FEDERAL CIRCUIT COURT OF AUSTRALIA

LORTON & LORTON *[2021] FCCA 42*

Catchwords:
FAMILY LAW – Parenting – interim parenting – where Applicant seeks that the child live with her and spend alternate weekends with Respondent – where Respondent seeks equal time on a week about basis – where Respondent asserts risk to child based on Applicant's mental health issues – where Court finds that such risk could exist without treatment – where Court finds that such risk can be mitigated by appropriate orders – where orders made for equal time.

FAMILY LAW – Property – spousal maintenance – where Applicant demonstrates a need – where Respondent demonstrates an inability to pay – where no orders made for interim spousal maintenance.

FAMILY LAW – Property – interim property orders – where Applicant seeks sole occupation of former matrimonial home – where Applicant seeks Respondent pay all outgoings and mortgage for former matrimonial home – where Respondent opposes both orders – where no orders made for sole occupation of former matrimonial home by Applicant – where no orders made in relation to the payment of outgoings and mortgage by the Respondent.

Legislation:
Family Law Act 1975 (Cth), ss.60B, 60CC, 61DA, 65D, 65DAA, 72, 74, 75.

Cases cited:
In the Marriage of Redman (1987) 11 Fam LR 411
M & M (1988) FLC 91-973
In the Marriage of Bevan (1993) 120 FLR 283
A & A & The Child Representative (1998) 22 FamLR 756
Napier & Hepburn (2006) FLC 93-303
Goode & Goode (2006) FLC 93-286
Johnson & Page (2007) FLC 93-344
Maroney & Maroney [2009] FamCAFC 45
Marvel & Marvel (2010) 240 FLR 367
SS & AH [2010] FamCAFC 13
MRR & GR [2010] HCA 240
Deiter & Deiter [2011] FamCAFC 82
Eaby & Speelman [2015] FamCAFC 104
Grella & Jamieson [2017] FamCAFC 21

Applicant:	MS LORTON
Respondent:	MR LORTON
File Number:	SYC 7623 of 2019
Judgment of:	Judge Morley
Hearing date:	16 July 2020
Date of Last Submission:	7 August 2020
Delivered at:	Sydney
Delivered on:	10 February 2021

REPRESENTATION

Solicitors for the Applicant:	Ms Winning of Barkus Doolan
Counsel for the Respondent:	Ms Coulton
Solicitors for the Respondent:	I & J Law

ORDERS

PENDING FURTHER ORDER, THE COURT ORDERS THAT:

(1) That the parties have equal shared parental responsibility for their child X born 2012 ("X").

(2) That X live with his parents on a week about basis throughout the year except for the Christmas school holidays, with changeovers occurring at the start of school (or 8:00AM if not a school day) on Mondays.

(3) That during the Christmas school holidays at the end of Term 4:

a) X live with his Father for the first half of those holidays that commence in an even numbered year and the second half of those holidays that commence in an odd numbered year; and

b) X live with his Mother for the first half of those holidays that commence in an odd numbered year and the second half of those holidays that commence in an even numbered year.

(4) That notwithstanding any other order X shall live with his Mother from 3:00PM on 25 December until 6:00PM on 26 December in even numbered years and X shall live with his Father from 3:00PM on 25 December until 6:00PM on 26 December in odd numbered years.

(5) That during any period of time that the Father is unable to himself care for X due to being required to be outside the Commonwealth of Australia for business then order 2 shall be suspended and X shall live with his Mother and then the regime under order 2 shall resume upon the Father's return as if it had not been suspended.

(6) That any changeovers that do not occur at X's school shall occur at the "Location A" referred to in the Father's Amended Response.

(7) That the Wife has exclusive occupation as between herself and the Husband of the real property at B Street, Suburb C NSW.

(8) That all outstanding interim applications are dismissed.

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

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYC 7623 of 2019

MS LORTON
Applicant

And

MR LORTON
Respondent

REASONS FOR JUDGMENT

Introduction

2. These are Reasons for Judgment in relation to interim parenting and financial proceedings between the Applicant mother, Ms Lorton, ('the Applicant') and the Respondent father, Mr Lorton, ('the Respondent').

3. The interim parenting proceedings concern the parties' only child, X born 2012.

4. The interim financial proceedings include proceedings for interim property orders, child support orders (subject to whether or not leave is granted by this Court), interim spousal maintenance orders, and an Application for interim exclusive occupation of the former matrimonial home.

5. An interim hearing in relation to these Applications took place on 16 July and 7 August 2020. The Applicant was represented by Ms Winning, solicitor advocate, and the Respondent was represented by Ms Coulton of Counsel.

Material relied upon at interim hearing

6. The Applicant relied upon the following material:

   a) Case Outline document with an attached minute of order sought, prepared by Ms Winning;

   b) Her Amended Initiating Application filed 17 April 2020;

   c) Her affidavit sworn and filed 19 June 2020 ('the June affidavit')

   d) Her affidavit sworn and filed 15 July 2020 ('the July affidavit');

   e) Her Amended Financial Statement sworn and filed 5 June 2020;

   f) The affidavit of Ms D, clinical psychologist, affirmed 14 February 2020 and filed 13 May 2020;

   g) The affidavit of Dr E, psychiatrist, sworn 26 May 2020 and filed 27 May 2020;

   h) Written submissions for the Applicant filed 24 July 2020; and

   i) Written submissions in reply for the Applicant filed 5 August 2020.

