on 26 April 2017 was appended to Dr V's affidavit. In that assessment Z's response to various matters was measured against results or responses provided by other children on a comparative basis.

40 [57] Dr V provided a further report on 13 March 2018. In it he expressed encouraging views about Z making progress that Dr V described as "very well." Dr V described Z as social, although at times, according to Dr V, Z lacks social insight. Dr V said Z was not accessing services.

45 [58] Dr H's report dated 20 June 2019 addressed issues relating to Z as well as issues relating to Y. Dr H said she saw Z on 13 separate occasions between October 2018 and June 2019. In a chronological context, Dr H reported that the mother had informed Dr H that Z demonstrated inappropriate sexual behaviour in February 2019. Dr H offered a variety of explanations for Z's behaviour but
50 declined to express a concluded view as she said she did not have enough information. She said Z dislikes visiting the father.

[59] Z's school report for semester 1 of 2019 confirmed that Z was at standard in all subjects. By way of general comment in that report nothing adverse arose. In fact, a fair reading of that report revealed a child who contributed to school life and fitted in well, despite his diagnosis for ASD.

[60] Dr K made observations about Z in her two reports. In her first report, Dr K said of Z —

- a) he was distractible and found answering questions difficult;
- b) he said he did not enjoy going to his father;
- c) said Z told her that Z regarded his mother as "*good and nice*";
- d) that X hurts him;
- e) that Z loves his sister; and
- f) that Z was kind to X.

[61] In her second report Dr K said Z was in the lower ranges of emotional and verbal maturity against age related peers. She said he was distractible, he showed poor concentration, he struggled to respond verbally to questions and he was often silly. She said that Z generally seemed uncomfortable and irritable. Dr K said Z's behaviour seemed fractious, defiant and oppositional. Dr K said that Z appeared overstimulated and unable to manage his emotions. Z said he did not like his father. According to Dr K, Z told her that he reported to Dr H that the father had touched Z's "*private parts*", as he described it. That led Dr K to telephone Dr H about Z's revelations of alleged sexually inappropriate behaviour. In the upshot, after consideration Dr K took the view that Z's allegations were unlikely and that based on the style of Dr H's questioning, probably produced a false positive result.

Drawing the threads together about the children

[62] To a greater or lesser degree, each of the three children has health or behavioural issues. By far, X's circumstances are the most complex. When carefully analysed, X's circumstances in July 2019 appear to be less severe than they were in, say, 2017. Better information exists in July 2019 to assist X. It seems that the VNT device has been helpful. His medication is in a more settled and less experimental state. Yet his prognosis for the future very much depends on on-going immersion by family members, especially the mother, by a variety of health professionals and carers and by frequent on-going involvement of specialist medical practitioners, particularly Dr L. X's behavioural development will require constant monitoring. For example, his sleep patterns remain unsettled and the steps involved in getting him to sleep are not yet fully settled. The mother has progressed from needing to lay next to X to being outside his bedroom.

[63] On behalf of the mother Mr Dickson QC urged me to accept that the frequency of the ongoing involvement of a large number of medical practitioners indicated the likelihood that the needs of the children were better served by proximity to those medical services in Town B rather than in regional Victoria. My more in-depth consideration of the issue is set out below.

[64] Having recorded the medical and behavioural circumstances of the children, it is now necessary to turn to an examination of the parents. Some of the information on which the observations that follow is based comes from the very detailed affidavits filed by each parent. Other information has emerged from the evidence given by the expert witnesses who provided reports for use in this litigation.

The mother

[65] Commencing at paragraph 407 of her affidavit made on 3 May 2019 the mother outlined her personal information. She deposed to the following —

- 5 a) she was born in Town D, in regional Victoria and was one of four children;
- b) she attended secondary school in Town D and in Town B;
- c) she studied at the CC University;
- d) while in her final year of her university studies she met the father;
- 10 e) she decided to forego a business in Town BB and decided instead to open a business in Town C, close to the father;
- f) in late 2006 she fell pregnant with their first child;
- g) they married in 2007; and
- 15 h) Y was born in 2007, prior to which the mother experienced complications while pregnant requiring hospitalisation for several months.

[66] The mother did not divulge certain information in her affidavit material that instead came from Dr K, some important, some not. Dr K narrated information that was presumably given to her by the mother by way of background or history. It included details of the mother's family, especially her
20 parents and siblings, her childhood, certain learning difficulties she encountered by reason of her dyslexia, her progress academically and in sports while at secondary school, her experiences as a youth worker and her time managing her family's farm. She also gave Dr K information about her having been sexually abused by her brother until 12 years of age. Dr K reported that the mother's
25 mistrust of relationships may be explicable by reference to her abuse by her brother. Dr K reported that the mother told Dr K that the mother was initially attracted to the father because he was "*quiet and safe*", "*really gentle*" and "*quietly spoken*", those words being taken verbatim from the conversation between Dr K and the mother. Dr K reported that the mother indicated early
30 problems in the mother's relationship with the father including how he was easily upset and the father suggesting to the mother that the father would take his own life.

The father

35 [67] The father's affidavit sworn 7 June 2019 was long and responded to a large number of the matters given in evidence by the mother. However, he gave very little evidence of his personal circumstances beyond stating his age, that he was a self-employed farmer who owned his own farming business as well as a contract baling business. He said that since this litigation began he has
40 experienced depression, stress and anxiety.

[68] As with the mother, Dr K provided relevant background information about the father. It is useful to set some of it out below. Dr K reported —

- a) the father is softly spoken who presented as earnest and having limited imagination;
- 45 b) he focused on a small circle of trusted people and was otherwise inclined to be suspicious of others;
- c) the father told Dr K that he struggled with literacy throughout his school years;
- d) he has re-partnered;
- 50 e) his present partner assists the father with reading and with administrative duties;

- f) the father described himself as being highly adept with machinery (his actual words recorded by Dr K were that he was “*brilliant with machines*”); and
- g) he has had no previous psychiatric or forensic history

Each parent’s interaction with each child

[69] It was common ground that the mother had been the primary carer for the children since the birth of Y. Under no circumstances could it be said that the mother has been anything but exemplary in her devotion to her children, especially in view of their very significant health and behavioural complications. It was put to the mother that she had been a “*helicopter*” parent, especially towards X. She disagreed as do I. His needs have been so great for the entirety of his life that he has required and been given extraordinary care by the mother. Many episodes affecting the children were documented by the mother in her 3 May 2019 affidavit. In view of X’s particular (and extensive) needs, the mother made the following statement in paragraph 148 of her affidavit —

I am the best person positioned to know what is in X’s best interests. I have been making the important decisions in relation to X’s health unilaterally for his whole life. To maintain control and ensure X receives the best treatment and lives his fullest life, I seek an order for sole parental responsibility in relation to X. I do not intend and have never excluded Mr Richter. I will discuss all medical decisions with him and value his opinion, however it will just prevent confusion and conflict including for X’s treating specialists and reduce my fear for X’s long term future.

[70] Counsel for the father objected to that evidence on the basis that it was opinion or it was argument. Whether or not the mother believes she is the best person to know what is in X’s best interests, the structure of the Family Law Act entrusts to this court the ultimate decision about X, underpinned by a deep investigation into his best interests. The mother’s comment that she has unilaterally made the important decisions about X’s health for the whole of his life was the very reason the father sought orders for equal shared parental responsibility for X. At a factual level, the father did not seriously challenge the mother’s evidence about her role and active involvement in all of X’s medical issues including visits to specialists, therapists or treaters from all facets of the medical profession.

[71] It seemed to me that the mother was extremely focused on X’s welfare. She has had a long and deep involvement with the medical practitioners who have provided advice, assistance or treatment over the whole of X’s life, especially Dr L who has had a major role in X’s life to date. The mother’s qualifications enable her to understand the significance and detail of the medical issues that confront X and which have confronted him since his birth.

[72] There can be no doubt that the task of parenting X is extremely difficult. Aside from his physical health issues, his behavioural complications coupled with his size and strength make the task of caring for him a formidable one. Understandably, the mother seeks some respite from the daily challenges posed in raising X. Detailed evidence was adduced (none of which was challenged) that X’s aggressive behaviour causes incidents at his school, at home and with carers. Medication is presently assisting. However, he requires constant supervision. Reprimanding him physically or verbally only encourages his misbehaviour, according to the mother. The mother has persisted in her endeavours to improve X’s sleep habits.

[73] The mother impressed me as being an extremely devoted parent to X who is determined to improve his lot in life as best she is able.

5 [74] Y's complexities are not as involved as X's. Her care requirements are not as involved, therefore. Nothing in the material indicated that the mother had been anything but a committed, involved, loving, caring and able mother in the mother's interaction with Y. Of course, in view of the desirability of ensuring the children live with one another to the extent possible, if a relocation order is made premised on the need to be closer to medical services for X, then all children will need to be relocated.

10 [75] Similarly, with Z, the mother impressed me as being very focused on all aspects of his welfare. She has taken him to all specialist appointments, consultations with therapists and other experts. For that matter, the father did not suggest otherwise.

15 [76] In short, in my view the mother has been an extremely involved, hands-on parent for all children. She enjoys a very favourable relationship with each child.

[77] The same cannot be said of the father's relationship with his three children. The evidence was equivocal about the precise point in time when the father's relationship with his children deteriorated. It is necessary to take each in turn.

20 [78] According to Dr K, the mother described Y's relationship with the father as being troubled at times. Dr K reported that prior to her parents' separation, Y had been craving for her father's attention. While the parents were separated under the one roof, according to Dr K, the mother stated that the father showered (Dr K's word) affection upon Y and Y thrived in that environment. Dr K reported that the father told her that he did not understand issues relating to Y's diagnosis of ASD. Dr K reported that Y told Dr K that Y was of the view that things are much better for her with her parents being separated as there now is "*not much fighting*" (Y's words). Y told Dr K that on occasions she does not want to see her father. Dr K reported that the father on one occasion became angry when Y reported that X had a seizure that Y reported to the mother, after which Y told Dr K that she (Y) was careful about raising issues of X's seizure with the father. Y was pressed by Dr K about Y's relationship with her father in answer to which Y said she wanted to see her father less frequently, that the father will not take Y to horse activities, that the father did not enjoy taking Y to swimming events and that the father had not seen her ride her horse. Y told Dr K that she (Y) was unable to have a good relationship with him. Y told Dr K that Y took that view because the father refused to talk to the mother.

35 [79] In her application to this court, the mother sought orders that Y spend time with the father by agreement.

40 [80] The father's interaction and relationship with X was far from straightforward. Dr K reported that the father expressed his love for all three children. The father's evidence in the witness box was to like effect. On the father's own evidence, X presented as a challenge to parent. The father told Dr K he wanted the best for X. The father told Dr K that the father took the view his relationship with X was good and that the two talked the same language.

45 [81] The mother took the view that the father lacked the necessary insight to adequately care for X without assistance. The mother told Dr K that the father did not have the same understanding as she did of X's needs. That said, the mother gave evidence that she at all times has wished the father to have a full and loving

relationship with the children. She pointed to communication difficulties between the parents making for difficulties in co-parenting.

[82] The mother gave evidence that X is edgy and agitated in the presence of the father. The mother gave evidence that the father rarely provided a description of his observations when X suffers a seizure. The mother stated that without those descriptions, she is impeded in the provision of the appropriate medication. In early February 2018 the father recorded in a communication book that X experienced minimal seizures whereas the mother said X was experiencing a high level of seizures. The mother took the view that the father had difficulty identifying seizures with the consequence that the father was unlikely to be treating them properly. It must not be overlooked that the mother administers medication to X in various forms, some of which address seizure control and one addresses cluster seizures. The mother stated that the father often leaves X in the care of the father's mother. The mother stated that X returns from the father's care in an aggressive state.

[83] A very large portion of the mother's evidence was the subject of objection by the father. Various grounds were pressed including hearsay, opinion, conclusion, relevance or submission. Both counsel requested me to receive the evidence despite the objection and to deal with the objection by according the evidence such weight as I considered appropriate. That was certainly a pragmatic approach having regard to the provisions of s 69ZT of the Family Law Act. In view of the course urged by counsel I have approached the evidence that was the subject of objection on that basis, that is it say, by receiving it yet according it such weight as I considered appropriate. That approach obviated the need to consider whether s 69ZT applied to the contents of an affidavit as opposed to *viva voce* evidence given as part of a witness's evidence-in-chief or cross-examination. In my view, the mother's statements in her affidavit were useful in the overall, whether suffering from deficiencies that may apply in adversarial litigation, say, in a property proceeding, especially in reference to her perceptions of the father's shortcomings when parenting X I have carefully considered the mother's evidence on point and balanced it against the evidence given on the same point by the father. As to the meaning of "*consider*" I have carefully kept in mind the observations of the High Court on point in *Bondelmonte v Bondelmonte*¹ as well as in the decision of Watts J in *Fells v Fells*.²

[84] The mother stated in her evidence that Y has undertaken tasks associated with preparing X for bed because the father frequently falls asleep before X. The mother has stated that Y continues to assist caring for X and Z.

[85] Counsel for the mother advanced the contention that the father does not steer X away from dangerous situations. He cited an incident where a tea towel caught fire in the microwave oven after X placed it in the microwave and activated the oven. Photographs were put in evidence of —

- a) a tractor on which X was sitting at the steering wheel the left front wheel of which tractor was raised off the ground by a header attached by a chain;
- b) X climbing the internal wall of a garage door;
- c) X at the top level of a cupboard, apparently having climbed there;

1. (2017) 259 CLR 662; 341 ALR 179; [2017] HCA 8.

2. [2019] FamCA 308.

d) X laying on the dorsal surface of what seemed to be a steel girder off the ground (although the precise height off the ground was not given in evidence);

e) an unfenced subfloor pit in a shed; and

5 f) X and Z placing a cat into a front loading washing machine.

[86] The father gave evidence that X enjoys spending time on the farm. That much seemed to be common ground. If X is unable to protect himself from risks arising at the farm then the amount of enjoyment he derives from time on the farm is not the end of the matter. The mother accepted in cross examination that X enjoys the farm and machinery.

[87] The father gave evidence in answer to questions put to him in cross examination that he has trouble looking after all three children when he has the care of all three children. The father admitted telling Dr K that he conceded the mother manages better than him in looking after the three children at once.

15 [88] The father admitted in cross examination that since April 2016 he had not physically attended on any medical practitioner beyond Dr L and Dr W in relation to appointments for any of the children.

[89] The father gave evidence he had trouble remembering medical information. He said he gets help to assist him in that regard.

[90] The father gave evidence that at night he locked the children inside the house by locking certain doors with deadlocks.

25 [91] The father was at pains to convey to me that until separation he had been involved in X's visits to Dr L and that the mother included the father in discussions with Dr L about X's treatment.

