

FEDERAL MAGISTRATES COURT OF AUSTRALIA

WYLIE & WYLIE

[2011] FMCAfam 1344

FAMILY LAW – Parenting – previous consent orders – urgent application following almost immediate failure to comply with orders – allegations of sexual abuse and violence by the father – allegations of manipulative and alienating behaviours by the mother – consideration of argument as to admissibility of statements attributable to the mother being made to Department of Communities officers and communicated to police officers – finding of admissibility – consideration of the objects of the Act and principles and application of relevant considerations – consideration of whether the behaviour of one or other of the parties constitutes an “unacceptable risk” to the children – determination on an interim basis that a risk of psychological harm of an unacceptable nature does arise – orders accordingly.

Family Law Act 1975, ss.60B, 60CA, 60CC(2), (3) and (4), 69ZT(1)
Commonwealth Evidence Act, s.69(1)(c) and (3)

Summerby & Cadogan [2011] FamCAFC 205
M & M (1988) FLC 91-979
A v A (1976) VR 298
M & M (1987) FLC 91-830, (1987) 11 FLR 765
B and B [Access] (1986) FLC 91-758
Leveque v Leveque (1983) 54BCLR 164
In re G. (a minor) (1987) 1 WLR 1461

Applicant:	MR WYLIE
Respondent:	MS WYLIE
File Number:	TVC 1088 of 2011
Judgment of:	Coker FM
Hearing date:	23 November 2011
Date of Last Submission:	23 November 2011
Delivered at:	Townsville
Delivered on:	9 December 2011

REPRESENTATION

Counsel for the Applicant: Mr Betts

Solicitors for the Applicant: MSL – Michael Sing Lawyer

Counsel for the Respondent: Ms Mayes

Solicitors for the Respondent: Purcell Taylor Lawyers

ORDERS

- (1) That the Orders made by consent in the Family Court of Australia at Townsville on 31 October 2011 be dismissed.
- (2) That the Mother deliver the children [X] born [in] 2007 and [Y] born [in] 2007 (“the children”) to the Father forthwith.
- (3) That pursuant to section 67Q of the *Family Law Act 1975*, a recovery order issue authorising and directing the Marshall, all Officers of the Australian Federal Police and all Officers of the police forces of all States and Territories of the Commonwealth of Australia to take possession of the children, [X] born [in] 2007 and [Y] born [in] 2007 and deliver the said Children to the care of the Father forthwith.
- (4) That such recovery order lie on the Registry file until 11.00am today and to be uplifted upon the request by the solicitor for the Applicant Father in writing.
- (5) That the Father have sole parental responsibility for the long-term care, welfare and development of the children, subject to the communication and notification of such decisions to the Mother, including but not be limited to:
 - (a) a child’s education (both current and future);
 - (b) child’s religious and cultural upbringing;
 - (c) a child’s health;
 - (d) a child’s name;

- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with other parent.
- (6) That the Children, [X] born [in] 2007 and [Y] born [in] 2007, live with the Father.
- (7) That the Mother spend supervised time with the Children at all reasonable times as may be agreed and in particular:
 - (a) At a registered contact centre with such time to be as agreed between the parties, and failing agreement for as much time as may be able to be facilitated by the contact centre.
 - (b) At such other times as may be able to be arranged with an agreed supervisor and in particular for a minimum period of two hours on Christmas day 2011 and on the children's birthdays, [date omitted] 2012.
- (8) That pursuant to Section 68L(2) of the *Family Law Act 1975*, the children [X] born [in] 2007 and [Y] born [in] 2007 be independently represented and that Legal Aid Queensland be requested to arrange such representation. That consideration of whether a report be given to the Court pursuant to Rule 15.09 of the Federal Magistrates Court Rules or otherwise be adjourned for further hearing at a later date. That the Independent Children's Lawyer be at liberty to peruse the Court file and obtain such copies as are required.
- (9) That each party comply with any lawful direction of the Independent Children's Lawyer including with regard to attendance for the purpose of any report or assessment.
- (10) That the Father shall:
 - (a) keep the Mother informed at all times of his residential address and contact telephone number;
 - (b) keep the Mother informed of the names and addresses of any treating medical or other allied health practitioners who treat the Children and authorise those practitioners to provide to the other

parent with information that they are lawfully able to provide about the Children;

- (c) inform the Mother as soon as reasonably practicable of any medical condition, significant health issue or significant illness suffered by the Children.
- (11) That during the time the Children are with either parent, that parent shall:
- (a) respect the privacy of the other parent and not question the Children about the personal life of the other parent;
 - (b) speak of the other parent respectfully, and
 - (c) not denigrate or insult the other parent in the presence or hearing of the Children and use their best endeavours to ensure that other do not denigrate or insult the other parent in the hearing or presence of the Children..
- (12) That the parties have liberty to apply on the giving of seven (7) days notice in writing to the other party and to the Court in relation to these Orders.
- (13) That the listing for 30 January 2012 be vacated and the matter be adjourned for further mention at 9.30am on 21 February 2012.

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

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT TOWNSVILLE**

TVC 1088 of 2011

MR WYLIE
Applicant

And

MS WYLIE
Respondent

REASONS FOR JUDGMENT

1. This matter is one that has been brought before this court and the Family Court very quickly. On only 18 October 2011, an initiating application was filed by Mr Wylie, whom I shall refer to as the father. That application sought orders in relation to the parenting of two children, [X] and [Y], both born [in] 2007. The children are the children of the relationship between the father and Ms Wylie whom I shall refer to as the mother.
2. The application of 18 October 2011 was brought on urgently and on 31 October 2011 orders were made by consent before Montieth J of the Family Court in Townsville. Those orders were in these terms:
 1. *The Mother and the Father have equal shared parental responsibility for the major long term issues of the children, [X], born [in] 2007 and [Y], born [in] 2007 (“the children”).*
 2. *The children live with the mother.*
 3. *The children spend time with and communicate with the father at all reasonable times as may be agreed between the parties, but failing agreement, then as follows:*
From the date of these Orders to 15 December 2011

- (a) Every Monday from 3.00 pm to 6.30 pm;*
- (b) Every Wednesday from 3.00 pm to 6.30 pm;*
- (c) Every Friday from 4.30 pm to Saturday 5.00 pm.*

From 15 December 2011 onwards

- (d) Every Monday from 3.00 pm to 6.30 pm;*
 - (e) Every Wednesday from 3.00 pm to Thursday 8.30 pm;*
 - (f) Every Friday from 4.30 pm to Saturday 5.00 pm.*
- 4. In the event the father is unable to look after the children, then the children will remain in the mother's care.*
 - 5. In the event that Ms S recommends family sessions, then both parents must engage in those sessions.*
 - 6. A Family Report be prepared.*
 - 7. The matter be transferred to the Federal Magistrates Court in Townsville on a date to be fixed.*
 - 8. Each parent have telephone communication on the days that the children are spending overnight time with the other parent between 6.00 pm and 7.00 pm and that the children be allowed to contact the other parent whenever they wish.*

