

**FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)**

Hardin & Avila [2023] FedCFamC2F 740

File number(s): SYC 4374 of 2021

Judgment of: **JUDGE BECKHOUSE**

Date of judgment: 11 July 2023

Catchwords: **FAMILY LAW – CHILDREN – With whom a child lives – Whether sole or equal shared parental responsibility – Spend time with – Children with gender identity issues – Children with significant mental health concerns – Change of residence ordered for younger children – Spend time with moratorium period of four months ordered for the father – Where the father failed to facilitate meaningful relationship with the mother – Where the mother found to be parent better suited to provide stable and secure home environment.**

Legislation: *Family Law Act 1975* (Cth) ss 60B, 60CA, 60CC, 61DA, 65DAC, 65D, 68L, 117

Cases cited: *Mazorski & Albright* (2007) 37 Fam LR 518
McCall & Clark (2009) FLC 93-405
R & R: Children's Wishes (2000) FLC 93-000
Rice & Asplund (1979) FLC 90-725
Waterford & Waterford [2013] FamCA 33

Division: Division 2 Family Law

Number of paragraphs: 285

Date of hearing: 3-5 April 2023

Place: Sydney

Counsel for the Applicant: Ms Petrie

Solicitor for the Applicant: Pigdon Norgate Family Lawyers

Counsel for the Respondent: Mr Iuliano

Solicitor for the Respondent: Lazarus Lawyers

Counsel for the Independent Children's Lawyer: Ms Messner

Solicitor for the Independent Children's Lawyer: Legal Aid NSW

ORDERS

SYC 4374 of 2021

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **MS HARDIN**
Applicant

AND: **MR AVILA**
Respondent

INDEPENDENT CHILDREN'S LAWYER

ORDER MADE BY: **JUDGE BECKHOUSE**

DATE OF ORDER: **11 JULY 2023**

ON A FINAL BASIS THE COURT ORDERS THAT:

1. All previous parenting orders be discharged.

Parental responsibility

2. The Father and the Mother have equal shared parental responsibility for the child X (formerly, B) born in 2006 ("X").
3. The Mother shall have sole parental responsibility for the children Y born in 2009 ("Y") and Z born in 2014 ("Z"), and in the exercise of sole parental responsibility the Mother shall:
 - (a) notify the Father of any proposed decision in relation to the long-term care of Y and Z in writing before a final decision is made, except in the case of an emergency;
 - (b) take into consideration any views expressed by the Father in respect of such proposed decision provided; and
 - (c) notify the Father of the final decision as soon as reasonably practicable.

Live with orders

4. Y and Z shall live with the Mother.
5. X live with the Mother and Father in accordance with his wishes.

The Father's time with Y and Z for first four (4) months

6. For a period of four (4) months from the date of these Orders, Y and Z shall spend no time with the Father ("the moratorium").
7. During the moratorium, the Father is restrained, without first obtaining the Mother's prior written consent, from attending or entering:
 - (a) the Mother's home;
 - (b) the Mother's parents' home;
 - (c) the grounds of any school that Y or Z may attend from time to time; and
 - (d) any after school activity or extracurricular activities that Y and Z may participate in from time to time.
8. During the moratorium the Father is restrained, without first obtaining the Mother's prior written consent, from communicating directly with Y and Z by any means including but not limited to telephone, social media messenger service or application, or email, except for the purpose of Order 9 herein, or with the Mother's prior written consent.
9. During the moratorium, the Father be permitted to send Y and Z letters, cards and gifts, not more than fortnightly, to an address nominated by the Mother and the Mother shall ensure that the receipt of any such letter, card or gift is acknowledged by text message or email.
10. In the event that Y and/or Z attend upon the Father's home or place of business, or make direct contact with him during the moratorium, the Father shall notify the Mother immediately and use his best endeavours to terminate the contact, and if face to face, use his best endeavours to facilitate the child's return to the Mother.
11. In the event that either of the children's treating psychologists or psychiatrists, or a person delivering services at the C Centre or any family therapist with whom the parties might be engaged ("treater") recommend that the Father come into contact with either Y or Z during the moratorium, then the Mother will facilitate this and in the event of a dispute, the Mother will ensure that the request of the treater is communicated to the Independent Children's Lawyer, who will consult with the treater and make a recommendation to the parties based upon what the Independent Children's Lawyer considers to be in the best interest of either or both Y and Z.

The Father's time with Y and Z after the four (4) month moratorium

12. From the conclusion of the moratorium until the conclusion of the 2023 school year, Y and Z spend time with the Father from 10.00 am to 7.00 pm each Saturday.
13. From the conclusion of the 2023 school year and during the December/January school holiday period, Y and Z shall spend time with the Father for a period of two (2) days each week from 10.00 am on the first day until 5.00 pm on the second day and failing agreement as to the days, from 10.00 am each Sunday to 5.00 pm each Monday (except for Christmas Eve/Day when failing agreement the children will spend time with the father from 10.00 am Christmas Eve until 2.00 pm Christmas Day).
14. Following the commencement of the 2024 school year, Y and Z will spend time with the Father as follows:
 - (a) During school terms from the conclusion of school (or 3.30 pm if a non-school day) on Friday until 5.00 pm on Sunday each alternate weekend commencing the second Friday of each term.
 - (b) During school holidays, for the first half of each school holiday period which commences in an odd numbered year and the second half of each school holiday period which commences in an even numbered year.
 - (c) During the weekend that Father's Day falls from 5.00 pm on the Saturday preceding Father's Day until 5.00 pm on Father's Day.
 - (d) In 2024 and each alternate year thereafter, from 2.00 pm on Christmas Day until 2.00 pm on Boxing Day.
 - (e) In 2025 and each alternate year thereafter, from 12 noon on Christmas Eve until 2.00 pm on Christmas Day.
 - (f) For the purpose of these Orders the following applies:
 - (i) School holiday periods are defined to commence at the conclusion of school on the last day of the relevant school term gazetted for New South Wales and to conclude at the commencement of school on the first day of the next school term gazetted for New South Wales.
 - (ii) Unless specified to the contrary in these Orders, changeover is to occur at 12 noon on the mid-point day between the first and last day of the defined school holiday period.

- (iii) In the event that there are two (2) consecutive mid-point days, changeover is to occur at 12 noon on the first of those two mid-point days.

15. For the purpose of changeovers on a non-school day, the Mother is to deliver Y and Z to the Father's residence at the commencement of the Father's time and the Mother is to collect Y and Z from the Father's residence at the conclusion of the Father's time.
16. The Father's time with Y shall be suspended should it coincide at the time when Y is attending the C Centre.

Education and schooling

17. As far as necessary, each parent shall give authority to any school that the children may attend from time to time for the other parent to obtain a copy of the school reports, notes and newsletters ordinarily provided to parents from the children's school at the parent's cost.

Communication

18. Each parent shall inform the other in writing of any change to their residential address not less than fourteen (14) days prior to such change occurring, and of any change to their contact telephone number not less than fourteen (14) days of such change occurring.

Health and medical care

19. The Father shall continue to attend upon his treating psychiatrist and psychologist (or other psychiatrist or psychologist as recommended by them in the event they are unable to continue treating the Father) at such intervals as recommended and follow all treatment recommendations. The Father's current psychiatrist and psychologist are:
- (a) Mr D, the Father's treating psychologist.
- (b) Dr E, the Father's treating psychiatrist.
20. The parents are to ensure the children continue to attend upon his/her/their treating specialist, psychiatrist and psychologist (or other specialist, psychiatrist or psychologist as recommended by them in the event they are unable to continue treating each of the children) at such intervals as recommended and follow all treatment recommendations. The children's medical specialists are:

- (a) Mr F, X's therapist.
- (b) Dr G, X's treating endocrinologist.
- (c) Dr H, X's treating paediatrician.
- (d) Ms J, Y's treating psychologist.
- (e) Dr K, Y's treating psychiatrist.
- (f) Ms L, Z's treating psychologist.

21. Should a medical emergency arise in relation to any of the children whilst in the care of one parent, then that parent shall notify the other parent as soon as practicable of the time and nature of such medical emergency, the name and address of any treating practitioners, and/or hospital, and the location of the children.

Restraints and injunctions

- 22. Each parent be restrained from showing any documents relating to these proceedings and discussing these proceedings within the hearing of the children.
- 23. Each parent is restrained from doing any act or thing or causing or permitting any other person to do any act or thing, that has as its intention or effect, the denigration of the other parent or of that parent's family within the presence or hearing of the children or any of them.

Implementation of these Orders

- 24. The Independent Children's Lawyer be permitted to provide a copy of these Orders (and Reasons for Judgment if required for the purposes of treatment) to:
 - (a) Mr F, X's therapist.
 - (b) Dr G, X's treating endocrinologist.
 - (c) Dr H, X's treating paediatrician.
 - (d) Dr M, X's General Practitioner ("GP").
 - (e) Dr N, Y's GP.
 - (f) Ms J, Y's treating psychologist.
 - (g) Dr K, Y's treating psychiatrist.
 - (h) Ms L, Z's treating psychologist.
 - (i) Dr O, Z's GP.
 - (j) Intake officer of the C Centre.

- (k) Dr P, a psychiatrist who may treat X.
- 25. The Mother be permitted to provide a copy of these Orders to the children's school.
- 26. The Father will, within 12 hours, facilitate the Mother and/or her nominee collecting the personal belongings of Y and Z including their school uniforms, books, devices/technology and clothing.

Passports

- 27. Order 2 of Orders made on 10 August 2022 is discharged and the children's passports are hereby released and held in the following manner:
 - (a) X's passport will be released to the Father and held by him at all times until X turns 18 (other than for any period in which X is travelling internationally).
 - (b) Y and Z's passports will be released to the Mother and held by her at all times (other than for any period in which either child or children are travelling internationally).

Independent Children's Lawyer's costs

- 28. Within twenty one (21) days of the date of the making of final orders to adjust the parties' interests in property, each party shall pay Legal Aid New South Wales their contribution towards the Independent Children's Lawyers' costs of \$2,500 each.
- 29. The Independent Children's Lawyer is discharged at the expiration of six (6) months from the date of these Orders.
- 30. All outstanding applications in relation to parenting matters are dismissed and the proceedings in relation to parenting only are removed from the list of matters awaiting finalisation.

THE COURT NOTES THAT:

- A. Orders 5 and 17 to 23 are made by consent.
- B. The proceedings were bifurcated on 11 November 2022. Property proceedings in this matter are still on foot and require determination.

Note: The form of the order is subject to the entry in the Court's records.

Note: This copy of the Court's Reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 10.14(b) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 10.13 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth).

Section 121 of the *Family Law Act 1975* (Cth) makes it an offence, except in very limited circumstances, to publish proceedings that identify persons, associated persons, or witnesses involved in family law proceedings.

IT IS NOTED that publication of this judgment by this Court under a pseudonym *Hardin & Avila* has been approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

REASONS FOR JUDGMENT

INTRODUCTION

1 This case is about the future parenting arrangements for X (16 years old), Y (13 years old) and Z (eight years old).

2 The family has had a tumultuous past heavily influenced by the death of their child, Q. This has had a profound impact on the family. Adding to the complex family dynamic are mental health challenges which see the father, X and Y each in the care of mental health professionals. In recent years, with the support of his family, X has (and continues to be) treated for gender dysphoria.

3 In this context, I am asked to consider what parenting orders are in all of the children's best interests.

EVIDENCE

4 The parties provided Case Outline documents setting out the material they relied upon.

5 The father relied upon:

- Amended Response filed on 5 December 2022.
- Affidavit of Mr Avila filed on 27 March 2023.

6 The mother relied upon:

- Amended Initiating Application filed on 4 November 2022.
- Affidavit of Ms Hardin filed on 13 March 2023 ("Mother's affidavit").
- Affidavit of Mr R filed on 13 March 2023.

7 All of the parties relied upon a report and evidence from the Single Expert, Dr S, a Child, Family and Adult Psychiatrist ("Dr S"), dated 18 August 2022 ("the Report").

8 I have also had regard to the material marked and tendered as exhibits.

9 The mother and father were legally represented.

10 Both parties were cross-examined.

11 I do not propose to respond to every submission made, however, I have considered all
12 submissions in determining what orders will meet the best interests of the children.