[92] So far as Z's circumstances were concerned, the father gave evidence that by the start of 2018 he did not understand Z's diagnosis. He said initially he thought Z had been diagnosed too quickly, a matter in which he expressed his disappointment. The father said he attended a consultation with Dr V at which the father understood Dr V to explain that some children who are diagnosed with autism at an early age grow out of it whereas others do not. The father said he thought there was nothing wrong with Z from 2017 when the father became aware of Z's diagnosis. Mr Dickson QC put to the father that the father knew of Z's diagnosis from March 2017 until March 2018 (the latter date being the date of his visit to Dr V) and proceeded on the basis that the diagnosis was wrong. In response the father said —

I don't know what to say.

40 [93] In that 12 month period the father agreed he did not communicate with the mother to say he disputed Z's diagnosis. The father agreed he always trusted the mother as he was content to let the mother make relevant decisions and she made good decisions. He said he continues to so trust her. He said later that he trusted the mother in her decisions and he trusted the soundness of the decisions she made.

45 [94] The father emphasised in his *viva voce* evidence that he and the mother made decisions on medical issues while their marriage was intact and that since separation, so the father said, the mother alone made decisions about the children. The father was challenged on whether he jointly made decisions about medical issues during the marriage. He agreed he left the decision making to the mother. Mr Dickson suggested that in relation to Z the father had not attended any

consultations with medical experts in the 12 months prior to his reading of Dr K's 2018 report. The father answered saying he could not recall.

Assessing the evidence of the mother and the father

[95] This was not a hard-swearing case where one party asserted a diametrically opposite version of events in relation to the same factual matter. Instead, the mother and father were at odds in relation to whether the relocation proposed was in the best interests of the children and whether the commensurate diminution in the time the father will spend with the children is in their best interests. The mother and father each made extensive trial affidavits that they adopted. Each entered the witness box where each was cross examined at length and with considerable exactitude by Queen's Counsel of great eminence.

[96] As the trial judge I enjoyed all the advantages of which Kirby ACJ spoke in *Galea v Galea*.³ There, his Honour said the trial judge has the advantage of —

- a) hearing the evidence in its entirety;
- b) hearing and seeing all evidence in context, chronologically and logically advanced;
- c) having time during adjournments and during the running of the case to reflect upon the evidence and to weigh it against all other evidence while fresh;
- d) hearing and seeing interruptions, hesitations and delays in the giving of testimony; and
- e) observing body language, sometimes important for interpreting communication.

[97] Several things must be said of not only the evidence each gave but of the way each gave it. There can be no doubt that the mother is a highly intelligent, articulate and driven person. She debated at length concepts and specific propositions put to her by Mr Bruce Geddes QC. She handled herself admirably. Where relevant, she made appropriate concessions. Where she disagreed with a point put to her by Mr Geddes she said so. In large measure her answers to questions put in cross examination corresponded to the version of events given in her very long and detailed trial affidavit. She was measured and matter-of-fact in her central thesis that while the father loves his children and wants only the best for them, he does not possess the necessary skills and does not have the necessary insight to advance the best interests of the children in Town D. I detected no malice in her stance. She adopted a very hands-on approach to parenting. Given that proper parenting of all children has and will continue to involve a constant and fully-immersed role with medical practitioners, she took the view that her skills in medicine enable her to comprehend, assimilate and then do whatever the medical practitioners recommend, especially Dr L in relation to X.

[98] The same cannot be said of the father. He has very real literacy problems and needs help to overcome that, often from his own mother who reads documents to him. That issue in itself presents an obstacle for the ongoing future management of all children's needs. The evidence revealed that the father obtained Y's assistance with medication for X. But a very large point of concern for me was the father's admission that he had trouble following "*the medical stuff*". The children's day-to-day requirements are closely tied to their medical

3. (1990) 19 NSWLR 263.

needs. The father's familiarity with those medical issues was nowhere near as developed as was the mother's. In terms of his style of response to questions put in cross examination, the father appeared to have trouble comprehending the questions put at times. I mean no disrespect to the father in pointing that out and, in fairness, Mr Dickson was balanced and even handed in the wording he chose to put to the father. The father maintained his position that the mother was inappropriately obsessed with safety issues on the farm. The father did not concede he had trouble with boundaries for the children, especially after he stated he took four photographs of his sons putting a cat in the washing machine rather than stopping the children from doing what they were doing. The father was unshakable in his belief that X's behavioural problems at every level will be solved by X having time on the farm because, according to the father, he had never observed X react badly in the outdoors. Those responses revealed to me that the father refused to entertain the possibility that the farm may not be the solution that the father believed it was to the behavioural issues exhibited by X.

[99] In my view the mother and the father gave honest evidence. Neither attempted to put a gloss on events that represented embellishment. I took the view each did her and his best, respectively, to honestly and truthfully give accurate evidence.

[100] Based on the foregoing and having heard and observed the mother and father when giving their evidence, it is possible to make certain factual findings on which other aspects of these reasons are premised. In no special order they are as follows —

- a) both the mother and father deeply love each of their children and want the best for them;
- b) the health and behavioural issues of all children have presented very considerable challenges for both parents and will continue to do so in years to come;
- c) of the three children, X's health and behavioural issues have presented the most significant challenges for both parents;
- d) to date the mother has deeply immersed herself in a full understanding of the medical issues affecting all children, especially X;
- e) during the marriage, the father made certain limited endeavours to familiarise himself with medical issues of relevance and to the conditions affecting each child;
- f) during the course of the marriage and subsequent to its collapse the mother has made all key decisions about medical matters relating to the children;
- g) during the course of the marriage the father's involvement in decision making about the children's medical issues was limited, confined to the mother informing him of medical information and advice imparted to her by medical practitioners;
- h) since separation, the father takes the view that he has not been involved in decisions affecting the children's medical issues; and
- i) since separation the father has been involved only to a very limited extent with medical practitioners who have seen the children in respect of their medical issues.

[101] So far as each parent's interaction with the children was concerned, other findings may briefly be stated. They are —

- a) the mother has been deeply involved in X's welfare and ongoing medical diagnoses since birth;
- b) she has made the key decisions about investigation, diagnosis and treatment of X's many health issues since his birth;
- c) the father has trusted the mother to do that and he is of the view that the mother's decisions have been sound;
- d) the father has been involved in steps associated with the investigation, diagnosis and treatment of X's many healthy issues to a vastly lesser extent;
- e) the father possesses a limited understanding of those medical issues and therefore trusted the mother to immerse herself in attending to them;
- f) the father finds it difficult to look after the three children at the one time;
- g) the father's judgment when supervising X has been questionable especially in relation to his sons putting the family cat in a washing machine, X climbing on various objects depicted in the photographs given in evidence, and X being involved in setting fire to a tea towel in a microwave;
- h) the father's management of X's sleep patterns has been questionable when laying down with X in an endeavour to send him to sleep when the mother was concurrently endeavouring to instil a regime where he fell asleep himself, thereby reducing his dependency; and
- i) the father's knowledge of X's medications was questionable leading to uncertainty that the father will have the necessary skills to administer the correct medication when X has any of the various seizures about which evidence was given.

[102] So far as Y and Z were concerned, agreement existed that the mother and father should have equal shared parental responsibility for Y and Z. The time that the father should spend with the children was an altogether different issue.

Relocation — Certain factual matters

[103] Mr Dickson QC opened this case on the basis that the mother's application to relocate was the first and largest of the issues in the case. Mr Dickson said the second issue in the case was her application for sole parental responsibility in relation to X only. Having heard Mr Dickson's characterisation of the relocation application as the first and largest issue, it is appropriate to address it first.

[104] A useful starting point in any examination of an application for a relocation order are the elements of s 60CC(3) of the Family Law Act as well as the learning in the family law jurisdiction as pronounced by the High Court of Australia and by the Full Court of the Family Court of Australia. Self-evidently, applicable propositions of law are to be examined in a factual context in which, relevantly here —

- a) the mother contends that by reason of superior medical services in Town B, the best interests of the children are advanced by relocating from Town C to Town B so the children can use those medical services;
- b) the father contends that any relocation of the children to Town B will mean that the children are denied the significant benefit to them of time with the father on the father's farm; and

- c) the father further contends that by the relocation proposed the children will be denied the benefit of equal shared parental responsibility as well as significant time with the father.

5 [105] Before addressing alterations to existing arrangements, it is utile to examine the existing arrangements. Since August 2016 when the mother and father physically separated, the mother and children moved from the farm on DD Street, Town D to a unit in Town C that the mother has rented ever since. The father continues to reside on the farm. It is relevant to point out that between 10 2013 and 2014, the mother and all three children lived in Melbourne to enable X to receive intensive therapy in the hope that by addressing his issues early, he stood a better chance of lessening what might otherwise have been the full burden and the impact of his physical and behavioural complications. During the time when the mother and children lived in Melbourne the father occasionally visited them. Equally, in that two year period the mother and children 15 occasionally visited Town D. In that period the mother was the primary carer for the children. During the course of this litigation, the parties agreed to consent orders that currently operate providing for the husband to see the children on alternate weekends from Saturday morning to Sunday afternoon. Naturally, relocation impacts on the children's time with the father. At paragraph 110 below 20 I have set out those consent orders.

[106] The parties proceeded in the recognition that the making of a relocation order was not to be gainsaid. They formulated different proposals that were premised on there being no relocation order. It is useful to record the respective proposals. The mother's parenting proposal on the basis that her application to 25 relocate was refused was as follows —

1. All previous parenting orders be discharged.
2. That the parties have equal shared parental responsibility for the children, Y born in 2007 and Z born in 2012.
- 30 3. That the Mother have sole parental responsibility for the child, X born in 2009.
4. The children live with the Mother.
5. That Y spend time with the Father by agreement.
6. That Z and X spend time and communicate with the Father as follows:
Z
- 35 7. On a two week cycle:
 - (a) in Week 1 each alternate weekend, from the conclusion of school on Friday until 6.30pm on Sunday; and
 - (b) in Week 2 from the conclusion of school on Monday to 6.30pm.
8. During school term holidays for 4 nights as agreed and in default of agreement: 40
 - (a) until 1 January 2021:
 - (i) in Week 1 from 10am on the first Saturday to 4pm Monday; and
 - (ii) in Week 2 from 10am on Monday to 4pm on Wednesday.
 - (b) thereafter:
 - (i) in Week 1 from 10am on the first Saturday until 6:30pm 45 Wednesday.
9. During summer school holidays pursuant to paragraph 7 above and in addition for 4 nights as agreed between the parties;
10. Each alternate Christmas from 12 noon on 23 December to 12 noon on 27 December in 2019 and each odd numbered year thereafter;
- 50 11. Each alternate Easter from 12 noon on Good Friday to 12 noon Easter Monday in 2020 and each even numbered year thereafter;

12. At all other times as agreed.

X

13. X spend time with the Father on weekends that Z is spending time with the Father as follows:
 - (a) each Saturday from 10:00am to 5:30pm with the Mother to deliver X to Town D School at the commencement of the Father's time and the Mother to collect X from Town D School at the conclusion of the Father's time on the first Saturday and on the second Saturday the Mother deliver X to Town D School at the commencement of the Father's time and the Father return X to the Mother's residence at 6:30pm; and
 - (b) in Week 2 from the conclusion of school on Monday to 6:30pm.
14. Each alternate Christmas for day time only as agreed between the parties during the period 12 noon on 23 December and 12 noon on 27 December in 2019 and each odd numbered year thereafter;
15. Each alternate Easter for day time only as agreed between the parties during the period 12 noon on Good Friday to 12 noon on Easter Monday in 2020 and each even numbered year thereafter;
16. X's time with the Father be increased based on the Mother's confidence in the Father's ability to safely care for and manage risks associated with the care of X;
17. That X and Z spend time with the Father on their birthdays, the Father's birthday and Father's Day as agreed between the parties;
18. That during term school holidays and special occasions time in accordance with paragraph 7 is suspended unless otherwise stated in these Orders;
19. At all other times as agreed.
20. For the purposes of changeover if it is a school day, the Father shall collect the children from school and on a non-school day, the Mother shall deliver the children to Town D School at the commencement of the Father's time and the Father shall return the children to the Mother's residence at the conclusion of time or at such other place as agreed between the parties in writing.
21. The children spend time with the Father by Face Time or telephone on Tuesdays and Thursdays between 3:30pm and 4:00pm and the children may end the call at anytime with a reasonable level of flexibility as to start and finish times dependent on school finish times.
22. That Y and Z spend time including additional Face Time and telephone time with the Father at other times as agreed or as desired by them.
23. That the parties attend upon Dr K in November 2021 to review the parenting arrangements.

[107] The father's proposal was as follows on the assumption that the relocation order was not made —

1. All previous parenting Orders be discharged.
2. The parties have equal shared parental responsibility for the children of the marriage, namely Y born in 2007, X born in 2009 and Z in 2012 (collectively "the children").
3. The children live with the Wife.
4. The children spend time and communicate with the Husband as follows during school term:

Z

- (a) Until the commencement of Term 4, 2019, on each alternate weekend, from the conclusion of school on Friday until the commencement of school on Monday or until 6pm in the event that Monday is a non-school day;
- (b) From the commencement of Term 4 in 2019 in each fortnightly cycle:
 - (i) in week 1, from the conclusion of school on Friday until the commencement of school on Monday in week 2 or the commencement of school Tuesday in the event that Monday is a non-school day; and

- (ii) in week 2, from the conclusion of school on Monday until the commencement of school on Tuesday.
- (c) From the commencement of Term 1 in 2020 in each fortnightly cycle:
- 5 (i) in week 1, from the conclusion of school on Friday until the commencement of school on Monday in week 2 or the commencement of school Tuesday in the event that Monday is a non-school day; and
- (ii) in week 2, from the conclusion of school on Monday until the commencement of school on Wednesday.
- 10 X
- (d) Until the commencement of Term 4, 2019, on each alternate weekend, from the conclusion of school on Friday until the commencement of school on Monday or until 6pm in the event that Monday is a non-school day;
- 15 (e) From the commencement of Term 4 in 2019, on each alternate weekend from the conclusion of school on Friday until the commencement of school on Tuesday;
- (f) From the commencement of Term 1 in 2020, on each alternate weekend from the conclusion of school on Friday until the commencement of school on Wednesday.
- 20 Y
- (g) from the conclusion of school until 7pm each Wednesday for dinner;
- 25 (h) on one weekend in each calendar month from 10am on Saturday until 5pm on Sunday, with such time to take place in Melbourne or at such other location as agreed between the Husband and Y;
- (i) at such times further and other as agreed between the Husband and Y.
5. The children spend time with the Father on either the Town B Show or Town E Show on alternating years.
- 30 6. The children spend time and communicate with the Father as follows during school holidays:
- (a) In the 2019 September school holidays, the Husbands weekend time pursuant to paragraph four be extended by one extra night to:
- 35 (i) Conclude at 6.00pm on Tuesday if the Husband's weekend is the first weekend or middle weekend; and
- (ii) 6.00pm on the Thursday preceding the Husband's usual weekend if the Husband's weekend is the last weekend.
- (b) In the 2019/2020 long summer school holidays, each alternate week for five consecutive nights as agreed and in default of agreement from 10.00am Tuesday to 6.30pm on Sunday commencing in the second week of the school holidays and alternating thereafter.
- 40 (c) Commencing from the start of the 2020 school year, for half of all Term holidays, as agreed in writing, and failing agreement for the first half in all even numbered years (from the conclusion school on the last day of term until 12 noon on the middle Saturday) and the second half in all odd numbered years (from 12 noon on the middle Saturday until the commencement of school on the first day of the next term);
- 45 (d) Commencing in December 2020, during the long summer school holidays, on a week- about basis, as agreed in writing, and failing agreement, for the first week, commencing the last day of school, and each alternate week thereafter (with changeover to take place at 12 noon) in all even numbered years and the second week and each alternate week thereafter in all odd numbered years;
- 50