IT IS FURTHER ORDERED THAT:

- 9. The parties have leave to inspect documents received under subpoena.*
3. Unfortunately that was not the end of the matter. In fact, what appears to have been the case is that virtually the day that the orders were made, the mother determined that she held further concerns in relation to the children, and as a result of that, though there was some time spent by the father with the children, pursuant to the orders of 31 October 2011, within a few days, the matter was back before the court, when an application was filed on 11 November 2011, seeking orders urgently as contained within an application in a case.
 4. The terms of the orders sought by the father were as follows:
 - 1. That the Orders made 31 October 2011 be dismissed.*

2. *That this matter be listed urgently for an interim hearing and the return date of the application be abridged.*
3. *An injunction that the MOTHER, Ms Wylie, her servants or agents, be and are hereby required to return the children [X] born [in] 2007 and [Y] born [in] 2007 (“the children”) to the FATHER at the Father’s residence within 24 hours of the date of this order issuing.*
4. *That in the event the MOTHER fails to comply with Order 2 herein, pursuant to section 67Q of the Family Law Act, a Recovery Order issue authorising and directing the Marshall, all Officers of the Australian Federal Police and all Officers of the police forces of all States and Territories of the Commonwealth of Australia to take possession of the said children and deliver the said Children to the care of the Father forthwith.*
5. *That the Recovery Order pursuant to Order 3 herein lie on the court file until a date and time to be prescribed by this Honourable Court and that it be uplifted upon request in writing by the solicitor for the FATHER in the event that the Children are not returned to the FATHER and in his care by the prescribed time.*
6. *That the FATHER have sole parental responsibility for the major long term issues of the Children.*
7. *That the Children live with the FATHER.*
8. *That the MOTHER spend supervised time with the Children at a registered contact centre with such time to be as agreed between the parties, or as ordered by this Honourable Court, but not less than two (2) hours every Saturday.*
9. *That the children, [X] born [in] 2007 and [Y] born [in] 2007 be represented in these proceedings and it is requested that Legal Aid Queensland arrange such representation, and that the Independent Children’s Lawyer be at liberty to peruse and/or take copies of all documents filed in these proceedings upon the making of an appointment to do so with the Registrar of the Family Court of Australia at Brisbane.*
10. *That each parent comply fully with all lawful and proper directions of the Independent Children’s Lawyer including with regard to attendance for the purpose of any report or assessment being prepared as might be considered appropriate by the Independent Children’s Lawyer including both the preparation of*

a family report and or psychiatric or psychological assessment of one or both of the parents.

- 11. That the MOTHER attend upon a psychiatrist as nominated by the Independent Children's Lawyer for the purpose of an interview for the preparation of a psychiatric report.*
- 12. That the MOTHER is hereby restrained from approaching within 200 metres of any place of residence or other place occupied by the Children or the FATHER.*
- 13. That the FATHER shall:*
 - (a) keep the MOTHER informed at all times of his residential address and contact telephone number;*
 - (b) keep the MOTHER informed of the names and addresses of any treating medical or other allied health practitioners who treat the Children and authorise those practitioners to provide to the other parent with information that they are lawfully able to provide about the Children;*
 - (c) inform the MOTHER as soon as reasonably practicable of any medical condition, significant health issue or significant illness suffered by the Children.*
- 14. That during the time the Children are with either parent, that parent shall:*
 - (a) respect the privacy of the other parent and not question the Children about the personal life of the other parent;*
 - (b) speak of the other parent respectfully, and*
 - (c) not denigrate or insult the other parent in the presence or hearing of the Children and use their best endeavours to ensure that other do not denigrate or insult the other parent in the hearing or presence of the Children.*
- 15. That in the event that either the MOTHER or FATHER refuses or neglects to execute a deed and/or instrument in compliance with the preceding Orders, an officer of the Federal Magistrates Court of Australia be appointed pursuant to Section 106A of The Family Law Act 1975 to execute all deeds and/or instruments in the name of the Applicant or Respondent and do all acts and things to give validity and operation to the deeds and/or instruments. That the*

costs associated with such application be paid by the defaulting party on an indemnity basis.

16. That the parties have liberty to apply on the giving of seven (7) days notice in writing to the other party and to the Court in relation to these Orders.

17. That the Mother pay the Father's costs of and incidental to this Application with costs to be as agreed or assessed.

18. Any other Order as this Honourable Court deems appropriate.

5. It should be noted that the orders sought by the father were, to a very significant degree, a reversal of those which had been agreed only a matter of 10 days or so before. In particular, the father sought to have sole parental responsibility in relation to decisions relating to the major long-term welfare of the children, and additionally sought orders with regard to the children living with him. The father's proposals in relation to the children spending time with their mother was that it should be of a limited nature and should only be of a supervised nature.

6. The mother's response to that application was filed on 18 November 2011. The orders sought there were in these terms:

1. That the Orders made 31 October 2011 be dismissed.

2. That the children [Y], born [in] 2007, and [X], born [in] 2011, live with the mother.

3. That the mother and father have equal shared parental responsibility for major long term issues of the children including but not limited to:

i. The children's education;

ii. The children's religion and cultural upbringing;

iii. The children's health;

iv. The names of the children;

v. Changes to the children's living arrangements that make it significantly more difficult for the children to spend time with each parent.

4. *The parties are to consult with each other about decisions to be made in exercise of their equal shared parental responsibility as follows:*
 - i. *They shall inform the other parent of the decisions to be made;*
 - ii. *They shall consult with each other on terms that they agree (or in writing in no agreement);*
 - iii. *They shall make a genuine effort to come to a joint decision.*
5. *That the Father spend supervised time with the children at a registered contact centre with such time to be as agreed between the parties, or as ordered by this Honourable Court, but not less than two (2) hours every Saturday or Sunday and on one (1) occasion on a week day each week between 4 and 6 pm.*
6. *That the children, [X] born [in] 2007 and [Y] born [in] 2007 be represented in these proceedings and it is required that Legal Aid Queensland arrange such representation, and that the Independent Children's Lawyer be at liberty to peruse and/or take copies of all documents filed in these proceedings upon the making of an appointment to do so with the Registrar of the Family Court of Australia at Brisbane.*
7. *That the Mother shall:*
 - (a) *keep the Father informed at all times of her residential address and contact telephone number;*
 - (b) *keep the Father informed of the names and addresses of any treating medical or other allied health practitioners who treat the children and authorise those practitioners to provide to the other parent with information that they are lawfully able to provide about the children;*
 - (c) *inform the Father as soon as reasonably practicable of any medical condition, significant health issue or significant illness suffered by the children*
8. *That the Father pay the Mother's costs of and incidental to this Application with costs to be as agreed or assessed.*
9. *Any other Order as this Honourable Court deems appropriate.*

7. As can be seen, they also were radically different to that which was agreed pursuant to the consent orders only a matter of some 18 days or so before. In particular, whilst the mother still proposed that there

should be equal shared parental responsibility, she sought that the father's time with the children should then be of a supervised nature.