THE PARTIES

12 Before considering the proposals and the law, it is useful to capture the relevant facts and the
13 parties involved.¹

13 The applicant mother is Ms Hardin, who I will refer to as “the mother/she/her”.

14 The respondent father is Mr Avila, who I will refer to as “the father/he/him”.

15 X (formerly, B), was born in 2006 and I will refer to him as “X/he/him”. At birth, X was
16 assigned as female but identifies as male. X was 16 at the time of the hearing and is enrolled
17 in Year 12 at T School. He is expected to complete high school this year.

16 Y (“Y/she/her”) was born in 2009 and is 13. Y is enrolled in Year 8 at T School.

17 Z was born in 2014 and is now aged 8. Z is non-binary and will be referred to as
18 “Z/they/them”. Z is in Year 3 at U School in Suburb V (“U School”).

18 Q (“Q”) was born in 2004 and died tragically in 2008.

19 As at the date of the final hearing:

- (a) The mother was living in a two bedroom apartment in Suburb W.
- (b) She worked full-time as a professional.
- (c) The mother has re-partnered with Mr R. They did not live together but have plans to do so in the future.
- (d) The father lived with the children in a two bedroom rental apartment above a business he operates in Suburb V.
- (e) The father has not re-partnered.

PROPOSALS

20 The final orders sought by the mother were contained in a Minute of Order that was tendered
and became Exhibit 4.

¹ The parties were asked what gender pronouns they preferred for themselves and the children. This is reflected in this judgment. Where it was not clear which pronouns were preferred, non-gendered or non-binary pronouns have been used.

- 21 The final orders sought by the father were contained in a Minute of Order that was tendered and became Exhibit 3.
- 22 On the final day of the hearing, the Independent Children's Lawyer ("ICL") proposed final parenting orders. The ICL's position on matters of contention can be summarised as follows:
- (a) The parties have equal shared parental responsibility for X.
 - (b) The mother have sole parental responsibility for Y and Z, provided she seek the father's views about any decision she proposes.
 - (c) Y and Z live with the mother, subject to the mother securing a residence so that Y and Z have separate bedrooms.
 - (d) For a period of four months from the date final orders are made, Y and Z spend no time with the father and the father be restrained from communicating directly with them or being within 100 metres of the mother's home, the maternal grandparent's home and Y and Z's school or extracurricular activities.
 - (e) After four months, Y and Z spend time with the father on a graduated basis culminating in alternate weekends from after school on Friday to 5.00 pm on Sunday.
 - (f) The father's time with Y be suspended if it coincides with Y's attendance at C Centre.

MATTERS OF CONTENTION

- 23 Having regard to the final positions adopted by the parties at the hearing and the matters resolved by consent, I am asked to determine:
- (a) Whether the parties should share parental responsibility for X (as the father proposes) or should the mother exercise sole parental responsibility for all medical decisions, including mental health services, in relation to X's gender dysphoria treatment (as the mother proposes).
 - (b) Whether the parents should share parental responsibility for Y and Z (as the father proposes), or whether the mother should exercise sole parental responsibility for Y and Z, in consultation with the father (as the mother and ICL propose).
 - (c) With whom Y and Z should live. The father sought orders that Y live with him and that Z should spend equal time with the parties. The mother, on the other hand, sought an order that Y and Z live with her.

- (d) The time Y and Z should spend with the parent with whom they are not living. The mother sought an order that Y and Z spend no time with the father for a six month period. The father said Y should be permitted to decide how much time she spends with the mother. The details of and rationale for their competing proposals are considered later in the judgment.
- (e) Whether further ancillary orders should be made to support the implementation of these orders. For example, whether any additional restraints on the parties should be made.

24 To the parties' credit, by closing submissions agreement had been reached on a range of matters and consent orders were made on 5 April 2023 which provided that:

- (a) X live with the mother and the father in accordance with his wishes.
- (b) Each party inform the other of any change to their residential address and telephone number.
- (c) The father will continue to see his psychiatrist and psychologist, and follow all treatment recommendations.
- (d) Both parties will ensure the children attend upon their individual specialist, psychiatrist and psychologist ("the children's medical treaters"), and follow all treatment recommendations.
- (e) Both parties will obtain a referral for Y to C Centre.
- (f) Both parties will obtain a referral from X's General Practitioner ("GP") to psychiatrist, Dr P.
- (g) The parties will notify each other if a medical emergency arises for any of the children whilst in their respective care.
- (h) A range of restraints and injunctions to ensure that the children are not further exposed to matters arising from the parental conflict.
- (i) For the children to be delivered to the Court Children's Service on the day of judgment delivery, and for an appointed Family Consultant to explain the final orders to the children and record any relevant observations.
- (j) For the ICL to provide a copy of the final orders to the children's medical treaters and schools.

25 Notwithstanding the interim parenting orders made on 19 October 2021, further interim parenting orders were made for the mother to spend time with Y on alternate weekends. These Orders were made in the hope that the relationship between the mother and Y could improve and that Y would increase the time she was spending in her mother's care whilst I was making my decision.

26 The orders of 5 April 2023 were made pending further order, so those Orders that were intended to continue on a final basis, are now made on a final basis and have been incorporated into the orders made.

RELEVANT BACKGROUND AND PROCEDURAL HISTORY

27 The parties met in 1999 and commenced cohabitation in 2003. In late 2003, both parties changed their legal surnames to "Avila" by deed poll.

28 In 2009, the father was diagnosed with anxiety and depression.

29 From 2017, the mother claimed that the father's mental health issues "intensified" and that:

His mood was volatile, he was negative and depressed, he had significant sleep disturbance, his tolerance for different opinions further diminished, his memory was poor, and he struggled with daily routine and structure. He acknowledged suicidal ideation to me and experienced frequent interpersonal conflicts.

(Mother's affidavit filed 13 March 2023, paragraph 112)

30 In 2018, the father advised the mother that he voluntarily admitted himself to the AA Hospital because he had become suicidal.

31 The father alleged that on 13 August 2019, the parties agreed to formally separate.

32 In late 2019, Dr BB at the mother's request wrote a referral for X and Y to see paediatrician, Dr CC. The father alleged that this was done without either his consultation or consent. He also alleged that he was not included in any correspondence or updates about the two older children's treatment between Dr BB and Dr CC, including the following reports:

- (a) Letter from Dr CC to Dr BB dated September 2019: Dr CC summarised the mental health concerns for X and Y, noting that both children looked flat and exhausted. He had commenced medication for Y to be reviewed in six weeks' time.
- (b) Letter from Dr CC to the Dr BB dated 31 October 2019: Dr CC reported that, despite some improvement on anti-depressant medication, Y's emotional regulation had decreased and she experienced episodes of crying and self-harm. These episodes were

so dramatic that they left Y debilitated and unable to attend school for over a week. Dr CC recommended ceasing medication and commencing Y on a trial of another anti-depressant.

- (c) Letter from Dr CC to Dr BB dated 25 November 2019: Dr CC reported that Y's mood had improved significantly and recommended that Y remain off medication. He noted that he did not have plans to see Y again, but was happy to re-engage if Y required further pharmacological intervention.

33 The father alleged he only discovered this correspondence between Dr BB and Dr CC on 1 February 2023.

34 In 2019, the father was diagnosed with adult attention-deficit/hyperactivity disorder ("ADHD"). He was prescribed medication to treat ADHD symptoms.

35 On 9 December 2019, the parties physically separated with the father moving out of the former matrimonial home. The father moved to a two storey rental property at DD Street, Suburb V where he now operates his business on the ground floor and resides on the first floor. The children commenced living with the parties on a week about basis at this time until November 2020.

36 In early 2020, the children remained in the father's care while the mother travelled to Region EE for a holiday with friends. The mother deposed that she had organised for the children to be cared for by the maternal grandfather and maternal step-grandmother, however the father did not consent to this arrangement and as a result they were in the care of the father for three weeks while she was away. The father alleged that the mother did not contact the children during this period.

37 In early 2020, X informed the parties that he wished to be referred to by male pronouns. The father alleged that the mother was resistant until X began to menstruate and became distressed.

38 On 28 April 2020, the mother emailed the father with concerns about the living standards of his home. The mother alleged that thereafter the father banned her from entering the premises.

39 In mid-2020, the mother commenced a relationship with her current partner, Mr R. She deposed that Mr R was introduced to the children in late 2020.

- 40 On 11 June 2021, the mother filed an Initiating Application seeking final property orders.
- 41 On 25 June 2021, X ceased spending overnight time with the mother. X has not spent overnight time with the mother since. From at least this time, the mother's relationship with X has been difficult and she alleged that X has been hostile towards her in the father's presence.
- 42 In August 2021, Y commenced living with the father, who alleged that Y refused to return to the mother's care.
- 43 On 6 September 2021, the father filed a Response seeking parenting and property orders.
- 44 On 10 September 2021, interim consent orders were made for the parties to attend mediation and family therapy with FF Centre.
- 45 On 14 September 2021, the mother's solicitor received correspondence from the father's solicitor about communication between Y speaking and spending time with her maternal cousin, GG.
- 46 On 20 September 2021, the mother and X had an argument about GG and other cousins allegedly being told not to spend time with X and his siblings. The mother alleged that X was physically intimidating and became verbally aggressive towards her before running away. The mother alleged that shortly after, a verbal altercation occurred between her and the father which caused Y to yell at the parties "I hate you both".
- 47 Between 13 October 2021 and April 2022, the parties engaged in family therapy with Ms HH at the FF Centre.
- 48 On 19 October 2021, further interim consent orders were made providing for Z to live with the parties on a week about basis, for the father to encourage X and Y to spend time with the mother, for the preparation of a Single Expert Report by Dr JJ, and the continuation of family therapy.
- 49 The mother deposed that on 27 November 2021, Y disclosed to her that she had been self-harming. The father had failed to communicate with her directly about this, but rather had asked Y to do so.
- 50 In December 2021, a dispute arose in relation to Y's attendance at the KK School. The mother alleged that on 15 December 2021 she advised KK School and the father that she

could no longer afford to pay the school fees and that Y's enrolment would have to be withdrawn. The father then advised KK School that he did not consent to Y being withdrawn from the school. The father deposed that he borrowed money from his father to pay half of Y's 2022 school fees.

51 On 26 December 2021, the mother informed the father that Y wanted to spend the night at her home. The father offered to drop off Y's medication but the mother informed him that she had medication on hand for both X and Y. She requested that the father confirm Y's dosage. The father was unable to confirm this and accused the mother of deliberately delaying Y's treatment to avoid him dropping off her medication. He then claimed he would inform the ICL about the mother's irresponsible "attitude to the wellbeing of the children".

52 On 17 January 2022, KK School informed the mother that Y would remain enrolled there as long as the school fees were paid by 4 February 2022.

53 On 9 February 2022, the father filed an Amended Application in a Proceeding and sought further funds to be released from trust for reimbursement of Y's school fees.

54 The father deposed that in early 2022 Z became reluctant to spend time with the mother.

55 On 18 February 2022, the mother called Z and noted that they were "uncharacteristically terse, reticent and rude". During a Zoom call with Z on 21 February 2022, the mother alleged that Z was not themselves as they were "cold, untalkative [sic] and became especially uncomfortable" when she mentioned their return to her care.

56 The mother alleged that from 15 April 2022 to 29 April 2022 the father withheld Z from her care.

57 On 15 April 2022 ("the April 2022 incident"), the mother arrived at the father's residence to pick up Z. However, Z did not want to leave with her and stated that they wanted to stay with their siblings.

58 The mother alleged that when she tried to persuade Z to leave with her, the father did not attempt to facilitate or encourage Z to leave with her, claiming that it was illegal for him to force Z. The mother then called the police. The mother alleged that the father accused her of not "validating the children" and began filming her. X then accused the mother of "upsetting Z terribly" and of not loving him and his siblings. The mother called the maternal grandfather for support. The police arrived and spoke with the parties and the children. They advised that

they could not do anything to enforce the orders made on 19 October 2021 and left. The maternal grandfather then arrived at the father's residence and banged on the father's door. The father alleged that the maternal grandfather proceeded to verbally abuse and physically threaten him, shouting "you are a f...uk [sic] wit and a complete waste of a human. Where is Z he [sic] is supposed to be here". The mother alleged that the father then began to film her and the maternal grandfather until they left. The father deposed reporting this incident to police.

