FAMILY COURT OF AUSTRALIA

HALIFAX & FABIAN ***[2010] FamCA 1212***

FAMILY LAW – CHILDREN – Same-sex parents – Definition of "parent" – Relocation

Evidence Act 1995 (Cth)
Family Law Act 1975 (Cth)
Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)

AMS v AIF (1999) HCA 26
Chappell and Chappell (2008) FLC 93-382
Mazorski and Albright [2007] FamCA 520
McCall v Clark (2009) FamCAFC 92
MRR v GR (2010) 263 ALR 368
Mathers & Mathers [2008] FamCA 856
R and R: Children's wishes (2000) FamCA 43
Sampson and Hartnett (No 12) (2007) FLC 93-350
Simpson and Brockmann [2010] FamCAFC 37
Taylor and Barker [2007] FamCA 1246

APPLICANT:	Ms Halifax
RESPONDENT:	Ms Fabian
INDEPENDENT CHILDREN'S LAWYER:	
FILE NUMBER:	BRC 737 of 2009
DATE DELIVERED:	24 December 2010
PLACE DELIVERED:	Melbourne
PLACE HEARD:	Brisbane
JUDGMENT OF:	THE HONOURABLE JUSTICE CRONIN
HEARING DATE:	29 APRIL 2010; 15, 16 JULY 2010

REPRESENTATION

COUNSEL FOR THE APPLICANT:	MR LINKLATER-STEELE
SOLICITOR FOR THE APPLICANT:	PARKER FAMILY LAW
COUNSEL FOR THE RESPONDENT:	DR SAYERS
SOLICITOR FOR THE RESPONDENT:	SBA LAWYERS
COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER:	MR ANDREWS
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER	LEGAL AID QUEENSLAND

ORDERS

(1) That all existing parenting orders are forthwith discharged.

(2) That Ms Halifax and Ms Fabian have equal shared parental responsibility for the children Y born … July 2002 and X born … June 2006.

(3) That for the purposes of s 65DAC of the *Family Law Act 1975*, the obligation to consult shall be fulfilled by the parties communicating in writing to one another but in the event of a disagreement, they shall arrange either a mediation or attend upon a family dispute practitioner before issuing any further legal proceedings arising out of such a dispute.

(4) That Y live with Ms Halifax.

(5) That X live with Ms Fabian.

(6) That until 31 December 2011, Ms Fabian be restrained from permitting X to live on the Central Coast of New South Wales.

(7) That until 31 December 2011, unless otherwise agreed, Y spend time with Ms Fabian as follows:

   (a) during each alternate weekend from the conclusion of school on Friday to 5 pm on the following Sunday; and

   (b) for one half of all school holidays by agreement and in default of agreement, the first half commencing with the first school term in 2011.

(8) That until 31 December 2011, X spend time with Ms Halifax as follows:

(a) During each alternate weekend from the conclusion of school on Friday to 5 pm on the following Sunday; and

(b) For one half of all school holidays by agreement and in default of agreement, the second half commencing with the first school term in 2011.

(9) For the purposes of paragraphs 7 and 8, the alternate weekends shall commence by agreement but failing agreement, paragraph 7(a) shall commence on the first weekend after the children's school commences in 2011 and paragraph 8(a) shall commence one week later.

(10) For the avoidance of doubt and for the purposes of paragraphs 7 and 8, it is the intention of the Court that during each such period, the two children will be together.

(11) For the purposes of determining when school holidays commence and end for 2011, unless otherwise agreed, they shall commence at 10 am on the day after school ceases for the term or year and shall end at 10 am on the day before the child returns to school.

(12) That during the school year 2011, subject only to any contrary views held by the principal, X shall attend S Catholic School.

(13) That as soon as practicable, Ms Halifax and Ms Fabian and to the extent necessary the children, attend upon and at the direction of, a counsellor during the year 2011, to be nominated by Ms L but to be organised by the Independent Children's Lawyer at the joint expense of Ms Halifax and Ms Fabian, to:

(a) discuss the implementation of these orders;

(b) endeavour to improve the communication relationship between Ms Halifax and Ms Fabian;

(c) deal with the impact of these orders on the children and in particular their respective relationships with each of the parties; and

(d) provide counselling for the parties generally.

(14) That for the purposes of paragraph 13 of these orders, copies of the orders this day and the reasons for judgment be made available by the Independent Children's Lawyer to:

(a) Ms L; and

(b) the nominated counsellor.

(15) That Ms Halifax and Ms Fabian do all things necessary to facilitate the children speaking to each other and to the other parent on one night per week at times by agreement and failing agreement, on Wednesdays at 7 pm.

(16) That until 31 December 2011, each parent collect the relevant child from the child's school at the commencement of their period and return her to the other parent at that parent's residence at the conclusion of the relevant period. If because of school holidays or for any reason brought about by the school, the relevant child is not at school on the Friday, the parent with whom the child lives has an obligation to deliver the child to the other parent at the relevant time at that other parent's residence.

(17) That in the event that the respective parents cannot determine a contact regime for special days during 2011, they may seek the Court determine those matters by written submission served upon the other parent but not the Independent Children's Lawyer, such submissions to be sent to Justice Cronin for determination in chambers.

(18) That after completion of the matters otherwise set out in these orders, the Independent Children's Lawyer be discharged from the proceedings.

(19) That if after 31 December 2011, Ms Fabian does not move to the Central Coast of New South Wales with X, the arrangements set out in paragraphs 7 and 8 shall continue until the parties otherwise agree.

(20) That if after 31 December 2011, Ms Fabian moves to the Central Coast of New South Wales, the following shall apply:

(a) X spend time with Ms Halifax as follows:

(i) during one weekend per term in Brisbane from 6 pm on the Friday (or at such other time as is practicable on the Friday having regard to flights from Newcastle to Brisbane) to 10 am on the following Sunday and for this purpose, the handover point shall be the residence of Ms Halifax;

(ii) for one half of all school holidays by agreement and in default of agreement, subject to paragraph 21, the first half commencing with the first school term in 2012 and for this purpose, the handover point shall be the residence of Ms Halifax.

(b) Y spend time with Ms Fabian as follows:

(i) during the weekend in Brisbane referred to in paragraph 20(a) from 10 am to 4 pm on the Sunday and for this purpose, the handover point shall be the residence of Ms Halifax ;

(ii) for one half of all school holidays by agreement and in default of agreement, subject to paragraph 21, the second half commencing with the first school term in 2012 and for this purpose, the handover point shall be the residence of Ms Fabian.

(21) That for the purposes of determining holidays in circumstances where the States of New South Wales and Queensland have different terms, the holidays

shall be deemed to commence with whichever State begins those holidays first and conclude when that State's holidays and the arrangements referred to in paragraph 20 shall be adjusted so that the children each spend an equal amount of time together with each parent.

(22) That the costs of the children's (as distinct from the adults' travel) travel for the trips referred to in paragraph 20 shall be as follows:

(a) For the trip during the term to Brisbane, all travel costs shall be borne by Ms Fabian;

(b) For the trips during school holidays, all airline expenses shall be equally borne.

(23) That subject to Ms Fabian moving to New South Wales, Ms Halifax and Ms Fabian do all things necessary to facilitate the children speaking to each other and to the other parent by Skype on one night per week at times by agreement and failing agreement, on Wednesdays at 7 pm together with a similar conversation on each child's birthday, each mother's birthday, each Mothers' Day and each Christmas Day.

(24) That for the purposes of paragraph 23 each of Ms Fabian and Ms Halifax do all things necessary to ensure that they have computer and internet facilities connected to enable the necessary Skype operation to occur and each shall take alternate turns to make the communication call.

(25) That each parent keep the other informed of all illnesses and accidents involving the children other than simple problems that do not require medical attention.

(26) That all applications save as to any application for costs be otherwise dismissed.

IT IS CERTIFIED:

(27) That pursuant to Order 19.50 of the Family Law Rules 2004 it was reasonable to engage counsel to attend.

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

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

FAMILY COURT OF AUSTRALIA AT BRISBANE

FILE NUMBER: BRC737 OF 2009

MS HALIFAX
Applicant

And

MS FABIAN
Respondent

And

INDEPENDENT CHILDREN'S LAWYER

REASONS FOR JUDGMENT

1. This is a difficult dispute about two children born to two women who were in a same sex relationship which has now broken down irretrievably. For reasons which I shall set out below, the women are the parents of both children despite the fact that the children are not biologically connected and hence are not sisters. One of the mothers proposes to move interstate with her child giving rise to arguments about the controversy of "relocation" but also the splitting of "siblings". The facts of this case also highlight the dilemma of the clash between freedom of movement of adults and the welfare of children.

2. In *AMS v AIF* (1999) HCA 26 Kirby J at 144 said:

> …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. If there is a conflict between these considerations, priority must be accorded to the child's welfare and rights. However, the latter cannot be viewed in the abstract, separate from the circumstances of the parent with whom the child resides.

3. Much of the judicial history about "relocation" cases has focussed on heterosexual parents where biological connection was clear. This case highlights the reality rather than the abstract of a breakdown of a same sex relationship into which had been born children by artificial conception procedures to two different mothers.