8. As can be seen, the position of the parties within a matter of days radically changed and each was very concerned about the effect of time being spent by the children with the other parent. Incredibly, and I must say I think rather troublingly, when the matter came back before the court on 23 November 2011, an amended response was filed in which the mother's position in relation to the matter had again radically changed.

9. In fact, to all intents and purposes, the mother sought an order to the effect that the arrangements revert to that which had previously been agreed on 31 October 2011, subject to the discharge or variation of some of the orders. An amended response was provided to the court and the orders that were then sought, though it indicated that they were of a final basis, it appears clearly to have been contemplated that they would be interim orders, were in these terms:

1. *The Mother and Father have equal shared parental responsibility for the major long term issues of the children, [X], born [in] 2007 and [Y], born [in] 2007 ("the children").*
2. *The children live with their Mother.*
3. *The children spend time with and communicate with the Father at all reasonable times as may be agreed between the parties, but failing agreement, then as follows:*

From the date of these Orders to 15 December 2011

- (a) *Every Monday from 3.00 pm to 6.30 pm;*
- (b) *Every Wednesday from 3.00 pm to 6.30 pm;*
- (c) *Every Friday from 4.30 pm to Saturday 5.00 pm.*

From 15 December 2011 onwards

- (a) *Every Monday from 3.00 pm to 6.30 pm;*
- (b) *Every Wednesday from 3.00 pm to Thursday 8.30 pm;*
- (c) *Every Friday from 4.30 pm to Saturday 5.00 pm.*

4. *In the event the Father is unable to look after the children, then the children will remain in the Mother's care.*
5. *That the children be represented in these proceedings and it is required that Legal Aid Queensland arrange such representation, and that the Independent Children's Lawyer be at liberty to peruse and/or take copies of all documents filed in these proceedings upon the making of an appointment to do so with the Registrar of the Family Court of Australia at Brisbane.*
6. *That the Father shall:*
 - (a) *keep the Mother informed at all times of his residential address and contact telephone number;*
 - (b) *keep the Mother informed of the names and addresses of any treating medical or other allied health practitioners who treat the Children and authorise those practitioners to provide to the other parent with information that they are lawfully able to provide about the Children;*
 - (c) *inform the Mother as soon as reasonably practicable of any medical condition, significant health issue or significant illness suffered by the Children.*
7. *That during the time the children are with either parent, that parent shall:*
 - (a) *respect the privacy of the other parent and not question the children about the personal life of the other parent;*
 - (b) *speak of the other parent respectfully; and*
 - (c) *not denigrate or insult the other parent in the presence or hearing of the children and use their best endeavours to ensure that other do not denigrate or insult the other parent in the hearing or presence of the children.*
8. *That the parties have liberty to apply on the giving of seven (7) days notice in writing to the other party and to the Court in relation to these Orders.*
9. *Each parent have telephone communication on the days that the children are spending overnight time with the other parent between 6.00pm and 7.00pm and that the children be allowed to contact the other parent whenever they wish.*

10. *That the parties ensure the children only consume food in accordance with the diet restrictions provided by the children's paediatrician.*
11. *That the children attend upon a counsellor as agreed between the parties.*
12. *That the Father pay the Mother's costs of and incidental to this Application with costs to be as agreed or assessed.*
13. *Any other Order as this Honourable Court deems appropriate.*

10. The matter is one that is troubling in very many respects. It is troubling, not only because of the enormous disruption that these two young girls have in their own lives, as a result of the dispute between the parents, but is also of grave concern because there are certainly counterbalancing suggestions put on the part of both parents, that the behaviours of the other parent is such that it radically affects either the emotional or even physical well-being of the children.
11. The mother's position in relation to the matter, particularly from 23 November 2011, was to say that she had dealt with the concerns that she felt existed in relation to the father's time with the children and that there should be a continuation of the existing arrangements, pursuant to the orders of 31 October 2011.
12. The father's position was entirely different. His counsel in this matter argued long and rather passionately, that this was a difficult case and it required a difficult decision to be made. It was certainly contended that there would be required to be a radical change in arrangements with regard to the parenting of the children, because that was the only way that it could be ensured that the children would not be placed in a situation where they were emotionally harmed, as a result of the mother's concerns.
13. Subpoenas had been issued in relation to the matter and information obtained from both the Department of Communities as well as the Queensland Police Service. The contents of the subpoenaed documents were referred to at length by counsel for both parties in relation to the matter and it was certainly the case that each utilised for their clients' case, the information contained within the documents produced.

14. In particular, I was referred by counsel for the father to a child concern report dated 15 September 2011. There, a case officer, Ms O, under the heading “Assessment of Harm and Risk of Harm”, made a number of comments which were said to give rise to a real concern as to manipulation, coaching or alienation of the children. In particular, under that assessment, and noted as occurring on or about 4 October 2011, is the following statement:

Assessment of Risk Factors. The children are at risk of emotional harm as a result of the allegations being made that their father is sexually harming them. Their Mother Ms Wylie has advised that she was sexually abused as a child and believes that Mr Wylie is doing exactly the same things to her daughters. A parent who has been harmed as a child is more likely to display harmful parenting patterns relating to what they were subjected to themselves as a child.

There is previous child protection history in relation to Ms Wylie alleging the girls were being sexually harmed by their father. The outcome of this investigation was Unsubstantiated as [Y] advised that the rash was caused by her underpants being too tight. Ms Wylie again contacted Intake and advised the girls were being sexually harmed by their Father. The second Intake was recorded as a CCR. Ms Wylie is exposing the girls to cumulative emotional harm as a result of the girls constantly being subjected to section 93A interviews by QPS and the Department.

Ms Wylie appears to be experiencing a high degree of stress as a result of her relationship breakdown with Mr Wylie. This occurred approximately two months ago. Ms Wylie is residing with her parents and has the girls in her care. I believe that Ms Wylie has allowed the stress of the situation to negatively impact on her ability to think rationally and parent the two girls.

Assessment of Protective Factors. Mr Wylie has stated that he will do a parenting skills course and engage with an anger management course as a result of the request made by Ms Wylie. A professional support network will act to improve Mr Wylie capacity to parent young children and enhance the functionality within the family unit. Both Ms Wylie and Mr Wylie are parents who are willing and able to meet the care and protective needs of the subject children. The parents have ended their relationship and have assumed joint responsibility of the care of the subject children. There is no current information to suggest that either parent is unwilling or unable to continue meeting the needs of the subject children.

15. It is clear that there were, prior to these proceedings being commenced, notifications which were the subject of investigation and determination. Notwithstanding that, however, the mother's position in relation to the matter appears, at the very least, to have been one that flows from belief that there has been abuse in some form or respect of the children to situations where she does not believe that the children have been abused.
16. The mother clearly was aware of such matters at the time of determination of these proceedings. I say that because in paragraph 60 of the mother's affidavit filed in support of the first application brought before the court the mother noted the following.