- (e) Commencing in December 2021, for one half of the long summer school holidays at times to be agreed in writing and to include a two week block for each parent and failing agreement:
 - (i) for the first half in 2021/22 and each alternate year thereafter;
 - (ii) for the second half in 2022/23 and each alternate year thereafter.
- 7. For half of all special days as follows:
 - (a) For Christmas in 2019 and in each alternate year thereafter, from 4pm on 23 December until 4pm Christmas Day;
 - (b) For Christmas in 2020 and in each alternate year thereafter, from 4pm Christmas Day until 10am on 27 December;
 - (c) For Easter in 2020 and in each alternate year thereafter from 10am Easter Saturday until 3pm Easter Sunday;
 - (d) For Easter in 2021 and in each alternate year thereafter from 3pm Easter Sunday until 10am Easter Monday.
 - (e) On each of the children's birthdays, in the event the children are not already spending time with the Father, as agreed and in default of agreement, from the conclusion of school to 6.30pm if a school day and from noon until 6pm if a non-school day;
 - (f) On the Father's birthday, in the event that the children are not already spending time with the Father, from the conclusion of school until the commencement of school the following day if the Father's birthday falls on a school day, and from 10am until 10am the following day if the Father's birthday falls on a non-school day;
 - (g) On the Father's Day weekend each year from 5pm on the Saturday immediately before Fathers' Day until the commencement of school on Monday; and
 - (h) At any other time as agreed between the parties in writing.
- 8. The Father's time with the children be suspended to ensure that the children are spending time with the Mother:
 - (a) For Christmas in 2020 and each alternate year thereafter, from 4pm on 23 December until 4:00pm Christmas Day;
 - (b) For Christmas in 2019 and each alternate year thereafter from 4pm Christmas Day until 10am on 27 December;
 - (c) For Easter in 2021 and in each alternate year thereafter from 10am Easter Saturday until 3pm Easter Sunday;
 - (d) For Easter in 2020 and in each alternate year thereafter from 3.00pm Easter Sunday until 10am Easter Monday.
 - (e) On the children's birthdays, in the event the children are not already spending time with the Mother, as agreed and in default of agreement, from the conclusion of school to 6.30pm if a school day and from noon until 6pm if a non-school day;
 - (f) On the Mother's birthday in the event the children are not already spending time with the Mother, from the conclusion of school until the commencement of school the following day if the Mother's birthday falls a school day, and from 10am until 10am the following day if the Mother's birthday falls on a non-school day;
 - (g) On the Mother's Day weekend each year from 5pm Saturday immediately before Mothers' Day until commencement of school on the following Monday; and
 - (h) At any other times agreed in writing between the parties.
- 9. For the purposes of these Orders:
 - (a) Time pursuant to order 4 continues during school holidays until the 2019/2020 long summer school holidays;
 - (b) From the 2019/2020 long summer school holidays, time pursuant to order 4 is suspended during school holidays and shall resume at the

commencement of term in the same pattern that would have been in place had the time not been suspended; and

- (c) School holiday periods are to be calculated based on the term dates as published by the GG School, or such other school as attended by the Z and Y. Where the children attend different schools, the holiday period will commence from after school on the day the first child finishes the term and conclude on the day the first child commences school for the new term.

10. The parties each be at liberty to telephone and/or Facetime the children on every second day the children are not in their care between 7.00pm and 7.30pm and the other party ensure that these calls are facilitated and further the parties agree to facilitate any reasonable request by the children to contact the other parent, with that other parent to then be at liberty to respond/speak with the children.

11. Y be provided with a mobile phone at the father's expense for the purposes of communicating with the Father.

12. All changeovers will take place at school, or if a non-school day the Mother shall deliver to the children to Town D School at the commencement of the Father's time and the Father shall return the children to the Wife's home at the conclusion of time, or such other place as agreed between the parties in writing.

13. The parties are each at liberty to attend any school or extra-curricular activities that parents are ordinarily able to attend and both parties be at liberty to communicate and spend time with the children at these events/activities.

14. The parties each be at liberty to communicate directly with the children's schools and to obtain copies of any documentation or information that is ordinarily available to parents.

15. The parties will keep each other advised as soon as practicable of any significant health issues relating to the children.

16. Both parents are at liberty to liaise with and attend upon all medical and allied health professionals upon whom the children attend and attend at all appointments for the children and to obtain any information relating to the children's health.

17. The parties are each hereby restrained, both personally and via their servants and agents from:

- (a) abusing, belittling and otherwise speaking negatively about the other party or their family, or partners, to or within the hearing or presence of the children or either child;

- (b) enrolling the children in any extra curricula activity on the other parent's time, without prior written agreement of the other parent.

18. The parties be hereby restrained from relocating any further than 25 kilometres from the children's current address or school:

- (a) without the written consent of the other party; and

- (b) with written notice of the intention to relocate to be provided to the other party no less than three months prior to the intended relocation.

19. The parties agree to trial the use of a Parenting App to facilitate communication about parenting issues and will otherwise communicate by way of email or text message in relation to parenting matters, save for in the event of an emergency. The parties also agree to communicate directly as appropriate, including at changeover or any other event they attend together with the children.

20. Each parent shall provide the other notice of any change to their residential address, contact phone numbers and email particulars, as soon as practicable, but in the case of a change of residential address, by no later than 14 days prior to the intended move.

21. Both parents shall continue to attend upon Ms FF until directed otherwise and shall:
 - (a) facilitate each of the children's attendance upon Ms FF if so requested by her;
 - (b) follow all reasonable recommendations, treatment and advice of Ms FF, particularly in relation to any variation of the time that the children are to spend with the Husband in accordance with these Orders.
22. The Wife be restrained from engaging any further allied health professionals for the children without the prior consent of the Husband.
23. 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 the parties adjust to comply with the order are set out in the Fact Sheet attached hereto and these particulars are included in these Orders as Annexure "A" to these Orders.

[108] The mother formulated parenting orders on the basis that the relocation order was made in the manner she sought. The mother's parenting proposal contained paragraph references that did not align. The parties will be required to provide an amended version of the mother's parenting proposal that will give effect to these reasons for judgment by noon on 5 August 2019. The mother's proposal was as follows —

1. All previous parenting orders be discharged.
2. That the parties have equal shared parental responsibility for the children, Y born in 2007 and Z born in 2012.
3. That the wife have sole parental responsibility for the child, X born in 2009.
4. That the children live with the wife and the wife be permitted to relocate with the children from Town C to Town B.
5. That Y spend time with the father by agreement.
6. That Z spend time with the father —
 - (a) each alternate weekend, with one weekend to be spent in the Town D region and the other in the Town B region as follows —
 - (i) from the conclusion of school Friday until 6pm Sunday when spending time in the Town B region with the father to collect Z from school at the commencement of the father's time and return Z to the mother's residence at the conclusion of the father's time and in the event the father is running late to collect Z from school he provide the mother with an hour's notice;
 - (ii) from 6pm Friday to 6pm Sunday when spending time in the Town D region with the mother and father to meet half way in Town EE at the commencement of the father's time and the father to return Z to the mother at the conclusion of his time or 4pm Sunday with the mother and father to meet half way in Town EE at the conclusion of time.
 - (b) during school term holidays for 4 consecutive nights as agreed between the parties and in default of agreement from 10am on the first Saturday to 6pm on Wednesday;
 - (c) during summer school holidays pursuant to paragraph 5(a) above and in addition for 4 consecutive nights as agreed between the parties;
 - (d) each alternate Christmas from 12 noon on 23 December to 12 noon on 27 December in 2019 and each odd numbered year thereafter;

- (e) each alternate Easter from 12 noon on Good Friday to 12 noon Easter Monday in 2020 and each even numbered year thereafter.
7. That X spend time with the father —
- 5 (a) each weekend that Z is spending time with the father in the Town B region from 10am to 6pm on Saturday and from 10am to 6pm on Sunday with changeover to occur pursuant to paragraph 5(a)(i) above;
- (b) each alternate Christmas for day time only as agreed between the parties during the period 12 noon on 23 December and 12 noon on 27 December in 2019 and each odd numbered year thereafter;
- 10 (c) each alternate Easter for day time only as agreed between the parties during the period 12 noon on Good Friday to 12 noon on Easter Monday in 2020 and each even numbered year thereafter.
8. For the purposes of changeover —
- 15 (a) with respect to paragraphs 5(b) and (c) it be as agreed between the parties and in default of agreement the parties meet half way in Town EE at the commencement of the father's time with Z and at the conclusion of the father's time; and
- (b) with respect to paragraphs 5(d) and (e) and 6(b) and (c) the mother will stay in the Town D region and deliver X to Town D School at the commencement of the father's time and the father will return X to the mother which will also allow for Y to spend time with the father as she wishes.
- 20 9. That X and Z spend time with the father on their birthdays, the father's birthday and Father's Day as agreed between the parties.
10. That during school holidays and special occasions time in accordance with paragraphs 5(a) and (b) and 7(a) is suspended.
- 25 11. The children spend time with the father by Face Time or telephone on Tuesdays and Thursdays between 3:30pm and 4pm and the children may end the call at anytime with a reasonable level of flexibility as to start and finish times dependent on school finish times.
12. That Y and Z spend time including additional Face Time and telephone time with the father at other times as agreed or as desired by them.
- 30 13. That the parties attend upon Dr K in November 2021 to review the parenting arrangements.
- [109] On behalf of the father it was contended that the mother and father should share parental responsibility for all three children. So far as his time with the children was concerned, the father invited me to —
- 35 a) consider the appropriateness of orders for equal time; or to
- b) consider the appropriateness of substantial and significant time if an order for equal time is not made; and
- 40 c) have regard to the consent orders made on 7 March 2018.
- [110] It is necessary to record the terms of the consent orders made on 7 March 2018. They were as follows —
- 45 1. The Husband and Wife have equal shared parental responsibility for the children Y born in, 2007, X born in, 2009 and Z born in, 2012 ("the children").
2. The children live with the Wife.
3. The children spend time with the Husband as follows:
- 50 (a) On the second and fourth weekend of each month from 10am Saturday until 6.30pm on the Sunday evening;
- (b) On the fifth weekend of each month (if applicable) at times agreed, and failing agreement from 10am on the Saturday to 10am on the Sunday;

- (c) On Monday following the first and third weekend of each month, from 4pm to 6.30pm;
 - (d) During school holidays, in addition to time pursuant to orders 3a & b, from 10am Tuesday to 6.30pm Wednesday;
 - (e) Notwithstanding any other order, for Easter 2018, from 10am Easter Saturday until 3pm Easter Sunday;
 - (f) Notwithstanding any other order, for Father's day, 2018, from 12 noon until 6.00pm on Father's Day with the Husband to collect the children from Pony Club and the Mother to collect the children from Town D School at the conclusion of time;
 - (g) By telephone on Tuesdays and Thursdays between 7pm and 7:30pm; and
 - (h) At such other times as may be agreed in writing between the parties.
4. For the purposes of changeovers, unless otherwise agreed in writing, the Wife shall deliver the children to Town D School at the commencement of the Husband's time and the Husband shall return the children to the Wife's home at the conclusion of time.
5. The Husband and Wife shall maintain a Communication Book in which they shall record information regarding the children's care, welfare, development, including but not limited to information regarding medical issues, the dates, times and locations of upcoming medical appointments, and the Husband to record the times of X's seizures, whilst in the Husband's care; and the Wife to record the times of X's seizures on each day before all overnight visits with the Husband and for the purposes of same;
- (a) The Wife shall forthwith purchase a diary to be used as the Communication Book;
 - (b) The parties shall not remove pages from the Communication Book; and
 - (c) The Communication Book shall travel with the children.
6. The Husband and Wife shall attend upon Ms FF for the purposes of assisting them with their communications and negotiations in co-parenting their children, and for the purposes of same;
- (a) The Husband and Wife shall abide by her recommendations as to attendance;
 - (b) The Husband and Wife shall use their best endeavours to obtain funding for such assistance from the NDIS, and
 - (c) In the event that such funding cannot be extended, the Husband shall pay the costs of same at first instance, and is at liberty to seek an adjustment for any payments he makes in this regard as part of the property settlement as between the Husband and Wife.
7. Both parents are at liberty to liaise with and attend upon all medical and allied health professionals upon whom the children attend, and attend at all appointments for the children.
8. Both parents are restrained from:
- (a) Denigrating the other parent or member of his or her family or household to the children or any of them, or permitting another person to do so;
 - (b) Discussing these proceedings to or in the presence or hearing of the children or any of them, or permitting another person to do so;
 - (c) Enrolling the children in any extra curricula activity on the other parent's time, without prior written agreement of the other parent.

Parental responsibility

[111] The Family Law Act sets out statutory mechanisms for the determination of issues about equal shared parental responsibility, about the time any of the children are to spend with one or other parent and the parent with whom each child will live. Orders about those matters are compendiously described in the Family Law Act as parenting orders for the purpose of Div 5 of Pt VII. The types of matters covered by a parenting order are set out in s 64B(2) of the Act. That section confers on this court power to make a parenting order. The guiding principles that are operative when a court is asked to make a parenting order are set out in Subdiv BA of Pt VII of the Act. Section 60CA makes a mandatory stipulation that in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration. A different section of the Act makes provisions for ascertaining the best interests of the child. Those are set out in s 60CC. That section is divided into what are called the “*primary considerations*” in subs (2) and the “*additional considerations*” set out in subs (3). So far as the primary considerations are concerned, the court must address —

- a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
- b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

[112] Of the two primary considerations, s 60CC(2A) instructs a court to give greater weight to the considerations in s 60CC(2)(b), namely the need to protect the child from physical or psychological harm.

[113] In this case some material was before me at trial to the effect that any one of the children needed protection from physical or psychological harm within the contemplation of the second of the two primary considerations. I say “*some*” (but not “*no evidence*”) because Mr Dickson submitted that the episode where X was in the seat of the tractor with the tractor wheel off the ground, an episode where Z’s head struck the dashboard of the father’s ute, an episode where Z’s face was grazed after his falling from a vehicle and the episode where X set fire to the tea towel indicated that the children were not free of risk of physical harm when in the father’s care. On behalf of the father Mr Geddes QC advocated for the need to focus on the first of the two primary considerations, that is to say, the benefit to the child having a meaningful relationship with both of the child’s parents. Mr Geddes submitted that his client’s relationship with each child will necessarily diminish if the relocation order is made. He said it was not in the children’s best interest to make orders that in any way compromised the first of the two primary considerations, that is to say, the benefit to the child having a meaningful relationship with both of the child’s parents and not just with one.