4. In a recent paper to the National Family Law Conference in Canberra 2010 titled "Outside the Nuclear Family – Children's Outcomes and Experiences in Same Sex Families" the author clinical psychologist Catherine Boland said:

> In many lesbian families there is a conscious avoidance of language that makes distinctions around biology. Unfortunately research that looks specifically at the role of the co-mother, the child's attachment to her and the strengths and challenges of this role, is still in its infancy.
>
> …
>
> Very little research specifically examines experiences where women in a lesbian couple each have a pregnancy or multiple pregnancies and yet this seems to be an emerging variable of importance and certainly seems to be a typical pattern of family formation.

5. Notwithstanding the complexities of the nature of the relationship between children in a same sex household who are not biologically connected, the principles for the determination of such a dispute remain the same; that is, the best interests of the children is the paramount, but not the only consideration.

6. Ms Halifax is the 39 year old biological mother of Y. Y was born in July 2002. Although Y was conceived by an artificial conception procedure, Mr Dalton is her biological father. He is named on Y's birth certificate.

7. Ms Fabian is the 41 year old biological mother of X. X was born in June 2006. X was also conceived by an artificial conception procedure but the donor remains anonymous. It was Ms Fabian's position that she did not want a father in X's life. No father is recorded on the birth certificate of X.

8. One of the contentious issues in this case is whether Ms Halifax should be recorded on the birth certificate of X.

9. Y has special needs. She was born with 50 per cent hearing loss and has been assisted by speech and developmental therapy. She has developmental delays and some intellectual impairment. According to Ms Fabian and not disputed by Ms Halifax, Y has problems about following instructions, remaining on tasks, communicating effectively, socializing and dealing with change.

10. From January 2002 until early 2008, Ms Halifax and Ms Fabian lived in an intimate relationship as a couple. It is not disputed that they lived in a defacto relationship. Ms Fabian had gone to Queensland from New South Wales specifically to conceive a child by donor's insemination in 2001 and after meeting Ms Halifax, commenced the relationship. Ms Fabian's family live in New South Wales. Although the intimate relationship ended in early 2008, the physical separation did not occur until September 2008.

11. During the relationship, Y and X were born. They were raised as sisters with their two mothers whom the children call "Mummy" and "Mumma".

12. It is not with any disrespect that I shall refer to all of the participants and the two children in this case by shortened names. The family dynamics are complicated enough without formalities making it more confusing.

13. Mr Dalton was a party to the proceedings but withdrew leaving Ms Halifax as the applicant and Ms Fabian as the respondent. Mr Dalton had and has, a significant parenting role in Y's life. He is a biological parent of Y but did not seek orders or make any submissions about a future role for any person in the life of X.

14. Throughout these reasons, Ms Fabian and Ms Halifax together are referred to as "the parties".

15. Mr Dalton is in an intimate relationship with Mr Ballard and together they have had a role in the lives of these two children. Both men are employed as health professionals.

16. Prior to the birth of X, Mr Dalton was in a relationship with man named Mr H. Mr H had involvement in Y's life from shortly after her birth but he separated from Mr Dalton before X was conceived. Mr H is no longer a participant in Y's life. For most of the lives of Y and X therefore, at least until separation in 2008, Mr Dalton and Mr Ballard have been father-figures for both children. Since separation, Ms Fabian has distanced herself from Mr Dalton and Mr Ballard and the time between X and Mr Dalton and Mr Ballard has been limited.

17. At the time of the separation when the relationship between Ms Halifax and Ms Fabian broke down completely, each made a choice to take charge of their biological child. That choice may not necessarily have been well considered. It is probable that Ms Halifax was unhappy about not being the "mother" of X on a full-time basis. Be that as it may, and I do not have to make a finding about that, the children were also separated from each other along biological lines.

18. Soon after separation, Ms Fabian announced that she wanted to move to New South Wales with X. Litigation then began in earnest and a number of hearings were held in the Federal Magistrates Court of Australia. In a court-ordered family report, the expert witness described the dispute as "complex". That may have been so and probably still is, but the fact remains that this is not about the politics of personal relationships but rather about the future interests of two children. I have no doubt all of the adults love these children. There is no doubt that to the extent that they can understand the concept, the children not only love each other but also consider themselves to be sisters. Each child shows love and affection towards their non-biological mother.

19. Ms Halifax is self-employed and Ms Fabian a part-time administrative officer and the children are their only children. They currently live within close

proximity of one another. There is currently significant time spent by both women with the children as a result of court orders. A move therefore to separate the children by significant distance will alter the relationships the children currently enjoy.

20. The relationship between Ms Halifax and Ms Fabian is not only strained to the point of non-communication, it is stressful. As I shall mention below, each party has had psychological difficulties as a result of the separation but on the evidence, I find it is Ms Fabian who is managing those problems better.

21. Until the amendment to the *Family Law Act 1975* (Cth) ("the Act") commenced in November 2008, there was considerable judicial comment about who was a parent (see *Simpson and Brockmann* [2010] FamCAFC 37; *Mathers & Mathers* [2008] FamCA 856). The amendment to s 60H by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) referred to children born before November 2008. Section 60H(1) provides that where a child is born to a woman as a result of an artificial conception procedure while a de facto partner of another person, and that other person has consented to the procedure, the child is a child of both. While the reference to the consent of the procedure is vague, s 60H(5) places the onus to refute the consent on the person asserting no such consent. None of that has been suggested here. In this case, none of the constituent elements was disputed. Thus each of Ms Halifax and Ms Fabian is a parent of both children.

22. Section 61DA(1) provides that when making a parenting order in relation to a child, the Court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

23. Section 61DA(2) provides that the presumption referred to does not apply if there are reasonable grounds to believe that a parent of the child has engaged in abuse of the child or another child who at the time, was a member of the parent's family or has engaged in family violence.

24. Family violence is defined in s 4 of the Act and in so far as it is relevant in this case, it means conduct whether actual or threatened by one person towards another such that the conduct causes the recipient to reasonably fear for or reasonably to be apprehensive about their personal wellbeing or safety.

25. A finding of family violence rebuts the presumption. In this case, there is no evidence upon which I could make such a finding.

26. Section 61DA(4) of the Act gives a court a discretion to rebut the presumption if the evidence satisfies the court that it would not be in the best interests of the child for the parents to have equal shared parental responsibility for that child. That determination is guided by the principles in s 60CC to which I shall turn

in some detail. Suffice to say, I find that the presumption in this case is not rebutted.

27. Section 60CA applies when a court is making a particular parenting order in relation to a child. The court must regard the best interests of the child as the paramount consideration. As was pointed out by the High Court in *AMS v AIF* (supra) the legislative use of the words "paramount consideration" must mean that it is not the only consideration. Kirby J at 143 said:

> (the Statute) may provide a list of considerations or "principles" to be applied in the exercise of the court's powers. However, the "paramount" consideration is not the same as the "sole" or "only" consideration. The relevance of enumerated statutory principles will depend upon the circumstances of the particular case. Preconceived notions as to the weight which must be given to particular facts are incompatible with the exercise of an individualised judicial discretion such as is mandated by Australian legislation.

28. In a case in which two parents have competing views about who should care for their children or child, the best interests principle also gives rise to a conflict between the biological attachment between a mother and child and the non-biological relationship between two young children who see themselves as sisters. In this case, the evidence suggests and I so find, the relationship between the biological mother and her child is much stronger and more important than the relationship between the "sisters".

29. The legal problem in this case is compounded by the fact that s 65DAA applies because the presumption earlier mentioned, is not rebutted. That requires the Court to determine whether it is in the best interests of the children for them to have equal time with each of the parents notwithstanding the biology. Findings must be made not only about whether it is in the best interests of the children to have equal time but also whether it is reasonably practicable. (See *MRR v GR* (2010) 263 ALR 368).

30. If a determination is made that it is not in the best interests of the children or not feasible for them to have equal time, s 65DAA requires the same exercise to be undertaken in respect of substantial and significant time. Substantial and significant time is defined in s 65DAA(3) to effectively mean parents spending time with children outside of weekends and holidays and the timing of which enables them to be involved in the child's daily routine and special events.

31. In a case in which Ms Fabian wishes to move to New South Wales with X which is opposed by Ms Halifax not only because of X but also because of Y's interests, all of these problems and the legislative pathway make the determination difficult. As Kirby J said in *AMS v AIF* (supra at 143) it is attempting a resolution of often irreconcilable considerations. In many ways, it

is the application of an "intuitive synthesis" (see *R and R: Children's wishes* (2000) FamCA 43).

32. The proposed move to New South Wales by Ms Fabian was said to be for both work and family reasons. I find it is also clear that Ms Fabian does want to get away from the area in Queensland where she no longer wishes to be.

33. In summary, it is clear, that Ms Fabian and Ms Halifax:

    (a) were in a defacto relationship;

    (b) consented to the various procedures which gave rise to the conception of the two children; and

    (c) are both the parents of Y and X.

34. The more difficult question is whether X should be moved with Ms Fabian to New South Wales.

35. Ms Fabian's case was begun on the basis that she adopted the position of the Independent Children's Lawyer but in giving evidence, her preferred position was to make the move to New South Wales now. To some extent, that position may have arisen from her perception about the evidence of the family report writer Ms L, but on the other hand it may be a natural desire to move to where she wants to be. That position is strongly opposed by Ms Halifax.