59 On 16 April 2022, the mother received a text message from the father stating that X was no longer comfortable with the mother and maternal grandfather coming to his residence. The father also stated that Y and Z were "freaked out at having the cops come in and talk to them" the day before. The mother then spoke to Z who stated that they no longer wanted to come over to celebrate Easter.

60 On 22 April 2022, the mother's solicitor wrote to the father's solicitor and the ICL requesting that Z to be returned to her care. She did not receive a response.

61 On 27 April 2022, interim consent orders were made for the preparation of a Single Expert Report by Dr S, and for Z to attend upon a paediatrician and commence counselling with Ms L.

62 On 29 April 2022, Z resumed spending time with the mother. Earlier in the day, the mother received a text message from the father stating that "[Z] is extremely distressed about coming back. He [sic] hasn't said it but I think he's [sic] afraid you'll be really angry".

63 The mother alleged that between 13 and 15 May 2022, Z was again withheld by the father from her care ("the May 2022 incident").

64 On 13 May 2022, as the mother was waiting to collect Z from school, she received a text message from the father advising that Z had been taken out of school to attend a GP appointment. The mother alleged that the father did not inform her of this appointment.

65 The father deposed that when he arrived back at the school with Z, Z refused to get out of the car and locked themselves in. When the father unlocked the car, Z got out and ran up the street. The father alleged that when the mother attempted to follow Z to talk to them, Z ran onto the road and into oncoming traffic. The father contended that when he caught up to Z, they "looked shaken and distressed. He [sic] wouldn't speak to me. He [sic] kept on running."

66 The mother got in her car and called her solicitor. She contended that she waited for 45 minutes for Z to return before leaving the school. The mother alleged that during the incident the father did nothing to encourage Z to go into her care.

67 On 16 May 2022, the father drove Z to the mother's home. The mother deposed that on arrival she could see Z in the car "curled up under the dashboard on the front passenger floor". The mother alleged that the father did not assist her to communicate with Z, and it was only after talking to Z for a little while through the partly open passenger side window, that they agreed to get out of the car and go into her home.

68 On 14 June 2022, the mother requested the father's consent to travel with Z and the maternal family to Country LL in mid-2022. The mother also extended the invitation to X and Y. On 16 June 2022, the father responded and did not consent, claiming that the mother's previous Country MM citizenship was a concern.

69 On 22 July 2022, the mother filed an urgent Application in a Proceeding for Z to travel to Country LL. On 10 August 2022, the parties entered into consent orders for the children to obtain passports and for them to be held by the Sydney Registry. The mother deposed that she had difficulty obtaining the passports due to the father completing the application forms incorrectly and failing to provide her with a copy of X's birth certificate.

70 On 9 September 2022, consent orders were made by Judge Monahan for Z to travel with the mother to Country LL.

71 On 31 August 2022, Dr S's Report was released to the parties. On 31 October 2022, by consent, the Report was released to the parties' and children's medical treaters.

72 On 11 November 2022, Deputy Chief Judge McClelland bifurcated the proceedings noting the urgency with which the parenting matter required determination. The parenting matter was set down for a three day final hearing commencing on 3 April 2023.

73 On 18 November 2022, the father contacted the mother regarding Y's enrolment at KK School. The mother maintained that she could not afford to pay the school fees and proposed Y attend another school.

74 On 21 November 2022, X called the mother to ask for her consent to undergo gender affirming surgery. He also invited her to attend a consultation with Dr NN, a cosmetic

surgeon. The mother accepted this invitation and alleged this was the first time she became aware of the referral and appointment.

75 On 25 November 2022, the father informed the mother's solicitor that Y's application to OO School had been accepted. The mother alleged that the father did not consult her before completing this application.

76 On 28 November 2022, the father filed and served a Notice of Child Abuse, Family Violence or Risk where he alleged that he had been a "victim of continuous domestic abuse since 2002". He listed the incidents that occurred in April and May 2022 as examples of family violence committed by the mother and maternal grandfather. On the same day, the father emailed the mother inviting her to join the family for X's birthday.

77 On 7 December 2022, Y sent an email to the ICL about her school change and the parties' financial circumstances. She blamed the mother for her departure from KK School.

78 In January 2023, the mother proposed that Z be enrolled to play sports for the PP Sports Club, which is a club local to her. She said that she followed this up with the father on several occasions but received no response.

79 On 3 January 2023, the parties agreed to tell Y about her enrolment at T School together. However, on 13 January 2023 Y informed the mother that the father had already informed her she would be attending T School.

80 On 3 February 2023, the father asked the mother for a copy of Y's birth certificate to finalise her enrolment at T School. On 5 February 2023, Y informed the mother that school had not begun due to teacher resignations.

81 On 3 February 2023, the father texted the mother that Z had been accepted into the QQ Sports Team, a sports club in Region RR.

82 On 6 February 2023, the mother alleged that Z told Mr R that they would prefer to play for a Region RR team "because Dad said [X] and [Y] will come to my games if I play there". The father disputed this and claimed he registered Z's interest in both teams, but that they were never offered a place in the PP Sports team.

83 On 7 February 2023, the mother spoke with the admissions officer at KK School. The mother was informed that Y was supposed to start the previous week but had not been enrolled as they were waiting for the father to provide proof of his residence.

84 On 8 February 2023, the mother emailed both Ms J and Dr K to advise that she was no longer in a position to meet the costs of Y's private psychiatric and psychological care. After making enquiries, the mother was recommended C Centre as a suitable public health program for Y.

85 On 12 February 2023, the mother and Mr R attended Z's first sports game only to discover that the game had started 30 minutes earlier than the time advised by the father.

86 On 12 February 2023, the father made a report to the Department of Communities and Justice ("DCJ"). He reported that Y and Z were emotionally distressed due to the mother's behaviour, and that the mother was "resentful towards the children".

87 On 13 February 2023, the parties and Y attended an enrolment interview at KK School. The mother deposed that the father and Y arrived late and that Y's behaviour was "rude and disrespectful".

88 On 19 February 2023, after Z's sports game, the mother alleged that the father followed her and Z despite attempting to dismiss him. The father allegedly continued to follow them to the mother's car. The mother deposed she felt "stalked and harassed".

89 On 20 February 2023, Y attended her first day of year 8 at KK School. The mother deposed to being informed by the admissions officer that Y's enrolment at KK School had been accepted, despite the unsatisfactory proof provided by the father of his residence within the local government area, due to concerns about Y missing out on school.

THE SINGLE EXPERT

90 Dr S conducted interviews on 8 and 9 August 2022, and a follow up interview with the father via Zoom. He also conducted interviews with all mental health professionals who had seen or were treating members of the family. They were:

- (a) Mr D, the father's treating psychologist.
- (b) Ms J, Y's treating psychologist.
- (c) Dr K, Y's treating psychiatrist.
- (d) Ms HH, the clinical and forensic psychologist who provided family therapy to the family.
- (e) Dr E, the father's treating psychiatrist.
- (f) Ms SS, the mother's treating psychologist.

91 Dr S finalised his Report on 18 August 2022 and, in doing so, made the following recommendations at paragraph 348:

- a. Although the maintenance of shared parental responsibility for all three children would be ideal, if the parents remain unable to agree on core issues related to health and education, the mother was identified to have a more balanced approach to this.
- b. For [Z] to primarily reside with [their] mother while maintaining regular contact with [their] father.
- c. [Y] [sic] is likely to have a more stable developmental experience in her mother's care. It was thus unfortunate that she was refusing to leave her father's care due to her perception that her mother was abusive.
- d. [X] should also be encouraged to re-establish contact with his mother. That said, at his age, his wish to reside with his father will need to be respected.
- e. A more consistent approach to the children's care is required. Consistent school was identified as a critical factor. A resolution to the issue of affordability regarding [Y]'s [sic] attendance at [KK School] is required. The father was seen to lack the capacity to address such matters in a pragmatic manner.
- f. Both parents should undertake not to denigrate the other parent or members of their extended families.
- g. Both parents would be well advised to utilise the coparenting and communication strategies as recommended by the [FF Centre] online course.
- h. It was unfortunate that the family therapy had been prematurely discontinued. That said it was unlikely, given the extent of the issues identified, that this would be effective.
- i. The resolution of the adversarial Family Court process will assist in the parties moving on from the current entrenched adversarial conflict.
- j. All three children should attend a single general practitioner. Both parents should be informed of all specialist referrals.

(As per the original)

92 At the hearing, the ICL provided Dr S with an update to the matter:

- (a) The mother gave evidence that she had been seeing X more regularly, mainly to assist with his schoolwork.
- (b) The mother's relationship with Y continued to be strained.
- (c) Z continued to spend equal time with each parent with some issues.
- (d) Y no longer attended KK School and had begun attending T School. However, Y did not start at T School until 20 February 2023, three weeks after the school term began. This was due to issues with her enrolment and the father's residential address.

- (e) Y's school attendance continued to be an issue, and evidence was given that she had five absent days from the period between 20 February 2023 and end of March 2023.
- (f) X's school attendance continued to be an issue, however the father gave evidence that he felt that his attendance had improved.
- (g) The mother continued to live in an apartment in Suburb W and the father continued to live above his business.
- (h) The father gave evidence that his current accommodation was unstable due to rental arrears and he appeared to have few means of financially supporting himself and the children.

93 At the hearing, Dr S's evidence was that:

- (a) The father has continued to vilify the mother to the children and that this affected the children's evolving sense of self. This was particularly concerning in relation to Y as she may develop a personality disorder given the nature of her experience.
- (b) The father continued to parent the children in a concerning way and shared with them his "paranoid world view". This led them to believe that they were at risk of being harmed and neglected by the mother and the maternal extended family (as evidenced by the Notice of Child Abuse, Family Violence or Risk filed by the father on 6 September 2021).
- (c) The current dynamic of the older children, X and Y, spending little time with their mother reflected that they were strongly aligned, enmeshed and dependent upon their father. The longer that went on at this critical stage of their development, the more likely it would become ingrained as an integral part of their personality structure.
- (d) The suggestion that a therapist would be able to undo the potent dynamics of enmeshment, parental estrangement and evolving alienation in this fractured family was simply unrealistic.

94 However, in light of the ICL's update and updating evidence, Dr S's recommendations changed when he gave evidence.

95 One such change was Dr S's view about Y remaining in the father's care. His initial view was expressed in paragraph 308 of his Report, that:

Every effort should be made to encourage her to maintain regular contact with her mother and maternal extended family. That said, her wish to primarily reside with her

father should be respected given her age.

96 During cross-examination, Dr S opined that a change of residence for Y from the father's care to the mother's care would be in the children's collective best interest. As Z was highly influenced by their older siblings, Dr S believed that Z would become caught up in the family dynamic if the current circumstances continued. Furthermore, if X was to spend time with his siblings in this changed dynamic, Dr S expressed tentative optimism that X's relationship with the mother could also improve.

97 Dr S readily acknowledged that such a change would be disruptive and distressing to Y, and that it was likely she would act out and abscond from the mother's care. However, he asserted that the mother had the appropriate family supports and capacity to facilitate such a move.

98 Dr S further articulated that this shift in opinion was due to the following concerns:

- (a) The father's sustained negative narrative regarding the mother, as highlighted by the father's ongoing notifications to DCJ, including his most recent report made in February 2023.
- (b) The father's perspective on the mother had not moved and, in light of the evidence, was unlikely to change. Consequently, the current family dynamics would only continue, further amplifying the children's identification with the father and polarisation from the mother.
- (c) The father's proposal for equal shared parental responsibility of the children was not realistic in the circumstances, as was his belief that family therapy would be a viable option to undo the potent dynamics of the current family dynamic.
- (d) The father was struggling financially to maintain adequate accommodation and living security for the children.
- (e) The father was demonstrating an inability to provide basic care and stability for the children, in particular evidenced by the father's ongoing struggle to ensure the children attended school.
- (f) The suggestion to refer Y to C was a suitable proposal and it is a public health service well suited to address her mental health.