7. In addition, the Applicant relied upon a tender bundle of documents and X's term 2, 2020 school report from F School, Sydney.

8. The Respondent relied upon the following material:

   a) Case outline document prepared by Ms Coulton of Counsel;

   b) His Amended Response filed 13 July 2020;

   c) Paragraphs of his affidavit sworn or affirmed and filed 14 July 2020, being paragraphs 1 to 83, 86 to 99, 102 to 107, 112 to 114, 117 and 118, 120 to 122, 128 to 159, 165, 170 to 172, 184 and 185, 192, 195 to 198, 203 to 206, 229 and 230, 234, 239 to 242, 244 and 245, and 251 to 253.

   d) His Financial Statement sworn or affirmed and filed 13 July 2020; and

e) Written submissions for the Respondent filed 3 August 2020.

9. In addition, the Respondent relied upon a tender bundle containing the documents produced on subpoenas for production by Dr G, Dr H, Dr E, and Ms D.

The competing proposals of the parties

10. The Applicant sought the orders as set out in the minute of order attached to her Case Outline, summarised as follows:

a) That the Respondent pay to the Applicant a sum of $300 per week by way of spousal maintenance.

b) That the Respondent make all payments when they fall due of the payments required on the loan accounts secured by way of mortgage on the former matrimonial home at unit B Street, Suburb C, NSW ('the Suburb C property'), council and water rates and strata levies relating to the Suburb C property and insurances relating to the Suburb C property.

c) That X live with the Applicant.

d) That X spend time with the Respondent during school term each alternate weekend from end of school or 3:00PM on Friday until the start of school or 9:00AM on Monday.

e) That X spend time with the Respondent for half of the school holidays at the end of terms 1, 2 and 3 as agreed between the parties, and if not agreed, for the first half of holidays in even years and for the second half of holidays in odd years, and for half of the school holidays at the end of term 4 as agreed between the parents, and if not agreed, on a week about basis.

f) That if the Respondent is not available to spend his time with X, he is to notify the Applicant in writing no less than 14 days in advance.

g) That the Applicant have exclusive occupation of the Suburb C property.

h) That her costs of the interim hearing be paid by the Respondent.

11. The Respondent sought orders as set out in his Amended Response filed 13 July 2020 being orders (1), (2), (4), (5), (6), and (27) of the interim orders set out in that document and an additional order in relation to school holidays, those orders summarised as follows:

    a) That the Applicant's Application for interim spousal maintenance order, payments of outgoings in relation to the Suburb C property by the Respondent, and for exclusive occupation of the Suburb C property be dismissed.

    b) That the parents share care of X during school term time on a shared care basis, week about from 8:00AM on Monday until 8:00AM the following Monday.

    c) That each parent has a 'first option to care' for X if the other parent is 'away', with that other parent to thereafter have 'compensatory time'.

    d) That X spend half of each school holiday with each parent, being the first half of each school holiday period with the Respondent and the second half of each school holiday period with the Applicant.

    e) That changeovers that do not occur at X's school occur at Location A.

The evidence

12. Both at the time of the interim hearing and again immediately before preparation of these Reasons, I read and carefully considered the whole of the materials relied upon by each of the parties.

13. At the time of the interim hearing, the Applicant was 40 years of age and the Respondent was 39 years of age.

14. The Applicant asserts that the parties commenced cohabitation in 2002, whereas the Respondent asserts that the parties met in 2002 and commenced cohabitation in mid-2004. The parties married in 2005.

15. The parties agree that they separated in April 2019 under the same roof, that in about June 2019 they began a 'nesting' regime where each would spend time with X in the Suburb C property whilst the other

parent lived elsewhere for varying periods of time. According to the Respondent, the parties spent roughly equal time with X, and according to the Applicant, X spent the greater part of the time with her, due to the Respondent's overseas travel on business.

16. X was born 2012. At around the time of his birth, the Applicant gave up fulltime work for a period of two years and she asserts that she was X's primary carer and the primary homemaker for that period of time. The Respondent asserts that the parties were equal carers for X from the time of his birth.

17. Following X's birth, the Applicant suffered from postnatal depression. Both parties give extensive evidence in relation to the Applicant's mental health issues in relation to which further detail is set out hereunder.

18. The Applicant asserts that from the time of X's birth, she received a great deal of assistance from her mother (the maternal grandmother), Ms I. The Respondent concedes that the parties were assisted in caring for X by the maternal grandmother, and also asserts that a great deal of assistance was provided to the parties in caring for X by his aunt, Ms J Lorton, his mother (the paternal grandmother), and his sister, Ms S.

19. During the parties' relationship and continuing after the birth of X, the Respondent travelled overseas for work, increasingly so after X had turned one year of age. In paragraph 30 of the Applicant's June affidavit, she sets out a table of the time spent travelling overseas by the Respondent from 2013 to 2019, being a summary of detail drawn from "*movement details*" material produced on subpoena by the Department of Home Affairs

20. She asserts that the Respondent spent the following total time overseas during the relevant periods:

    a) 2013 – 18 days;

    b) 2014 – 47 days;

    c) 2015 – 75 days;

    d) 2016 – 87 days;

e) 2017 – 95 days;

f) 2018 – 89 days; and

g) 2019 – 117 days.