[114] The concept of “*meaningful*” for the purposes of Pt VII of the Family Law Act is not defined in the legislation. In s 60B(1)(a) the phrase “*meaningful involvement*” appears and in s 60CC(2)(a) the phrase “*meaningful relationship*” appears. The absence of any statutory definition of “*meaningful*” when used in either phrase was pointed out by the Full Court in *McCall v Clark*.⁴ Yet two years earlier a single judge of this court observed that “*meaningful*” is synonymous with “*significant*” which in turn is synonymous with “*important*” or “*of consequence*”. That emanated from the decision of Brown J in *Mazorski v*

4. (2009) 41 Fam LR 483; [2009] FamCAFC 92.

Albright.⁵ Further, it was held by Bennett J in *G v C*⁶ that a “meaningful relationship” required the court to make its assessment on a prospective basis. The prospective approach was embraced by the Full Court in *Sigley v Evor*.⁷

[115] In this case I have proceeded on the basis that I am required to examine the evidence as it was adduced at trial in order to ensure that on a prospective basis, that is to say, into the future, the orders to be made —

- a) ensure the objects of Pt VII of the Act are met;
- b) the children have the benefit of both of their parents having a meaningful involvement in the children’s lives as set out in s 60B(1)(a);
- c) the children have the benefit of a meaningful relationship with both of the children’s parents as set out in s 60CC(2)(a); and
- d) meaningful means any of “significant”, “important” or “of consequence”.

[116] Under the relocation proposed, the children will live with the mother. By reason of that phenomenon alone, she will have a meaningful relationship with all three children. But by definition, the father’s time with the children will be less than he presently enjoys, a matter about which he complained because his starting position was that his time should be equal or at least substantial and significant. The point was answered in *Godfrey v Sanders*⁸ where Kay J held that even where a relocation move results in a diminution in quality of the relationship between a parent and a child, the legislation aspires to the promotion of a meaningful relationship, not an optimal relationship. The obligation that falls to this court, as was pointed out in *Champness v Hanson*,⁹ is the making of orders that most likely promote the best interests of the child. The court held that in seeking to attain that objective, the court is directed by s 60CC(2)(a) to consider the benefit to the child of having a meaningful relationship with both parents. And even if such a benefit is demonstrated, that benefit must be weighed against all other relevant factors. That seems to me to be a different way of saying that the “meaningful relationship” consideration described as a primary consideration by s 60CC(2)(a) is the first of many considerations a court must address but by no means does it predominate and dispositively determine the matters to be considered and weighed when determining the best interest of the child when making a parenting order. All matters in s 60CC must be considered, weighed and assessed, as the Full Court stated in *Collu v Rinaldo*.¹⁰

[117] One of the larger issues in the case was the mother’s application for an order for sole parental responsibility in relation to X. The father opposed the application. The mother’s application for sole parental responsibility enlivened a consideration of whether the presumption recorded in s 61DA(1) of the Act had been rebutted. Section 61DA(4) provides that the presumption in s 61DA(1) that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility may be rebutted. That rebuttal may be established if the court is satisfied that it would not be in the child’s best interests for the child’s parents to have equal shared parental responsibility for the child.

5. (2007) 37 Fam LR 518; [2007] FamCA 520.

6. [2006] FamCA 994.

7. (2011) 44 Fam LR 439; [2011] FamCAFC 22 (*Sigley v Evor*).

8. (2007) 208 FLR 287; [2007] FamCA 102.

9. [2009] FamCAFC 96.

10. [2010] FamCAFC 53.

[118] If therefore became necessary to address each of the subsections of s 60CC(3) in order to make a finding about whether it was in the best interests of X for the mother to have sole parental authority for him or whether the presumption recorded in s 61DA(1) of equal shared parental responsibility for X should prevail on the basis that the presumption was not rebutted.

[119] For the reasons that follow, in my judgment the presumption recorded in s 61DA(1) that both the father and mother should have equal shared parental responsibility for X has been rebutted and that it is in the best interests of X for the mother to have sole parental responsibility for X. It is necessary to expose my path of reasoning in that conclusion by addressing each s 60CC(3).

[120] **Section 60CC(3)(a)** invited a consideration of any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views. Both counsel submitted that X's intellectual capacity is that of a two year old and he has not expressed a view. Mr Geddes QC submitted that from X's behaviour it can be inferred that X has a great love of the farm and that he enjoys spending time with the father. Mr Geddes also submitted that the mother acknowledged that X enjoys being outdoors. Whatever is to be made from observations of unexpressed attitudes, the position remained that X did not express a view in words. His actions are equivocal and they lend themselves to different interpretations depending on who was endeavouring to interpret which behaviour. To say that a child enjoys the outdoors is very different to reaching a conclusion that the same child has a great love of the farm in this case and enjoys spending time with the father on that farm. Section 60CC(3)(a) is mostly concerned with the views that are physically and audibly articulated by a child whose maturity and level of understanding makes it important to take those articulated views into account. I was unable to draw any conclusion about X's wishes. I have taken into account Y's and Z's view, however.

[121] **Section 60CC(3)(b)** invited consideration of the nature of the relationship of the child with —

- i) each of the child's parents; and
- ii) other persons (including any grandparents or other relative of the child).

[122] Neither counsel dissected their submissions in relation to this subsection with specific reference to X. Mr Dickson QC said the parties acknowledged that the mother was the primary carer, that since separation the children's relationship with the father had improved, all children shared a greater connection with him and that the children have a close connection with the mother's family. Mr Geddes QC likewise submitted that the wife had been the primary carer for all children. He said the children have a loving relationship with both parents. The father was complimentary of the way the mother had raised the children, although s 60CC(3)(b) was very peripherally relevant on that issue. Equally, the mother gave evidence that she was very keen for the children to have a favourable relationship with the father. Again, that was only tangentially relevant to s 60CC(3)(b). The subsection brought into sharp focus the nature of each child's relationship with his or her mother on the one hand and with his or her father on the other hand. It must be said that X has a favourable relationship with his mother. It seems to be mutual. It must also be said that X is barely controllable at the hands of the mother, especially if his aggression levels are heightened, if he is unwilling to do as he is told, if he is agitated or if he is overexcited. He remains difficult to get to sleep and while his destructive behaviour has

diminished, it continues. He remains aggressive to his younger brother. The mother at times must physically restrain him, although more recently that has reduced.

[123] When in the father's care, X makes full use of the space that the farm provides. The father attempts to ensure X has positive times with the father and the father has ascertained that X has a liking for machinery. The father does his best to enhance that enjoyment. The father through Mr Geddes QC invited me to take into account the evidence given by Mr HH about the father's relationship with his (the father's) children. The contents of the affidavit of Mr HH was the subject of numerous objections on the grounds of relevance, opinion and speculation. As with other affidavit material in this case, I have received the evidence over the objections and have considered its subject matter in the context of the weight to be ascribed to that particular evidence. Mr HH gave evidence that he has spent considerable time with the father interacting with his children Y, X and Z. Mr HH said Y, X and Z seem relaxed in the father's care. Mr HH gave evidence that the father and Y, X and Z interact positively and are polite, well behaved and engaged.

[124] Ms KK, the wife of a friend of the father also gave evidence about the nature of the father's relationship with Y, X and Z. Her evidence was general and its general purport was to the effect that Y, X and Z are happy in the father's care.

[125] As mentioned earlier, I accept that both parents love their children.

[126] X in particular has required firm intervention to control, a matter Dr K observed. The mother did that by imposing strong boundaries and by monitoring X carefully. The father has not adopted such an approach. While loving towards X, the father did not match the mother's determination to delve as deeply as was required to fully understand X's medical conditions. The father did not impose strong boundaries for X, preferring instead for X to have the freedom of openness that a farming environment offered. The father made little attempt to assist with transitioning X to a better bedtime routine beyond laying down with X. The evidence revealed that X frequently returned from his time with his father in an agitated state. Of course I accept the overwhelming state of the evidence in this case that X's behavioural issues produce extremely difficult situations for the mother, for the father, for Y, Z, carers, medical people and others who come into contact with X. But when I am asked to take into account the nature of the relationship between a child (here X) and each of his parents, the assessment of that relationship does not begin and end with the love between parent and child. It includes whether the parent sets boundaries for the child, whether the parent imparts life skills, whether the parent is in truth a mentor. It also includes what a reasonable parent in that parent's shoes might do with that particular child, it seemed to me. X may well love both of his parents and they him, but the mother's approach to the requirements of her role as one of X's parents has been more dutifully discharged by the mother than has the father dutifully discharged his role as one of X's parents.

[127] **Section 60CC(3)(c)** invited a consideration of the extent to which each of the child's parents has taken or failed to take the opportunity —

- i) to participate in making decisions about major long-term issues in relation to the child;
- ii) to spend time with the child; and
- iii) to communicate with the child.

[128] On behalf of the father it was contended that a strained relationship continues to exist between the father and mother and that despite the existence of orders for equal shared parental responsibilities the mother has elected to make all decisions concerning X's long-term care, putting little weight on point on anything the father has to say. Conversely, on behalf of the mother it was put that the father has not been closely involved with X's care with the consequence that the task fell to her. She said the father relied on information obtained by the mother and that the mother applied her own skills in best caring for X. The mother said that during the years when the mother and children were living in Melbourne the father visited them infrequently, approximately twice monthly. The mother contended that after Dr K produced her report in early 2018 the father commenced to attend some medical appointments and other events relevant to X.

[129] There is considerable force in the mother's contentions. The material makes plain that the father left to the mother the task of taking X to medical practitioners, especially specialists. The father maintained the farm when the mother took X to specialists or other persons for treatments or diagnosis. That much was true. But the father was content to let the mother liaise with doctors or other health professionals. The evidence did not reveal that the father joined the mother when she and X travelled sometimes very long distances in order to consult all specialists until Dr K's report in early 2018. The mother's task was made all the more difficult by doing that singlehandedly. The father was less equipped than was the mother to discuss medical issues with medical practitioners. Yet the father left the task of making major decisions concerning X's health and welfare to the mother. As it happened, in this family that approach seemed to work. But it is not difficult to see that the mother shouldered the burden of doing so and the father was content with that approach.

[130] So far as this subsection invited a consideration of the extent to which each parent had taken or failed to take the opportunity to spend time with X or to communicate with X, the evidence showed that the mother made the larger effort. She has persisted over the whole of X's life to get to the very root of all of X's medical and behavioural problems never once permitting X's reaction to her to rebuff her attempts. That was particularly the case with her attempts to communicate with X. The mother was so perceptive to X's style of communication that she was able to identify that X was having a seizure of one variety or another that the father failed to pick up. That caused additional tension between the father and mother. It must not be forgotten that X's verbal communication is limited. Being able to communicate with X required the mother and father to deploy skills that included the spoken word, gestures and occasionally drawings. The mother's affidavit material was replete with evidence of her methods of communicating with X whereas the father did not descend to that level of minutiae. The evidence of Mr Hedt and Ms KK did not provide any objective evidence from observers about the manner in which the father communicated with X. On this subsection the preponderance of the evidence favoured the mother.

[131] **Section 60CC(3)(ca)** invited a consideration of the extent to which each of the child's parents had fulfilled or failed to fulfil the parent's obligation to maintain the child.

[132] In this litigation property issues were settled between the mother and father by the time I embarked upon the parenting issues. As a result, very little time in the trial was devoted to factual issues that bore upon this subsection. That

said, prior to the property issues being resolved during the running of the trial on parenting issues, on 2 August 2016 orders were made by consent that required the father to maintain private health insurance and ambulance cover. By those orders the father was also required to pay all school fees and utility accounts. He was required to reimburse the mother for medical expenses including medication (nett of any rebate) and for uniforms, books and excursions. It was common ground that the father had been assessed (on review) to pay child support at \$576.62 per week. The father indicated he will continue to pay school fees and fees for uniforms, private health insurance and ambulance cover. The mother contended that over a three year period the father reimbursed her for only certain medical expenses he having disputed several thousands of dollars worth of expenses, so the mother argued.

[133] The father was not cross examined about medical expenses the wife incurred for which he provided no reimbursement. This issue was but faintly pressed by the mother. It was not the subject of forceful submission by Mr Dickson QC.

[134] **Section 60CC(3)(d)** invited a consideration of the likely effect of any change in the child's circumstances, including the likely effect on the child of any separation from —

- i) either of his or her parents; or
- ii) any other child or person (including any grandparent or other relative of the child) with whom he or she has been living.

[135] Subparagraph (d)(ii) was not relevant in this case.

[136] The father's complaints in this case were at their most vocal in relation to this section. On behalf of the mother, the relocation application that she propounded was the most important issue in this litigation.

[137] In essence the mother argued that little adverse consequence will flow in the relationship between all children including X and the father if the mother and the children relocate from Town C to Town B. The estimates differed slightly in the evidence but the travelling time from Town C to Town B was slightly over three hours and the travelling time between Town D and Town B was over four hours. The mother recognised that any relocation meant that the children as well as their parents will be commuting between Town B and Town D. In her outline of case the mother recognised that the children's time with the father will be limited by the relocation but, so she said, the children will be spending "*quality time*" with the father. Distilled to its essence, the reasons advanced by the mother to support her relocation application were the following —

- a) Town B offers superior health services for X;
- b) in Town B are quality hospitals and X in particular will be in closer proximity to M Hospital;
- c) in Town B are specialists and other health services that X will need to use in years to come;
- d) it is unrealistic to proceed on the basis that X will not need substantial ongoing expert assistance; and
- e) the relocation proposal is for two years' duration.

[138] In resisting the relocation application the father contended that the father and X will benefit from having more time together on the farm. The father said the relocation proposed by the mother amounts to a separation of all children from the father. The father submitted in his case outline that he entertained real

fears that the relocation proposed by the mother will lead the children to becoming further enmeshed with the mother only exacerbating the hostility that presently pervades the relationship between the mother and father and the father had no confidence the mother will actively facilitate all children including X having a proper relationship with the father.

[139] On behalf of the father, Mr Geddes QC highlighted two aspects of the expert evidence. First he said that Dr K was wholly silent on the subject of relocation. Next, Mr Geddes said that X's own specialist neurologist Dr L stated in unequivocal terms that he saw no material advantage in X's relocation to Town B for enhanced medical services. Of those two propositions let me say this. Dr K no doubt was silent on the subject of relocation, not because she opposed the idea, but rather that in the context of this highly complex situation of this family, it was best to leave the relocation decision to me. As to Dr L's views, whether or not services exist in Town B to support Dr L's views was only one of several considerations that bore upon an assessment of whether relocation was in the best interests of the children. Schooling and a city environment rather than a rural environment were also relevant.

[140] The father pointed out that if a relocation order is made, the father's drive time to Town B from Town D will amount to four hours whereas the drive time between Town C and Town D is about one hour.

[141] It scarcely needs pointing out that s 60CC(3)(d) focuses on the likely effect on the child, not the parent, of any separation. Questions of distance between the non-relocating parent and the child are relevant only to the extent that the distance impacts upon the child.