THE APPLICABLE LEGAL PRINCIPLES

99 The principles governing a court's determination on competing parenting applications are set out in Part VII of the *Family Law Act 1975* (Cth) ("the Act").

100 I must consider what is in the best interests of the children when making a parenting order (in accordance with s 60CA of the Act). In deciding whether to make a particular order, I must consider the matters set out in s 60CC(2) of the Act, being the primary considerations, and s 60CC(3), being the additional considerations.

101 There are two primary considerations. I must balance the benefit to the children of having a meaningful relationship with each parent, with the primary consideration of protecting them from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence. Fortunately, this is not a matter where the parties allege that there is a need to protect these children from harm from being exposed to abuse, neglect or family violence.

102 There are 13 additional considerations which are set out in s 60CC(3). In arriving at my decision, I have not made specific reference to all of the various factors set out in this provision, however, those of the s 60CC matters which are relevant have been considered in determining the children's best interests.

103 The best interests of the child are met by ensuring they have the benefit of both their parents having meaningful involvement in their lives to the maximum extent, consistent with their best interests. The concept of a meaningful relationship has been considered in a number of decisions including *Waterford & Waterford* [2013] FamCA 33, *Mazorski & Albright* (2007) 37 Fam LR 518, and *McCall & Clark* (2009) FLC 93-405.

THE CHILDREN

X

104 X is 16 years old. He will complete his Higher School Certificate ("HSC") this year at T School.

105 Both parties described X as a precocious and socially confident young person. The father noted that X "thrived" in school and had developed "a strong sense of social justice". The mother described X as "very creative and empathic with a very dominant personality". As the eldest child, he appeared to have taken on the role as an older brother seriously and he has admirably acted protectively towards his younger siblings.

106 Between 2020 and 2021, while in her care, the mother reported that X was involved in sports, and was involved in other hobbies and interests.

- 107 At the time of the final hearing, X worked a casual job in entertainment and reportedly wanted to pursue tertiary studies in this area. X also intended to move out with friends once he completes his HSC at the end of 2023.
- 108 Dr S identified X to be vulnerable to both the loss associated with the death of his older brother, Q, and his experience of the parties' separation. He has undoubtedly been affected by his parents' separation, which has affected his mental health. He has been diagnosed with ADHD and suffers from depression and anxiety. X also has a history of disordered eating.
- 109 X identified as non-binary when he was in year 2. There was an incident at his primary school in year 4 which triggered avoidant behaviour of attending school. This remained an ongoing issue for X.
- 110 In 2021, X consulted with an endocrinologist, Dr G, and began testosterone therapy and puberty blockers. In recent times, X has met with Dr NN to discuss the "top procedure" for the removal of his breasts. He plans on undertaking this cosmetic procedure after he completes his HSC.
- 111 At the time of Dr S's interviews, X was taking medication for anxiety and depression and his ADHD. He was also undergoing medical treatment to transition, including testosterone therapy and puberty blockers.
- 112 At the final hearing, orders were made by consent for X to do all things to obtain a referral and to attend upon Dr P, an experienced adolescent psychiatrist. This was also in line with Dr S's recommendations, who was concerned X was receiving "suboptimal psychiatric care".
- 113 Since June 2021, X has lived with the father. Dr S observed X to be strongly aligned with the father. He was reported to be avoiding contact with the mother because he viewed any reservations expressed by the mother and maternal grandfather when he was transitioning as a "sign of disrespect and lack of acceptance of his true self".
- 114 X's relationship with his mother is currently fractured, although the mother gave evidence of her positive interactions with X in the months leading up to the hearing. At the interviews, Dr S reported observing a positive engagement between X, the mother and Mr R. Dr S also gave evidence during cross-examination that he was optimistic about their relationship improving.

115 Dr S opined that X's wishes should be respected but that it would be beneficial for him to re-establish a relationship and regular contact with the mother and maternal extended family. He was concerned about X's negative influence on his younger siblings.

116 The parties agreed to an order that X will live with the parties in accordance with his wishes. This outcome was consistent with the views X expressed to both Dr S and the ICL. The parties are in dispute about parental responsibility for X.

Y

117 Y is 13 years old. She is currently in year 8 at T School. Despite her poor school attendance, her academic progress at school is impressive. She achieved high results in her 2022 NAPLAN results for Numeracy and Conventions of Language, and Spelling and Reading.

118 The parents described Y as a sensitive and intelligent child who is very imaginative and creative. She enjoys reading and has been described as a bright and deep thinker. This is evidenced by her participation in school speech nights during 2021. Post-separation, both parents have noted a change in Y's usual warm and affectionate nature. The father described that Y "has been extremely oppositional" and that she craved stability.

119 Since August 2021, Y has lived with the father. Y's relationship with the mother is currently strained as previously outlined.

120 Y has been diagnosed with obsessive-compulsive disorder ("OCD") and generalised anxiety disorder. She is cautious around Z as she experiences them as dirty and is hesitant about physical contact with them, their belongings, or things they have come into contact with. When she saw Dr S, Y estimated the intensity of her OCD as 9-10/10. She described it as affecting her daily as she had a series of rituals, including wiping her feet before entering the house, using a lot of soap, and avoiding cracks on the pavement. Dr S noted that this was a source of distress and impairment for Y.

121 Y has undergone cognitive behavioural therapy with Ms J since September 2021. She is prescribed medication for OCD and takes Melatonin at night to help her sleep.

122 She has a history of self-harming and suicidal ideation.

123 The mother raised concerns about the adequacy of Y's mental health treatment and its efficacy. Y's psychiatrist Dr K and psychologist Ms J have expressed to the mother that the

father's parenting of and co-dependent relationship with Y has been detrimental to her therapy.

124 The mother was also concerned that the father did not encourage or facilitate her involvement in Y's life. For example, she complained that in November 2021, Y disclosed to her that she had been self-harming. When the mother raised this with the father, he allegedly replied: "I am glad that Y has at last informed you that she had been self-harming. I told her she needed to tell you".

125 In early August, at the time of Dr S's interviews, the father had not followed through with the recommendations made by Dr K to increase Y's dose since March 2022. It was only addressed following Dr S's enquiries.

126 An issue had also arisen due to the impending retirement of Dr K. The mother had proposed to the father that they transition Y's care to the public health system but this issue remained unresolved at final hearing. Dr S was of the view that Y would benefit from stability in both her mental health team and school. He did however support Y's referral to C Centre. He described C Centre as being recognised as a no cost service of excellence and commended it as a good option for Y. Orders were made by consent for the parties to obtain a referral to C Centre and complete the intake and enrolment process for Y.

127 There is no doubt that Y is comfortable in her father's care and that she loves him very much. The mother was concerned that an unhealthy co-dependent relationship between Y and the father had developed. This too was observed by Dr S, who reported at paragraph 308:

[Y] was strongly aligned with her father and older brother. She felt nurtured and supported in this environment. She expressed concern for her father and brother's well-being. She was well aware of their emotional vulnerabilities. [Y] also felt protective of her younger brother. The report writer did not share [Y]'s view that she was at risk in her mother's care.

128 Y expressed a clear wish to Dr S and the ICL that she live primarily with her father.

Z

129 Z is 8 years old and is in year 3 at U School. They are reportedly doing well socially and academically, and enjoying leadership opportunities.

130 The parents described Z as a considerate and emotionally mature child with few complaints. The mother described Z as "happy, active, confident and affectionate", who was caring and reflective.

131 At school, Z plays sports. Z has a wide range of interests and hobbies, including going to the beach and other activities.

132 Z continued to spend equal time with both parents in accordance with orders made on 19 October 2021. Z expressed a wish for this current arrangement to continue.

133 Z reports enjoying a close and loving relationship with their siblings. When asked by Dr S who they would take on a long journey, they chose: “[X], because he is my big brother”.

134 Z spoke to Dr S as identifying as non-binary. The father confirmed this. However, Dr S concluded that Z’s reflections on being non-binary “reflect the views of his [sic] father and older siblings. This highlighted his [sic] vulnerability to being influenced by their views”.

135 The mother asserted that Z is overweight, but this was denied by the father, who claimed Z’s GP determined there was nothing concerning about their weight. Dr S described Z as “noticeably overweight, shy, and immature”.

136 There have been occasions where Z has refused to spend time with the mother and these occasions have been outlined above and will be referenced later. In the lead up to the hearing, the father had continued to assert that Z was reluctant to spend time with the mother.

THE CHILDREN’S PARENTS AND OTHER PEOPLE IN THEIR LIVES

The capacity of the parents to provide for the needs of the children, including emotional and intellectual needs

137 The mother is in stable full-time employment. She experienced mild mental health issues in the past for which she sought treatment. At the time of the hearing, no mental health concerns were raised about the mother in the context of her capacity to appropriately meet the needs of the children.

138 At the time of the final hearing, she was residing in a two bedroom apartment in Suburb W. She was unable to put before the Court a firm plan in relation to her accommodation of the children in future living arrangements. She acknowledged that it would not be appropriate for Y and Z to share a bedroom. She has engaged in conversations with Y about setting up a bedroom for her. She gave evidence that she would secure more permanent housing appropriate to the orders made.

139 The mother is in a long-term relationship with her partner, Mr R. They are not living together but plan to do so in the future. They may also start a family together, which is likely to

happen in the short-term given their ages. Mr R gave evidence and was cross-examined on this evidence. He appeared supportive of the mother and not naïve to the challenges of providing a stable and consistent home to the children.

140 The father operates a business in Suburb V which is dedicated to providing a space to the local community. The father and the children live above the commercial premises with their bedroom accommodation upstairs leading directly into the business. It was not clear if the business had its own bathroom facilities. Each of the older children has their own bedroom. The father shares bunk beds with Z or sleeps on a sofa, both located in the living room. He said that a wall partition could easily be constructed in the room.

141 The mother annexed to her affidavit photographs that she had taken of the father's living conditions in November 2020. She described the house as being disordered, cluttered and unclean. She was concerned about the accessibility of the residence from the business downstairs and the supervision of the children when the father was working. She also raised concern that there was no functional bathroom door. The father gave evidence that the photos were taken before he had reorganised his household belongings and that there was now a bathroom door.

142 The father has experienced financial hardship since separation and this has impacted on his ability to make rental payments as and when they fall due:

- (a) In June 2021, he requested the urgent release of funds held in trust to pay rental arrears in excess of \$19,000.
- (b) He has previously been issued with a notice of eviction.
- (c) The father admitted that one of the reasons for Y missing the first three weeks of school in 2023 was that he was in rental arrears and had to go through a process of proving his residential address to the school. He said that he "closed his business down to prove his residence". This explanation was confusing and, if nothing else, points towards some chaotic aspects of the father's life.
- (d) He conceded that his rent was currently in arrears, that his landlord continued to demand more rent, and that he was at risk of eviction.
- (e) While he was of the view that his business had good future prospects, the income he currently received from it was not sufficient to meet his and the children's needs. At the time of the hearing, he was investigating ways of supplementing his income and

alternative rental properties. Under re-examination, the father said he would consult with a financial advisor but had not had the time to do so.

143 Dr CC wrote a report on 16 September 2019 after seeing X and Y. The children complained that they wanted their lives to be “simpler and less chaotic”. He observed that their sleep structure “is terrible”. He said that their computer access was “unregulated”. However, they report being happy living with their father in this bohemian environment.

144 The children’s school attendance was a significant issue. The school attended by X and Y is around 750 metres away on the same street as the father’s home. Notwithstanding its proximity, X’s school attendance has been unacceptably low. The father argued that the children’s school attendance was a reflection of their medical issues and their own refusal to attend school, combined with the COVID-19 pandemic. The mother did not accept this argument entirely. I accept the mother’s evidence that:

- (a) From 31 January 2020 to 6 March 2023, X had a total of 200 days of partial absences from school (for non-school reasons) and 190 whole absences (for non-school reasons). I noted that 35 of the days of absence arose whilst in the mother’s care (eight for being late, eight for appointments, and 10 days where X was sick or awaiting a COVID-19 test result).
- (b) In the first term of 2022, Y had whole absences and partial absences due to lateness.
- (c) From 5 October 2021 to 6 March 2023, X had a total of 100 partial absences and whole absences in the father’s care.
- (d) From 29 January 2020 to 4 November 2021, Y had 40 absences and was late 58 times in the father’s care.
- (e) From 28 January 2022 to 5 December 2022, out of 190 days, Y was absent 50 times and late 80 times in the father’s care.
- (f) From 20 February 2023 to 6 March 2023, Y was late eight times over 11 days.