21. In paragraphs 46, and 48 of his affidavit, the Respondent asserts that that the tally of his days travelling overseas is:

a) 2012 – 1 day;

b) 2013 – 17 days;

c) 2014 – 48 days;

d) 2015 – 76 days;

e) 2016 – 71 days; and

f) 2017 – 86 days.

22. On these occasions, X was left in the care of the Applicant, though the Respondent asserts in his evidence that he always ensured on these occasions that either the maternal grandmother or his aunty Ms J Lorton were in the Sydney area to assist the Applicant with the care of X due to his concern in relation to the Applicant's mental health issues.

23. The Applicant asserts that she returned to work on a part-time basis as a sales professional with Employer K in early 2015. The Respondent asserts that she returned to work in "*November 2015*".

24. The parties' 'nesting' arrangement ended in January 2020 when the Applicant notified the Respondent while he was away on an overseas trip that she was assuming sole occupation of the Suburb C property, that he should find alternate accommodation upon his return, and that the locks to the Suburb C property had been changed. Since that time, the Applicant has been in sole occupation of the Suburb C property as between the parties and the Respondent has occupied alternate accommodation.

25. In April 2020, the Respondent entered into a six-month lease on a two room fully furnished un-serviced apartment at a rental of $900 per

week inclusive of utilities costs, at which X has his own bedroom and bathroom. The property is located about 500 metres from X's school.

26. The Respondent will not be taking any overseas business trips until, at the earliest, the second half of 2021 as all overseas business occasions in the first half of 2021 have been cancelled already due to the worldwide SARS-CoV-2/COVID-19 pandemic.

27. While the parties were pursuing their 'nesting' arrangement for X's care at the Suburb C property, the Applicant resided with the maternal grandmother during the periods of time when the Respondent was at the Suburb C property with X. The Applicant acknowledges that she has continued to receive assistance, both practical and financial, from her mother post the parties' separation.

28. The Applicant asserts that she cared for X alone from 18 December 2019 until 21 January 2020, with the exception of the period from 2 until 5 January 2020, the Respondent asserting that the Applicant had the assistance of her mother during this time.

29. At the onset of the SARS-CoV-2/COVID-19 pandemic in Australia, the Applicant was stood down from her employment with Employer K in April 2020 and was in receipt of the Job Keeper allowance until she resumed that employment in June 2020, still on a part-time basis.

30. The Respondent has not undertaken any overseas travel following the onset of the SARS-CoV-2/COVID-19 pandemic in March 2020.

31. The Respondent presents the matter as a risk case based upon his assertion that there is an unacceptable risk to X of being neglected in the Applicant's care due to her mental health issue, unless the parties share care of X on a week about basis, enabling the Respondent to monitor the Applicant's mental health situation on a regular basis.

32. The central submission behind his case on that basis is specious, being at first glance plausible, but on a small amount of consideration, plainly wrong. I will expand on this finding later in these Reasons.

The Applicant's mental health issues

33. The Respondent gives a great deal of evidence in his affidavit in relation to the Applicant's mental health issues and his tender bundle contains detail from the Applicant's medical records produced on subpoena by her previous treating psychiatrist, her current treating psychiatrist, and her current treating clinical psychologist.

34. In the Applicant's evidence, she also gives considerable detail in relation to her mental health issue. Concerningly, she asserts that she has since her teenage years suffered from anxiety and depression due to child abuse she suffered in her youth and asserts that:

> *I was initially diagnosed with bipolar disorder. This diagnosis was later changed to post-traumatic stress disorder.*

35. I use the word 'concerningly', as all of the Applicant's medical records placed in evidence indicate that the Applicant was diagnosed as suffering from bipolar disorder type 1 when she was in her mid-teenage years, that this diagnosis has never been contradicted, and there is certainly no evidence that the diagnosis was "*changed to post-traumatic stress disorder*".

36. Rather, the medical evidence in the affidavit of Dr E, filed by the Applicant herself, indicates that the Applicant has consistent diagnosis for bipolar disorder type 1 and "*likely*" suffers from a post-traumatic stress disorder due to childhood abuse.

37. The Respondent details various episodes of manic condition affecting the Applicant over the years, incidents he relates to her mental health issues, and seven occasions when the Applicant was hospitalised as an inpatient in relation to mental health issues. However, the last occasion ended on 22 December 2014, and most of the material set out in the Respondent's evidence relates to matters concerning the Applicant's mental health issues between 2004 and 2013.

38. The Applicant asserts that she had admissions to Hospital L at Suburb M on two occasions and to Hospital N on several occasions (her treating psychiatrist, Dr E is a consultant at Hospital N), but none since May 2013.

39. The Applicant has consulted with Dr E since 2012 and sees him once per month, and consults once each week with Ms D, clinical psychologist, with whom she has been consulting since 2014.

40. Except for one occasion in mid-2020, the Applicant's medical records from both Dr E and from Ms D indicate that she maintains her regular regime of consultation, though the medical notes of both Dr E and Ms D indicate that there have been occasions during 2020 (April, July, and August) when they have noted the Applicant's presentation as "*somewhat hypomanic*", "*hypermania*", and "*still a bit up*".