[142] Section 60CC(3)(e) invited a consideration of the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis. In her case outline the mother said that any relocation to Town B is not so distant that it will interfere with all children's ability to maintain and grow their relationship with the father. Conversely, the father gave evidence that at present very few work requirements present themselves calling for his making a trip by truck to Town B. I accept what he says on that issue but the father can always use a car to drive from Town D to Town B to see the children when they are not visiting him in Town D.

[143] The word "*substantially*" in the phrase "*substantially affect*" is a word of emphasis. It is derived from the word "*substantial*", judicially interpreted to be the equivalent to "*considerable*", as was held in *Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd*.¹¹ It has also been held to mean "*of substance*" as opposed to "*minimal*" (*Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union*).¹² It was also held to mean more than merely "*insubstantial*" or "*insignificant*" in *Secretary, Department of Social Security v Wetter*.¹³ In *Palser v Grinling*¹⁴ Viscount Simon identified the difficulties and uncertainties which the use of the phrase was liable to cause and held that the word "*substantial*" was equivalent to "*considerable, solid or big*"

11. [1958] 1 WLR 845; [1958] 2 All ER 551.

12. (1979) 42 FLR 331; 27 ALR 367.

13. (1993) 40 FCR 22; 112 ALR 151; 29 ALD 310.

14. [1948] AC 291; [1948] 1 All ER 1.

yet the application of the word must be left to the discretion of the judge of fact to decide as best the judge can according to the circumstances of the case. In *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd*,¹⁵ substantial was held to mean considerable. Of course none of those cases were family law cases. In my view that of itself does not matter because in the context of s 60CC(3)(c) of the Family Law Act the phrase “*substantially affect*” must be construed in context as authority at the highest level commands. Propositions of law about statutory interpretation of relevance here may be briefly stated.¹⁶

[144] Ultimately, it is the primacy of the words used in the legislation itself that determines the proper construction of the legislation. Since the decision of the High Court of Australia in *Project Blue Sky Inc v Australian Broadcasting Authority*,¹⁷ Australian law has held that the primary object of statutory construction is to construe the relevant provisions so that it is consistent with the language and purpose of all of the provisions of the statute. That much is consistent with the observations of Barwick CJ in *Taylor v Public Service Board (NSW)*,¹⁸ According to Lord Scarman’s speech in the House of Lords in *Southwest Water Authority v Rumble’s*¹⁹ as well as the observations of Wilson and Mason JJ in *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation*,²⁰ the meaning of a particular legislative provision must be determined by reference to the language of the instrument viewed as a whole. The context, the general purpose and policy of the provision of a piece of legislation as well as its consistency and fairness are surer guides to meaning than is the topic with which the legislation is constructed.²¹ As was held in *Toronto Suburban Railway Co v Toronto Corporation*,²² *Minister for Lands (NSW) v Jeremias*²³ and *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*,²⁴ the process of construction must always begin with an examination of the context of the provision that is being construed.

[145] High Court authority of very long standing has prescribed that a court construing a statutory provision must strive to give meaning to every word of the relevant provision. So much was held in *Commonwealth v Baume*²⁵ as well as in *Chu Kheng Lim v Minister for Immigration*.²⁶ No sentence, clause or word is superfluous, void or insignificant if by any other construction they may all be made useful and pertinent.²⁷

[146] In *Project Blue Sky* the majority pointed out that the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended those words to have.²⁸ Ordinarily, that meaning will correspond with the grammatical meaning of the relevant provision.

15. (1982) 62 FLR 437; 44 ALR 557.

16. *Commissioner of State Revenue v Kimiora* (2016) 309 FLR 277; [2016] FCCA 1229.

17. (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28 (*Project Blue Sky*).

18. (1976) 137 CLR 208; 10 ALR 211.

19. [1985] AC 609.

20. (1981) 147 CLR 297; 35 ALR 151.

21. *Project Blue Sky* at [69].

22. [1915] AC 590.

23. (1917) 23 CLR 322.

24. (1985) 157 CLR 309; 60 ALR 509; 2 MVR 289.

25. (1905) 2 CLR 405; 11 ALR 124.

26. (1992) 176 CLR 1; 110 ALR 97.

27. *R v Berchet* [1794] EngR 1806.

28. *Project Blue Sky* at [78].

[147] More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,²⁹ the majority (Hayne, Heydon, Crennan and Kiefel JJ) held that the task of statutory construction must begin with a consideration of the text itself and that historical considerations and extrinsic material cannot be relied upon to displace the clear meaning of the text. Other decisions of the High Court reflect similar reasoning such as *Yanner v Eaton*,³⁰ *Commonwealth v Yarmirr*,³¹ *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue*,³² *Stevens v Kabushiki Kaisha Sony Computer Entertainment*,³³ *Carr v Western Australia*,³⁴ *Director of Public Prosecutions (Vic) v Le*³⁵ and *Northern Territory v Collins*.³⁶

[148] In many respects, modern Australian jurisprudence on the subject of statutory interpretation has placed former High Court Justice, the Honourable Justice Kenneth M Hayne at the vanguard. His extra-judicial writing on point is illuminating: The Honourable Justice Kenneth Hayne AC, *Statutes, Intentions and Courts: What Place Does The Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?*³⁷

[149] The father offered a range of reasons why the relocation proposed by the mother represented practical difficulties such that they affect each of the children's right to maintain personal relations with the father. To catalogue them, they are as follows yet in no special order —

- a) presently the father travels one hour between Town C and Town D whereas if relocation is ordered, he will be required to travel in one direction for four hours;
- b) under the current regime, the father is able to travel for one hour to attend the children's extra-curricular activities and school events which he will be unable to do if they live in Town B;
- c) no practical difficulties or expenses befall the wife if she remains in Town C;
- d) under the existing regime a school bus operates between Town C and Town D and a taxi service can deliver X to the Town C School;
- e) if the children relocate to Town B any mid-week time between the children and the father (them in Town B and him in Town D) will not be feasible and even regular weekend time for the children when commuting between Town B and Town D will create significant practical obstacles;
- f) travel costs in petrol alone to be incurred by the father who will undertake very significant travelling will be vast;
- g) when travelling under the relocation arrangements proposed by the mother, the father will be taken away from the farm thereby impacting on his need to tend the farm which in turn will impact on his income earning capacity;

29. (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41.

30. (1999) 201 CLR 351; 105 LGERA 71; 166 ALR 258; [1999] HCA 53 at [17].

31. (2001) 208 CLR 1; 184 ALR 113; [2001] HCA 56.

32. (2001) 207 CLR 72; 181 ALR 307; [2001] HCA 49.

33. (2005) 224 CLR 193; 221 ALR 448; 65 IPR 513; [2005] HCA 58.

34. (2007) 232 CLR 138; 239 ALR 415; [2007] HCA 47.

35. (2007) 232 CLR 562; 240 ALR 204; [2007] HCA 52.

36. (2008) 235 CLR 619; 249 ALR 621; 78 IPR 225; [2008] HCA 49.

37. (2014) 13(2) *Oxford Commonwealth Law Journal* at 271.

- h) the husband does not have accommodation in Town B so he will need to meet the costs of ad hoc accommodation or he will need to enter into longer term accommodation where the children will not have the creature comforts that they have in a permanent place of residence;
- i) the children have grown up on a farm which they love and by moving away from the farm they will be negatively impacted because the quality of the time they spend with the father diminishes when away from the farm;
- j) if relocation is ordered, the father will need to find activities that are appropriate for the children in the Town B area, something he did not need to do when they were spending time with him on the farm; and
- k) to the extent that financial expenditures are involved in the relocation, the father's income fluctuates in view of the variable nature of farming.

[150] Those matters are perfectly valid and most are worthy of serious consideration. It must be observed that under this subsection, the practical difficulties that a parent might identify as the consequence of a relocation order must “*substantially affect the child's right*” to maintain direct contact with both parents. Mere inconvenience to a parent is not relevant to the subsection. Further, even if the practical difficulties that one parent identifies as the consequence of the relocation affect the child's right to maintain personal relations and direct contact with both parents (as most relocations do) the practical difficulties must “*substantially affect*” those things.

[151] The notion of “*substantially affect*” in the Family Law Act is not defined. In other fields of law that phrase has been judicially defined. It is dangerous to transpose those other judicial interpretations of the phrase to the family law jurisdiction. Yet the undeniable tenor of the phrase “*substantially affect*” is that any affecting of a state of affairs is substantial and not merely transitory, minor, inconsequential or trivial. Plus, in the specific context of s 60CC(3)(e), whatever substantial affect manifests itself, that substantial affect is on the child's right, not the parent's. The father rather puts the cart before the horse in examining how the relocation will affect him.

[152] Both parents will be affected by the relocation proposed. The mother will leave her family in the Town D area. She will need to find suitable rental accommodation. When she travels to her family she too will incur a long drive, at her expense. By no means is the relocation that is proposed an event that will orchestrate wholesale benefit to one parent while concurrently occasioning wholesale detriment to the other.

[153] **Section 60CC(3)(f)** invited a consideration of the capacity of each of the child's parents and any other person to provide for the needs of the child including emotional and intellectual needs. In relation to X, in my view the scales tipped unanswerably in favour of the mother.

[154] The mother is highly educated. The father suffers from literacy problems and encounters difficult reading. The mother is able to discuss complex medical issues with doctors. The father does not enjoy immersing himself in medical matters. The mother has demonstrated an approach towards X that has his safety in the forefront. The father's approach to X's safety as outlined above shows that the father is cavalier towards X's safety.

[155] The father contends that both the father and the mother have the capacity to meet X's emotional and intellectual needs. That may have been the case when the mother and father were not separated whether under the one roof or

physically. However, if the mother were not deeply involved in X's day-to-day care I am unable to reach a point of persuasion that the father could care for X single-handedly. I hold no confidence that the father is able to understand the nuances of X's highly complex circumstances and to accord to them the requisite priority they need.

[156] In my view s 60CC(3)(f) was addressed comprehensively by the mother and less so by the father.

[157] Section 60CC(3)(g) invited a consideration of X's maturity, sex, lifestyle and background (including lifestyle, culture and traditions) and of either of X's parents and any other characteristics of the child that the court thinks are relevant. On behalf of the mother the propositions advanced under this subsection were as follows, so far as X was concerned —

- a) he had a disorder causing benign tumours to grow throughout the body and in particular the brain;
- b) he suffers from severe epilepsy;
- c) he has ASD;
- d) he has severe behavioural problems and an inability to regulate his emotional state;
- e) he is aggressive towards his siblings and people around him;
- f) he has severe sleep disturbances;
- g) he suffers from pneumonia, ear problems and dental issues; and
- h) he requires constant supervision.

[158] On behalf of the father it was stated that the requirement for X to attend medical appointments has dramatically decreased.

[159] The characteristics of X as formulated by the mother are undeniable. His ASD and his disorder will not abate. His behavioural problems are as acute as ever. His sleeping issues may lessen in time depending on the steps the mother makes over years to come. X's ear problems and his dental issues may abate over time but any prognosis in those areas cannot sensibly be made by me nor even acted on. His need for constant supervision is being met by the mother as his full-time carer.

[160] Section 60CC(3)(h) was not relevant as X is not an aboriginal child or a Torres Strait Islander child.

[161] Section 60CC(3)(i) invited a consideration of the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents.

[162] On behalf of the father it was contended that the father demonstrated commitment to X pursuing a relationship with him despite multiple obstacles and that the father displayed a dedicated attitude towards the responsibilities of parenthood.

[163] Conversely, the mother said the father did not possess an in depth knowledge of X's health issues and needs and the father placed X (as well as the other children) in unsafe situations exposing them to physical and psychological risk while they were in his care.

[164] In my view the mother's contentions on this subsection were correct. The father's contentions were unduly glib and he omitted the grapple with the proposition that the father does not possess an in depth knowledge of X's health issues and needs and he has placed X in unsafe situations (the tractor depicted in exhibit W3, X climbing on some external beam being just two illustrations).

[165] **Section 60CC(3)(j)** invited a consideration of any family violence involving the child or a member of the child's family. Neither party submitted this provision was relevant.

[166] **Section 60CC(3)(k)** also invited a consideration of issues relevant to family violence. Both parties agreed this section was not relevant.

[167] **Section 60CC(3)(l)** invited a consideration of whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child. The mother submitted that it was preferable to make the order that will least likely lead to the institution of further proceedings. The father submitted that this litigation should be finalised because it began in 2016 and little was achieved at mediation. The father indicated that if orders were made for a limited time, it would not be unreasonable to anticipate that the father would apply for other orders. Mr Dickson QC on behalf of the mother submitted that orders should be made in the form urged by the mother but that those orders should operate for a limited period. He suggested two years.

Sole parental responsibility for X

[168] The mother argued, forcefully, that the presumption in favour of equal shared parental responsibility in relation to X recorded in s 61DA(1) of the Family Law Act had been rebutted. Mr Dickson contended that under s 61DA(4) of the Act I should be persuaded that it would not be in X's best interests for both the mother and the father to have equal shared parental responsibility for X.

[169] I agree. In my view, in relation to X the presumption of equal shared parental responsibility under s 61DA(1) has been rebutted and by operation of s 61DA(4) of the Family Law Act, I am satisfied that it is not in X's best interests for his mother jointly with his father to have equal sole parental responsibility for X. It follows that I make an order that the mother is to have sole parental responsibility for X.

Equal shared parental responsibility for Y and Z

[170] The mother and father posited orders that contained provisions for the mother and father to have equal shared parental responsibility for Y and Z.

With whom the children will live

[171] The father and the mother independently contended that orders should be made that all three children live with the mother. In view of that joint proposal, I am willing to proceed on the basis that the parties themselves take the view that it is in the best interests of all three children for them to live with the mother. In view of that approach it rendered unnecessary the task of ascertaining which sibling should live with which parent as was considered in *In the Marriage of Schmidt*,³⁸ *In the Marriage of Ahmad*³⁹ and *Thompson v Thompson*.⁴⁰

[172] In addition to her request for orders for all three children to live with her, the mother additionally sought an order that the mother relocate with the children from Town C to Town B. As mentioned earlier, the father opposed the making of the order for relocation to Town B.

38. (1979) 28 ALR 84; 5 Fam LR 421.

39. (1979) 24 ALR 621; 5 Fam LR 15.

40. (1980) 29 ALR 634; 5 Fam LR 737.

Relocation — Certain legal matters

[173] Since the decision of the Full Court in *Taylor v Barker*,⁴¹ the approach to relocation applications has involved —

- 5 a) considerations of the best interests of the child under s 60CC(3) of the Family Law Act; as well as
- b) considerations of the time the child will spend with each parent under s 65DAA of the Family Law Act.