145 The mother alleged that Z was on time to school when in her care, but was late when in the father’s care. She also alleged that Z told her the father paid them \$20 when the father made them late for school. Z’s Semester 2, 2022 report noted that their late arrivals to school meant they were missing out on learning time.

146 It is clear that X and Y have been exhibiting avoidant behaviour towards school since before separation. However, I accept the evidence that the problem is not assisted by both giving

agency to the children to make decisions about school attendance combined with a lack of structure and routine in the father's home.

147 The father had attempted to introduce systems in his home to address the school attendance issues. For example:

- (a) Z reported sleeping in their school uniform to assist the father to get them to school on time.
- (b) The father introduced a fine system with the children where they would fine him if he was late getting them to school or shouted at them.

148 While the children viewed the fining system as the father respecting their experience, Dr S was concerned that such an approach empowered the children by undermining their respect for adult authority and being rewarded for their father's poor behaviour.

149 The father has a longstanding history of depression and anxiety for which antidepressants had been prescribed. There was a history of mental health issues in the paternal family which Dr S, identified as a "significant genetic loading" for both the father and the children.

150 At the time of the father's first interview with Dr S, it appeared he had not taken his medication for some time. He told Dr S at the first meeting that he had suffered a nervous breakdown. He had been "diagnosed with Adult Attention Deficit Disorder (ADD/ADHD) and was thus often distracted". He requested that he be redirected should he become distracted during the assessment. This was consistent with how he was observed during the final hearing, where the father became distracted when he gave evidence and had to be redirected on a number of occasions to focus on answering questions asked.

151 When he was reinterviewed by Dr S, the father had restarted his medication and Dr S noted a marked difference between the father's presentations at both interviews.

152 The father's treating psychologist, Mr D, described the management of the father's depression and anxiety as "only just" adequate.

153 When asked by Dr S about the father's parenting capacity, Ms J identified that he was disorganised in the context of his ADHD. When asked about the father's parenting capacity, she observed to Dr S that:

[Y] was often late for school and for their appointments. There was a lack of consistency and lack of daily routine. She identified [Mr Avila] to struggle in his

parenting capacity. He generally struggled to keep on top of everything. This occurred in the context of enmeshment, co-dependency and overprotectiveness.

([Dr S]'s report, paragraph 285)

- 154 The father's own diagnosis arguably has impacted on his approach to the children's mental health treatment. The mother alleged that the father had unnecessarily sought an assessment of both Y and Z for ADHD. This was not viewed by Ms J to be an appropriate diagnosis for Y, as her symptoms were anxiety related.
- 155 Dr S was concerned that there was an element of paranoia in the father's presentation and responses, particularly his concerns about the relationship between Dr E and the maternal grandfather. He observed that his paranoia led to his failure to attend follow-up appointments and continue medication, concluding that "this highlighted the detrimental impact of his paranoid worldview on his general functioning and thus his parenting capacity".
- 156 Ultimately, the father's failure to attend a follow up appointment with Dr E in June 2022 meant that the father has likely not been appropriately medicated for his ADHD since at least May 2022.
- 157 It would be inappropriate and erroneous to find that a cluttered household, or the financial hardship experienced by a parent, or their mental health diagnosis are indicators of a lack of parenting capacity. Living conditions, poverty, employment status and mental health diagnosis, no matter how dire, are not proper considerations for determining a child's best interests. They only become of relevance if they have a negative impact on the emotional and intellectual needs of the children. This is a case where they have.

Conclusions

- 158 Having regard to the evidence, I make the following findings:
- (a) The mother has not secured appropriate accommodation to house the children on a full-time basis but I am satisfied that she will do so if orders were made necessitating it.
 - (b) Due to the open nature of the sleeping quarters and the access to the business downstairs, the father and the children have little private space, and what private space they do occupy is cluttered with their belongings.
 - (c) The school attendance of the children is unacceptably low.

- (d) As a result of their living environment with the father and the ongoing conflict between the parties, the children were rundown and this manifests itself in physical illness. It can have an impact on their school attendance.
- (e) In the father's household the children stayed up late and lived with little structure or rules. This also has an impact on their school attendance.
- (f) The children enjoyed the living arrangements they shared with the father. X and Y expressed a preference for remaining in the father's care, as opposed to the more structured and consistent living environment the mother offered.
- (g) The father has been behind in rent for a significant period of time and faced eviction.
- (h) The mother is the parent better placed to provide stable and consistent care for the children when compared to the father.
- (i) The father has at times been unable to properly and appropriately manage the children's day to day care and needs due to his demonstrated inability to manage his own mental health. This is evidenced in the way the father has approached the mental health concerns of the children and their poor school attendance while in his care.

The extent to which the parents have participated in making major long-term decisions, spend time with and communicate with the children

159 To the parties' credit, they have been able to jointly participate in making some major long-term decisions about the children post separation including:

- (a) When they first separated, they agreed to a week about arrangement for the children.
- (b) They both supported X's gender dysphoria and gender identity, including ensuring support and medical treatment for his transition.
- (c) At the final hearing, the parties agreed to respect X's wishes in relation to which parent he lives and spends time with.
- (d) The parties both play an active role in the psychiatric and psychological treatment of their children.

160 Despite the mother's strained relationship with the older children, she has continued to try to spend time and communicate with them, and play a parental role in their lives. She has remained actively involved in the children's treatment.

161 The father has repeatedly reinforced that he respected X and Y's decisions to not spend time or communicate with the mother. In doing so, he believed he was protecting them from further emotional and psychological harm.

162 There were numerous examples of the difficulties faced by the parties in communicating on day to day issues about the children. For example:

- (a) Y's continuing enrolment at KK School and late enrolment at T School.
- (b) The mother's trip to Country LL with Z and the maternal family.
- (c) Z's enrolment in a sports team.

163 The issues relating to Z's enrolment in a sports team and trip to Country LL have already been discussed at length.

164 The circumstances surrounding Y's enrolment and withdrawal at KK School have also been outlined. The mother claimed that the father did not respond to her correspondence on this issue, and ultimately the father appeared to have taken steps on his own to withdraw Y from KK School and enrol her at T School.

165 In early 2023, the mother grew concerned that Y had not yet commenced school and did not know when she would start. In early February after the school year had commenced, the mother made enquiries directly with the school and was advised that Y's enrolment had not been completed because the father had yet to provide proof of residence in the local area due to his rental arrears. The mother's intervention arguably led to a resolution of the situation, but as a consequence, Y commenced (at a new high school) at least three weeks into first term.

166 The mother said that she has been excluded by the father from making certain decisions in relation to the children, and that her communication with the father was difficult. She cited examples such as:

- (a) A lack of consultation around medical appointments, especially specialists including X's medical treatment for his gender dysphoria.
- (b) Z's enrolment in a Region R sports team.
- (c) Y's school enrolment processes including to OO School, her withdrawal from KK School and subsequent enrolment at T School.

167 The father, on the other hand, accused the mother of communicating “in a very hostile and illogical manner”.

168 I prefer the mother’s evidence in relation to this issue, as it was supported by evidence in the form of correspondence between the parties. As an example, in relation to Y’s enrolment at T School, the father agreed to communicate any updates or information directly to the mother. However, the father did not advise the mother that he and Y would attend an interview at T School on 13 February 2023.

Conclusions

169 The mother has persistently and under very difficult circumstances continued to play an active role and participate in long-term issues for the children.

170 There is no doubt that the inability of the parents to reach agreement with each other on a range of matters, including those noted above, now brings into question their ability to co-parent or share the parenting of any or all of the children.

The nature of the relationship of each child with each parent and with significant other persons

Relationship with each parent

171 Set out earlier are details of the mother’s relationship with X and Y both historically and currently, and it needs not repeating. She has kept open communication lines with X and Y, and taken steps to ensure she plays a role in their lives notwithstanding the difficulties in their relationships.

172 The father alleged the children’s contact with the mother had been “highly traumatic”. He further insisted to Dr S that:

... the children had been constantly destabilised by their mother. He expressed his opposition to their contact with the maternal extended family as their actions had been ‘extremely dangerous’.

([Dr S]’s Report, paragraph 196)

173 I accept that the separation of the parties was traumatic for the children. I have no doubt that the manner in which the children have been exposed to the parental conflict has similarly been traumatic for them. However, there was no evidence that could lead me to conclude that the mother’s behaviour towards the children, or the contact she has with them, could be described as traumatic.

174 The father's relationship with the children is more complex. There is no doubt that he is a very committed parent who is acting in a manner that he believes is in the best interests of the children. But this needs to be viewed in the context of an already difficult situation that is made harder by his own mental health issues and the children's particular needs.

175 A concern was raised about the father's care for the children including that he failed to ensure that they were administered the correct doses of medication. Dr S was concerned that the father could not remember Y's dosages, had not followed the recommendations of Dr K, and had not organised follow up appointments for Y.

176 In relation to X and Y, this led Dr S at paragraphs 337 and 338 of his Report, to conclude that:

[X] had received suboptimal care. His care should ideally be transferred from the paediatrician to an experienced adolescent psychiatrist. [Dr P], [Suburb W], could be a suitable choice given his extensive experience in the management of gender dysphoria, transitioning, mood disorders and ADHD.

[Y] [sic] requires regular follow up with her treating psychiatrist. She was currently receiving suboptimal treatment as she had not attended for review of her medication dose.

(As per the original)

177 At paragraph 343, Dr S ultimately concluded that:

The father's approach to the children's care was problematic. He was evidently loving, but there was a lack of balance between care and control. He was self-referential when considering the children's experience. An enmeshed and co-dependent relationship with the children was identified. This was consistent with the observations of [Y]'s [sic] treating psychologist. Both her psychologist and psychiatrist observed that he had failed to consistently attend follow up appointments. As a result, [Y] [sic] remained on suboptimal treatment for her OCD. Her psychologist identified that his disorganisation and lack of routine had contributed to the children failing to consistently attend school. His overprotectiveness had exacerbated the children's emotional and behavioural vulnerabilities, rather than contain their dysfunction. When provided with feedback during the assessment, he became highly defensive.

(As per the original)

178 The mother complained that the father projected certain issues onto the children. Dr S supported this, suggesting that the children have an enmeshed and co-dependent relationship with the father.

179 Y's sessions with Ms J provided more insight into the enmeshment and co-dependency between Y and the father. Ms J observed that Y had been reluctant to be seen on her own and

was becoming reliant on the father to speak for her during sessions. Similarly, Y was using the father as her “go to person” whenever she had a concern at school. This was seen by Ms J as being problematic because it “reinforced her anxiety through a phobic avoidance”. Ms J also described the relationship between the father and Y as one of enmeshment and co-dependency.

180 Post separation, the mother alleged X and Y’s mental health had deteriorated, particularly since living with the father to the exclusion of the mother.

Relationship with the maternal family

181 Prior to separation, the mother deposed that the children had a healthy and close relationship with the maternal family. Since then, the children’s relationships with some of the members of the maternal family have broken down.

182 The father complained to Dr S that the children had been destabilised by their mother, expressing that his opposition to the children’s contact with the maternal extended family was because their actions had been “extremely dangerous”. Presumably, he was referring to the April 2022 incident and the involvement of the maternal grandfather with the children’s treating health professionals and their prescription medications.

183 After separation and during the course of these proceedings, the father became aware that the maternal grandfather at times provided referrals to Dr CC and corresponded directly with him and the mother. The mother gave evidence that the children’s psychologist, Ms TT, had sought to refer Y and Z to Dr CC who operated out of the same rooms. The father consented to the referral, but a referral letter from a doctor was required. Consequently, however, he was treated as the referring doctor and correspondence about the progress of therapy was sent directly to him. Dr S observed that this referral system was a common practice within medical families.