41. It is on this basis that the Respondent asserts that the Applicant represents an unacceptable risk to X "*as a result of her ongoing mental health condition*", allayed to some extent by the assistance she receives from her mother.[1]

42. For the Respondent's part, in December 2017 he obtained a mental health plan from his general practitioner for treatment of "*increased anxiety*" and "*generalised anxiety disorder*" and he has had consultations with Ms O, psychologist, since September 2018.

43. Ms D gives evidence in her affidavit of having been the Applicant's treater as clinical psychologist since 7 April 2014. She provides a report dated 6 February 2020 in which she indicates awareness of the Applicant's diagnosis with a bipolar disorder as a teenager, her suffering postnatal depression after the birth of X, and her being subject to anxiety and panic attacks and post-traumatic stress disorder due to childhood sexual abuse. She asserts that since the Applicant has been under her treatment, she has shown "*serious improvement*" and that her "*prognosis is very good*". She says:

> *Ms Lorton has demonstrated a firm and unwavering commitment to improving her mental health by attending ongoing sessions with me. There is no end date to the therapy.*

44. She opines that:

> *Ms Lorton's current mental state is stable, despite being stressed and anxious about the current separation and difficulties with Mr*

[1] Respondent's written submissions page 15 bullet point 4.

Lorton. In my opinion, there are no limitations to her capacity as a parent to care for X.

45. In Dr E's affidavit, he notes that he took over care of the Applicant as her treating psychiatrist on 10 July 2009 on the retirement of her previous psychiatrist and that she had a history of bipolar 1 disorder, first diagnosed in her late teens. He says, in paragraph 2.2:

> *I confirmed Ms Lorton's diagnosis of bipolar 1 disorder. It was also likely that she had been suffering from post-traumatic stress disorder in the context of childhood abuse.*

46. This contradicts the Applicant's assertion in relation to her diagnosis of bipolar being overruled and changed to a diagnosis of post-traumatic stress disorder. He details the Applicant's medication as at the time of his report in February 2020, being a mood stabiliser, an antidepressant, a sedative (taken as needed) and a sleep agent (also taken as needed). It was Dr E who referred the Applicant to Ms D. At the end of his report letter annexed to the affidavit, he says:

> *At the time of our most recent consultation, Ms Lorton stated that she felt she was a totally capable parent and was prepared to remain X's primary parent. I agree with this assessment.*

47. He describes the Applicant's mood as "*good and even*".

X with a psychologist

48. At the Applicant's instigation and with the cooperation and participation of both parents, X has had two consultations with Dr P, a clinical psychologist. Dr P is properly titled as she holds a doctorate of clinical psychology.

49. The Respondent provides a copy of a letter dated 25 May 2020 prepared by Dr P setting out her advice as to caution in the use and interpretation to documents produced on subpoena by her, cautioning that:

> *The clinical notes of a clinical psychologist, particularly one specialising in child and family psychology, require particular interpretation based on developmental knowledge of children.*

50. She then goes on to:

…convey my initial impressions after working briefly with X and his parents as a way of further helping the Court to better understand X's emotional understanding of his experiences.

51. She indicates that she began working with the family on 27 November 2019 and met with both parents prior to meeting with X on two separate occasions. I quote the following from her report:

X expressed that he loved both of his parents and wanted to spend time with both of them. Observations of X with each of his parents indicated that he shared a warm, secure attachment with each of them. In a brief part of his session where his mother was present X appeared connected and accepted her support when we were exploring his feelings about his parents' separation. X's mother's statements to him were indicative of her support of him being truthful in his time with me about how he was feeling and what it was that he needed from both her and his father with respect to emotionally supporting him and meeting his needs. Similar observations were noted when X's father attended his session. X appeared to enjoy being re-united with his father after our time together, smiling at him warmly and eagerly showing him the pictures he had drawn in the session. My clinical observations when they were together reflected a warmth and easiness between them that was experienced as being genuine.

…

Given he is a highly sensitive and thoughtful child he is likely to want to please the parent he is with and consequently could subjugate his own feelings and needs, which would be highly detrimental to his continued healthy emotional development.

When communicating with both of X's parents, I consistently stressed the importance in them being able to effectively co-parent X. He is a child who needs to know that there is a parenting plan in place so that he can emotionally understand what his week and weekends look like.

…

In summary, X was thoughtful and brave in his narratives as he communicated his feelings about his family's situation, particularly his sadness about when plans with his parents "go wrong". It is my strong view that X appears to find new situations and uncertainty particularly difficult to emotionally tolerate and that any long-standing uncertainty with respect to his family life

is highly likely to have an adverse impact on his overall psychological well-being.

Evidence in relation to the financial issues

52. The Applicant's mother has provided financial support to the Applicant over the years including, since about 2015, depositing money to the Applicant's account and providing her with sums of money in cash. At the time of the interim hearing the maternal mother was depositing a sum of $500 per fortnight into the Applicant's account for the Applicant's use and support.

53. As stated previously, the Applicant took up part-time employment as a sales professional with Employer K about two years after X's birth, was stood down from that employment in April 2020 due to the SARS-CoV-2/COVID-19 pandemic, and resumed that employment in June 2020, receiving a combination of wages and JobKeeper top-up so as to give her a gross pay of $1500 per fortnight, a net pay of $1287.60 per fortnight or $643.80 per week.