36. In this case, I think it is appropriate for X to move but not for another 12 months during which time X will develop sufficient cognitive skills to understand where she fits in this world. My reasons are set out below.

37. To the credit of the parties, the hearing was confined to a few issues. The evidence of what happened during the relationship was hardly of significance. The events at and after separation were highly contentious. The period from the first hearing until now has been difficult and traumatic for the parties.

THE EVIDENCE OF THE PARTIES

38. I had the opportunity to observe each of the parties tested under cross-examination. Each carefully considered the answers to the questions but there had been so much litigation that those answers were given almost by rote. I have no reason to doubt each party was endeavouring to be honest in what has been very emotional proceedings.

39. Ms Halifax relied upon affidavits filed 12 March 2010 and 21 June 2010. Ms Fabian relied on affidavits filed on 5 March 2010 and 26 March 2010.

40. Unfortunately, much of Ms Halifax's evidence was opinionated commentary and not particularly helpful in working out the future interests of Y and X. It did however show how hurt she was by the prospect of the removal of X.

41. Paragraph 2 of Ms Halifax's affidavit epitomised the problem. She said she was the one who had spent significant funds on advice and urgent court applications to prevent the move by Ms Fabian. She referred to the money spent on mediation, a family report, correspondence and court appearances. She mentioned the opposition by Ms Fabian to the involvement of Mr Dalton and Mr Ballard. Again, sadly, she said her view was that Ms Fabian opposed the involvement of the men because "it might weaken her case to relocate". Ms Halifax claimed Ms Fabian was generally untruthful.

42. In various paragraphs of the two affidavits relied upon by Ms Halifax, the accusation of dishonesty against Ms Fabian appeared more than once and she accused Ms Fabian of "pushing boundaries" to "cause conflict". She used language such as "sabotage" referring to Ms Fabian's attempt to separate the children.

43. A concern for me was Ms Halifax's proposal which she said maximised the time of the children together but which she thought were "fair for the parents". That theme emerged more than once. The concern I have relates to her focus and reinforces the poor prospects of any relationship with Ms Fabian.

44. In his final submission, counsel for Ms Halifax said his client's criticisms had been "measured and reasonable". I reject that.

45. Affidavits drawn by lawyers need to be tempered bearing in mind the existing provisions of ss 55 and 56 of the *Evidence Act 1995* (Cth). Lawyers must be a buffer for clients in any emotionally charged atmosphere and point out to them that the Court's function is a positive inquiry in determining what is best for children. Whilst the historical facts are clearly relevant, opinionated diatribe is not. The five principles in s 69ZN of the Act as to the conduct of the hearing are important.

46. The underlying unhappiness expressed in Ms Halifax's evidence supports the view of Ms L that Ms Halifax has not been progressing well psychologically. That is a significantly different position from what was happening during the relationship when the parties were together.

47. During their committed relationship, the parties worked well as a cohesive unit. They planned the births of the children. They made documents such as "Naming Day" invitations proudly announcing they were parents to both of these children.

48. Despite Ms Fabian's expressed view in cross-examination that she did not see Ms Halifax as a parent of X, that was not the way she approached the physical and psychological tasks during the relationship. To the outside world, the only impression open to inference was that she and Ms Halifax were jointly parenting these children and "parent" was the word Ms Fabian used. Their

attempts at the pregnancy procedures were all joint commitments save for a period of one monthly cycle.

49. Although her evidence was that she chose to become pregnant, Ms Fabian portrayed a position in evidence as though she dictated the terms. It is clear on the evidence which I accept, that these pregnancies were the subject of discussion and commitment.

50. After Y's birth, Ms Fabian who then wanted to have a child, made clear to Ms Halifax that she did not want Mr Dalton and his then partner Mr H, as donors. Ms Fabian said that albeit the men were involved, her decision was made because she tried to fit around Ms Halifax's lifestyle. I accept that happened because Ms Fabian ultimately chose an anonymous donor procedure. Despite that, after the birth of X, the child did spend several hours with the two men. It was a cooperative arrangement even to the extent that Ms Fabian who was breastfeeding, provided expressed and formula milk for the visits.

51. Ms Fabian's explanation for the distancing of herself from Ms Halifax was that she never felt there was a cohesive family. By early 2008, disputes about the treatment of Y's disability began to arise. The separation under one roof then occurred. Thus, up until separation, there were signs of problems between the parties but they did not impact on the parenting of the children. That distinction became apparent thereafter separation and I find that Ms Fabian decided that course. She began distancing her parenting role of Y from what it had previously been.

52. On 14 January 2009, Ms Fabian advised Ms Halifax of a job offer she had received in New South Wales. Ms Halifax asserted in her affidavit that Ms Fabian did this to cause conflict and generate problems. Having now heard all of the evidence, I reject that was Ms Fabian's intention. Sadly, Ms Halifax said that Ms Fabian had never put the children "first" in the proceedings. Subsequent to separation, I find that Ms Fabian's interest was more with X than Y. It was to X that she constantly maintained she had a primary attachment. There is no evidence upon which I could make any finding that Ms Fabian abandoned Y or did not take a serious interest in Y's welfare subsequent to separation.

53. Ms Halifax said that early after separation, when she spoke to Ms Fabian, Ms Fabian was aggressive and was prepared to speak aggressively to her in front of the children. Problems began to arise regularly.

54. Orders were made under which X was to spend time with Ms Halifax and therefore Y, from 2.00pm on Saturday until 6.00pm on Monday in the first week of the four week cycle and from 2.00pm on Sunday to 8.45am on the following Tuesday in the second week of the cycle. She was to spend time with Ms Halifax from 2.00pm to 5.00pm on the Wednesdays of weeks 1 and 3.

55. Ms Fabian's time under the orders with Y was after school on Friday until 2.00pm on Saturday in the first week of the cycle and after school on Friday until 2.00pm on the following Sunday in the second week.

56. The arrangements concerning X spending time with Mr Dalton and Mr Ballard, leaving aside any arrangements between the men and Y, were from Sunday at 8.00am until 4.00pm in the third week of the cycle.

57. There were a number of examples of how the fractured adult relationship began to impact upon the children. At a gymnastics carnival, Ms Fabian distracted X from where Mr Dalton was sitting and sat away from him. At Y's Christmas carols in 2008, the parties had a confrontation and Ms Fabian tried to keep X away from Ms Halifax.

58. One example which indicates how poorly the parties communicate and also their polarised positions, relates to the incident known as the nose bleed of X. X suffered nose bleeding problems and the parties could not agree on medical treatment. The breakdown of discussion led Ms Halifax to take X to a doctor herself. That in turn led to an argument. Ms Fabian's response was to deny permission for the doctor to treat X. The letter by Ms Fabian to the doctor again makes abundantly clear her view about who had the responsibilities for decisions relating to X. She was intending to act unilaterally.

59. Throughout 2009, there were a number of incidents in which Ms Halifax saw Ms Fabian's behaviour towards Y as inappropriate and of showing a lack of interest in Y. Having regard to the position that Ms Fabian adopted as expressed by the family report writer Ms L in endeavouring to separate herself from the psychological attachment to Y as a parent, I find Ms Fabian's behaviour understandable. She took the view that X was her child and Y was Ms Halifax's. Ms Fabian for her part, usually had a reason for missing events or being late but I find that her focus was more on X than Y.

60. At the same time, there were ongoing disputes between the parties about X. One such dispute was over the unilateral enrolment of X by Ms Fabian in a kindergarten for the Year 2010. Ms Halifax described Ms Fabian as having placed Ms Halifax's name on the enrolment form as "third contact". Ms Fabian's response was that she had made a number of inquiries about kindergartens and had put her own name down for various enrolments. It was clear however that Ms Fabian was creating the impression that she was solely responsible for the future of X and particularly in relation to decisions. Ms Fabian distinguished her position on the enrolment form from that of Ms Halifax.

61. In December 2009, the parties had an argument about handover time at the kindergarten. The unseemly dispute festered on a speaker phone with at least Y hearing it. Ms Halifax said that if Ms Fabian did not agree with what she perceived to be the court orders which were then in place, she, Ms Halifax,

would call the police. That reflects poorly on Ms Halifax and does not auger well for future parenting.

62. At Christmas 2009, the parties could not agree on time between the children for Christmas Day or New Years Eve. Similar problems had arisen during the Christmas period the year before. Lack of cooperation was obvious. Despite the fact that during the school holidays, the parties had an agreement for two days to be spent with each family, even that arrangement broke down by the parties unilaterally varying it.

63. There were disputes towards the end of 2009 when arguments flew about each not respecting the other. All of this was occurring because Ms Fabian was separating herself from the previous arrangement and Ms Halifax was desperately trying to hang on to it.

64. Ms Halifax's evidence supported the position adopted by Ms L. Ms Halifax said that Ms Fabian had been "withdrawing" from Y after separation. Ms Halifax said that when Ms Fabian chose to take X to New South Wales for three weeks as early as the 2008 summer holidays, Y was not considered as an option as well.

65. Despite all of the problems until now, the relationship between X and Ms Halifax is still close. Ms Halifax's evidence was that X called her "Mummy" and they were relaxed and happy together. They did and still do, many wonderful things together. X returned the love and affection of Ms Halifax.