184 When the father became aware that there were direct communications between Dr CC and the Dr BB, he ended Dr CC’s involvement in X’s care treatment. He described Dr BB’s contact with Dr E as “illegal and unethical”.

185 This incident is relevant to several considerations about what is in the children’s best interest. It is especially relevant because of X’s experience of Dr CC. He reported to Dr S: “I didn’t feel comfortable with him. He treated me and my sister like idiots.” He also complained to Dr

S about the referrals being organised by Dr BB. It would seem that the father had influenced X's views about this. X told Dr S at paragraph 129 of the Report:

But all along I suspected it was a problem because [Dr BB] would write the script. You need to take into account [Dr BB] doesn't believe that I have ADHD, anxiety, depression, or that I'm trans. He was still thinking I was a girl. These people should not have been prescribing my medication. I was put on a drastically lower dose by my GP.

(As per the original)

186 Of note, when describing the April 2022 incident to Dr S, X cried and spoke about the mother and Dr BB as being “abusive and a threat to the children”.

187 X and Y, in the context of their alignment with the father, have become alienated from Dr BB and extended family.

188 Perhaps to strengthen the relationship between Z and the maternal family, the mother arranged a trip to Country LL. In Dr S's view, the father “had badgered [Z] when he expressed his desire to go on this holiday with the maternal extended family”. He further observed at paragraph 114 of his Report:

When asked about [Z]'s view regarding the planned holiday with his maternal extended family to [Country LL], [Mr Avila] explained that [Z] had initially been excited and was really upset with his father for refusing to allow him [sic] to go. [Z] had responded, “You're not listening to me.” [Mr Avila] had explained that it was inappropriate for his [sic] mother to arrange the holiday without his permission. For days, [Z] had questioned whether he [sic] was going to allow them to go or not. Finally, [Z] had agreed that he [sic] did not want to go because of the way it had been arranged. Further, [Z] was fearful of a family friend who had bullied him [sic] who was also going on the trip. [Ms Hardin] had reportedly dismissed this as “just a game”.

(As per the original)

189 The mother claimed that Z had started to speak negatively about the maternal grandfather and his wife in March 2023.

190 Dr S concluded at paragraph 323:

The loss of the maternal extended family in the children's lives will be detrimental to their future, as they will lose important figures with the potential to guide and support them into the future. This will also serve to amplify their paranoid worldview, that key figures cannot be trusted.

191 The father alleged that the children enjoyed the care of their paternal grandmother before she passed away in 2020. The paternal grandfather also provided financial support for Y's ongoing enrolment at KK School. However, on the evidence before me, it appears that the

paternal family have limited involvement in the care of the children, and there was no evidence before me regarding their ongoing support to the father.

Relationship with Mr R, the mother's current partner

192 The mother commenced a relationship with Mr R in 2020, but he was not introduced to the children until around late 2020.

193 Although X and Y initially appeared to have liked Mr R, Dr S reported that they subsequently rejected him and referred to him as the mother's "awful boyfriend". However, Y conceded that Mr R was supportive of the mother and made the mother happy.

194 Z appeared to enjoy a better relationship with Mr R and his extended family of nieces and nephews. Mr R gave evidence. He was committed to ensuring that he developed both a good relationship with Z and Z's sense of belonging in their family unit. Mr R claimed that he also spent one-on-one time with Z when they were in the mother's care, and enjoyed outdoor activities together like playing sports and riding bikes together.

195 The mother and Mr R initiated Z's engagement in sports in the area where they resided as a bonding activity. However, it would appear that the father "took over" and dictated many aspects of it, including who could attend Z's games, who could talk to Z after games ended, and provided them with the wrong game time information.

Conclusions

196 I form the view that the father:

- (a) has a strong and loving relationship with all three children;
- (b) takes a rigid and negative view of the mother;
- (c) appeared unable to prioritise the children's needs ahead of his own negative feelings for the mother; and
- (d) through his actions and behaviour, has caused an enmeshed and co-dependent relationship with the children to develop.

197 There was no evidence before the Court to support the father's various assertions that the maternal family posed a risk to the children or that their actions were extremely dangerous. In fact, this argument was not ultimately advanced by the father in the final hearing. I conclude that the breakdown of the children's relationship with the maternal grandfather was aided by the father's response, often in the presence of the children. He was unable to deflate the

conflict nor provide the children with a more neutral or less critical perspective of the maternal grandfather.

198 The father's view of the maternal family was both exaggerated and without substance. It leaves me with little confidence that there will be any improvement in the relationship between the children and the maternal family whilst they remain in the father's care. I accept the evidence of Dr S that this will be detrimental to their future, as they will lose important figures with the potential to guide and support them.

199 There was insufficient evidence to make findings about whether the father deliberately enrolled Z in a Region RR sports team against the wishes of the mother. However, I find it was an example of how the father's actions have often undermined the mother and excluded her from participating in the children's lives to the maximum extent possible.

The lifestyle and background of the children and the parents (including gender identification)

200 The father is gender non-conforming. He identifies as male, but on occasion has worn gender non-conforming clothes. In February 2020, he was reported to have attended Y's first day at KK School in a dress. His right to self-expression is not a reflection or criticism of his parenting capacity. However, it is possible that raising the children without adopting societal gender norms and expectations has led them to be confused and question their gender identity. Dr S observed that "all three children had identified as non-binary, reflective of their father's values".

201 The mother claimed that she was supportive of X's transition and gender identity, and has always wanted him to make an informed decision. However, she was concerned about how his transition is being managed with his co-existing psychological and emotional issues, including anxiety and depression, which predated his gender dysphoria. The mother was concerned that the father was overly invested and actively promoted X's transition rather than approaching the matter as an objective parent. In particular, the mother holds serious concerns that:

... in managing [X]'s treatment [Mr Avila] will be unable to navigate processes; follow instructions correctly; identify the pertinent questions to ask; and approach the matter as a parent rather than as a friend or peer.

(Mother's affidavit filed 13 March 2023, paragraph 43)

202 At the time the mother filed her affidavit, she was also concerned that X had yet to be assessed by a psychiatrist. Dr S appeared to mirror this concern and he recommended that X's care be transitioned to Dr P, an experienced adolescent psychiatrist. Orders to this effect were made on the final day of the hearing by consent.

203 There is nothing obviously detrimental about a parent allowing their child to reject the prevailing societal gender norms and expectations. But arguably, it has the potential to make them more vulnerable when they are, at the same time, questioning their sense of belonging following a difficult parental separation. In Dr S's view, the impact of this is that it had amplified rather than contained the emotional experience of the children. This was supported by the mother's experience that: "The children are sensitive to and defensive about any criticism or distaste they perceive to be expressing about [Mr Avila's] dress style".

Conclusions

204 I place little weight on this consideration in reaching a final determination of the question of who the children should live with. There is however some relevance on the question of how parental responsibility for the children should be allocated.

The attitude to the children and the responsibilities of parenthood demonstrated by each parent

205 Both parties complained that each had spoken negatively about the other to the children.

206 The mother also alleged that the father had inappropriately involved the children in parental decisions and influenced their views on issues. She complained that the father has established a narrative with the children since separation that painted her as "bad" and the father as "good".

207 As previously outlined, the parties deposed their version of a number of contentious events. These included:

- (a) The ultimate withdrawal of Y from KK School and enrolment at T School.
- (b) The cessation of the relationship between Y and her cousin GG in September 2021.
- (c) The dispute during the April 2022 incident about the mother spending time with the children, including the maternal grandfather's attendance at Suburb V to collect the children and police involvement.

- (d) Some occasions in April and May 2022 when Z resisted spending time with the mother.
- (e) The father's refusal to allow Z to travel on a holiday to Country LL with the mother in 2022.

208 These incidents provide some insight into the children's exposure to conflict and the manner in which the father has influenced their world views.

209 Earlier in the judgment, the circumstances around Y's departure from KK School and enrolment at T School were outlined. It was a live issue when the parties and the children attended upon Dr S. There is no doubt that Y's departure from KK School was traumatic for her. She had settled in and made friends there, and it was likely she was disappointed when she had to depart KK School. Schooling is an issue that impacts directly on a child and it is not surprising that the father engaged with Y on this topic.

210 Nevertheless, regardless of whether it was right or wrong to remove her from KK School, it would appear that the father most likely influenced Y's views about who to blame for the outcome. The mother gave evidence that on or around 13 January 2022, she emailed the father proposing that they discuss the issue with Y in the presence of Ms J. The father did not agree to this. The mother gave evidence that on at least two occasions Y blamed the mother for her withdrawal from KK School.

211 The mother alleged that the father was now influencing Z to take a critical view of spending time with her, as well as adopt a negative view of her, in a similar way that X and Y were.

212 The mother argued that the May 2022 incident, when Z resisted spending time with her, provided another example of the way in which the father influenced the views of the children and failed to manage what became a difficult situation. Despite the orders made on 19 October 2021 that he spend time with the mother, Z was reported to have said: "I am angry with you for keeping me from my dad".

213 During the period in 2022 when Z was resistant to spending time with the mother, the mother alleged that the father made no attempt to facilitate conversation between her and Z, nor did he encourage Z to stay with the mother. The father denied this and deposed encouraging Z to spend time with his mother at all times. However, in Dr S's Report at paragraph 93, the father seemed to indicate the manner in which he aligned Z on the issue:

When this allegation was explored, [Mr Avila] continued in the emotive fashion, ‘She makes every interaction with them a tool for manipulation. My brain is exploding. I have 40 pages of this. She threatened to contact the police about them. She said to [Z], ‘If you don’t come with me now, dad will get in trouble with the authorities for breaking the rules’ after she had called the police. [Z] thought that both of us wanted him dragged off to Juvie.’

(As per the original)

214 Later the father reported at paragraph 191 of the Report:

At the time of this incident, [Mr Avila] had spoken to [Z] about his [sic] refusal to go with his mother, ‘I told him [sic] that if he [sic] did not want to go, he [sic] absolutely had to come and talk to her himself. He [sic] couldn’t just not just go.’ The report writer noted that this was different from ensuring that [Z] went with his [sic] mother.

(As per the original)

215 The deterioration of the mother’s relationship with X and Y was heavily influenced by the negative view they took of their mother. Dr S concluded at paragraph 346 of his Report that:

The father had encouraged [X] and [Y] to view their mother as pathological and uncaring given her more pragmatic approach to their care. This promoted their idealisation of him and was seen to be damaging to their psychological development.

216 Of the father, Dr S reported at paragraph 330 that:

... he did not trust or respect the mother’s approach to parenting given his lived experience. He had repeatedly supported the children in their complaints about her controlling and disrespectful communication and parenting style. Thus, although he asserted that he had consistently supported their relationship with her, he had failed to ensure the maintenance of contact.

217 His conclusion was not challenged under cross examination.

218 In Dr S’s Report, “[X] was identified to use the same expressions as the father. This was interpreted as evidence of extensive discussions resulting in the evolution of a shared worldview” between X and the father.

219 Y was critical of the mother for similar behaviour. She told Dr S at paragraphs 162 and 163 of his Report that:

Her mother would say hurtful things about [the father]. When [Y] brought this up, she would deny this but she said [X] had witnessed this. [Y] complained that her mother had ‘gaslighted’ her. She would hear her mother talking about her dad with her friends in the next room. She would refer to him wearing a dress and a topknot. [Y] explained that her father often wore dresses. This had become iconic in the [business]. Her mother viewed it as silly and unorthodox.

[Y] also did not like that her mother discussed things that should not be discussed such as child support. When [Y] had talked about getting pocket money from dad, her mum responded that she paid him money because his business ran at a loss. This

made [Y] freak out about their financial position.

(As per the original)

220 I do not challenge Y's lived experience. It is inappropriate for the mother to have spoken about these proceedings or the father in the presence or hearing of the children. However, it is curious that Y was unable to identify inappropriate responses or behaviour by her father, because there were plenty of examples available. Whilst neither parent has demonstrated an ability to shield the children from the negative views they hold about each other, Y's views tend to support Dr S's proposition that the children idealise their father as "the good parent". Dr S saw this idealisation to be damaging to the children's psychological development.