I accept the findings of the Department and police. However, given what the girls were saying and doing as a parent I had to report my concerns.

17. Notwithstanding that sworn statement having been made in the affidavit sworn on 25 October 2011 and filed on 27 October 2011, the very same day that the orders were made in relation to this matter, the mother indicated to the father that her concerns continued, and in fact she, as she put it, in a text to him, knew what he had done. The text, as best I can understand it, was to this effect, "just know [Mr Wylie] that we know."
18. What is more troubling also is the fact that the mother had sworn her affidavit on 25 October 2011, but had utilised a Facebook page on 30 October 2011 to make the following entry:

Hoping and praying that this judge tomorrow has a heart and some common sense to see through the lies and attacks and can help me protect the girls. Please please PLEASE!!! :(4yo little girls cannot defend themselves!!

19. They are not the statements of a person who has accepted that the inquiries had revealed nothing of concern. Of even greater concern, however, was the entry placed on the day of the orders having been made. It should be noted, of course, that at that time the mother was legally represented by both solicitor and counsel. The orders were by consent, and yet the entry of the mother that day was in these terms:

Not a very successful day :(. Girls will now be spending two nights and one arvo a week away. I am devastated. And even though I communicated the change to the girls as the psych recommended, they are really upset and keep asking me if I can 'please, not do it'. It is AWFUL when you can't do anything to protect your own children!!!!!! BUT found out some useful information. Not just a pack of lies in the affidavit and 'notice of child abuse' against me - but also being told to the police. Hopefully the whole truth is going to come out one day...!!! Please please please! At least the requested 'immediate removal' of the girls from me didn't happen. Thank God I sent them to a psychologist and they were able to report is all I have to say!!!!

20. The comments are of great concern for a number of reasons. Firstly, the mother, it would seem, suggests that the orders were made contrary to her wishes. They were not. They were orders by consent. Secondly, the mother appears to indicate that information was available to her which showed that there were lies, not only in the affidavits and notice of child abuse, but also lies had been told to the police. No indication is given of that.
21. Most significantly, however, the mother says that she is glad that she sent the children to a psychologist, and they were able to report. This is notwithstanding the fact that the mother's affidavit, filed in support of the response on 18 November 2011, suggests that the contents of the report was not clearly known to her. Obviously it was known to her, and notwithstanding that, the orders by consent were made.
22. It is also, of course, troubling that the mother, having entered into consent orders within a matter of hours, had indicated clearly to the world at large that she was "devastated by those orders", and within a matter of days had ceased complying with the orders. Notwithstanding that, however, there was no application made by the mother in relation to the matter until such time as she was required to respond to the proceedings brought by the father.
23. The father therefore contends that the mother has lied in her affidavit of 25 October 2011, and that either the contents of that affidavit, at least insofar as her suggestion that she accepted the findings of both the Queensland Police Service and the Department of Communities was untrue, or it was part of an elaborate plan on her part to destroy the father's relationship with the children.

24. In that respect, reference was made particularly to the documentation produced by the Queensland Police Service. In an entry of 4 October 2011, the following statement is noted:

Ms M from DOCS will follow up with [Ms Wylie] to bring the VC [Y] to the police for a 93A Statement at 2:00 pm on 04/10/2011.

Ms M disclosed that the Informant has been making harassing phone calls to Child Safety. The informant [Ms Wylie] told Ms M, on Friday 30/09/2011 in a phone conversation that she was going to “set the suspect up” by inviting her friends and family to confront the suspect about him sexually abusing the children. [Ms Wylie] said that when he admits it she will record it and he’ll never be allowed to see the children or her again.

25. A more troubling statement could not be imagined because a situation such as that in fact developed. The father was confronted by the mother. In the presence of other persons he was advised by the mother that the child, [Y], did not wish him to further touch her vagina though, in fact, there was the use of a term by the father which appears to be a name used by the family to describe their genital areas. As best I can understand it, it is referred to as a “tooska”.

26. A concern here is that the mother does, as was submitted on her behalf, appear to be vacillating. She accuses the father then retracts the accusations, and says that she acknowledges that they are not truthful or that she does not have any belief that they are true. This is confirmed by the fact, for example, that on 19 September 2011 an interview was conducted with the mother by the Department of Communities, and they note:

When the children came back into her care she asked them if daddy had played with them. [X] said they had played outside but it is a secret. [Y] said she can’t tell because the game is secret.

At the time [Ms Wylie] was worried and asked the girls if daddy had touched them inappropriately. Both children said no and that it is wrong. [Ms Wylie] said she was relieved at the time she told her this.

The next night, a Sunday she walked into the bathroom while the children were in the bath and saw one of the girls lying on top of the other one in what [Ms Wylie] considered to be sexual.

[Ms Wylie] said she asked, "What are you girls up to? That is a silly game." [Ms Wylie] said that one of the girls said, "It's a game we play with daddy, but it is a secret."

27. Again, the mother presumed that that was a secret of a sexual or inappropriate nature. She questioned the girls about it. In particular, the notation goes on to say:

When [Ms Wylie] asked [X] the child said her daddy has tickly tummy hair. [Ms Wylie] said the children continued to deny to her that their daddy had touched them on the 'Tushka'.

[Ms Wylie] has reported this to Child Safety and want police to talk to the children to find out if they really haven't been touched. [Ms Wylie] thinks that the children may have been sexually abused but they don't know how to properly tell her.

28. It is clear that the mother has no real appreciation of the damage she causes to these children though this continued saga of questioning and physical examination. The Department of Communities also conducted inquiries with Mr Wylie. They note that on 5 October 2011, the father attended at the Townsville Police Station, as arranged. It goes on:

As both alleged victims had been interviewed and there were no disclosures and no evidence that any offences had occurred police spoke to [Mr Wylie] on an informal basis and to provide information in relation to the investigation of such serious allegation.

Police informed [Mr Wylie] that the police investigation is over and police are completely satisfied that no offences had been committed as alleged. Police explained they were aware that [Mr Wylie] and the Informant in this matter his ex-wife were currently engaged in a bitter Family Law Court dispute.

29. It is noteworthy, of course, that proceedings were not commenced until a date nearly two weeks after this investigation and interview were conducted, however, the records then go on:

[Mr Wylie] informed police that his ex-wife has been doing everything within her power to prevent him spending quality time with his daughter but he did not expect her to start accusing him of sexually abusing his kids.

[Mr Wylie] said he was devastated when she told him on Saturday that she had gone to police and he was being investigated. He said how he felt she set him up.

He said on Saturday it had been arranged for him to attend and pick up the girls from [Ms Wylie]’s mum’s house. Before he left home [Ms Wylie] text him and said, “Hi honey when are coming over the kids are really excited to be seeing you.”

[Mr Wylie] said he thought that strange because since the separation she had not been so nice. Five minutes after that text he received another text from her, “How long are you going to (be) the girls really want to see you.”