66. X is very much aware of the conflict between Ms Fabian and Ms Halifax and raised it with Ms Halifax who observed that on some subjects, X had suddenly become evasive. X, like her biological mother, may be beginning to see Ms Halifax in a different light.

67. On the other hand, all of the evidence shows that X and Y are close and care for one another. They delight in seeing one another after any separation. They spend time together at a gymnasium on Mondays but also play with their own friends at that place. According to Ms Fabian and not disputed by Ms Halifax, the children are excited to see each other, interact easily and separate easily upon the conclusion of their time. On Ms Fabian's evidence which I accept, X has not raised with her why she and Y are in separate houses.

68. Ms Halifax's view of the prospects of her having any ongoing relationship with X and similarly between Y and X is that it will be unlikely to continue if Ms Fabian moves to New South Wales. She described that change as fracturing the relationship. I reject that.

69. Sadly all of Ms Halifax's evidence points to the inescapable conclusion that she sees little prospect herself in any cooperative parenting arrangement in circumstances where her own view is that Ms Fabian is withdrawing from Y.

70. Ms Fabian's view is that being in New South Wales would reduce the conflict and her own stress levels would decrease. She felt she would again become a "functional person". I accept that. She said that there would be no problem about X having photos of Ms Halifax and Y in her house. Ms Fabian said she was prepared to provide photographic reminders of Y and Ms Halifax for X and I see no reason not to accept she would do that. Her position was that communication would occur between the children by webcam and there would be regular holidays. Ms Halifax seemed very cynical about the webcam arrangement suggesting that X would be influenced in some way by Ms Fabian's behaviour behind the camera. Only time will tell whether that is right.

71. I have carefully considered the limited evidence of Ms Fabian about what her financial position would be in New South Wales and the logistical difficulties of transporting these children between the two states. I am satisfied that Ms Fabian has the necessary security of tenure now in Queensland and consequently, the capacity within her employment to be able to move there without financial detriment. I am also confident of her physical capacity to enable any child movement to occur.

THE EXPERT EVIDENCE OF MS L

72. March 2009 saw the dispute between the parties result in the involvement of Ms L. In her evidence, Ms L referred to the fact that she has been around family law litigation for long enough to see three generations of children. That was not just a flippant remark. Ms L not only has significant experience as a reporter but she has also seen the impact of various arrangements on children and parents whether by court order or otherwise, through generational change.

73. Ms L is a qualified social worker with 29 years experience specialising in child protection and family welfare fields. She has all of the requisite qualifications and experience to give expert evidence. No party challenged her expertise in the hearing but in final submissions, criticism was made of her evidence by counsel for Ms Halifax.

74. The experience of Ms L as set out in her curriculum vitae is extensive. She prepared a number of reports in this case. Despite the criticism to which I shall refer, she gave evidence supporting her opinions by reference to research. I was impressed with her expertise.

75. In final written submission, counsel for Ms Halifax said Ms L's opinions should not be given weight because neither her written opinions nor oral evidence was founded in "identifiable research or current expert opinion in the field". He referred to her reliance on social theories "long since passed their use by date". This was an unusual submission. First, Ms Halifax's lawyers were well aware that prior to the commencement of the hearing, I had asked the Independent

Children's Lawyer to ascertain the basis upon which Ms L was making her statements in the affidavits provided. Ms L was apparently requested to give that basis. No issue was made prior to the hearing about it being a particularly unusual case requiring adversarial witnesses to challenge or expand upon the evidence of the single expert witness. Secondly, Ms L did refer to both old and recent research. No-one challenged that evidence nor importantly, did they challenge her evidence about her experiences. Accordingly, it seems to me that any criticism of the evidence of Ms L is unfounded.

76. One of the issues raised by counsel for Ms Halifax in final submissions was that s 60H of the Act did not permit a ranking of biological connection between X and Ms Fabian and between X and Ms Halifax. All s 60H does is recognise particular people as parents for legal purposes. It has nothing to do with biology. Ms L said that the biological connection between Ms Fabian and X was more important than the sibling relationship between Y and X. That must be so having regard to the very nature of childhood dependence on adults.

77. It was suggested by Ms Halifax's counsel that Ms L was engaging in vague speculation about the adverse impact on X of the proposed move. No-one can be certain about how a child will develop and cope with change. Ms L was adamant that professional help was needed. I agree and I am satisfied that Ms Fabian will seek it.

78. I turn then to the evidence of Ms L as it unfolded sequentially.

79. In March 2009, Ms L saw the dispute as particularly complex without an easy solution that would meet the needs of everyone. She noted the strong bond between the children. She saw a commitment by both women to both children. She commented that Ms Fabian was beginning a process of detaching herself from Y. Ms L opined that such a detachment may lead to a failure to maintain the relationship between the children and that between X and the other adults in her life.

80. The dilemma is not just the separation by Ms Fabian from her emotional attachment to Y but also her overtly strong and protective role of X. She does not see Ms Halifax as having the same entitlement to such a role in respect of X.

81. Even though the law recognizes Ms Fabian and Ms Halifax as parents of both these children, that status cannot make an individual fulfil what they do not accept or believe. To do otherwise would be harmful to the child. The legal status gives individuals parental responsibility about their roles as parents. That means all of the duties, powers, responsibilities and authority which, by law, parents have in relation to children. The vagueness of that requires some consideration. It means responsibility for decisions such as health, education, religion and welfare but it also concerns day to day mundane tasks. Both Ms Fabian and Ms Halifax say they want to fulfil those tasks but Ms Halifax's

view is that the long term and the daily responsibilities should be carried out on biological lines. Biology does not limit the capacity of a person to provide for the needs of a child. Those needs are part of the tasks carried out in families. In families, the attachment relationship between a parent and a child is a fundamental need of the child which provides the stability and security for the child. Attachment in this case was important for these children until separation and although Ms Fabian constantly distinguished her role on the basis of biology, the question is whether and if so how both Ms Halifax and Ms Fabian could carry out the various responsibilities in the future and fulfil the needs of the children if the children are no longer part of one family unit.

82. Ms L in her evidence, pointed to the text "Beyond the Best Interest of the Child" by Goldstein, Freud and Solmit (1973 edition) as authoritative statements of the principle held by social scientists about attachment. When I queried Ms L whether that text was still current, she said that the attachment concepts were. Of interest, those authors wrote:

> [T]he "family", however defined by society, is generally perceived as the fundamental unit responsible for and capable of providing a child on a continuing basis with an environment which serves his numerous physical and mental needs during immaturity. The law reflects this expectation about the family's relation to a child's well-being. The child's body needs to be tended, nourished and protected. His intellect needs to be stimulated and alerted to the happenings in his environment. He needs help in understanding and organising his sensations and perceptions. He needs people to love, receive affection from and to serve as safe targets for his infantile anger and aggression. He needs assistance from the adults in curbing and modifying his primitive drives (sex and aggression). He needs patterns for identification provided by the parents to build up a functioning moral conscience. As much as anything else, he needs to be accepted, valued, and wanted as a member of the family unit consisting of adults as well as other children.

83. It is that last sentence which is troubling in this case. Ms Fabian does not want Y as part of her family unit nor for X to be a part of Ms Halifax's. Justifiably or not, and whether accepted by Ms Fabian and Ms Halifax or not, the major parenting roles described above have been carried out since at least September 2008 by each of them separately in respect of Y and X. Clearly each has done a good job but these children do live in different households and different environments. The question is what is best for their respective futures and part of that is whether the separation by distance will best advance their needs or alternatively, have an adverse impact.

84. At March 2009, although shared care of both children had been suggested as a solution by Ms Halifax, Ms L noted that because of Y's special needs and the benefit to her of stability and security, it was not a good idea. X was then not quite three years of age. Ms L noted the lack of enthusiasm in Ms Fabian for

time being spent by X with Y's biological father. She noted that Ms Fabian did not believe it was important for X to have a father at all. That was also an unequivocal statement made by Ms Fabian in her evidence. Thus, endeavouring to have a joint decision-making role was seen by Ms L as too complex to be workable.

85. In March 2009, Ms L saw a need for court orders because without them, various relationships could cease. However it was her view that a forced retention of Ms Fabian would lead to a further compromise of these forced relationships. She opined that commitment from all parties was required if the various relationships were to be successful. On the available evidence at that relatively early time after separation, things did not auger well for a sensible resolution. One of the things that became apparent in 2010 was that if there was to be a separation of the children, it may have been better for that to have occurred in early 2009 because the subsequent time together under the court orders had meant that the children had become closer as sisters.

86. Now, X has a much greater awareness of all of the relationships with which she is involved. Notwithstanding a separation at that time might have assisted X, with Y's special needs, the loss of X in her moving away would also then have been unlikely to have been in Y's best interests.

87. After receiving Ms L's report, when the parties returned to court, the orders maintained the continuation of the various relationships. On the hindsighted evidence of Ms L, that would not appear to have been a perfect compromise.

88. A year later, Ms L completed another report noting that nothing had changed except that, with the intensity of the problem, and no doubt an impending hearing, the prospect of an adult relationship improvement was slipping away. Ms L observed the polarised respective positions of the two mothers concerning shared parenting.