Conclusions

221 It is apparent from the evidence that the children have been exposed to both the mother and the father's negative views of each other. However, the dynamic with their father is more complex and potentially damaging to the children. I therefore find that:

- (a) The father has and continues to influence the views of the children.
- (b) The father is now influencing Z to take a critical or negative view of the mother, in a similar way that X and Y have.
- (c) It is likely that, if the father's behaviour continues, Z will resist spending time with his mother, as the older siblings have done.

WHAT FINAL PARENTING ORDERS SHOULD THE COURT MAKE?

222 The parties reached agreement that X would exercise his own preference as to his living arrangements but it is understood that he will remain living with his father. Given his age, a decision regarding how parental responsibility for X should be exercised for the next 12 months needs to be made. A decision concerning how parental responsibility for Y and Z should be exercised must also be determined.

Parental responsibility

223 Section 61DA of the Act provides for the application of a presumption that it is in the best interests of the children for the children's parents to have equal shared responsibility for those children when making a parenting order. Relevantly for this case, s 61DA(4) of the Act permits the presumption to be rebutted when a court is satisfied by the evidence that it would not be in the best interests of the children for their parents to have equal shared parental responsibility for them.

224 Pursuant to s 65DAC of the Act, an order for equal shared parental responsibility requires the parents to make together (and jointly) decisions about major long-term issues affecting the child. This section requires three things of the parents where the exercise of parental responsibility involves making a decision about a major long-term issue. The Act requires that:

- (1) the parents consult the other in relation to the decision to be made;
- (2) the parents make “a genuine effort to come to a joint decision about that issue”; and
- (3) the decision be made jointly by those persons.

225 On this issue, Dr S concluded at paragraph 348(a) of his Report that:

Although the maintenance of shared parental responsibility for all three children would be ideal, if the parents remain unable to agree on core issues related to health and education, the mother was identified to have a more balanced approach to this.

(As per the original)

226 The ICL asserted that the parties have no co-parenting relationship and are unable to communicate in any meaningful way. The father came before the Court seeking orders that the parties engage in a family therapy process, as they have done in the past. There was no evidence before the Court to provide any optimism that a family therapy process would provide them with a better platform to make decisions of a joint nature into the future. There was also no evidence that could lead me to be satisfied that the communication and co-parenting between the parties would improve in either the short or long-term future.

227 However, the decision about how parental responsibility should be allocated must also be considered in the context of the children’s ages and the future decisions to be made.

228 X plans to leave home at the end of the year. He has expressed a desire to proceed with surgery next year when he will still be under 18. The mother has expressed concern that the father “is overly invested in X’s transition and that he has not been objective or well informed when discussing all the options with X.” The father has alluded that the mother has at times been resistant to X’s gender identity. I found no evidence to support this assertion although the mother has been more questioning and cautious of X’s treatment than the father. Dr S was concerned that X needed appropriate psychiatric treatment in place to support this decision.

229 I have considered that the mother’s relationship with X is fractured and that X will continue to live with the father until at least the end of the year. This raises a question of whether it is

practical to expect the parties to share parental responsibility for X. Given that the surgery seems to be the only long-term decision that may need to be made, I have concluded that it is in X's best interests for his parents to share parental responsibility for the limited time remaining.

230 The allocation of parental responsibility for Y and Z is more complicated because of their ages and complex needs. In the circumstances of this case, I have concluded that the parties are unable to exercise joint parental responsibility for Y and Z. The evidence satisfied me that they communicate poorly with each other and there is a profound mistrust of the mother by the father. On that basis, equal shared responsibility would not be in the younger children's best interests.

231 While the father gave evidence about the benefits of equal shared parental responsibility, he displayed no ability to problem solve. He maintained a negative view of the mother throughout the course of the proceedings.

232 There has been no criticism raised of the mother's decision making. I have concluded that she is the parent most capable of making a balanced decision in consultation with the children. In addition, having viewed the conflictual decision making processes between the parties, it is not practical to require the mother to arrive at decisions jointly with the father into the future. It would also cause her ongoing stress which may adversely impact upon her parenting capacity, and, hence, would not be in the best interests of the children.

233 That is not to suggest that the father will not continue to play an important role in the younger children's lives. Orders will be made requiring the mother to seek out the views of the father, and to consider them before making a final decision.

234 On that basis, an order will be made for the mother to exercise sole parental responsibility for Y and Z.

Live with orders

235 At the time of the final hearing, Y was spending very limited time with the mother and had expressed a very clear and strong view to remain in the care of the father. In response to spending time with the mother, Y told Dr S; "I have a routine. I stay with my dad and I see my mum when... [sic] I shouldn't do something that I don't feel happy, safe or uncomfortable with." She is 13 years old and at an age where significant weight should and is

placed upon her wishes. However, Y's reluctance to spend time with the mother is a far more complex issue than simply being something she does not want to do.

236 Z on the other hand, is younger and did not express a clear view.

237 In *R & R: Children's Wishes* (2000) FLC 93-000, the Full Court of the Family Court of Australia noted at [54]:

There are many factors that may go to the weight that should be given to the wishes of the children and these will vary from case to case and it is undesirable and indeed impossible to catalogue or confine them in the manner suggested. Ultimately it is a process of intuitive syntheses on the part of any trial judge weighing up all the evidence relevant to the wishes of the children and applying it in a common sense way as one of the factors in the overall assessment of the children's best interests.

238 The difficulty before me is how much weight I should place on the views of Y in the context of finding that she has been heavily influenced by the father, and an enmeshed and co-dependent relationship between them has developed.

239 There was clear evidence before the Court that if Z is not taken out of this environment, he will become increasingly resistant to spending time with his mother and more aligned with the father.

240 I accept that the father's behaviour will have a long-term impact on the children's sense of self and where they belong.

241 This does not mean that I reject or disrespect the views of Y. I accept that they are the views held by her, and the making of an order contrary to her wishes will cause her deep distress.

242 The decision before the Court is a difficult one to make in light of the views of Y. In order to weight up all of the matters necessary to make a determination of what outcome is in the children's best interests, I will consider the strengths and weaknesses of each proposal and the impact each proposal would have on the children.

Strengths and weaknesses of the father's proposal

243 The father proposed no significant change to the current status quo of the children's living and care arrangements.

244 The strengths of a status quo outcome are that:

- (a) It will accord with the express wishes of both X and Y.

- (b) X and Y will continue to live with the father, who they love, and it is a lifestyle they clearly prefer.
- (c) Such an outcome ensures that the children will remain living in an area they are familiar with (most likely in Suburb V). They have resided in the Suburb V area for several years, attended schools close by, participated in extracurricular activities in the area, and have a network of friends within the community.
- (d) The children's attachment to each other is clear and a status quo order will ensure that that attachment is not disturbed.
- (e) An order for the mother to exercise sole parental responsibility, even if they remain living with their father, may address some of the concerns raised about suboptimal treatment of their mental health.

245 The weaknesses of a status quo outcome are that:

- (a) X and Y are strongly aligned, enmeshed and dependent upon their father. Y is at a critical stage of her development and unless orders are made to change the status quo, it is likely that this dynamic would become an integral part of their personality structure. If left unaddressed, it will cause Y psychological harm.
- (b) The father's sustained negative narrative regarding the mother means it is unlikely that in the future he would support and foster the children's relationship with the mother and the maternal family. Thus the current family dynamics would continue, resulting in an amplification of the children's identification with the father and polarisation from the mother. Ms HH, the family therapist, expressed to Dr S "grave concerns for the children's future given the unresolved family dynamics". Unless changes are brought about, this "unresolved family dynamic" will continue.
- (c) There were no changes or suggestions made by the father that would address the current circumstances of the children, described by Dr S in cross-examination as problematic, concerning and unsatisfactory for the children.
- (d) The father will most likely struggle to manage his own mental health issues, which has a direct impact on the children's wellbeing, health, school attendance, and quality of life.
- (e) There will be no improvement in Y's mental health.

- (f) There would be no improvement in the relationship between the mother and Y, and, even if the relationship improved, that may not translate into Y spending more time with the mother.
- (g) Z is starting to reject their mother. In the face of the negativity displayed by the father and older siblings, there is a risk that Z will increasingly align and become more enmeshed with them. They may also validate and encourage this behaviour.
- (h) There is the potential for Z's mental health, which to date has been unremarkable, to become negatively impacted.
- (i) The father likely faces eviction from his residence. The life the children have grown to love with the father most likely cannot continue long-term.

Strengths and weaknesses of the mother's proposal

246 The mother's proposal represented a significant change to the current living arrangements for the children, especially for Y. The strengths of making orders in accordance with the mother's proposal are that:

- (a) The mother can provide a stable and loving environment for the children.
- (b) The mother is the parent most likely to promote and support the father's relationship with the children. It will most likely result in the children enjoying a meaningful relationship with both the maternal and paternal family.
- (c) The mother is the parent more likely to ensure better school attendance, compared to the father.
- (d) Long-term, it is likely that Y's mental health would improve in the mother's care. This was the view of Dr S, who felt that over time, and with good consistent care, psychological support and pharmacotherapy, Y's mental health would settle.
- (e) X would be relieved of the parental role and protective responsibility that he has played.
- (f) The change in residence would allow the father time for respite. It would allow the children the opportunity to take less responsibility in parenting themselves and introduce some structure into their lives especially around sleep routines, the use of electronic devices, diet, and consistent medical treatment.

- (g) Whilst this outcome would result in a significant change of circumstances for Y, the mother has the support of her family and partner, including to managing Y's oppositional response to changing residence.

247 The weaknesses of making orders in accordance with the mother's proposal are that:

- (a) Given their close sibling relationship, the younger children will miss living with X and X will miss having them in his household.
- (b) It would be contrary to Y's clearly expressed and long held wishes. She has lived her life, at least in recent years, with authority to make decisions on her own behalf and has been actively encouraged to do so. By removing that agency, there is a strong possibility that she will ignore the orders made. This could play out by her running away and seeking the father out. Indeed, Dr S opined at paragraphs 320 and 321 of his Report that this might result in:

...an exacerbation of their mood disturbance and behavioural dysregulation. They would be likely to respond by becoming oppositional and running away. ...

The children would experience an exacerbation of emotional distress should they be separated from their loved father.

(As per the original)

- (c) Initially at least, Y's mental health may deteriorate.
- (d) While the mother offered a more stable future for the children, this might not be achieved in the short-term. The mother was non-committal about both her plans for the children's accommodation and schooling should orders be made that they live with her. The mother also has plans to start a family with Mr R, and this will add a further unknown dimension to the household.
- (e) Y and Z may need to change schools. It could potentially lead to a third change in schools in less than a year for Y. She would need to make new friends and adjust to a new school environment when she already has significant health challenges. This would cause her further upheaval and trauma in the short-term and may not be in her best interests.
- (f) There were concerns about how Y can manage her OCD issues if she has to travel distances to school or share a bedroom with Z. The mother understood this issue and had been in discussion with Y to make changes to her room. I note that Y has also been living in the same household as Z her entire life.

Conclusions on live with orders

248 This is a finely balanced case. There are strengths in each of the proposals made by the parties.

249 When determining what orders are in the children's best interests, s 60CC sets out a range of considerations. Before considering the secondary considerations, I must consider the two primary considerations set out in the Act. While I am concerned that there are psychological harms present for these children, the harm does not arise from being subjected or exposed to abuse, neglect or family violence. Therefore the primary consideration for me is what order will most likely ensure that the children have the benefit of a meaningful relationship with each parent.

250 In reaching a conclusion about what outcome would be in the children's best interests, I am minded that s 60B of the Act sets out a range of objects and principles underlying them. These include:

- (a) Ensuring that the children have the benefit and involvement of both of their parents having a meaningful involvement in their lives. I am concerned that the father's proposal will not ensure the meaningful involvement of the mother in the children's lives to the maximum extent. By contrast, the mother's proposal will.
- (b) Ensuring that the children receive adequate and proper parenting to help them achieve their full potential. I am concerned that the father's proposal will not ensure that the children receive adequate and proper parenting to help them achieve their full potential. By contrast, the mother's proposal will.
- (c) When I reflect on the principles underlying these objects that are set out in s 60B(2), I am also satisfied that the mother's proposal best achieves these objects.