54. The Applicant provided that updated income evidence in her July affidavit, including a copy of her then most recent pay advice notice from Employer K, but she did not update the information in her Amended Financial Statement of 5 June 2020, completed by her before she resumed her employment with Employer K. I will assume for this matter that she is still in receipt of the $85 per week family tax benefit amount deposed to in her Amended Financial Statement.

55. The Applicant asserts that the Respondent pays $1300 per month by way of assessed child support through the Child Support Agency, being exactly $300 per week, whilst the Respondent asserts that he pays $1319.33 per month as assessed child support since October 2019, being $304.46 per week.

56. The Applicant arranged and received a hardship moratorium on payments of principal and interest on the ANZ Bank loan account secured by way of mortgage on the Suburb C property from February to July 2020. I do not have evidence of what has happened since July 2020, whether the moratorium was extended or what arrangements had been made for payment since that time, if any.

57. Post-separation, the Respondent continued to make payments on the ANZ loan account secured by way of mortgage on the Suburb C property until 14 February 2020 when he ceased making those payments in consequence, he asserts, of having to arrange his own permanent accommodation. He continued paying the utility accounts, rates, strata levies and insurance on the Suburb C property until about May 2020 when he also ceased contributing with those payments.

58. In the Applicant's Financial Statement she asserts that her expenses are $1230 per week, being $900 for herself and $330 for X. She details in annexure "A" to her Amended Financial Statement how payments are made of those various expenses as between herself, the maternal grandmother and the Respondent.

59. At $330 per week, X's monthly expenses would be $1430, some $130 in excess of the child support paid by the Respondent.

60. Accordingly, after deducting from the expenses that the Applicant asserts she incurs for X the amount paid by the Respondent as child support a sum of $30 per week remains, which, unless the Applicant is assisted otherwise by the Respondent or the maternal grandmother, must be met by the Applicant.

61. The Respondent asserts a yearly income of $215,000 plus superannuation plus use of a motor vehicle. He asserts that his weekly gross income is $4132 from his employment to a sub-company of Company Q plus $191 from a sole trader business he conducts, being $4323 per week.

62. He asserts that his expenses are $4871 per week.

63. The Applicant has savings of $300 whilst the Respondent has savings of $18,748, though there is strong implication in his evidence that this sum is a savings toward payment of X's yearly school fees for 2021 which will be in a sum of about $25,000. The whole of X's school fees and almost all of the cost of his extracurricular activities are paid by the Respondent.

64. The Applicant seeks sole occupation of the Suburb C property. That application seems to be opposed by the Respondent only on the basis that he asserts that the Applicant will not be able to retain the Suburb C

property in a final settlement and that it should be sold in the short term as neither party can afford the outgoings relating to servicing the loan account secured by way of mortgage on the property, occupation and ownership.

65. The Applicant's Amended Initiating Application indicates that she seeks a final property settlement order whereby she retains the Suburb C property and refinances the loan account over the property with ANZ Bank so as to relieve the Respondent from all liability thereunder, with an unspecified:

> *Cash payment from the Respondent to the Applicant so as to result in a just and equitable division of the net pool of assets available for distribution between the parties including superannuation entitlements, to be calculated following receipt of full and frank financial disclosure from the Respondent.*

66. The Applicant does not indicate in her evidence how she asserts she has reasonable prospect of refinancing the current loan account secured on the Suburb C property in a sum of $650,274 or how she could sustain repayments on that sum together with all the other outgoings relating to the Suburb C property if her application were granted.

67. If the orders sought by the Applicant in relation to property settlement were granted, using the values contained in her Amended Financial Statement, and each party retained his and her own superannuation, the Applicant would have 66.8 per cent of the matrimonial asset pool constituted by the Suburb C property and the parties' superannuation's and the Respondent would have 33.2 per cent thereof. If the Applicant were asserting that the further order should be made by her requiring the Respondent to pay to her a sum of money so as to achieve a "*just and equitable division net pool of assets*" the question arises as to where the Respondent would obtain that sum of money, the only asset remaining in his hands being his superannuation entitlements.

68. Further analysis of the financial position of the parties will be made later in these Reasons when considering the Applicant's claim for interim spousal maintenance and for the Respondent to pay the outgoings relating to the Suburb C property by way of either further spousal maintenance or interim property orders for preservation of property assets.

The law – interim parenting proceedings

69. In parenting proceedings under the *Family Law Act 1975* (Cth) ('the Act'), the Court is required to follow the legislative pathway set down in the Act. That applies to interim hearings on parenting issues.[2]

70. The Court must give attention to section 60B of the Act that sets out the objects of Part IV of the Act relating to children. Those objects inform the making of parenting orders.[3] That section also contains the principles behind those objects. In this matter I have considered those objects and the principles behind those objects.

71. Section 60CA of the Act provides that in deciding whether to make a particular parenting order in relation to a child the Court must regard the best interests of the child as the paramount consideration. The child's interests are not the only consideration. Parents and other persons, especially partners and extended families, are almost always relevant in the matter, but the child's interests must always be the paramount consideration.