89. The clinical observations of the two mothers showed Ms Halifax as having a compromised functionality whilst Ms Fabian had improved on what Ms L had previously seen. Ms Fabian said she had been on anti-depressant medication since separation and had received counselling but she said she still felt intimidated. When questioned about that, Ms Fabian said that because of her level of anxiety and stress, she could not read the communication book entries between the parties and did not respond to Ms Halifax's suggestions. Having heard Ms Fabian's evidence, I accept that. As for the children, Ms L felt that neither appreciated the long term implications of the decisions that had to be made.

90. In her addendum report in July 2010, Ms L said that the greatest risk of emotional harm to these children would be not so much the relocation but how the adults managed the care arrangements. That become clear when Ms L was cross-examined. She said the success of attachment of a child in a separated

family depended upon the lack of high conflict. Emotive as that may sound in this case, Ms L described "high conflict" as including anything from basic disagreement about philosophy through to family violence. In her view, disagreement can lead to disempowerment in an emotional sense. If one parent cannot face a confrontation about fundamental parenting decisions, it can lead to conflict and disengagement. The candid evidence of Ms Fabian which I accept, was that the location in which the women currently lived, gave rise to potential for them to meet and for confrontation. She described her anxiety in going to shops. It was suggested to Ms Fabian in cross-examination that her fear was spurious but she denied that. I accept the fear is real. She said she wanted to get away from the area. Ms L said the conflict could make the grieving process of separation difficult to manage. In turn, that could lead to resentment, dissatisfaction, negativity about the other parent and the reluctant requirement to fulfil obligations under orders. I accept all of that applies in this case.

91. In turn, a child living in that situation would be affected by and begin to find coping mechanisms such as turning to school as an escape and become insecure. Such a situation is not emotionally and psychologically good for X but it also points to the probability that this could not make for a successful shared caring arrangement because of its ultimate and long term impact on both children. All of the long-term problems of forming relationships, self-esteem and behavioural problems could arise.

92. Ms L observed that there was currently no working relationship between the mothers and Ms Fabian did not want one. That negativity could only give rise to further conflict. To try and force such a relationship upon Ms Fabian would risk emotional harm to both children. X would not take long to understand her mother's negativity towards Ms Halifax as someone who was not a favoured person. Y could be put in a position where she was not treated as a sister of X. These children will no doubt face a variety of confusing questions over the next few years and those will require sensitive responses from their respective primary attachment figures. Any disparity in responses could exacerbate the difficulties and confusion.

93. On the evidence, I do find there is a conflictual environment. The cause of that conflict is perceived by Ms Halifax (and the father of Y) as being the fault of Ms Fabian. I do not find that to be the case and even if it could be so established, it matters little if the long term effect on at least X is negative.

94. When she was cross-examined about a sharing arrangement for Y, Ms Halifax candidly conceded she would only seek that if Ms Fabian wanted it. She said it would be unfair to put Y into such an arrangement if Ms Fabian did not want it. The evidence is overwhelming that Ms Fabian does not want it. Despite that and her own sadness, Ms Halifax maintained that she wanted half of the time

with X. In this case, a shared care arrangement could not be in the best interests of X.

95. Ms L noted that her primary issue was the emotional impact upon Y and X of being separated from each other and the significant adults in their lives. She looked at four options.

96. The first option was that the parents had equal shared care of the children. Needless to say, that would require the mothers to live in reasonably close proximity, a concept resisted by Ms Fabian but also for Ms Fabian to embrace Ms Halifax as a parent of X. For reasons earlier set out, the option is not viable.

97. The second option was for both children to live with Ms Halifax. Ms L pointed out that historically, the parties chose for the children to live with their biological mothers and that is where their primary attachments remain. Ms L thought that separating that attachment may compromise the emotional welfare of the children leaving aside the stress upon Ms Fabian. Ms L expressed concern about the current "functionality" and "coping capacity" of Ms Halifax. There is not sufficient evidence for me to simply disregard or dismiss those concerns. I would be taking a hazardous guess with the interests of the children to take option two.

98. The third option was for Ms Fabian to move to New South Wales as she desires. Ms L saw difficulties for the children in this. Y has special needs. How the ongoing relationship through electronic communication means could be fostered seems problematic although Ms L noted the parties did not foresee those difficulties. Ms L expressed some reservation about whether it was more important for X to come to Queensland in such an arrangement rather than Y go to New South Wales because of what she perceived as a distinction in the mothers' parenting commitment. This option would require the adults managing logistical issues in circumstances where their communication was not good. Financial issues of the magnitude of this travel may also be a problem but that issue affects most parents. It is difficult to crystal ball gaze and I prefer to presume that what the mothers have offered to do, could be achieved.

99. More importantly, separation of the attachment as sisters between the children will be significant. Two important considerations arise from the evidence of Ms L on this issue. First, the relationship between the mothers is not good and that will impact on the children. The children are cognitively older now than at separation and Ms L expressed concern about the capacity of them to understand the separation. She felt that a two year delay would enable them, and particularly X, to cope with it. The children's emotional stability over the delayed period would depend upon not only professional help to deal with the conflictual dispute between the mothers but also X's separation from Y and Y's

biological father for distinctly longer periods of time. At the moment, X could not understand those prolonged absences.

100. Ms L was of the view that the children currently understood their separation timetable and were resilient enough to manage that without difficulty although X could not understand time frames as a concept. Trying to explain time would be pointless now but in almost two years time, the cognitive ability of X would be better to understand and maintain the relationship from a distance.

101. Ms Fabian sensibly and I think sensitively, saw the problem raised by Ms L and agreed to delay her proposed move. However, it will be what happens in the next year about her proactive cementing of all of the relationships that X enjoys, that matters.

102. A significant dilemma is that Ms Halifax has functionality and coping problems. Thus, it would not be just Ms Fabian who has to ensure the success of the development of the cognitive capacities of both children to cope with the absence of X if she went to New South Wales. I have concerns about that prospect. Some of the development of the relationship between the children will occur if they attend the same school in the intervening period. But that too gives rise to the second important consideration. Strong as their sisterly attachment is, Y and X have to develop peer relationships of their own having regard to their disparate ages. Too much interaction at the school may hinder that. On balance, much depends upon the vigilance of the mothers and their assurance to both children that absence will not damage their relationship more than it has already been damaged.

103. The fourth option was for Ms Fabian to remain within Queensland and within a 50 kilometre radius of where Ms Halifax lived. That would lead to a cyclical weekend relationship between the adults and the children. Ms L described this as less than ideal if Ms Fabian could not move to New South Wales. She felt there were logistical problems with Ms Fabian working and X being in day care. This option still required cooperation but Ms L was doubtful about its success if Ms Fabian had to remain in Queensland in circumstances where she was also periodically travelling to New South Wales. Ms L agreed that she thought Ms Fabian would comply with court orders and act responsibly but I could not be confident that her reticence, let alone negativity, would not give rise to all of the emotional problems for X and possibly also for Y if the fourth option was attempted.

104. The conflict and possible rejection by Ms Fabian of Ms Halifax as a primary parent-figure in X's life would not enable the fourth option to be any more successful for these children than the other options.

105. Ms L was cross-examined about the options and said that she was not advocating one over the other but rather raising the pros and cons. Notwithstanding the position of Ms L about the options, there are obvious and

distinct preferences based on the evidence if the paramount consideration is the best interests of these two children. For example, which option is likely to most promote the interests of both children as a sisterly couple. Clearly, the first, if both mothers were in close proximity, able to be cooperative and were promoting the relationship. That will not happen here.

106. A fundamental piece of evidence of Ms L was that the primary attachment relationship was more important than a sibling relationship. If that importance is considered and it is, the second option cannot work.

107. The third option provides the prospect most likely to work because of two things. First, the delayed time will enable the sisterly attachment to be strengthened such that when each child, but particularly X, cognitively understands their relationship, separation will change but not necessarily destroy, the relationship. Secondly, the more fundamental relationship of biological mother and child is likely to be protected and enhanced. That may be subject to Ms Halifax's psychological state improving but she has at least the supportive relationship of Mr Dalton and Mr Ballard along with regular holiday time with X.

108. From a social science perspective therefore, the evidence supports the move of Ms Fabian and X to New South Wales notwithstanding Ms L saying that she did not prefer one option over another.

109. The evidence about the current problems for the four options can be seen particularly in the period after the litigation began.

LITIGATION LEADING TO COURT ORDERS

110. Only weeks after the physical separation but clearly upon learning of Ms Fabian's desire to move to New South Wales, Ms Halifax began court proceedings. Initially, arrangements were agreed in mediation. The significant point about that agreement was that the children were split. The parties agreed that on each alternate weekend, Ms Fabian was to have Y from the conclusion of school on the Friday until 3.00pm on the Saturday afternoon and then both children went to Ms Halifax from the Saturday afternoon until the Monday morning. On the second week of the cycle, Ms Fabian's time was extended by a day and Ms Halifax's time was shortened by one day. The parties were able to agree that on Wednesday nights, the children had a meal together alternating between the two houses.

111. The mediation agreement was short lived. The parties ended up in the Federal Magistrates Court of Australia when again orders were made splitting the children and times were set which were different from those at the mediation but not substantially. That position continued until the current orders.

112. These children have therefore had regular changes in their lives between households but they have also managed school and daycare. The evidence is that the children have adapted to changes despite the absence of daily contact. Thus, they have already begun to live in two distinctly different households albeit seeing each other much more regularly than would be the case if Ms Fabian went to New South Wales.