251 Weighing up all of the considerations under s 60CC of the Act there are some factors that lead me to support the difficult decision to make orders that Y and Z live with the mother. The most persuasive reasons are that:

- (a) Both Y and Z would benefit from the greater stability and security that will be provided by the mother. I am confident that she is the parent best placed to manage X and Y's mental health as well as their school attendance.
- (b) The father has demonstrated no capacity to shield the children from these proceedings and the negative views he has of the mother. Leaving the children to live with their

father will most likely result in a continuation of their alignment and enmeshment with the father's views, a poor relationship with their mother, and be emotionally harmful for them. I am however more confident that the mother will better ensure that the children enjoy a meaningful relationship with each parent in the future. Y and Z will be given the opportunity to re-establish their relationships with the mother and the extended maternal family.

- (c) While Y's mental health is currently unstable and may decline in the short-term, the mother has engaged appropriately with Y's therapists and will continue to do so. I accept that the orders made might lead to a short-term decline in her mental health because it is contrary to her express wishes. This will be a destabilising and distressing event for her. I am satisfied that the mother is able to support Y's mental health needs during this transitional period. The children's mental health issues are likely to have been exacerbated by the nature of the father's relationship with each of them. Ultimately, and hopefully, there may be vast improvements in her mental health within the context of the stability provided by the mother's household.
- (d) In supporting the children through these changes, the mother will also have the support of her family and friends. However, I am satisfied that the mother will work closely with Y's medical treaters and will seek out professional assistance when necessary during the transition into her care.

Implementation of these changes

252 I will make an order that Y and Z live with the mother on a full-time basis.

253 In doing so, I have carefully considered the views of Y and X. They are of an age where the Court must place great weight on their expressed views. However, I also have to balance such views against the potential long-term psychological consequences for the children. I acknowledge that the orders proposed by the mother will result in "significant emotional distress" to the younger children in being separated from both their father and X in the short-term.

254 Interim orders were made by consent to provide some scaffolding to better support the children and the father through whatever changes I decided are in the children's best interests. In accordance with those orders, the parents have agreed to follow the treatment recommendations of the children's medical treaters.

255 On the advice of Dr S, orders were also made by consent that the parties obtain a referral for X to see Dr P, a child and adolescent psychiatrist who specialises in work with gender diverse children through UU Counselling.

256 Due to the complexity of the family dynamic and the vulnerabilities of the children, an order was made that the parties and children attend upon the Court Registry when judgment is to be handed down.

257 While I have no confidence that the explanation of the decision to the parties and children, nor the implementation of the Orders, will be without challenge, I am at least satisfied that the challenges ahead of the children and parties are assisted by a range of therapeutic supports.

258 While the Orders for now relieve X of the need to continue to play a parental role and have a protective responsibility for his siblings, I understand that he will be angered by this decision. However, Dr S was hopeful that if given the opportunity to spend time with his younger siblings, X has the potential to develop a different narrative with regard to the new family dynamic under the mother's care. I am hopeful that both parents can ensure that X continues to access therapeutic support.

259 The mother gave evidence that she would not necessarily seek to change Y's school again. She said that she will seek advice, work with her medical treaters and people close to Y, as well as monitor the practicality of Y remaining at T School, given its proximity to the father's home. Similarly, she was content for Z to remain at his current school, but conceded that a decision would need to be made about his secondary schooling before year 5. While the mother has been granted sole parental responsibility, it is expected that in the short-term she will work with the children's medical treaters to ensure that any changes to schools and medical treaters is done in a consultative manner and with consideration and caution.

Spend time with orders

260 I accept the submissions of the ICL and the mother, that there should be a period after the transition of Y and Z to the mother's care during which time the children should spend no time with the father at all. This is an appropriate order as it will allow the children and the mother to settle into their new care regime without distraction and without risking further negative involvement and influence of the father. Without such a moratorium, I consider that the children will not have the opportunity to settle emotionally into the care of the mother.

261 The mother seeks an order that Y and Z spend no time with the father for a six month period. The ICL proposed a period of four months.

262 I consider it appropriate for a moratorium period between the father and the children to be in place for four months (“the moratorium period”). This is based on the following reasons:

- (a) X is currently completing his HSC. He will have sat his last exam shortly before the conclusion of the moratorium period. Whilst the father is not restrained from making arrangements to see and spend time with the children through the mother, the moratorium period will allow the father to give his undivided support and attention to X.
- (b) The moratorium period will give the father time to restore his parenting capacity so that he is better placed to appropriately parent the children. At the hearing, the father was visibly tired. He said he had not had a break for many years. His financial circumstances were tenuous and he said that his business needed more of his attention to be viable. This break from parenting Y and Z will hopefully allow him to put his business back on track and make some hard decisions about whether he can retain the business and residential property in Suburb V. It is perhaps better that he is able to make these decisions and if necessary transition to new accommodation without Y and Z in his care.
- (c) There is no question that the father loves and cares deeply for his children. However, his inability to also concurrently manage his own mental health issues during these proceedings has undoubtedly had an impact on the way that he has exercised judgment and made decisions. He needs to stabilise his mental health in order to improve his parenting capacity and hopefully he can use the next four months to also focus on self-care.

263 Such orders imposing a moratorium on communication between the father and the children, even if to facilitate the children’s adjustment to changing their primary place of residence, will no doubt cause emotional distress to the children. It might be that the parties agree on a reduction in that moratorium period if they consider it appropriate at the time and in accordance with therapeutic advice. The Orders will make provision for this.

264 Another question to determine is whether the father should be permitted to communicate with Y and Z during this moratorium. Dr S was of the view that communication would be of assistance to maintain the children’s connection with the father. However, Dr S stressed that

the challenge for the father would be to modify how he communicated with the children, including avoiding questions enquiring about their welfare, during this period to avoid otherwise amplifying their distress.

265 I will permit the father to send the children letters, cards and gifts, but not more than on a fortnightly basis. I will make an order that the father is restrained from communicating directly with Y and Z (by electronic and telephonic mediums) during this four month period without the mother's prior written consent. This will allow the mother to make a considered decision that takes into account the children's views and the advice of the children's medical treaters.

266 During the moratorium period, the Father will not be permitted to attend or enter (unless with the mother's consent):

- (a) the mother's home;
- (b) the mother's parents' home;
- (c) the grounds of any school that Y or Z may attend from time to time; and
- (d) any after school activity or extracurricular activities that Y and Z may participate in from time to time.

267 It is likely that at some time during the moratorium period, Y will ignore the Orders made by running away and seeking out the father or trying to communicate with him directly. If this occurs, the father is required to notify the mother immediately and take whatever steps are required to terminate the communication and/or facilitate her return to the mother. I recommend that the mother and father seek advice about how to best manage this situation from Y's medical treaters.

268 While I appreciate that the father will be devastated by the prospect of having no time with Y and Z for four months, I urge him to act in the spirit of these Orders. The children need to see their parents as a united front moving forward, if that is possible. To this end, and before the parties leave the Court today, they will need to reach agreement on how the mother can collect school uniforms, books, technology, clothing and personal items belonging to Y and Z. This should take place within 12 hours of the Orders being made and with as little conflict as possible. The father should use his best endeavours to ensure that X is not present when the mother attends.

269 At the conclusion of the moratorium period, the father and children will recommence spending time together each Saturday until the end of the 2023 school year. From the commencement of the December/January school holiday period, Y and Z shall spend time two days each week with the father including overnight time. Following the commencement of the 2024 school year, Y and Z will spend time with the Father each alternate weekend from the conclusion of school on Friday until 5.00 pm on Sunday.

270 These spend time with orders reflect the conclusion that the children should spend time with their father but the mother is better placed to take responsibility for them on school days to ensure optimal school attendance.

271 I will also give the mother the liberty to show a copy of the Orders to the Principal of the schools attended at any time by the children so that they are aware of these restraints on the father. However, to be clear, the Orders will still expressly authorise the father to be able to communicate with the Principal of any school attended by either child so as to be provided with any information about the children that such school or facility are normally lawfully able to provide parents of children who attend that school or facility.

Family therapy

272 The father sought an order that the parties recommence family therapy. Family therapy is a process that requires the engagement of the entire family unit. This was one of the reasons that the process was unsuccessful when last attempted with Ms HH.

273 In view of the complex therapeutic processes taking place, I am not inclined to add another layer of therapeutic intervention on top. In time, the parties might reach agreement between themselves to engage in such a process. This is probably the best starting point for family therapy – a joint intent and a willingness on the part of all family members to engage with it. Accordingly, I will not make the order proposed.

Passports

274 After evidence had closed it came to my attention that an order was made on 10 August 2022 requiring the children's passports to be held in this court registry. The parties sought no orders about this issue but it is unnecessary for the children's passports to remain in the possession of the court. I have no concerns about either party being a "flight risk". Accordingly the passports are hereby released and they should be held in the following manner:

- (a) X's passport will be released to the father and held by him at all times until X turns 18 (other than for any period in which X is travelling internationally);
- (b) Y and Z's passports will be released to the mother and held by her at all times (other than for any period in which either child or children are travelling internationally).

The ICL's costs

275 The ICL has sought an order for costs. The parties have limited funds but have monies sitting in trust as the proceeds of sale of their matrimonial property.

276 An ICL is appointed because the Court has found it is in the best interests of the child or children the subject of the proceedings, that they be independently represented (pursuant to s 68L(2) of the Act).

277 Section 117(4)(b) of the Act confers the statutory power not to make a costs order under s 117(2) against a party if the Court considers that such party would suffer financial hardship.

278 The ICL has been brought into this litigation by court order and the ICL had undertaken substantial activities leading to the resolution of the parenting issues. In my view, it is appropriate to recognise that the costs and disbursements rendered by the ICL should be met in this case in the manner contemplated by s 117(3).

279 However, considering that the parties still have to reach agreement about the adjustment of interests in property, and are both limited in means, I will not make an order that they bear the full amount claimed. Instead, I will make an order for each party to make a contribution of \$2,500 towards the costs of the ICL to be paid within 21 days of orders being made about the adjustment of interests in property. This is done so on the basis that these funds (\$5,000 in total) can be released from the monies held in trust.

280 I make an order for the discharge of the ICL at the expiration of six months and publicly place on the record my thanks for the assistance provided by the ICL to both the Court and the family.

CONCLUSIONS

281 There is no doubt that the father has spent the children's whole lives devoted to them and that the children adore him. These Orders are not made with the intention of eliminating him from the children's lives. They share a strong connection and bond with him that will no doubt continue in the long-term.

282 Dr S anticipated that the father would be highly distressed by the outcome of these proceedings, and this is a risk for the children because their father's wellbeing is of ongoing importance to the children's mental health and evolving sense of identity. Dr S, in the course of his cross-examination, recommended some steps the father should take to both deal with his response to these Orders and to continue the care of X. They bear documenting. Dr S recommended for the father:

- (a) To maintain his current medication.
- (b) To discontinue the medication that impacts on his disorganisation.
- (c) To continue seeing his current psychologist, Mr D, and psychiatrist, Dr E. I will make an Order for these reasons for judgment to be released to all medical treaters of the family for this purpose.
- (d) In the event of a mental health crisis, to seek assistance from community mental health services, including at the AA Hospital.
- (e) To remind himself to remain mentally afloat as this is of ongoing importance to the children's mental health and evolving identity.

283 During communication with Y and Z, the father should acknowledge to them that:

- (a) he loves and supports them;
- (b) he will be there in the future;
- (c) he knows that they will be adequately cared for by the mother; and
- (d) he should avoid communicating with the children about their welfare.

284 For now, the Orders provide the parties and the children with space from litigation and conflict to recover.

285 Decisions such as this one, though sometimes clearly needing to be made, are never easy. It is hoped that the children can have the childhood that they deserve, and that the mother can quickly arrive at a point where the children will be able to continue their relationship with her in an emotionally safe and secure way without further emotional and psychological harm being done to them.

I certify that the preceding two hundred and eighty-five (285) numbered paragraphs are a true copy

of the Reasons for Judgment of
Judge Beckhouse.

Associate:

Dated: 11 July 2023