[174] That is not to say that prior to the 2006 Family Law Amendment (Shared Parental Responsibility) Act the notion of relocation was absent from the Family Law Act. It was embedded in differently numbered sections of the Act then in operation. Those provisions were considered by the High Court in *AMS v AIF*.⁴² In that case, Kirby J set out nine propositions that represented general principles relevant to a relocation case. It is useful to set them out in précis form —

- 15 a) first, each case depends on the application of the governing legislation which is in a constant state of amendment and reexpression;
- b) second, unless legislation provides otherwise, no single factor is dispositive of decisions governing the residence of a child in the context of the proposed relocation of the parent with whom the child resides;
- 20 c) third, a statutory instruction to treat the welfare or best interests of the child as the paramount consideration does not oblige a court making the decision to ignore the legitimate interests and desires of the parents and if there is conflict between those considerations, priority must be
- 25 d) fourth, having regard to a court's reluctance to interfere in the freedom of a parent with whom a child lives, the applicable legislation is enacted and relevant discretions are exercised for a society that attaches high importance to freedom of movement and the rights of adults to decide where they will live;
- 30 e) fifth, while legislative reform (sometimes reflective of international law) has laid increased emphasis on the rights of the child who is separated from one or both parents to maintain personal relations and direct contact with each of them on a regular basis, the rule is not an absolute one;
- 35 f) six, a more relaxed attitude should be adopted to relocation within Australia than relocation overseas;
- g) seven, where a parent seeks to change arrangements affecting the residence of or contact with the child, the parent must demonstrate that the new arrangement is for the welfare of or in the best interests of the child;
- 40 h) eight, departure from the norm of shared parental responsibility is within the court's discretion; and
- 45 i) nine, an appellate court, invited to review the exercise of discretion at first instance will avoid an overly critical, or pernickety analysis of the primary judge's reasons given the large element of judgment, discretion and intuition which is involved.

50 41. (2007) 37 Fam LR 461; [2007] FamCA 1246 (*Taylor v Barker*).

42. (1999) 199 CLR 160; 163 ALR 501; 24 Fam LR 756; [1999] HCA 26 (*AMS v AIF*).

[175] Those observations were set against a legislative backdrop that preceded the 2006 amendments to the Family Law Act yet they have ongoing application to the existing emanation of the Family Law Act and have been applied by Full Courts since 2006.

[176] An early exposition of the operation of the 2006 amendments in the context of a relocation application was the decision of Dessau J in *M v S*,⁴³ judgment in which was handed down on 21 December 2006. There, her Honour (as her Excellency then was) traced through the provisions of the Family Law Act in logical sequence. It is utile to paraphrase her Honour's approach in the following way —

- a) in deciding a particular parenting order the best interest of the child is the paramount consideration: s 60CA;
- b) a presumption exists that it is in the child's best interests for the parents to have equal shared parental responsibility: s 61DA;
- c) as the concept of equal shared parental responsibility does not relate to the time the child spends with each parent, the court is required to consider whether the child spending equal time with each parent would be in the child's best interests (s 65DAA(1)(a)) and whether it is reasonably practicable (s 65DAA(1)) and then to consider an order for equal time (s 65DAA(1)(c));
- d) if the court does not make an order for equal time the court must consider whether the child spending substantial and significant time with each parent would be in the child's best interests (s 65DAA(2)(c)) and whether it is reasonably practicable (s 65DAA(2)(d)) and then to consider an order for substantial and significant time (s 65DAA(2)(e)).
- e) the concept of "*substantial and significant time*" is defined in s 65DAA(3);
- f) when considering propositions of "reasonable practicability", s 65DAA(5) sets out the matters the court must consider.

[177] Thus far, none of her Honour's comments touched on the criteria to be established when considering an application for relocation. However, her Honour pointed out that the legislation does not include a provision about relocation and the proposal recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report on the exposure draft of the 2005 bill was not adopted. In *M v S* her Honour (at paragraph [38]) said the following about whether an applicant for a relocation order bore any onus of proof —

Counsel for the father submitted that the new Pt VII provisions effectively cast an onus of proof on the applicant for relocation. They do not, and it is clear that was not the intent of the amendments. The legislature has not explicitly prohibited the relocation of a child away from one parent. It has not introduced a specific presumption against it, nor an onus of proof on the moving party. Nor has it suggested that just because the relationship between a child and a parent will inevitably be affected by a move away, that in itself should preclude the court from permitting the relocation. Otherwise, given the inevitability of some change to the nature of the child/parent relationship when the structure of the time spent together is changed, virtually all requests for relocation would as a matter of course be disallowed. Had that been the intention, the Act would have been amended accordingly.

[178] Ultimately her Honour made a relocation order in that case.

43. (2006) 37 Fam LR 32; [2006] FamCA 1408 (*M v S*).

[179] The decision in *Morgan v Miles*⁴⁴ is frequently cited as the *locus classicus* on the criteria to be established in an application for a relocation order. It must be acknowledged that the decision of Boland J in that case has been widely accepted, not the least reason for its consideration of the appropriateness of orders in the nature of relocation orders made at an interim stage. Boland J held that earlier core principles, that is to say, core principles that predated the operation of the 2006 amendments remain valid, those being —

- a) that the child's best interests remain the paramount but not sole consideration;
- b) that a parent wishing to move does not need to demonstrate "compelling" reasons;
- c) that a judicial officer must consider all proposals, and may himself or herself be required to formulate proposals in the child's best interests; and
- d) the child's best interests must be weighed and balanced with the "right" of the proposed relocating parent's freedom of movement.

[180] Boland J further held that the 2006 amendments required a consideration of the criteria in s 60CC as informed by s 60B plus the consequences of an order being made for sole parental responsibility. On the facts of that case Boland J held that distance per se was not the determinative criteria. Her Honour held that the relevant issue was the consequence of relocation. Hence, the legislation contains no definition of local, intrastate, interstate or international relocation.

[181] More recently, the Full Court has embraced the notion that relocation is not to be dealt with as a discrete issue but rather as just one of the matters that are under consideration for the child's future living arrangements. That was the upshot of decisions that preceded the 2006 amendments in *U v U*⁴⁵ and *Bolitho v Cohen*.⁴⁶ In the 2007 decision of the Full Court in *Taylor v Barker* such an approach was restated. The Full Court decided *Sampson v Hartnett (No 10)*⁴⁷ a month and three days after *Taylor v Barker* was decided yet in *Sampson*, *Taylor v Barker* was not mentioned at all. That may be accounted for on the basis that in *Sampson* the trial judge made orders requiring the mother to relocate with her child from Melbourne to Sydney and the Full Court was required to pass upon on the jurisprudential basis (especially the power) for the making of that order. While not relevant to the determination of this case, former Family Court Justice Richard Chisholm wrote about the subject in his article *To What Extent Can The Court Make Orders That Inhibit a Parent's Right to Relocate? Sampson v Hartnett (No 10)*.⁴⁸

[182] Given that a court must engage in a consideration of s 65DAA(1), the observations of the High Court in *MRR v GR*⁴⁹ about the imperative nature of its terms must be addressed. The relevant passage is as follows —

Section 65DAA(1) is expressed in imperative terms. It obliges the court to consider both the question whether it is in the best interests of the child to spend equal time with each of the parents (para (a)) and the question whether it is reasonably practicable that

44. (2007) 38 Fam LR 275; [2007] FamCA 1230.

45. (2002) 211 CLR 238; 191 ALR 289; 29 Fam LR 74; [2002] HCA 36.

46. (2005) 33 Fam LR 471; [2005] FamCA 458.

47. (2007) 38 Fam LR 315; [2007] FamCA 1365 (*Sampson*).

48. (2008) *Australian Family Law Bulletin* at 934.

49. (2010) 240 CLR 461; 263 ALR 368; 42 Fam LR 531; [2010] HCA 4.

the child spend equal time with each of them (para (b)). It is only where both questions are answered in the affirmative that consideration may be given, under para (c), to the making of an order.

[183] Elsewhere, the plurality held as follows —

Section 65DAA(1) is concerned with the reality of the situation of the parents and the child, not whether it is desirable that there be equal time spent by the child with each parent. The presumption in s 61DA(1) is not determinative of the questions arising under s 65DAA(1). Section 65DAA(1)(b) requires a practical assessment of whether equal time parenting is feasible.

[184] The High Court held that the Full Court erred by upholding the decision of a magistrate and by dismissing the appeal from the magistrate. At paragraph [19] of its reasons the plurality held as follows —

The evidence before his Honour did not permit an affirmative answer to the question in s 65DAA(1)(b). It follows that there was no power to make the orders for equal time parenting. It was necessary for his Honour to proceed to consider whether substantial and significant time spent by the child with each parent was in the child's best interests (given that equal time was not possible) and whether that was reasonably practicable. That would require consideration of the mother being resident in Sydney. But without a finding as to practicability no conclusion could be reached. At the rehearing of this matter afresh, the necessary determinations will be made on the evidence as to the practicability of such orders, given the circumstances pertaining to the parties as they then stand.

[185] As has been recorded above, in *Sigley v Evor* the Full Court approached the determination of an intrastate relocation application by reference to considerations of whether the children would have a meaningful relationship within the contemplation of s 60B(1)(a) if the relocation was permitted. The Full Court then applied the primary and additional considerations in s 60CC(2)(a) and (3) respectively.

[186] The need for a trial judge such as me to provide sufficient reasons that address the difficulties involved in the time sharing arrangement after the children commence school was the focus of the decision in *Adams v Randall*.⁵⁰ The Full Court in *Adams v Randall* held that the principles governing the adequacy of reasons were set out in *In the Marriage of M J and K H Bennett*.⁵¹ With respect, the principles go very much further than those canvassed in that case, as I wrote about in an article concerning the adequacy of curial and arbitral reasons.⁵²

[187] In that article I said the following —

- (a) reasons must include (a) relevant evidence, (b) any material findings of fact and conclusions and (c) why the judge found those facts and drew those conclusions;⁵³
- (b) the reasons must set out in full the grounds that led the judge to a conclusion on a disputed factual issue and the findings on the principal contested issue;⁵⁴

50. (2011) 46 Fam LR 453; [2011] FamCAFC 204 (*Adams v Randall*).

51. (1990) 14 Fam LR 397.

52. Dr Josh Wilson QC, "Adequate Arbitral Reasons After Westport — Has the Tension Been Resolved to Any Real Degree?" (2015) 34 *Arbitrator & Mediator* 9.

53. *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 441; 25 MVR 373.

54. *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 260 per Kirby (*Soulemezis*).

- (c) the findings in respect of every fact leading to or relevant to the judge's final conclusion of fact need not be stated nor one fact to the next along a chain of inference leading to the ultimate conclusion;⁵⁵
- (d) bald statements of ultimate conclusion are unlikely to be sufficient.⁵⁶ It is not sufficient to set out arguments of both sides then to state that one party's contentions are to be preferred over the others;⁵⁷
- (e) any submission worthy of serious consideration should ordinarily receive some attention in the reasons;⁵⁸
- (f) but the judge is not required to address every submission advanced in the hearing;⁵⁹
- (g) if credibility is an issue, it is necessary for the judge to state not merely whose evidence the judge accepts and also to explain, in appropriate detail, why the judge reached that conclusion;⁶⁰
- (h) reasons should trace the major steps in the reasoning process so that anyone reading the reasons can understand exactly how the judge came to the conclusion the judge did;⁶¹
- (i) summarising the evidence on which one party relies is not sufficient where the judge relied on certain specific evidence and the reason why it was relied upon should be stated;
- (j) reasons should deal with the substantive points raised by the parties, including findings on material questions of fact, refer to the evidence or other material upon which those findings were based and provide an intelligible explanation of the process that led the judge from the evidence to the findings and from the findings to the ultimate conclusion;⁶²
- (k) where the judge rejects evidence, the judge should refer to that evidence and explain why it was rejected;⁶³
- (l) merely reciting the evidence, followed by a statement of findings without explanation as to why the evidence was said to lead to the findings is 'about as good as useless'.⁶⁴

[188] To those authorities may be added the decision of the Appeal Division of the Supreme Court of Victoria in *Massoud*⁶⁵ and the decision of the Court of Appeal of the Supreme Court of New South Wales in *Pollard v RRR Corporation Pty Ltd*,⁶⁶ both of which were considered by the Full Court of this court in *Garrety v Steyn*⁶⁷ judgment in which was handed down yesterday, 1 August 2019.

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- 55. *Soulemezis* at 279 per Mahoney JA.
 - 56. The Honourable Justice Mark Weinberg, "Adequate, Sufficient, and Excessive Reasons" (2014) 5 *Victorian Judicial Scholarship* at [1]–[36].
 - 57. The Honourable Justice Mark Weinberg, "Adequate, Sufficient, and Excessive Reasons" (2014) 5 *Victorian Judicial Scholarship* at [1]–[36].
 - 58. *Sydney Water Corporation Ltd v Aqua Clear Technology Pty Ltd* [1996] NSWSC 640.
 - 59. The Honourable Justice Mark Weinberg, "Adequate, Sufficient, and Excessive Reasons" (2014) 5 *Victorian Judicial Scholarship* at [20]–[21].
 - 60. The Honourable Justice Mark Weinberg, "Adequate, Sufficient, and Excessive Reasons" (2014) 5 *Victorian Judicial Scholarship* at [22].
 - 61. The Honourable Justice Mark Weinberg, "Adequate, Sufficient, and Excessive Reasons" (2014) 5 *Victorian Judicial Scholarship* at [25].
 - 62. *Hunter v Transport Accident Commission* (2005) 43 MVR 130; [2005] VSCA 1 at [21] per Nettle JA, as his Honour then was; *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 18 (*Massoud*).
 - 63. *Franklin v Ubaldi Foods Pty Ltd* [2005] VSCA 317 (*Franklin*) per Ashley JA.
 - 64. *Franklin* at [37].
 - 65. [1989] VR 8.
 - 66. [2009] NSWCA 110.
 - 67. [2019] FamCAFC 124.

[189] One of the last decisions in my survey of the authorities concerning relocation is the Full Court's treatment of the point in *Blanding v Blanding*.⁶⁸ In that case the Full Court rejected the criticism levelled at the trial judge for allegedly failing to consider whether the children spending substantial and significant time with the parties was in their best interests and reasonably practicable. The Full Court held that the trial judge made no error in discussing the proposals propounded by the parties. On 31 July 2019 the Full Court decided *Babcock v Waddell*,⁶⁹ a relocation case. There the Full Court was influenced by the decision of the UK High Court in *Re TC and JC (Children: Relocation)*⁷⁰ where the High Court held —

- (a) is the application genuine in the sense that it is not motivated by some selfish desire to exclude the father or other person from the child's life?;
- (b) is the application realistically founded on practical proposals both well researched and investigated?;
- (c) what would be the impact on the applicant, either as a single parent or as a new spouse or partner, of a refusal of a realistic proposal?;
- (d) is the other parent or person's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?;
- (e) what would be the extent of the detriment to the father and his future relationship with the child if the application were to be granted?; and
- (f) to what extent would that detriment be offset by the extension of the child's relationships with the applicant's family?

[190] In that same case the Full Court embraced the decision of Lord Fraser of Tullybelton in *G v G (Minors: Custody Appeal)*⁷¹ where his Lordship said as follows —

The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory.

Equal time and substantial and significant time

[191] In the passages above I have already addressed the issue of equal shared parental responsibility finding —

- a) the mother should have sole parental responsibility for X; and
- b) the mother and father should have equal shared parental responsibility for Y and Z.