[Mr Wylie] said when he arrived at the house he saw that [Ms Wylie], her mum and dad, her mum’s friend [name omitted] and her husband were sitting with the kids. He went to pick up the girls bag and [Ms Wylie] told him to sit down as there was something she needed to discuss.

30. It then goes on:

[Mr Wylie] said he felt uncomfortable because [Ms Wylie] had set up this audience and her independent witnesses. He said [Ms Wylie] asked him, “[X] has said that she doesn’t want you to touch her tooska anymore. Have you been touching her. I need to know if you have been touching the girls.”

31. It is, of course, exactly what was reported to the Department of Communities as the intent of the mother, which occurred in relation to this matter. It is a horrifying circumstance where such a situation has arisen. The father was sensitive to the situation. He realised that the children were present and should not overhear the conversation, but the mother, he says, was insistent that the children needed to be involved in this.

32. The father also is noted as commenting, quite appropriately, I would think, that interviews with the girls about this type of topic could be damaging to them. The father was concerned for the wellbeing of his children.

33. Most significantly, the notations contained within the Queensland Police Service documents then go on as follows:

Police provided [Mr Wylie] with advice in relation to recording all conversations with his ex-wife, to keep diary notes of the time he spends with the kids, to document everything and to keep all text messages from his ex-wife.

34. The print received from the Queensland Police Service is not clear. However, it goes on:

After interviewing both children, [Y] twice, and both children definite that no one has offended against them, even under direct questioning, the EVIDENCE INDICATES THAT NO OFFENCES HAVE OCCURRED.

THIS MATTER SEEMS TO HAVE BEEN INSTIGATED BY THE MOTHER OF THE CHILDREN FOR FAMILY LAW COURT PURPOSES AND ALTHOUGH [MS WYLIE] HAS DENIED IT AND POLICE HAVE NO EVIDENCE, THERE IS A SUSPICION THAT THE CHILD [X] WAS COACHED OR HAS BEEN PRESENT WHILE THE ALLEGATIONS WERE SPOKEN ABOUT, BY THE MOTHER.

IT IS SUGGESTED THAT IF FUTURE ALLEGATIONS OF A SIMILAR NATURE ARE MADE, THE INVESTIGATION BE DISCUSSED WITH OIC CPIU IN REGARD TO THE POTENTIAL EMOTIONAL ABUSE OF THE CHILDREN OF REPEATED UNFOUNDED ALLEGATIONS.

35. It is somewhat prescient that comments of that nature should be made in relation to these proceedings because, as I have indicated, the matter is immediately back before the court and the mother continues, without substantiation, to make allegations in relation to this matter.
36. It is contended on the part of the father, therefore, that the only proper course that can be followed to protect the children is to make orders in terms of those, which are sought by the father.
37. The father says that the mother recanting or stepping back from the proposals contained within her response of 18 November 2011 is indicative of the mother's position in relation to this matter, being put in a position where she cannot produce evidence in relation to the allegations and therefore seeks simply to step back from the precipice and to continue as she wishes.
38. The father's position is to say that it is not a situation where the mother has stepped back on a permanent basis, but rather suggests, if you like, that the mother has in no way changed her mind or her views in relation to the wellbeing of the children and the fact that they are being abused by the father, rather, it is simply a further opportunity for the

mother to gather, if she can, more evidence, but more particularly to take steps with regard to the dreadful emotional abuse that has already occurred with these children being genitally examined, genitally photographed and interviewed repeatedly, such that a situation of systems abuse has arisen and continues to this day.

39. These children have been involved in these proceedings from the beginning. The mother questions them, the mother examines them and the mother draws every negative conclusion that can possibly be available in relation to allegations which relate to the father.
40. As was indicated earlier in these reasons, counsel for the father strongly submitted that the proper course in relation to the matter dealing with a difficult case is to make the difficult decision.
41. I must say that I have grave concerns in respect of continuing the orders on the basis that they presently stand. Counsel strongly submits that to do so is to put the children into a situation of unacceptable risk. I am mindful of the significant attachment, perhaps primary attachment, of the children to their mother and the obvious concerns that would arise in relation to a situation of the children being removed from the mother's care.
42. However, there is, of course, always the need to put the welfare and the best interests of the children to the fore, and there is a very serious concern that exists here as to the mother being unable or unwilling to cease the terribly damaging behaviours that have already occurred and to which I have referred.
43. That is not to suggest that the mother should be punished or that the children should be punished or that, because of the father having missed out on occasions to spend time with the children in recent time, that he should be compensated. It is rather, as it always must be, a consideration of the best interests and the welfare of the child.
44. In that regard, I am mindful of the comments of Wilson FM in *Summerby & Cadogan* [2011] FamCAFC 205, which was the subject of appeal and recent decision by the Full Court of the Family Court, delivered on 20 October 2011. At the conclusion of the determination

of the Full Court in relation to that matter, at paragraph 127 they said the following:

As we have found no merit in any of the grounds, Appeal NA38/2010 will be dismissed. We think it proper, however, to record that our decision should not be interpreted as condoning the mother's conduct. We adopt the same view as his Honour expressed.

45. And they then go on to say:

4. If it is kept uppermost in the consideration of what parenting orders to make, that [the child's] best interests are the paramount consideration, it is immediately apparent that parenting orders ought not be made to assuage concern about injustice to one parent or the other, nor to redress what may be perceived to be some unfairness in the outcome. Nor should parenting orders be made as a form of retribution or penalty against one parent for what might be regarded as unacceptable behaviour on that parent's part, if otherwise the best interests of the child warrant that parent having the primary or sole care for the child.

46. If you like, it is a nice way of expressing the often quoted position as detailed in section 60CA relating to the paramount consideration being the welfare of the children. Here it is not a question of punishing the mother and it is not a question of unfairness to the father. It is purely and simply a question of fostering these children's rights to a relationship with both of their parents and how that may be able to be determined.

47. In that regard, the father says that it can only be determined by him having sole parental responsibility or him having the children live with him and for the mother's time with the children to be supervised. Quite simply, the father says that any other course is to leave the children subject to emotional hurt and systems abuse which has been overwhelming already in this matter.

48. In that regard, special consideration needs to be given to the evidence of the psychologist commissioned by the mother to assist the children in these proceedings. Ms S has filed two affidavits in relation to the proceedings. The first was filed on the part of the mother on 31 October 2011 and, as I previously noted, that is in fact the day that consent orders were made in relation to the proceedings and was, if you

like, the day when concerns in relation to the behaviours of both parents accelerated.