EQUAL SHARED PARENTAL RESPONSIBILITY

113. The Independent Children's Lawyer submitted that Ms Fabian should have sole responsibility for X and, Ms Halifax should have sole responsibility for Y. For reasons to which I shall turn, I disagree with that position.

114. Ms Fabian's position was the same as the Independent Children's Lawyer.

115. Counsel for Ms Halifax said that the presumption could not be rebutted on the evidence of Ms Fabian as to family violence. Both parties made submissions in respect of this issue. I agree with Ms Halifax's position and propose to say nothing more about that at this stage. That is not the only basis to rebut the presumption. A court may rebut it where equal shared parental responsibility is not in the best interests of a child. That too does not mean that although the presumption is rebutted, an order for equal shared parental responsibility cannot still be made.

116. Communication between parties is but one indicator of the parental capacity to make decisions about children particularly about long-term issues. Communication about children means more than just passing messages and ideas; it is about planning for children in a positive way. All parents have that responsibility and this Court well knows the many cases where positive interaction is hampered by mistrust and ill feeling which does not abate with time. Where there is evidence of incapacity to communicate but a clear desire to have positive input into decisions about directing a child's future, the Court has an obligation to find the way for that input. In those cases, removal of equal shared parental responsibility is not appropriate because the argument is really about logistics. Where a parent does not have that positive involvement as the core of the communication, he or she has little to contribute to the direction of the child's future. That is a case where it is not in the best interests of the child for the parents to have equal shared parental responsibility. Here, Ms Halifax points to the communication book. The two books which covered the period of part of 2009 showed no more than logistics of handover, requests on various contact event changes and observations about what was happening with the children. These types of conversations would normally be oral but where the parties will not or cannot talk to one another, written communication is not only safer but probably the only way it can be done. Neither of the books

in this case assists me on the issue of determining parental direction necessary for the future of these children.

117. In *Chappell and Chappell* (2008) FLC 93-382 the Full Court observed that:

> 75. In order to rebut the presumption it is necessary for the Court to make a finding that it would not be in the best interests **of the child** for the presumption to be applied. We accept that in determining what is in the child's best interests the Court must take into account the prescribed matters in ss 60CC(2) and (3), one of which requires the Court to consider whether it would be preferable to make the order least likely to lead to the institution of further proceedings. In our view, it would be an appropriate exercise of discretion in some cases to find that application of the presumption would not be in the child's best interests because the track record of the parents would suggest a high probability of deadlock, which would inevitably lead to further proceedings. In such cases, however, the process of reasoning required to rebut the presumption would involve findings related to the welfare of the child, rather than findings concerning, for example, the likelihood that schools and hospitals would find it easier to deal with one parent rather than two.
>
> 76. We can also envisage circumstances in which the Court, in the proper exercise of discretion, might make very specific orders in relation to issues which could be loosely described as relating to the "management" of particular aspects of a child's welfare. Thus, for example, in the present matter his Honour might appropriately have made an order that the wife have responsibility for making of appointments with the speech therapist, as this has been a point of contention. However, where the Court proposes (as his Honour did in this case), to give one of the parents a form of responsibility for issues as broad as "health" and "education", we consider this should ordinarily be done by use of the concepts prescribed by the legislation itself.

118. Leaving aside any argument about the rebuttal of the presumption of equal shared parental responsibility in s 61DA, there is not sufficient evidence of the high probability of deadlock which would inevitably lead to further proceedings. Distance should not be a disqualification for equal shared parental responsibility because decisions can still be made after a variety of forms of consultation.

119. In this case, there is no basis for me to rebut the presumption.

Requirements of s 65DAA

120. I propose to make an order that each of the parties has equal shared parental responsibility for each of the children. Section 65DAA(1) therefore requires that I consider whether each child spending equal time with each parent would be in the best interests of those children. Ms Fabian does not wish to share

equally the time with Y and for reasons earlier mentioned in the evidence of Ms L, has begun to distance herself from Y in respect of that primary parenting role. Ms Halifax desires to spend equal time with Ms Fabian in respect of X. Having accepted the evidence of Ms L, a shared arrangement of that nature in this case would not be workable. It would not be in the best interests of either child for that order to be made.

121. It is also a requirement under s 65DAA to consider whether such a time would be reasonably practicable. In *MRR and GR* (supra) the High Court said that the court needed to make a practical assessment of whether equal time parenting was feasible. It clearly could not be feasible if Ms Fabian was living in New South Wales whilst Ms Halifax remained in Queensland. Even should Ms Fabian remain in Queensland, such an arrangement could only work if an order was made requiring that Ms Fabian remain living within a reasonable proximity of Ms Halifax so that the various exchanges of children could occur on a regular basis. Ms Fabian was cross-examined about remaining in her current location but it is clear that she does not want to remain in the immediate vicinity of where Ms Halifax lives and it is affecting her psychological welfare. To move further away and maintain her employment which is necessary for the support of X could be done but not without a degree of difficulty. If both children attended the same school, Ms Halifax would be able to arrange the collection and care of X until Ms Fabian arrived but with the uncomfortable relationship between the parties, that also would most probably lead to conflict. The children attending the same school would create an unreasonable burden upon Ms Fabian if she moved further away from her current location. That is particularly so in circumstances where the children grow older and have less need and desire to be with each other during school hours as their peer group relationships develop. Much depends on how one defines “feasible”. If it is meant to mean possible, Ms Fabian could clearly have her life regulated by such an arrangement. The word however means “easy” or “effortless” and having regard to the nature of the current relationship between the parties and where Ms Fabian desires to live, it would be anything other than easy. In those circumstances, it would not be feasible and therefore not reasonably practicable for these children to spend equal time with each of the parents.

122. Section 65DAA(2) requires that if a court rejects equal time, it must consider whether the children spending substantial and significant time with each parent would be in the best interests of the children. Similar requirements are then set out for the same question to be answered in respect of reasonable practicability. I find for the same reasons as those set out just above, it would not be reasonably practicable for these children to spend substantial and significant time or either of them to spend substantial and significant time with the other parent.

123. Based on those findings, I turn to the question of what is an appropriate time for each of these children with each of the parents.

THE PARTIES' SUBMISSIONS

The Independent Children's Lawyer

124. The Independent Children's Lawyer submitted that orders should be made permitting X to live with Ms Fabian in New South Wales but not until December 2011. In the intervening year, the Independent Children's Lawyer submitted that the cycle of contact between Ms Fabian and Y should be between Friday to Saturday in week one and Friday to Sunday in week two and between Ms Halifax and X from Saturday to Monday in week one and Sunday to Tuesday in week two. It was submitted that X should also spend time with Ms Halifax on Wednesday afternoon and evening for a few hours. Various ancillary orders relating to holidays, telephone communication and special days were proposed.

125. Put simply, the Independent Children's Lawyer's submissions were:

- The parties were the parents of both children for the purposes of the Act;
- The New South Wales move by X would compromise her relationship with Y but counselling would assist her to adjust;
- Y would suffer emotionally by long-term separation but also from not being embraced by Ms Fabian but again, counselling would assist;
- Separation had already begun and the children were spending time apart. As they grew older, the children could withstand the time apart;
- That primary attachment of each child was with their biological mother and that attachment was more important that the sibling attachment; and
- Being forced to remain in Queensland would build resentment in Ms Fabian which would have an adverse impact on the children.

126. The Independent Children's Lawyer submitted that to give effect to the proposed orders, Ms Fabian should be restrained from moving but also that an order should be made that X and Y attend the same school until the end of 2011.

127. In a comprehensive synopsis of the law much of which I accept, the submission was very helpful.

The submission of Ms Halifax

128. The submission of Ms Halifax was that it was not in the best interests of X to live in New South Wales. Despite her evidence that she would not want a

shared arrangement for Y unless Ms Fabian wanted it, Ms Halifax's counsel's final submissions were that it would be in the best interests of both children for such a shared arrangement. It was submitted that in the alternative, both children should live with Ms Halifax.

129. Counsel for Ms Halifax asked the Court to consider whether or why, a biological connection eroded Ms Halifax's legal position as a parent even if there was some basis to distinguish between the children on biological lines. I dealt with this point earlier when dealing with the family unit.

130. The Act sets out the test and framework by which a decision is to be made. It is then a question of what evidence is available to make the decision. Ms Halifax's case was that there was no evidentiary basis to argue a need to move away because of nervousness or fear. Having regard to the definition of high conflict that Ms L used and which I accept, there is such evidence and I have set out my findings earlier.

131. In a similar vein, it was submitted that Ms Fabian had attempted to portray herself as a victim from the start of the relationship. I do not accept that Ms Fabian did. Ms Fabian's evidence showed what normally occurs when a relationship breaks down. Parties distance themselves from each other and their respective activities. Sadly, in the parenting of children, that breakdown leads to a lack of communication and with other consequent anxiety and stress, the sort of conflict Ms L mentioned, arises. Here, Ms Fabian did distance herself from Ms Halifax and consequently her parenting of Y, preferring to focus on X.

132. It is the Court's task to work out what relationships will best provide for these children in the future having regard to the emotional and psychological parental states of mind. Counsel for Ms Halifax characterised Ms Fabian's agreement to a delayed move which was consistent with the position of the Independent Children's Lawyer, as opportunistic saying that she was not child-focussed. I reject that. Ms Fabian's preferred view was that X would cope with the move immediately. Ms L said otherwise and I accept her opinion.