[192] Next, the issue of the parent's time with the children fell for determination.

[193] Extant orders provide for the father to have time with all children on alternate weekends from Saturday morning until Sunday afternoon. The precise terms of the consent orders in operation have already been set out.

68. (2016) 55 Fam LR 218; [2016] FamCAFC 21.

69. [2019] FamCAFC 129 (*Babcock v Waddell*).

70. [2013] EWHC 292 (Fam).

71. [1985] FLR 894 (*G v G*).

[194] So far as the father's time with the children was concerned, the parenting orders proposed by the mother were predicated on the relocation being ordered. They were as follows —

- 5 1. That Y spend time with the father by agreement.
2. That Z spend time with the father —
 - (a) each alternate weekend, with one weekend to be spent in the Town D region and the other in the Town B region as follows —
 - 10 (i) from the conclusion of school Friday until 6pm Sunday when spending time in the Town B region with the father to collect Z from school at the commencement of the father's time and return Z to the mother's residence at the conclusion of the father's time and in the event the father is running late to collect Z from school he provide the mother with an hour's notice;
 - 15 (ii) from 6pm Friday to 6pm Sunday when spending time in the Town D region with the mother and father to meet half way in Town EE at the commencement of the father's time and the father to return Z to the mother at the conclusion of his time or 4pm Sunday with the mother and father to meet half way in Town EE at the conclusion of time.
 - 20 (b) during school term holidays for 4 consecutive nights as agreed between the parties and in default of agreement from 10am on the first Saturday to 6pm on Wednesday;
 - (c) during summer school holidays pursuant to paragraph 5(a) [a differently numbered paragraph] above and in addition for 4 consecutive nights as agreed between the parties;
 - 25 (d) each alternate Christmas from 12 noon on 23 December to 12 noon on 27 December in 2019 and each odd numbered year thereafter;
 - (e) each alternate Easter from 12 noon on Good Friday to 12 noon Easter Monday in 2020 and each even numbered year thereafter.
- 30 3. That X spend time with the father —
 - (a) each weekend that Z is spending time with the father in the Town B region from 10am to 6pm on Saturday and from 10am to 6pm on Sunday with changeover to occur pursuant to paragraph 5(a)(i) above [a differently numbered paragraph];
 - 35 (b) each alternate Christmas for day time only as agreed between the parties during the period 12 noon on 23 December and 12 noon on 27 December in 2019 and each odd numbered year thereafter;
 - (c) each alternate Easter for day time only as agreed between the parties during the period 12 noon on Good Friday to 12 noon on Easter Monday in 2020 and each even numbered year thereafter.
- 40 4. For the purposes of changeover —
 - (a) with respect to paragraphs 5(b) and (c) [a differently numbered paragraph] it be as agreed between the parties and in default of agreement the parties meet half way in Town EE at the commencement of the father's time with Z and at the conclusion of the father's time; and
 - 45 (b) with respect to paragraphs 5(d) and (e) and 6(b) and (c) [a differently numbered paragraph] the mother will stay in the Town D region and deliver X to Town D School at the commencement of the father's time and the father will return X to the mother which will also allow for Y to spend time with the father as she wishes.
- 50 5. That X and Z spend time with the father on their birthdays, the father's birthday and Father's Day as agreed between the parties.

6. That during school holidays and special occasions time in accordance with paragraphs 5(a) and (b) and 7(a) [a differently numbered paragraph] is suspended.
7. The children spend time with the father by Face Time or telephone on Tuesdays and Thursdays between 3:30pm and 4pm and the children may end the call at anytime with a reasonable level of flexibility as to start and finish times dependent on school finish times.
8. That Y and Z spend time including additional Face Time and telephone time with the father at other times as agreed or as desired by them.
9. That the parties attend upon Dr K in November 2021 to review the parenting arrangements.

[195] Under s 65DAA it is necessary for me to consider whether the children spending equal time with the father is in their best interests and whether it is reasonably practicable. If I reach the conclusion that equal time for the children with their father is either not in their best interests or is not reasonably practicable, then I am required to consider whether substantial and significant time between the children and their father is in their best interests and whether it is reasonably practicable.

[196] The mother put forward a proposal for the children's time that Mr Dickson said involved the children spending substantial and significant time with the father and which was reasonably practicable. By definition, that meant that the mother contended that equal time for the children with their father was either not in their best interests or it was not reasonably practicable. The father contended in his outline of case that the regime proposed by the mother —

- a) was contrary to the time recommendations offered by Dr K which spoke of any arrangement for time maximising the children's time with the father in Town B or at his home;
- b) did not represent substantial or significant time; and
- c) would not enable the children to have a relationship with the father.

[197] Conversely, on behalf of the father a proposal was put forward that involved consecutive overnight time with all children including a block of time in school holidays for travel or simply time. The father pointed out that the arrangement that currently applied provided for the father to have one weekend per fortnight with X and Z with an additional dinner in the alternative week plus an additional overnight each week of the school holidays from 10am Tuesday until 6.30pm on Wednesday and time with Y was by agreement. On behalf of the father it was said that his proposal was supported by the recommendations of Dr K who stated that spending some regular block time between the children and the father over the school holidays was likely to enhance their experiences and time with their father and allow some of the stress of the children associated with transitions between their parents to alleviate.

[198] The father did not advance an argument in terms that he sought equal time.

[199] It is necessary to record in precise terms the orders sought by the father. They were as follows —

1. All previous parenting Orders be discharged.
2. The parties have equal shared parental responsibility for the children of the marriage, namely Y born in 2007, (“Y”), X born in 2009 (“X”) and Z born in 2012 (collectively “the children”).
3. The children live with the Wife.
4. The children spend time and communicate with the Husband as follows during school term:

Z

- (a) Until the commencement of Term 4, 2019, on each alternate weekend, from the conclusion of school on Friday until the commencement of school on Monday or until 6pm in the event that Monday is a non-school day;
- (b) From the commencement of Term 4 in 2019 in each fortnightly cycle:
 - (i) in week 1, from the conclusion of school on Friday until the commencement of school on Monday in week 2 or the commencement of school Tuesday in the event that Monday is a non-school day; and
 - (ii) in week 2, from the conclusion of school on Monday until the commencement of school on Tuesday.
- (c) From the commencement of Term 1 in 2020 in each fortnightly cycle:
 - (i) in week 1, from the conclusion of school on Friday until the commencement of school on Monday in week 2 or the commencement of school Tuesday in the event that Monday is a non-school day; and
 - (ii) in week 2, from the conclusion of school on Monday until the commencement of school on Wednesday.

X

- (d) Until the commencement of Term 4, 2019, on each alternate weekend, from the conclusion of school on Friday until the commencement of school on Monday or until 6pm in the event that Monday is a non-school day;
- (e) From the commencement of Term 4 in 2019, on each alternate weekend from the conclusion of school on Friday until the commencement of school on Tuesday;
- (f) From the commencement of Term 1 in 2020, on each alternate weekend from the conclusion of school on Friday until the commencement of school on Wednesday.

Y

- (g) from the conclusion of school until 7pm each Wednesday for dinner;
- (h) on one weekend in each calendar month from 10am on Saturday until 5pm on Sunday, with such time to take place in Melbourne or at such other location as agreed between the Husband and Y;
- (i) at such times further and other as agreed between the Husband and Y.
5. The children spend time with the Father on either the Town B Show or Wimmera Field Days on alternating years.
6. The children spend time and communicate with the Father as follows during school holidays:
 - (a) In the 2019 September school holidays, the Husbands weekend time pursuant to paragraph four be extended by one extra night to:
 - (i) Conclude at 6.00pm on Tuesday if the Husband’s weekend is the first weekend or middle weekend; and
 - (ii) 6.00pm on the Thursday preceding the Husband’s usual weekend if the Husband’s weekend is the last weekend.

- (b) In the 2019/2020 long summer school holidays, each alternate week for five consecutive nights as agreed and in default of agreement from 10.00am Tuesday to 6.30pm on Sunday commencing in the second week of the school holidays and alternating thereafter.
 - (c) Commencing from the start of the 2020 school year, for half of all Term holidays, as agreed in writing, and failing agreement for the first half in all even numbered years (from the conclusion school on the last day of term until 12 noon on the middle Saturday) and the second half in all odd numbered years (from 12 noon on the middle Saturday until the commencement of school on the first day of the next term);
 - (d) Commencing in December 2020, during the long summer school holidays, on a week — about basis, as agreed in writing, and failing agreement, for the first week, commencing the last day of school, and each alternate week thereafter (with changeover to take place at 12 noon) in all even numbered years and the second week and each alternate week thereafter in all odd numbered years;
 - (e) Commencing in December 2021, for one half of the long summer school holidays at times to be agreed in writing and to include a two week block for each parent and failing agreement:
 - (i) for the first half in 2021/22 and each alternate year thereafter;
 - (ii) for the second half in 2022/23 and each alternate year thereafter.
7. For half of all special days as follows:
- (a) For Christmas in 2019 and in each alternate year thereafter, from 4pm on 23 December until 4pm Christmas Day;
 - (b) For Christmas in 2020 and in each alternate year thereafter, from 4pm Christmas Day until 10am on 27 December;
 - (c) For Easter in 2020 and in each alternate year thereafter from 10am Easter Saturday until 3pm Easter Sunday;
 - (d) For Easter in 2021 and in each alternate year thereafter from 3pm Easter Sunday until 10am Easter Monday;
 - (e) On each of the children's birthdays, in the event the children are not already spending time with the Father, as agreed and in default of agreement, from the conclusion of school to 6.30pm if a school day and from noon until 6pm if a non-school day;
 - (f) On the Father's birthday, in the event that the children are not already spending time with the Father, from the conclusion of school until the commencement of school the following day if the Father's birthday falls on a school day, and from 10am until 10am the following day if the Father's birthday falls on a non-school day;
 - (g) On the Father's Day weekend each year from 5pm on the Saturday immediately before Fathers' Day until the commencement of school on Monday; and
 - (h) At any other time as agreed between the parties in writing.
8. The Father's time with the children be suspended to ensure that the children are spending time with the Mother:
- (a) For Christmas in 2020 and each alternate year thereafter, from 4pm on 23 December until 4:00pm Christmas Day;
 - (b) For Christmas in 2019 and each alternate year thereafter from 4pm Christmas Day until 10am on 27 December;
 - (c) For Easter in 2021 and in each alternate year thereafter from 10am Easter Saturday until 3pm Easter Sunday;
 - (d) For Easter in 2020 and in each alternate year thereafter from 3.00pm Easter Sunday until 10am Easter Monday.

- (e) On the children's birthdays, in the event the children are not already spending time with the Mother, as agreed and in default of agreement, from the conclusion of school to 6.30pm if a school day and from noon until 6pm if a non-school day;
- 5 (f) On the Mother's birthday in the event the children are not already spending time with the Mother, from the conclusion of school until the commencement of school the following day if the Mother's birthday falls a school day, and from 10am until 10am the following day if the Mother's birthday falls on a non-school day;
- 10 (g) On the Mother's Day weekend each year from 5pm Saturday immediately before Mothers' Day until commencement of school on the following Monday; and
- (h) At any other times agreed in writing between the parties.
9. For the purposes of these Orders:
- 15 (a) Time pursuant to order 4 continues during school holidays until the 2019/2020 long summer school holidays;
- (b) From the 2019/2020 long summer school holidays, time pursuant to order 4 is suspended during school holidays and shall resume at the commencement of term in the same pattern that would have been in place had the time not been suspended; and
- 20 (c) School holiday periods are to be calculated based on the term dates as published by the GG School, or such other school as attended by the Z and Y. Where the children attend different schools, the holiday period will commence from after school on the day the first child finishes the term and conclude on the day the first child commences school for the new term.
- 25
10. The parties each be at liberty to telephone and/or Facetime the children on every second day the children are not in their care between 7.00pm and 7.30pm and the other party ensure that these calls are facilitated and further
- 30 the parties agree to facilitate any reasonable request by the children to contact the other parent, with that other parent to then be at liberty to respond/speak with the children.
11. Y be provided with a mobile phone at the father's expense for the purposes of communicating with the Father.
- 35
12. All changeovers will take place at school, or if a non-school day the Mother shall deliver to the children to Town D School at the commencement of the Father's time and the Father shall return the children to the Wife's home at the conclusion of time, or such other place as agreed between the parties in writing.
- 40
13. The parties are each at liberty to attend any school or extra-curricular activities that parents are ordinarily able to attend and both parties be at liberty to communicate and spend time with the children at these events/activities.
14. The parties each be at liberty to communicate directly with the children's schools and to obtain copies of any documentation or information that is ordinarily available to parents.
- 45
15. The parties will keep each other advised as soon as practicable of any significant health issues relating to the children.
16. Both parents are at liberty to liaise with and attend upon all medical and allied health professionals upon whom the children attend and attend at all appointments for the children and to obtain any information relating to the children's health.
- 50

17. The parties are each hereby restrained, both personally and via their servants and agents from:
 - (a) abusing, belittling and otherwise speaking negatively about the other party or their family, or partners, to or within the hearing or presence of the children or either child.
 - (b) enrolling the children in any extra curricula activity on the other parent's time, without prior written agreement of the other parent.
18. The parties be hereby restrained from relocating any further than 25 kilometres from the children's current address or school:
 - (a) without the written consent of the other party; and
 - (b) with written notice of the intention to relocate to be provided to the other party no less than three months prior to the intended relocation.
19. The parties agree to trial the use of a Parenting App to facilitate communication about parenting issues and will otherwise communicate by way of email or text message in relation to parenting matters, save for in the event of an emergency. The parties also agree to communicate directly as appropriate, including at changeover or any other event they attend together with the children.
20. Each parent shall provide the other notice of any change to their residential address, contact phone numbers and email particulars, as soon as practicable, but in the case of a change of residential address, by no later than 14 days prior to the intended move.
21. Both parents shall continue to attend upon Ms FF until directed otherwise and shall:
 - (a) facilitate each of the children's attendance upon Ms FF if so requested by her;
 - (b) follow all reasonable recommendations, treatment and advice of Ms FF, particularly in relation to any variation of the time that the children are to spend with the Husband in accordance with these Orders.
22. The Wife be restrained from engaging any further allied health professionals for the children without the prior consent of the Husband.
23. 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 the parties adjust to comply with the order are set out in the Fact Sheet attached hereto and these particulars are included in these Orders as Annexure "A" to these Orders.

[200] At the risk of repetition, the driving distance between Town D and Town B, when measured by time, is a little over four hours, as was given in evidence. Precisely equal time is unrealistic and not reasonably practicable. Neither party said it was. Whether a relocation order was made depended on whether in the best interests of all children orders can be struck that confer substantial and significant time in their favour with their father. Once again, that invited a consideration of the elements of s 60CC(3) in the context of the children's time with the father.

[201] The first consideration is s 60CC(3)(a), the provisions of which have been earlier recorded. As a person nearly 12 years of age Y has expressed her views about relocating to Town B as well as about the time she might have with the father if a relocation order is made. She told Dr K that she felt happier spending less time with the father and she said she wanted to spend time with the father by agreement. She told Dr K that spending one-on-one time with the father might be better (her words) as the father could then pay attention to her and she would not have the responsibility for the care of her brothers X and Z. So far as

the proposed move to Town B was concerned, Y said it will be sad for her to leave her friends but she regarded it as a fresh start at a new school and that after a while she will adjust to living in a new location.