49. Ms S annexes to her affidavit a report which she says was “prepared on behalf of Ms Wylie and these proceedings”. That opening does not auger well for the evidence sought to be relief upon by the mother in these proceedings.
50. In the report, Ms S makes a number of comments in relation to what she observed or noted in relation to the girls. For example, at point 14 she notes, “at the first session [Y] and [X] appeared to be moderately anxious, however this was assessed as age appropriate.” At paragraph 15 she notes, “[Y] and [X]’s relationship with their mother has appeared appropriate and positive. In my opinion, [Y] and [X] demonstrate an appropriate attachment to their mother.”
51. At paragraph 16, she comments about the children’s apparent comfort and happiness in being returned to their mother’s care following the session and on a number of occasions makes reference to age appropriate concepts of time, place, persons, speech, intonation and articulation of words. She also speaks of the children’s thought-content as being what would be developmentally expected and that the children display appropriate social responses, including eye contact and the like. She notes that the children appear to be of average intelligence and display working memory abilities of an age appropriate level.
52. Under the heading “Mood and Affect” however, Ms S notes particularly that these appropriate behaviours are not evidenced in [Y] when there is mention of the father. She notes that [Y] “will disengage from the conversation and withdraw”. Additionally, she notes that [X]’s mood shifts from happy and sprightly to sombre and withdrawn when discussing her father.
53. I make reference to that particularly observation or comment by Ms S because under the more general heading “Summary of Session Content” she notes:

The girls attributed negative incoming and outgoing feelings only to their father, which related to him being angry. An example of statements placed on Mr Wylie by both [Y] and [X] was, this person in the family is mean to me, this person in the family gets too angry,

this person in the family sometimes gets angry with me, sometimes I wish this person in the family would go away, this person in the family makes me feel afraid, this person in the family makes me feel unhappy, sometimes I think I would be happier if this person was not in our family.

54. After this lengthy recitation of comments attributable to both girls, though she noted previously that [Y] would disengage from the conversation, she noted that the girls appeared to “tire from the statements and wanted to play and draw”.

55. Ms S also spoke about exploring issues about the children feeling safe and noted that networks of safe people were established. She went on to note:

Both [X] and [Y] agreed that their safe people were mum, teacher, nanny and poppy. I asked the children if a police person or myself could be safe people and they agreed.

It is troubling that it would appear that the children were not asked whether they felt safe with their father but an adverse inference is clearly sought to be drawn.

56. Similar concerns to those which I have already touched upon arise in relation to other comments, including particularly questions directed to the girls by Ms S about “good secrets and secrets that were not good to keep”. The concern here, obviously, is that raising that issue specifically occurred because of matters raised with Ms S by the mother, and there is if you like a concern as to the independent nature of any comment or behaviours by the children. An inference, for example, is suggested in the report because “[X]’s head was tilted downward at this stage and she cease being giggly and enthusiastic about the conversation and appeared to be withdrawn”.

57. The inference is clearly to the effect that the child was thinking about a secret that wasn’t good to keep but there is nothing whatsoever to suggest that it relates to the father and in light of the enormous amount of independent evidence, may be just as clearly as a result of the emotional stressors brought to bear upon the child.

58. Finally, and I think of greatest concern in relation to this first report are the assessments in relation to the father arising from Ms S’s telephone

contact with him. The father was seeking information about the treatment being provided to his two young daughters. Ms S notes that the father was not satisfied with an answer given by her to his query in relation to the nature of the concerns for the children. She notes at paragraph 47 the following:

Mr Wylie asked what interventions I use in therapy. I informed Mr Wylie that in these cases I use a generalised protective behaviours program that ranged from safe people networks to body awareness and this intervention is delivered through play and art therapy. Mr Wylie asked why his children need to partake in this, and said “What do they need protection from?” I again reiterated my initial response. I informed Mr Wylie that there were concerns identified and that this intervention was the most appropriate. I also highlighted that this program is designed to teach children how to assist them to act in self-protective ways in all instances.

At this point in the conversation I observed Mr Wylie’s verbal expression and voice tone to shift and identified that he was becoming forceful and frustrated and he began asking similar questions I had answered.

59. I observe here simply that I also would have been frustrated and concerned at the lack of information provided and am horrified at the suggestion that the questions properly directed to her by the father, which were not in any real way answered, were then cut off because of “time constraints”. When a further telephone conversation occurred, the father asked the same questions, understandably, and was provided, it would seem, with little response from Ms S who then subsequently determined after reviewing clinical notes, “not to work with Mr Wylie”.
60. In my assessment, Ms S has made the classic error that arises so often in relation to matters that are brought by one parent or the other to an independent professional. They accept unconditionally the legitimacy and honesty of the facts that are provided to them and fall into a position where there is only one possible conclusion for why children are making statements or behaving in a manner that is observed by them. They become part of the abusive process that sometimes arises and in this instance, upon the evidence that I have so far seen, Ms S has made that classic error.

61. It would appear that she took the father's frustration in his dealings with her as evidence of aggression, anger and abusive behaviours, rather than perhaps just as obviously frustration in one more impediment being raised in relation to his proper interaction with his children. Ms S did not know of the real concerns of the Queensland Police Service and of the Department of Communities and of the expressed intent of the mother to "set the father up". Unfortunately, she became part of the process utilised by the mother in relation to these proceedings.
62. Ms S swore a second affidavit which was filed by leave on 22 November 2011. She refers to "some consistencies in what the children had spontaneously discussed in sessions to what was contained on the audio files". The same comments apply in relation to these observations and actions taken by Ms S. I was not much assisted by Ms S's recommendations in relation to this matter but must say that I was concerned with a great deal of the approach taken by her in relation to this matter.
63. To make that decision in relation to the matter, there must obviously be consideration of the statutory pathway to be followed in relation to the proceedings. I am mindful, of course, therefore, of the objects and principles of the Act as set out in section 60B. Section 60B is in these terms:
- (1) *The objects of this Part are to ensure that the best interests of children are met by:*
- (a) *ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and*
 - (b) *protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and*
 - (c) *ensuring that children receive adequate and proper parenting to help them achieve their full potential; and*
 - (d) *ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.*

(2) *The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):*

(a) *children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and*

(b) *children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and*

(c) *parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and*

(d) *parents should agree about the future parenting of their children; and*

(e) *children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).*

(3) *For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:*

(a) *to maintain a connection with that culture; and*

(b) *to have the support, opportunity and encouragement necessary:*

(i) *to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and*

(ii) *to develop a positive appreciation of that culture.*

64. I am also mindful, of course, of the considerations that must be looked at by a court making decisions in relation to the welfare and best interests of children, as detailed in section 60CC(2) and (3). Section 60CC(2), (3) and (4) is in these terms:

Primary considerations

(2) *The primary considerations are:*

(a) *the benefit to the child of having a meaningful relationship with both of the child's parents; and*

- (b) *the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.*

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

(3) *Additional considerations are:*

- (a) *any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;*
- (b) *the nature of the relationship of the child with:*
 - (i) *each of the child's parents; and*
 - (ii) *other persons (including any grandparent or other relative of the child);*
- (c) *the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;*
- (d) *the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:*
 - (i) *either of his or her parents; or*
 - (ii) *any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;*
- (e) *the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;*
- (f) *the capacity of:*
 - (i) *each of the child's parents; and*
 - (ii) *any other person (including any grandparent or other relative of the child);*

to provide for the needs of the child, including emotional and intellectual needs;