133. Ms Halifax's position was that there was little possibility of Ms Fabian being proactive about continuing and fostering any of the important relationships here. I reject that too. A major consideration is whether separating Y and X by distance and hence by contact time, in 12 months time, will be in their best interests. Whilst no-one can predict with certainty what will happen, I am satisfied on the evidence that Ms Fabian will comply with orders. The children will have a sound relationship and understand concepts of time and separation. Despite the importance of the biological relationship over the sibling relationship there is no basis to say that Ms Fabian would not foster a sibling relationship but also the relationship between Ms Halifax and X.

134. Counsel for Ms Halifax argued that Ms Fabian's complaints against Ms Halifax "were not put to" Ms Halifax and the "areas" explored about conduct and attitude "fell flat". I am satisfied that the evidence in each party's affidavit was sufficiently comprehensive to make findings about not only what happened, particularly after separation, but also to assess what attitude the parties will have about parenting responsibility in the future. Whilst cross-examination is important, the forensic exercise here about determining the future of the children is helped more by the evidence of the expert.

135. It was put by Ms Halifax that Ms Fabian does not hold that X and Y "are in truth sisters". I am sure Ms Fabian does say that. Indeed, she is correct, Y and X are not sisters. These children act as if they were. The law does no more than make the parties parents of both children. Nothing in the law or in biology distinguishes these children from step-sisters or half-sisters. That is not the issue. Part VII of the Act requires the Court to deal with Y and X simply as children.

136. In respect of "relocation" principles, counsel referred to the dissenting opinion of Faulks DCJ in *Taylor and Barker* [2007] FamCA 1246 about parental happiness. His Honour's judgment apart from being in dissent, was no more than an expressed view about happiness not being a factor set out in s 60CC of the Act. Section 60CC requires the Court to take all of the factors into account. I am certainly not elevating parental happiness to the point where it is the determinative factor.

137. This is not a case about Ms Fabian's capacity to parent "being compromised by disappointment". This is about what will best advance the interests of Y and X. I accept the evidence of Ms L that keeping Ms Fabian in the area proximate to Ms Halifax may affect her parenting but I do not consider that evidence was suggested to mean that she would not parent at least X properly.

138. Counsel for Ms Halifax succinctly made the following points:

- Distance (between New South Wales and Queensland) brings with it a very different set of life circumstances;
- The nature of the relationship will be unlike to remain;
- Being parented by Ms Halifax on a daily basis has meaning for X;
- Separation and less contact creates less impetus to make contact;
- Ms Fabian would not be likely to preserve a parental relationship;
- Distance makes it easy to impede the parental (and sisterly) relationship.

139. I have already dealt with the issue about equal shared parental responsibility. In relation to what time was appropriate regardless of the formulaic approach set out in the pathway, counsel for Ms Halifax submitted that a week about arrangement was best for these children and that, of necessity, required X to be

in Queensland. Counsel submitted that as a fallback position, X should live with Ms Halifax. Each of those positions was based upon, inter alia:

- The distance factor created a practical difficulty and expense which would affect the children's relationship (s 60CC(3)(e));
- The limitation in Ms Fabian's ability to promote the relationship of X and Ms Halifax was such that Ms Halifax should be the primary carer of both children (s 60CC(3)(f));
- The need of the children to have both parents in close proximity required that if Ms Fabian decided to move to New South Wales, X should live with Ms Halifax because of Ms Fabian's attitude to parental responsibility (s 60CC(3)(i)); and
- Ms Fabian's rejection of Y was a practical manoeuvre.

140. All of those submissions were put forcefully by counsel for Ms Halifax rejecting the Independent Children's Lawyer's approach of allowing the parties to "move on". Each of the submissions has force. In each case where one parent moves away, altering the nature of the relationship, one party is hurt and unhappy. Ultimately, the hurt and unhappiness are factors which a court is obliged to consider but it is the best interests of the child or in this case, children that is paramount.

Ms Fabian's submissions

141. Counsel for Ms Fabian succinctly put submissions as follows:

- Ms Fabian accepted the view of the Independent Children's Lawyer save that it was still her "preferred" position not to delay a move with X;
- There was no doubt that as a matter of law, Ms Fabian and Ms Halifax were the parents of X and Y;
- Ms Fabian did not seek to continue to "co-parent" Y bearing in mind that Mr Dalton was at a significant person if not a parent also, in Y's life. Mr Dalton did not seek orders nor was his position that he wanted to "co-parent" X;
- In determining best interests, the Court had to take into account different parenting patterns and parental relationships;
- The legal issue about siblings could be distinguished from the biological issue between them; and
- The relationship between X and Y was as, a matter of law, not one that "warranted" the same weight as if biologically, the children were siblings.

142. In respect of those submissions, the positions created by law do no more than cloud the issue. The weight given to any relationship between legal or biological siblings is but one factor that must be considered when determining what is best for the children. In reality, the question must be asked as to which of the proposals will give the best outcome for the future of both of these children. In my view, the evidence of Ms L sets the various parameters for that determination.

143. It was not a proposal of either party that Ms Halifax move to New South Wales. It is easy to imagine the difficulties such an arrangement would create for her as she has no connections with that State, her business is in Queensland and Mr Dalton and Mr Ballard are both in reasonable proximity. In addition, Y has all of the professional supports in that area.

144. The proposals of the parties are simply guides to the inquiry about what is in the best interests of both children.

145. In relation to the question of what orders a court can make, the position now seems clear. In *Sampson and Hartnett (No 12)* (2007) FLC 93-350, the Full Court made some observations about the varying circumstances that might arise in "relocation" cases. In a case similar to the facts here, the Full Court said that directing an order to the issue of where the primary parent lived served little or no purpose. The Court said:

> 10. The orders are better directed to parental responsibility for arrangements for a child, hence orders that a parent not remove a child from a nominated town.

The Court (at para 19) had little doubt about the existence of the power to order a parent who was a primary parent not to change the location of a child.

146. The major question therefore is where should X live. There is no dispute about where Y should live.

147. Of the four options referred to by Ms L, there are only two that warrant consideration. To see what best promotes the interest of the children, these have to be considered in light of the matters set out in s 60B and s 60CC.

148. Section 60B sets out the objects of Part VII of the Act and the principles that underlie those objects. These are the aspirations of the community for all children but they are difficult to achieve in many cases because the very fabric of the parenting relationship has broken down. Parents in cases where relocation of a child is involved have much greater difficulties because they cannot fulfil their own aspirations let alone what they see as their duties and responsibilities towards children.

149. The Court is left to grapple with community expectations which in many cases (and particularly "relocation" cases) are at odds with parental expectation. This is one such case.

150. An object of Part VII of the Act aspires for children to have the benefit of their parents having a meaningful involvement in their lives consistent with their best interests. With two loving, caring and responsible parents, separation by significant distance must hamper their involvement. Another aspiration is to ensure children receive adequate and proper parenting to help them achieve their full potential. One parent alone may be able to provide that but if both parents desire to do it and one is hampered by distance, full potential may not necessarily be achieved. Another object is to ensure parents fulfil their duties and meet their responsibilities about all aspects of their children. That cannot be achieved for both parents wishing to have a significant role if distance separates them from the children.

151. The principles underlying the objects focus on the rights of the children. That is, their rights to regularly spend time with and be cared for by both parents. Distance creates a barrier if it is accepted that the legislative aspiration is proximity.

152. Some of the principles in s 60B(2) have a qualitative basis. For example, children's rights of knowing their parents and being cared for by them. That can be achieved regardless of the tyranny of distance. Other principles such as parents sharing duties and responsibilities and agreeing about future parenting, have a quantitative aspect. It is desirable for parents to sit down and do these things but human experience tells us that it is not often possible regardless of geographical problems. That is certainly the case here. It is with an eye to these ideals that the matters in s 60CC have to be realistically considered.

153. Whilst these legislative aspirations often do not sit comfortably with parental desires, they remain the guide when assessing a child's needs. The legislative pathway requires the child's best interest to be determined by a set of considerations (s 60CC) where some are "primary" and others are "additional" but all must be considered.

154. Ultimately, the assessment of what is best for a child is a subjective consideration guided by the objects and principles mentioned above. With the demise of the intimate relationship of the parents, the Court does the best it can to ensure the children are part of two (and sometimes more) families often with very different ideals from what they had as one family.

155. Some of the matters for the purposes of s 60CC are not in dispute. First, the children are too young for their views to carry weight. Secondly, each child enjoys a close relationship with the other parent along with each other and in the case of Y, a close relationship with Mr Dalton and Mr Ballard. Thirdly, each parent has the capacity to provide for the physical and emotional needs of both children.

156. The following matters of controversy require findings. First, as a primary consideration, there is no doubt there is a benefit to each child in having a

meaningful relationship with both parents. In *McCall v Clark* (2009) FamCAFC 92 the Full Court although dealing with an international relocation case favoured the concept of examining a meaningful relationship in the prospective sense. Their Honours pointed out that the difficulty for the court was to frame orders to ensure the child has a meaningful relationship with both parents. The Full Court went on to describe the phrase "meaningful relationship" as being synonymous with significant or important. The Full Court quoted Brown J in *Mazorski and Albright* [2007] FamCA 520 as follows:

> It is a qualitative adjective, not a strictly quantitative one. Quantitative concepts may be addressed as part of the process of considering the consequences of the application of the presumption of equal shared parental responsibility and the requirement for time with children to be, where possible and in their best interest, substantial and significant.