72. In parenting proceedings, pursuant to section 65D of the Act, the Court may, subject to the presumption of equal shared parental responsibility in section 61DA and consideration of parenting plans under section 65DAB, make such parenting order as it thinks proper.[4] The Court may make a parenting order that discharges, varies, suspends, or revives some or all of an earlier parenting order.[5]

73. In determining what is in a child's best interest, the Court must consider the matters set out as the primary considerations and additional considerations in section 60CC and make findings. [6]

74. Section 61DA provides that when making a parenting order in relation to a child the Court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.[7]

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[2] *MRR & GR* [2010] HCA 240; *Goode & Goode* (2006) FLC 93-286; *Marvel & Marvel* (2010) 240 FLR 367.
[3] *Family Law Act 1975* (Cth) s 60B.
[4] *Family Law Act 1975* (Cth) s 65D(1).
[5] *Family Law Act 1975* (Cth) s 65D(2).
[6] *Family Law Act 1975* (Cth) s 60CC.
[7] *Family Law Act 1975* (Cth) s 61DA.

75. The presumption does not apply in circumstances where a parent has perpetrated family violence or abuse. The presumption, when applying, may be rebutted by evidence that satisfies the Court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.[8]

76. When the Court is considering parenting matters on the interim basis the presumption applies unless the Court considers it would not be appropriate in the circumstances for the presumption to be applied when making interim orders.

77. If a parenting order provides that a child's parents are to have equal shared parental responsibility for the child, then pursuant to section 65DAA, the Court must consider:

    a) Whether the child spending equal time with each parent would be in the best interest of the child;[9] and

    b) Whether the child spending equal time with each of the parents is reasonably practicable.[10]

    If both questions are answered 'yes', the Court must consider making an order to provide for the child to spend equal time with each of the parents.[11]

78. If the Court does not make an order for the child to spend equal time with each of the parents, then the Court must consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child and consider whether the child spending substantial and significant time with each of the parents is reasonably practicable and, if the answer to both is yes, the Court is to consider making an order to provide for the child to spend substantial and significant time with each of the parents.

79. What is meant by substantial and significant time is set out in section 65DAA(3) of the Act and includes days that fall on weekends and holidays, days that do not fall on weekends or holidays, the child being

[8] *Family Law Act 1975* (Cth) s 60B.
[9] *Family Law Act 1975* (Cth) s 65DAA(1)(a).
[10] *Family Law Act 1975* (Cth) s 65DAA(1)(b).
[11] *Family Law Act 1975* (Cth) s 65DAA(1)(c).

able to be involved in occasions and events special to the parents, the parents being able to be involved in occasions and events of particular significance to the child, and the parents being able to be included in the child's daily routine.

80. If the Court does not make an order for the child to spend substantial and significant time with each of the child's parents, the Court must then go on to determine what parenting orders are proper in the best interests of the child, per section 65D.

81. As to what is 'proper' and how the Court's discretion is to be exercised I note the comments of the Full Court of the Family Court of Australia in the recent decision of *Grella & Jamieson*:[12]

> *A discretionary judgment concerning the parenting orders necessarily involves, because of the focus upon the future, significant elements of value judgments; assumptions; necessarily uncertain predictions and intuition.*[13]

82. There is much jurisprudence on the issue of risk in parenting proceedings. The jurisprudence may be simplified by saying that the task of the Court where risks are asserted is not necessarily to make a finding as to whether the actions and events asserted have actually happened or have definitely not happened, as such a finding is rarely open to the Court on the evidence and most particularly in interim parenting proceedings replete with contested evidence.

83. Rather, the task of the Court is to assess whether the evidence establishes that there is a risk to the best interests of the child. If the evidence establishes that there is such a risk, briefly expressed, the Court must:

a) Assess whether that risk is an acceptable risk or an unacceptable risk;

b) If it is assessed that it is an unacceptable risk, assess whether or not the risk can be mitigated by appropriate orders; and

c) Decide what orders are proper in all the circumstances in the best interests of the child.

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[12] *Grella & Jamieson* [2017] FamCAFC 21.
[13] *Grella & Jamieson* [2017] FamCAFC 21, [18].

84. Detailed exposition of the treatment of risk in parenting matters can be found in the decision of the High Court in *M & M*[14] and the decisions of the Full Court of the Family Court of Australia in *A & A & The Child Representative,*[15] *Napier & Hepburn,*[16] *Johnson & Page,*[17] *Deiter & Deiter,*[18] and *Eaby & Speelman.*[19]

85. Where there is contested evidence in an interim hearing the Court is not always able to make a finding, but must do what can be done on the basis of agreed facts and any contested evidence where there is sufficient corroboration on one side to enable a finding. This is to enable the Court to perform its function, and resolve any interim issues with the best interests of the child as the paramount consideration, and make whatever orders are then considered proper.