- (g) *the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;*
 - (h) *if the child is an Aboriginal child or a Torres Strait Islander child:*
 - (i) *the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and*
 - (ii) *the likely impact any proposed parenting order under this Part will have on that right;*
 - (i) *the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
 - (j) *any family violence involving the child or a member of the child's family;*
 - (k) *any family violence order that applies to the child or a member of the child's family, if:*
 - (i) *the order is a final order; or*
 - (ii) *the making of the order was contested by a person;*
 - (l) *whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;*
 - (m) *any other fact or circumstance that the court thinks is relevant.*
- (4) *Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:*
- (a) *has taken, or failed to take, the opportunity:*
 - (i) *to participate in making decisions about major long-term issues in relation to the child; and*

- (ii) *to spend time with the child; and*
 - (iii) *to communicate with the child; and*
 - (b) *has facilitated, or failed to facilitate, the other parent:*
 - (i) *participating in making decisions about major long-term issues in relation to the child; and*
 - (ii) *spending time with the child; and*
 - (iii) *communicating with the child; and*
 - (c) *has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.*

65. The starting point, therefore, is at least to consider the primary considerations. There are only two, but they are, without doubt, the legislature's indication of the matters that must be at least to the forefront in any decision maker's mind, but still must be looked at in conjunction with those additional considerations set out in subsection (3).

66. The benefit to the child of having a meaningful relationship with both of the child's parents is obvious. The children grow up with a more adjusted and balanced view of the world and of the roles of adults, particularly in the lives of children. There is clearly a benefit to these children having a relationship with both of their parents which is meaningful and beneficial to them. It is clear also from the material that is before the Court that the children have that meaningful attachment and relationship with both of their parents, though it is clearly acknowledged that perhaps the primary attachment, is to the mother.

67. Balancing that, however, is the need to ensure that the children are protected, and it is noteworthy that the primary considerations specifically make reference not only to the protection from physical harm but also psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence. Certainly, the mother's position until the door of the Court was to suggest that these children have been, and one would think will continue to be, the subject of physical abuse by the father.

68. Her supporters contend that that is the case in relation to this matter, though I must say, from the reading of the affidavits that have been filed in support of the mother's position in relation to this matter, much of what they say appears to be conjecture or assumption or, at the very least, a reflection of what they have been told by the mother, and, having already commented some of her Facebook entries, it is clear that what the mother says is in no real respect a reflection of the truth or the reality of the situation.

69. In that respect, a considerable number of the deponents speak of their observations in the context of information received from the mother. For example, the deponent Ms F at paragraph 7 of her affidavit says:

Approximately six (6) months ago Ms Wylie spoke to me about the children having a negative reaction to their father. The children had a negative reaction to the father because he has an anger problem.

70. Ms N speaks generally of her observations of the mother's primary responsibility for the care of the children but it is noteworthy for example, that she refers at paragraph 7(e) to the mother being the person who would cancel the work commitments to care for the children but deponents for the father speak of the father having to cancel or re-schedule booked appointment times and leave early in order to assist Ms Wylie with or relieve her from the children. See particularly the affidavit of Ms H, paragraph 6(c).

71. Quite simply, the supporters of the mother and the father paint very different pictures of the role and involvement of each parent in the care and supervision of the children and, more specifically, with regard to the role that they played in the children's lives.

72. At the present time it is impossible to make findings in relation to those particular aspects of the matter and it is brought starkly into contrast when it is noted that Ms H is a primary school teacher and indicates that that expertise gives her the opportunity to "witness the dynamics of and interactions between Mr Wylie and Ms Wylie and their children", particularly noting at paragraph 6(d) and (e):

Ms Wylie has not demonstrated any level of care or nurturing of her children that exceeds or is over and above what is required and given by other mothers in the course of caring for their children.

Mr Wylie's care of and involvement with his children has been as much or more so at times as any other father who is working full-time and the primary income earner of the family.

73. Ms B is also a school teacher. She emphasises her educational qualifications and at paragraph 4 makes the following comment:

I have always considered Ms Wylie to be the primary caregiver for the children. Mr Wylie's involvement with the children is much less than that of Ms Wylie's. During all my time in their household, I very rarely encounter Mr Wylie interacting directly with the children or assisting inside the home.

74. Quite simply, the opportunity to gain any real assistance from the various deponents is limited because of the entirely divergent perspectives that each deponent has and until such time as the evidence is tested, no real assistance can be gained from the evidence of either parent's group of supporters.

75. More particularly, however, there is a need to protect the children from psychological harm and independent assessments in that regard are clearly to the effect that there is a very clear risk or, in fact, occurrence of psychological harm occurring, in relation to these children. It was contended on the part of the father that the entries contained with both the Queensland Police Service file and the Department of Communities file are documents and entries which must be specifically considered in relation to these proceedings.

76. In that respect, I am mindful of the provisions of section 69 of the Commonwealth Evidence Act. Section 69 headed "Exception: Business Records" is in these terms:

(1) This section applies to a document that:

(a) either:

(i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or

(ii) at any time was or formed part of such a record; and

- (b) *contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.*
- (2) *The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:*
 - (a) *by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or*
 - (b) *on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.*
- (3) *Subsections (2) does not apply if the representation:*
 - (a) *was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or*
 - (b) *was made in connection with an investigation relating or lead to a criminal proceeding.*

77. The position taken on the part of the father is that as the documents are documents which have been prepared in the course of inquiry in relation to this matter, that they are admissible as a business record, and that whether the statement by Ms M of the Department of Communities to a police officer of the Queensland Police Service about what she says was said to her by the mother constitutes hearsay on hearsay, there is no basis upon which the evidence is not admissible because of the exception that arises pursuant to the provisions of section 69.

78. Counsel for the mother suggests that subsection (3) clearly indicates that it is not admissible, because the document was prepared or obtained for the purposes of conducting, or in contemplation of, or in connection with, an Australian or overseas proceedings, or was made in connection with an investigation relating or leading to a criminal proceeding.

79. It may be that that exception to the exception could be taken in relation to these proceedings, but I am also mindful, of course, of the provisions of section 69ZT of the Family Law Act and, in particular, subsection (1). Section 69ZT(1) is in these terms:

[Provisions of the Evidence Act which do not apply to child-related proceedings] These provisions of the Evidence Act 1995 do not apply to child-related proceedings:

(a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;

(b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections)

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

(c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

80. Clearly the exception for business records set out in section 69 of the Commonwealth Evidence Act forms part and parcel of the Act constituted by part 3.2. It is noteworthy, therefore, that section 69ZT(1)(c) relates specifically to parts 3.2 to 3.8 and that, therefore, the provisions of the Evidence Act do not apply, and even if the exception does not apply because of the provisions of subsection (3) of section 69(3) of the Commonwealth Evidence Act, it is an admissible document subject, of course, to what weight the court might give it, in relation to the determination of the proceedings.