157. I have already dealt with the issue of the quantitative concepts. Here, from a qualitative perspective, there is a meaningful relationship between both children and both parents because it can be seen as significant and important and one with which the children are at ease. How that relationship will continue into the future depends upon how each party fosters it. The evidence of Ms L is convincing that over the ensuing year, with the development of cognitive skills, both children will understand time and distance concepts such that what is currently an important relationship will not be destroyed. There can be no doubt that the relationship will change, that the children will have sufficient skills and the understanding for it to be retained. How strong that relationship is remains a matter for the parties.

158. Whilst each parent will argue the proposition differently, I find on the evidence of Ms L that the children will have that strength of relationship by the end of 2011 providing they have professional assistance in the meantime such that there will be a meaningful relationship which will be cemented and not forgotten.

159. Secondly, I am satisfied that Ms Fabian will facilitate and encourage the relationship of X and Ms Halifax. I have no concerns about Ms Halifax doing the same with Y and Ms Fabian. There is no reason for me to find that what has been established will not be fostered. This applies in respect of both options. Ms Fabian has said she will provide the necessary photographic reminders of Ms Halifax and Y and will assist in communication by Skype. Ms Fabian has shown no reluctance to continue X's relationship by agreeing to orders in relation to travel.

160. Thirdly, in taking into account the effect of the change for both children in both options, I find that a separation has already been established and the children have adapted to those changes. The children will have to adjust whether Ms Fabian moves to New South Wales or outside the current locale. Whilst not

ideal from Ms Halifax's perspective, the relationships will change but not cease.

161. Fourthly, whilst there is cynicism in Ms Halifax about Ms Fabian's offer to keep the communication going, I have no reason to doubt Ms Fabian will continue to keep up the association because she loves Y but also because she recognises the importance of the relationship between Y and X.

162. Fifthly, many different views may be held about how parents demonstrate responsibilities in their roles. Whilst concern has been expressed about Ms Fabian stepping back with her parenting role with Y, there is no evidence upon which to conclude that she will terminate all relationship ties. In respect of X, I am satisfied that Ms Fabian has taken a distinct stance about Ms Halifax's role as a parent of X but there is not sufficient evidence to find that Ms Fabian will endeavour to terminate and erase the relationship of X and Ms Halifax.

163. Sixthly, there can be no doubt about Ms Halifax's desire to be a decision maker about X. That is a role that Ms Fabian has unilaterally resisted. To a very large degree, the biology of parenthood may be seen to have given rise to that but there are other signs such as the refusal to accept Mr Dalton or share as donors in the first place, the decision to each retain a child upon separation and Ms Fabian's decision to step back from the primary attachment to Y. All of these would explain why Ms Fabian has not facilitated Ms Halifax's role which the law accords her as a parent of X.

164. The two proposals therefore must be balanced taking into account all of the things above. For the stability of the emotional needs of the children, it is in their best interest that they live where their respective mothers desire to be but not until the end of 2011 when they will be old enough to maintain and continue the various relationships which Ms L sees as important for their respective futures.

165. Another consideration is the nature of the relationship between the children and the parents and other persons. This is a contentious issue in this case. Y's relationship with her parents must include Mr Dalton and his partner Mr Ballard. It is important that Y has her primary attachment to Ms Halifax and X to Ms Fabian. That has come about predominantly as a result of how the parties chose to parent the children after they separated. Both children have adapted to moving between houses comfortably but there can be no doubt that the preponderance of time and the strongest attachment lies in the biological reality. The children cannot understand the complicated nature of the relationships. Their physical, emotional and psychological needs are met predominantly by their biological mothers and it would be detrimental in my view to try and alter that primary attachment.

166. At a practical level, both parents have the capacity to provide for the needs of the children. Both have financial resources and appear to be independent.

Both were in a position to provide the financing of any necessary counselling help. It is important to note also that these children are still very young. Y has special needs and since separation, it would seem that Ms Halifax has undertaken the major responsibility for that role. X is still not in school but otherwise would appear to be a happy child. X changes households easily but has little concept of time. I see no reason on the evidence to presume that that situation will not continue into the future and with a period of time to allow X to understand concepts of distance and time, she can be prepared for the continuation of the relationship by Skype and holidays. Just how it will impact upon Y remains to be seen.

167. All of these matters revolve around the attitude to the children and the responsibilities of parenthood. For the reasons earlier set out, there is really only one option here that will benefit these children. Ms L maintained that Ms Fabian did not want a shared care arrangement but that does not mean that as a parent, Ms Fabian should not have the opportunity should she wish, to have a significant say in the future decisions about Y. Whether Ms Fabian wants that arrangement or not is a matter for her but it is quite clear that Ms Halifax sees her role as a parent in the life of X as very important and I see no reason why continuing that role would be anything other than beneficial for both children. An order for equal shared parental responsibility will remind both parents of their obligations to the other parent's child. On the evidence, notwithstanding Ms L's hesitation about Ms Fabian's attitude to Y, I found Ms Fabian focussed on the needs of Y and she has been and will be a significant parent in this child's life.

168. Returning then to making the decision about what is in the best interests of the children, it is clear that their primary attachment should be protected and their respective relationships with other parties and each other can be supported once both children have had sufficient time to understand that a move is going to be made and the way in which they deal with each and with each other's mother will be different to that which currently prevails. It would not be in their best interests for them to have any of the other sorts of relationships to which Ms L referred and about which I have made findings above. It is also important for the future of these children that a final decision is made so that all parties can get on with their respective lives.

169. In balancing all of the issues therefore I am satisfied that the benefits provided to the children in X living with Ms Fabian in New South Wales outweighs the detriments of the other proposals or options considered by Ms L. I am satisfied that the children will adjust to the changes but only with the professional help suggested by Ms L and I propose to order that accordingly.

170. Thus, what should happen in the meantime. In my view, all parties should embark upon counselling with a person who has the requisite expertise from a list nominated by Ms L. That counselling should be extended to the children.

171. The ensuing period until the end of the 2011 year was the period recommended by Ms L. Both children should attend the S Catholic School during the 2011 school year. The Independent Children's Lawyer submitted that an injunction should be made requiring Ms Fabian to live within 15 kilometres of that school. I do not think that is necessary in the circumstances because I would not envisage that Ms Fabian would prejudice the daily interests of X by being any considerable distance away from that school. The closeness of the children and the parents to the one school also enables the necessary professional help to which I have earlier referred to be obtained. The attendance at the S Catholic School must however be acceptable to the principal of that school bearing in mind the contractual arrangements that are involved. That school principal if willing to accept both children must understand that the Court has endorsed both parents as the parents of both children.

THE BIRTH CERTIFICATE ISSUE

172. Another dispute between the parties relates to the birth certificate issue. Ms Halifax wants to be on the birth certificate of X. When Ms Halifax was questioned about why it should be done, she simply said it was because she was the parent of X. Ms Fabian refuses the option now open under State law. Ms Fabian was cross-examined about her position. She pointed to the fact that she could not be on Y's birth certificate and did not see what the point was all about. Her view of the law is not entirely correct because an application could be made to the Supreme Court for an alteration of the birth certificate in respect of Y. This however, is another example of Ms Fabian separating out what was once a family unit.

173. Ms Halifax's submission was that her addition to the birth certificate of X was a "proper recognition" of the relationship between she and X. All of that is to do with practical assistance for the determination of "legal rights" involving X. Counsel for Ms Halifax described Ms Fabian's position as one in which it was "unfair" to Ms Halifax because the same position could not apply in respect of Y. In my view, two points need to be made. First, Ms Fabian's evidence was that she saw no need for the addition rather than it being unfair. I accept that. Secondly, the issue must still be determined on what is in the best interests of X. No such demonstration was made on the evidence.

174. Accordingly, I fail to see what benefit these children would have at this time in their lives where there is a psychological separation occurring by Ms Fabian from Y and an attempt at distancing X from Ms Halifax. It is not therefore in the best interests of these children for that birth certificate entry to be made.

175. Section 65DAC requires parties to consult and attempt to reach agreement in relation to major long term issues. Major long term issues is defined in s 4 of the Act and includes issues about the care, welfare and development of the

child of a long term nature. The definition gives some examples to include education, religion, cultural upbringing, health, names and changes to living arrangements. Leaving aside the current dispute about where X will live, the disputes between the parties about those issues have been relatively modest. As I earlier pointed out, the communication book deals with modest issues. There has been a dispute between the parties about health issues for X in relation to her nose bleeds wherein Ms Fabian took the unilateral approach that only she could make decisions. By the very nature of her role as a parent because of s 60H of the Act, Ms Fabian has to accept that Ms Halifax has by law, all of the duties, powers, responsibilities and authority which the law gives in relation to the parenting of children. Thus, in respect of both Y and X, each parent has currently those responsibilities. Accordingly, I will make an order that reinforces that shared responsibility.

I certify that the preceding One Hundred and Seventy Five (175) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin delivered on 24 December 2010.

Associate:

Date: 24 December 2010