86. In *SS & AH*,[20] in the context of discussing the obligations of the Court whilst conducting interim children's proceedings where the evidence available was contradictory in nature but nonetheless raised significant welfare concerns for the children concerned, the Court observed:

> *… Apart from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims and the likely impact on children in the event that a controversial assertion is acted upon or rejected. It is not always feasible when dealing with the immediate welfare of children simply to ignore an assertion because its accuracy has been put in issue.*[21]

87. As noted by the Full Court of the Family Court of Australia in Eaby & Speelman,[22] this approach "*enables the Court to appropriately and carefully deal with contentious issues relevant to the welfare of the child, and for those issues to not be ignored*."[23]

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[14] *M & M* (1988) FLC 91-973.
[15] *A & A & The Child Representative* (1998) 22 FamLR 756, [3.23] to [3.25].
[16] *Napier & Hepburn* (2006) FLC 93-303.
[17] *Johnson & Page* (2007) FLC 93-344.
[18] *Deiter & Deiter* [2011] FamCAFC 82, [61].
[19] *Eaby & Speelman* [2015] FamCAFC 104 (Thackray, Ryan, and Forrest JJ).
[20] *SS & AH* [2010] FamCAFC 13 (Boland, Thackray, and O'Ryan JJ).
[21] *SS & AH* [2010] FamCAFC 13, [100].
[22] *Eaby & Speelman* [2015] FamCAFC 104.
[23] *Eaby & Speelman* [2015] FamCAFC 104, [19].

Section 60CC – the primary considerations

88. The primary considerations are the benefit to X of having a meaningful relationship with both of his parents and any need to protect X from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. Subsection (2A) mandates that in applying the considerations, the Court is to give greater weight to the consideration of any need to protect X over the benefit to X of having a meaningful relationship with both of his parents.

89. It is implicit in the evidence of both parties that each accepts that it is of benefit to X to have a meaningful relationship with the other parent.

90. The Respondent asserts through his Counsel's submissions that the Court should have concerns about the Applicant's capacity to facilitate a meaningful relationship between X and his Respondent "*given her unnecessary conduct since 17 January 2020*." I find that the evidence does not bear out that submission.

91. The Respondent further submits that:

> *There is medical evidence that the child would suffer neglect as a consequence of the mental health issues of the Applicant from time to time if the Applicant does not or did not have assistance to care for the child.*

92. He refers to what he terms "*erratic or irrational behaviour*" and asserts that:

> *The Applicant suffers from mental health issues and through no fault on her part is unable to properly provide for the child's emotional and physical wellbeing if the Court accedes to the parenting orders sought by her.*

and that:

> *The proposal by the Respondent for week on week about care of the child by the parties would best protect the child and allow a meaningful relationship with both parents. It would allow the Respondent to monitor the situation to ensure that the child and indeed the Applicant are safe.*

93. This is what I referred to earlier in these Reasons as the specious argument put by the Respondent in relation to the unacceptable risk to

X if in the care of the Applicant pursuant to the orders she seeks – that is, for 11 continuous nights per fortnight rather than for the seven continuous nights per fortnight proposed by the Respondent.

94. Any situation arising so as to present an unacceptable risk to X in the Applicant's care consequent upon her mental health issues slipping out of appropriate management and the Applicant entering a period of mania or depression and anxiety can occur on the first, the third or the seventh day of the week by week regime proposed by the Respondent just as easily as on the first, third, seventh or 11th days of the period proposed by the Applicant.

95. The Applicant deposes, and there is no evidence to the contrary, that except for a small lapse in mid-2020 she maintains a weekly consultation with her clinical psychologist and a monthly consultation with her treating psychiatrist.

96. Having said that about the submission of the Respondent – that a continuous seven days in the Applicant's care does not present a risk whereas a continuous 11 days in the Applicant's care does present an unacceptable risk – I do find that the Applicant's mental health issues present a risk to X at all times in the event that they slip out of management for any reason.

97. I find that such an unacceptable risk *can* be mitigated and appropriately addressed by orders that provide that the Applicant must maintain her regime of weekly consultations with her clinical psychologist and monthly consultations with her psychiatrist, and in orders enabling either of those health professionals to provide notification to the Respondent in the event that they consider that the Applicant's mental health circumstance had deteriorated to the extent that it raises concern in relation to her day to day care of X.

98. On the basis of those findings, I do not find that the Applicant's mental health issues should influence the determination as to what orders are properly to be made with X's interests as the paramount consideration for the sharing of his care between his parents, whether that is to be living with his Mother and spending alternate weekends and half school holidays with his Father, or his care being shared equally

between his parents on a week about basis during school term and half school holidays each.

99. As the need to protect X from any risk represented by his Applicant's mental health circumstance can, as I have found, be mitigated and addressed by appropriate orders, I find that it is on all of the evidence self-evident that it is very much in X's best interest to have a meaningful relationship with both of his parents.

100. Whether his meaningful relationship with his Father can be maintained and continue to develop to an adequate degree under the spend time with orders proposed by the Applicant is doubtful given the very even nature of X's relationship with each of his parents and his desire to please them both, spend time with them both, and have the love of both parents as reflected in the comments found in the report by Dr P that I have quoted above. I will take that issue up again in my consideration of the appropriate care regime hereunder.

Section 60CC – the additional considerations

101. The Respondent submits that X has "*expressed a clear intention to reside with both parents on an equal basis*". However, that asserted clear intention is contained only in paragraphs 58 and 204 of the Respondent's own affidavit evidence.

102. Some indication of X's views are also found in the letter of 25 May 2020 prepared by Dr P, based on her two interviews with X. She notes that:

> *X expressed that he loved both of his parents and wanted to spend time with both of them. Observation of X with each of his parents indicated that he shared a warm, secure attachment with each of them.*

103. Whilst an indication that X wants to spend time with both of his parents, it is not an indication by X either for or against spending equal time with each of his parents.