81. Obviously, therefore, consideration must be given to the statement contained within the Queensland Police Service Records and also the Department of Child Safety records. In that respect, the concerns are almost overwhelming, because it is clear that their own records indicate a direct statement of intent on the part of the mother to, "set the father up" and to gather evidence which would mean that the father would not have the opportunity to see the mother or the children ever again. It is a chilling indication of intent in relation to the matter, and, as I say, the clear indications in the evidence in relation to this matter is to the effect that the mother was true to her word and set out specifically to set the

father up and to have him make admissions in the presence of third parties such that he would not be able to see the children again.

82. It is a most troubling position in relation to this matter and one which is of very significant concern, in relation to the determination of these proceedings.
83. I turn, then, to the additional considerations as contained within section 60CC(3). The views expressed by the children are difficult to assess in relation to this matter, but, in any event, perhaps most effectively can be seen as reflected in the fact that the children were happy to see both of their parents, and that the records of the Department of Communities were to the effect that the children moved comfortably to the father, as they did to the mother.
84. One is not in a position at this time to make an assessment as to the wishes of the children, but it is not unreasonable to assess that both children would wish nothing more than the opportunity to a full, proper and meaningful relationship with both of their parents.
85. The relationship of the children with each of their parents is also significant here and, again, one would think that the evidence so far available would clearly show, that it is a positive and beneficial relationship, notwithstanding the very real concerns as to the mother's determined attempts to undermine the father's relationship with the children.
86. Of very great significance in relation to this matter is the consideration of the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent. It is abundantly clear from everything in relation to this matter, that the mother does not have an apparent willingness, and certainly does not have an ability to foster a relationship with the father and the children. The mother's actions on the day that orders were made were designed specifically to elicit a negative response from the father and one which no doubt she then intended to rely upon.
87. The actions of the mother in repeatedly questioning the children as to the father's physical dealings with them is damaging in the extreme, not only to the children's psyche generally, but, more particularly, must by

inference clearly affect the children's own understanding of their relationship with their father, because they are being put in a situation where their relationship with their father is being challenged as beneficial on every level.

88. Similar to the concerns that I have referred to there are the concerns that arise pursuant to the provisions of section (f) and (i). They relate to issues as to the parents' capacity to provide for the needs of the child, including their emotional and intellectual needs, as well as the attitude to the child and to the responsibilities of parenthood.
89. As is obvious from the comments that I have made here, I have very real concerns as to the mother's capacity to in any way fully appreciate the children's emotional needs and certainly a very real concern as to the mother's capacity to fully appreciate the responsibilities of parenthood which include fostering and developing a meaningful and beneficial relationship with the father.
90. Every indicator to date is that the mother's intent is to act exactly contrary to that, to undermine the relationship, to seek to "set the father up" and to gather evidence which will be sufficient to prevent him from ever having a relationship with the children. The emotional damage to the children has already no doubt been catastrophic and will grow worse with time.
91. I have very real concerns about the mother's capacity here to meet the children's needs, and, more particularly, have very real concerns at the present time, as to the mother's ability to step back, as now appears at the eleventh hour to be suggested as the appropriate course to be taken in relation to this matter, and to not continue to in some way emotionally or psychologically affect the relationship between the father and the children.
92. It is a matter of great concern, but it is a matter that must, of course, be balanced against those matters that arise pursuant to the provisions of section 60CC(3)(d). The changes to the child's circumstances would be radical. The father proposes that they move from a situation where they are entirely within the household of the mother with the support of her parents, though I have concerns as to the basis upon which her parents can be seen to be supportive of fostering the relationship with

the father, in light of the affidavits that have been filed by them, as well as the difficulty that would be caused as a result of the children moving from that settled and stable environment to the environment provided by the father.

93. It would be a radical change and would no doubt give rise to practical difficulties for the father in immediately making arrangements to facilitate and meet the needs of the children, though I have no doubt that that could be done.
94. It is a question, therefore, of whether there is short term pain for long term gain or whether the effect is too great in relation to the children. It is not, as I commented earlier, a question of punishment of the mother or assuaging the feelings of the father. It is purely and simply a concern as to ensuring that the best interests and the welfare of the children are met and, in particular, referring back to the provisions of section 60CC(2)(b), to protecting these children from the serious psychological harm that arises as a result of the continued actions of the mother.
95. As is perhaps obvious, therefore, from the various matters that I have referred to herein, I have come to the view, after struggling with the decision to be made in relation to these proceedings, that there is an unacceptable risk to these children and to their psychological wellbeing, as well as to any fostered and proper relationship between them and the father being developed, if they are to remain primarily in the care of the mother.
96. In that regard, I note the comments of the Full Court of the High Court in *M & M* (1988) FLC 91-979 where when speaking of allegations of sexual abuse, but I think applicable generally, the Full Court said at page 77,081:

Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a “risk of serious harm” (A v A (1976) VR 298 at p.300), “an element of risk” or “an appreciable risk” (M & M (1987) FLC 91-830 at pp.76,240-76,242; (1987) 11 Fam.LR 765 at pp.770 and 771 respectively), “a real possibility” (B and B [Access] (1986) FLC 91-758 at p.75,545), a “real risk” (Leveque v Leveque

(1983) 54BCLR 164 at p.167), and an “unacceptable risk” (In re G. (a minor) (1987) 1 WLR 1461 at p.1469). This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child’s paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.

97. Here it is stressed to me by counsel for the father that there is an unacceptable risk to the emotional and psychological well-being of these children if they were to continue to live with the mother or to even spend time with her which, at least, at the present stage was not supervised. It is submitted that the evidence is overwhelming that the mother has consented to orders and acknowledged that the concerns were not correct, but within a matter of hours resumed the exact same behaviours which occurred before and which directly affected the children and their right to a meaningful relationship with the father.
98. Unfortunately, I have come to a similar view in relation to this matter. The mother, at least at this time, appears through her own actions to show that she is unwilling or unable to foster a relationship of any proper nature with these children and their father. Her threats and subsequent actions are a clear indication of the inability to act appropriately in relation to the children and their lives.
99. The mother will no doubt be hurt by the decision made by me on an interim basis in relation to this matter, but it may also lead to her acknowledging the difficulties that she has herself in relation to this matter and to seek out and obtain the necessary assistance to deal with what appears to be very much the distress that she experienced as a result of incidents in the past and, more particular, to deal with how those incidents in the past affect her capacity to parent and provide for the children.
100. The orders are not long term. The orders are orders to provide protection for the children until such time as full inquiry can be made in relation to this matter and to ensure that the children's best interests

in the long term can be met. For the reasons that I have given in relation to this matter, the orders that I intend to make are as outlined at the beginning of these reasons.

I certify that the preceding one hundred (100) paragraphs are a true copy of the reasons for judgment of Coker FM

Date: 9 December 2011