5 [202] For reasons canvassed above, X's intellectual capacity equated to a two year old so he was unable to express a view about relocating or about having time with the father.

10 [203] Z told Dr K that he enjoys spending time with the mother and that the mother wants to move. Z said he thought the fighting between the father and the mother and the fighting between the father and Y will stop if they move.

15 [204] Under s 60CC(3)(b) (the precise terms of which have been set out above), the nature of the relationship of each child with each parent must be considered. X's situation has already been canvassed. So far as Y and Z were concerned, the father and the mother acknowledged that the mother was the primary care giver. The mother said she hoped all children's relationship with the father would continue to grow stronger. The father said he had been persistent in his resolve to have a relationship with his children yet he said the mother had placed constraints on his time.

20 [205] Under s 60CC(3)(c), the language of which has been set out above, it was relevant to consider the extent to which each parent had taken or failed to take the opportunity to participate in making decisions about major long term issues, to spend time and to communicate with each child.

25 [206] The father asserted he had endeavoured to be involved in decisions about long term care and that he took every opportunity to spend time with the children. The father asserted that he had attended the children's extracurricular activities. Conversely the mother said the father, during the marriage, was not intimately involved with the children's care as that fell to the mother. She said she had managed the children and that the father relied on her to do that. She mentioned
30 how, during the two years she lived in Melbourne with the children the father visited about twice a month. The father said that following separation the father had begun spending more regular time with the children and that since early 2018 when Dr K produced her first report, the father had begun attending some
35 medical appointments, school events and extracurricular activities.

[207] Issues about maintaining the children as canvassed in s 60CC(3)(ca) have already been canvassed above.

40 [208] Section 60CC(3)(d) is important in the context of relocation. In his case outline the father said a proposed move to Town B will be likely to have a detrimental effect on Y as the distance will impede her ability to spend individual time with the father. The father also mentioned his concerns that any further reduction in his time with the children will lead to the children's enmeshment with the mother. As has already been mentioned above, X will benefit mostly
45 from the proposed relocation yet Y and Z will as well as their proposed schooling offers additional support for them having regard to their respective learning difficulties. A summary of the benefits to the children may be stated as follows —

- a) Town B facilities for X are superior than those in Town C;
- b) disability services are extensive;
- 50 c) Town B has special development schools, including LL School, which, unlike Town C School, cares for severely disabled persons;

- d) Town B has facilities that will cater for X's future including home modification, innovative community participation, therapeutic support, community nursing care, group centre activities and special disability accommodation;
- e) Town B is more proximate to M Hospital;
- f) for Y and Z Covenant College would be suitable as it parallels the Christian education Y and Z have previously enjoyed;
- g) Y and Z will benefit from Covenant College's horticultural and animal husbandry programme;
- h) Y and Z can continue their extracurricular studies in Town B;
- i) during the two years in Melbourne the children established an extensive range of friends and if they relocate to Town B the children can enliven their friendship groups more easily in Town B;
- j) Y and Z make friends easily;
- k) a developed support network exists in Town B; and
- l) if relocated to Town B, holiday activities for the children are more available.

[209] Outlined in those terms, for all children enormously beneficial effects are likely to result for them if a relocation order is made.

[210] Under s 60CC(3)(e), the precise wording of which has been canvassed above, the practical difficulty and expense of the children spending time with the other parent is relevant. The mother did not identify any practical difficulty or expense to the father as a result of any relocation. Conversely, the father made several points including the following —

- a) the father's mid-week time with the children and regular weekend time will be difficult due to onerous travel times for the children;
- b) the mother did not address changeover details for the children when Z is spending time with the father in Town D;
- c) under the mother's proposal, the father is to spend one night per month with Z in Town B and two days on that weekend with X yet the father does not have accommodation in Town B nor do the children have toys or home comforts anywhere in which the father stays; and
- d) the father will be required to find activities for the children in and around Town B.

[211] Turning next to s 60CC(3)(f) considerations, the language of which has been recorded above, the father submitted that he and the mother have the capacity to meet the emotional and intellectual needs of Y and Z. Conversely, the mother said the father is limited by his own literacy issues in his ability to provide for the intellectual and emotional needs of Y and Z. The mother said the father is unable to safely care for Y and Z. As for Y, the mother said the father was unable to prioritise Y's emotional needs because the father relies on Y to help care for Z and X.

[212] Next, it was relevant to address the elements of s 60CC(3)(g) the full particulars of which have been earlier set out. The mother said on this issue —

- a) all children have special needs;
- b) Y has ASD and she regularly attends a psychologist and receives tutoring;
- c) Y's behavioural issues include anxiety, aggression, frustration and stimming;

- d) X's multifarious physical, intellectual and behavioural issues have been addressed above;
- e) Z has ASD and his behaviour can be defiant, he is under the care of a psychologist and a paediatrician and he receives tutoring; and
- f) Z has occupational therapy as well as speech therapy.

[213] It must not be forgotten that the father said he finds it challenging taking care of all three children at once.

[214] Section 60CC(3)(h) was not applicable.

[215] Turning next to s 60CC(3)(i), the terms of which have been recorded above, it was necessary to address each parent's attitude to each child and to the responsibilities of parenthood. The father said he had demonstrated a commitment to the children and he had pursued a relationship with them despite what he said were multiple obstacles. Conversely, the mother submitted that the father —

- a) does not enjoy an indepth understanding of X's health issues and needs;
- b) has while in his care previously placed the children in unsafe situations thereby exposing them to physical and psychological risks;
- c) has relied on Y to assist in the care of X and Z; and
- d) has involved the children in discussions about the parties' separation.

[216] Family violence issues relevant to s 60CC(3)(j) and (k) were not applicable.

[217] Both parents sought orders finalising this litigation. In final addresses I asked Mr Dickson QC how that submission was to be reconciled with paragraph 13 of the orders he proposed. He said final orders should be made and the success or otherwise of them should be reviewed by Dr K in 2021, two years hence. It seemed to me that there was real merit in that suggestion.

Findings on s 65DAA matters

[218] In approaching the relevant enquiries under s 65DAA, I have followed the guidance given by Dessau J in *M v S*, as subsequently embraced by Full Court decisions.

[219] An order has been made in this case for the mother to have sole parental responsibility for X. The parties have agreed that each will have equal shared parental responsibility for Y and Z.

[220] I am of the view that a relocation order should be made. In reaching that conclusion I have carefully considered the detailed and complex matters that bear on an assessment of that question, underpinned as they are by the best interests of all children. X's needs and requirements predominate in the consideration of that issue although the needs of Y and Z are also highly relevant. Let me set out my main conclusions on the matter in view of my decision that the children will benefit from having a meaningful relationship with both the mother and father, although not necessarily an optimal one. They are as follows —

- (a) Y and Z are enthusiastic about the proposed move and X's intellectual state is such that he is unable to express a view;
- (b) the mother is the primary carer to all children and while the father is now involved in the lives of his children, his involvement is significantly less than the mother's;
- (c) since early 2018 the father has become involved with the children's extracurricular activities and with medical people yet that is of comparatively recent times only and the mother has made all major long

term decisions about the children, sometimes with the father's contribution but mostly singlehandedly, especially on medical issues for all children, a position in which the father freely acquiesced;

- (ca) no real issue emerged in the parenting aspect of this litigation about maintenance of the children although some evidence existed about a shortfall in the sums for which the father reimbursed the mother in the nature of medical and educational expenses;
- (d) there will be limited adverse effect on the children by the proposed relocation to Town B as they will benefit enormously by the fact that they will be more proximate to better medical and associated services and closer to M Hospital by the relocation. The evidence does not bear out any suggestion that they will be adversely affected by a geographical separation from the father and while the benefits of time on his farm are apparent, those benefits are comprehensively displaced (so as to render them near nugatory) by the opportunities for the children in the proposed relocation;
- (e) the proposed relocation will obviously add to the time involved in driving between Town B and Town D which in turn might bear upon the frequency of the travelling between the two destinations, yet in my view that factor is not of such magnitude as it should foreclose on the making of the relocation order;
- (f) overwhelmingly, the mother possesses the superior ability to provide for the emotional and intellectual needs of the children and has demonstrated her very deep devotion to each child since he or she was born. The same cannot be said of the father;
- (g) all three children have very significant special needs that relocation to an environment equipped to address those needs will help alleviate;
- (h) the children are not aboriginal or from the Torres Strait Islands;
- (i) the mother impressed me in very real terms about her attitude towards each child and to the responsibilities of parenthood. Conversely, the father seemed to take the view that life on a farm was the panacea to all issues confronting the children. I do not share that view. The needs of the children are such that they must be located near highly sophisticated medical services. I do not agree with Dr L's conclusion that those services are as readily available in Town C as they are in Town B;
- (j) family violence was not an issue in this case;
- (k) it was not necessary to address family violence;
- (l) in my view the mother's proposal for Dr K to review this case in two years is desirable although final orders need to be made.

[221] The relocation just ordered will impact on the father's time with the children. Equal time is not reasonably practicable having regard to the four hour drive that will separate the father in Town D from his children in Town B. It is noteworthy that one should not speak of making an order granting "*permission*" to relocate, for the reasons given in *AMS v AIF* by Kirby J at paragraph 188, as restated by the Full Court in *Babcock v Waddell* at paragraph 139. The question then became whether the orders proposed by the mother represent substantial and significant time for the children with the father. In my view they do for the purposes of s 65DAA(3). In order to determine the reasonable practicability of substantial and significant time, s 65DAA(5) requires a consideration of five matters. The first is how far apart the parents will live from one another. That has already been addressed. The second is the parents' current and future capacity to

implement substantial and significant time for the children with each parent. The mother expressed her willingness and capability to perform the orders she proposed. The father told me he had no way of knowing whether his roster as presently formulated called for trucking work between Town D and Town B. That
5 may be true but the father has a car or access to one and he can drive to Town B with ease, even if that requires him to be away from the farm for a very short time while seeing his children. It must not be forgotten that the mother will be driving to Town D under her proposal. As for the need for the father to find accommodation in Town B, I do not regard that as a compelling reason to not
10 make the orders sought having regard to the overwhelming importance of the children's needs to be proximate to highly sophisticated medical services in Town B.

[222] So far as there being no overnight time while X is in the father's care, I
15 am of the view that such a proposal is proper in the circumstances. The father has said himself he has trouble coping with the three children at once. He said to avoid the risk of X leaving the farm at night the father deadlocks the doors. Self evidently that poses a real risk, especially in case of fire. The father has not followed the mother's lead in progressing X's sleep patterns and the father will
20 lay down next to X. In all, I am persuaded that the proposals put forward by the mother for the children to spend substantial and significant time with the father satisfied s 65DAA(5)(b).

[223] So far as s 65DAA(5)(c) was concerned, I have considered the parents' capacity to resolve difficulties that might arise in the implementation of the
25 mother's proposal. The communication between the mother and father since separation has been poor, it must be acknowledged. That said, they are not at daggers drawn. At one stage they communicated effectively by using a communication book. That stopped, it seemed, when the communication book
30 flew out of the back of the father's ute. In my view, the parties must resume the use of the communication book. A mobile telephone app now exists to make that easier still.

[224] Under s 65DAA(5)(d) it is necessary to consider the impact on the children of "*an arrangement of that kind*". That phrase is inelegant. But it seems
35 to be a reference to the arrangement for substantial and significant time. In my view the evidence revealed nothing adverse by way of impact on the children in the relocation proposed and in the substantial and significant time proposed by the mother.

[225] Section 65DAA(5)(e) invited a consideration of such other matter as the
40 court considers relevant. None were urged and none come to mind.

[226] It is useful to record why I was not persuaded to make the orders proposed by the father. In the passages that appear above I have canvassed why
45 equal shared parental responsibility for X is not appropriate. The father's proposal for the children to live with the mother corresponded with the mother's proposal for the children to live with the mother. The father's proposal said nothing about relocation. His proposal for time varied as between each child. He proposed the new time regime to commence from prior to and subsequent to
50 school term 4 of this year. In Z's case, it involved a two week cycle where a particular regime applied in the first week then a different regime applied in the second week. It also involved a different regime for 2020.

[227] For X the father's proposal involved alternate weekends from the conclusion of school on Friday until the commencement of school on Monday. As mentioned above, that regime involved overnight stays. For reasons already given I agree with the mother that the father should not have X overnight.

[228] For Y the father proposed time from the conclusion of school each Wednesday until 7pm for dinner and one weekend per calendar month from 10am on Saturday until 5pm on Sunday to take place in Melbourne or at such other location as Y and the father may agree. Otherwise Y's time with the father was as agreed.

[229] The father's proposal involved time with him during school holidays from this date until 2023. It also involved a regime for special days. Changeovers were to take place at the children's school. The father proposed a restraint on both parents forbidding them from relocating any further than 25 kilometres from the children's current school or Town C address. The father proposed the parenting app I mentioned earlier in these reasons. The father proposed a restraint on the mother forbidding her from engaging any further allied health professionals for the children without his consent.

[230] The foregoing distillation of the father's proposals reveals the unsuitability of the orders he proposes to the circumstances of this case. That is because they —

- a) forbid relocation beyond 25 kilometres from Town C;
- b) forbid, despite necessity, the mother retaining any further allied health professional without the father's consent;
- c) contemplate changeovers at the children's current school or at Town D School (thereby tying the children to Town D or Town C);
- d) they involve X spending overnight time with the father despite the father's difficulties coping with three children at once and notwithstanding his questionable judgment while X has been in his care;
- e) they involve Y spending time with the father in Melbourne when no suggestion had emerged in this case that (rare occasions aside such as a trip to the zoo) Y would be regularly in Melbourne; and
- f) the arrangements contemplated an enlargement of the father's time in due course.

[231] Conversely, the mother's proposal had a different regime for all children. Y's time was by agreement and Z's involving one weekend in the Town D region and the other in Town B. Whenever Z was spending time with his father in Town B, X would also. The mother's regime was far more straightforward which in turn offered less likelihood of complications in its implementation.

[232] I am persuaded that relocation is in the best interests of the children, that consequent upon relocation the father's time with the children will confer upon the children substantial and significant time and that the regime proposed by the mother is reasonably practicable.

[233] As was mentioned earlier yet it warrants repeating, in the United Kingdom case of *G v G*, Lord Tullybelton said the following about a case involving the child's best interests —

The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory.

Conclusion

[234] For those reasons I have made the orders set out in the early pages of this judgment.

5 [235] May I record my gratitude to both counsel in this case. As might have been expected of Queen's Counsel of their standing and eminence, they conducted this case with great sensitivity and genuine concern not only for the children but also for the parents whose future, on any view, will be a challenge.

Order

10 (1) By noon on 5 August 2019 the parties are to bring in minutes to give effect to these reasons.

MARGARET NAKAGAWA
SOLICITOR

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