104. I have already made comment above in relation to the nature of the relationship between X and each of his parents.

105. Each of X's parents have taken their available opportunities to participate in making decisions about major long-term issues in relation to X, to spend time with X and to communicate with X and each has fulfilled their obligation to maintain X.

106. The change in X's circumstances proposed in these proceedings is found in the orders sought by the Respondent in that he seeks that X spend equal time between his parents rather than the current regime as set by the interim consent orders agreed between the parties on 19 February 2020 on an interim-interim basis. If it is found by the court that X spending equal time with each of his parent is in his best interest, then the time that he spends with his Respondent would increase and the time that he spends with his Applicant would correspondingly decrease.

107. What is the likely effect of such a change in X's circumstances? It is clear from the evidence that for a period of time following separation, from June 2019 until January 2020 the parties kept to a 'nesting' regime using the former matrimonial home whereby X spent about equal time between his parents except for those periods of time when the Respondent was absent overseas in the course of his employment. That regime was terminated by the Applicant's action in taking sole occupation of the matrimonial home in January 2020 by changing the locks and informing the Respondent that the nesting arrangement had come to an end and that he needed to find alternate accommodation.

108. Since that time, X has been predominantly in the Applicant's care, spending alternate weekends from Friday end of school until Monday start of school with the Respondent, and half school holiday periods at the end of terms of 1 and 2 in 2020 with each of his parents. Whilst it is plain in the Respondent's case, and it was made explicit by the notation A made by the Court on 19 February 2020, that the Respondent's consent to the interim-interim orders made that day were not an indication that he accepted that anything short of equal time for X with his parents was an arrangement in X's best interest, the consent orders did involve the Applicant agreeing that X spending half of the term 1 and 2 school holidays with his Respondent was in his best interest, that is, that X spending a week with each parent in each of those school holiday period was in his best interest.

109. The Respondent seeks that X spend equal time with his parents on a week about basis. On consideration of all of the evidence and taking into account the Applicant's acknowledgement at the time of the interim-interim consent orders on 19 February 2020 that it is a matter in X's best interest that he spend a week in his Respondent's care – that consent being explicitly to term school holiday occasions – I do find, as is very rarely open to be found on the interim basis, that, to express it in this point in a negative sense, it is not detrimental to X's best interest to spend a week at a time with his Father, and therefore that the care regime proposed by the Respondent on the interim basis can be an arrangement in X's best interest.

110. The Applicant lives at Suburb C and the Respondent lives at Suburb R. There is no evidence indicating any practical difficulty or expense in X spending time with and communicating with either parent. There is no practical difficulty or expense involving X spending time between his parents as proposed by the Applicant or as proposed by the Respondent.

111. The Applicant suggests in the totality of her case that the Respondent's capacity to provide for X's needs is subordinate to her own in that she has been X's primary carer since his birth in consequence of the amount of time the Respondent spent attending to his employment, including on trips overseas, during X's life. The Respondent for his part seeks to cast doubt on the Applicant's parenting capacity through the evidence he presents in relation to the Applicant's mental health issues. However, as I have stressed earlier in these Reasons, the Respondent's very proposal relating to X spending equal time with each of his parents is an inherent admission of the Applicant's adequate parenting capacity, whether on the basis of the orders she proposes or the orders proposed by the Respondent.

112. Once again, the Applicant's acceptance that it is in X's best interest that he be with his Father for one half of the term 1 and 2 school holidays during 2020 is an acknowledgment of the Respondent's adequate capacity to provide for X's needs, and including his emotional and intellectual needs, for periods of one week at a time.

113. Accordingly, I find that each of X's parents has appropriate capacity to provide for his needs for any care regime between that proposed by the Applicant and that proposed by the Respondent.

114. X was eight years of age at the time of the interim hearing, he will turn nine on 23 April 2021. He is, on all of the evidence, a child of high intelligence and, on close reading of the letter of 25 May 2020 prepared by Dr P, a highly qualified clinical psychology practitioner, a "*bright, intuitive child*".

115. This is not a matter where family violence is an issue.

Section 61DA – parental responsibility

116. The presumption that it is in X's best interests for his parents to have equal shared parental responsibility for him applies in these interim proceedings unless the Court considers that it would not be appropriate in the circumstances for that presumption to be applied.

117. Neither party has sought an order in relation to parental responsibility. Unless an order is made by the Court addressing parental responsibility then each of X's parents has parental responsibility, pursuant to section 61C of the Act. That does not bring with it the statutory responsibility set out in section 65DAC of the Act to consult each other and to make a genuine effort to come to a joint decision about major long-term issues concerning X.

118. The fact that neither parent has sought a specific order in relation to parental responsibility does not relieve the Court from the requirements of section 61DA, which applies "*when making a parenting order in relation to a child*" and mandates that on such occasions, subject to the balance of the section:

> *The court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.*

119. I find in this matter that there is no basis upon which the presumption does not apply under section 61DA(2). I find that there are no circumstances in the matter that render it not appropriate to apply the presumption on the interim basis.

120. Accordingly, I will make an order on the interim basis that X's parents have equal shared responsibility for him.

Section 65DAA – equal time, substantial and significant time

121. Is X spending equal time with each of his parents in his best interests and is X spending equal time with each of his parents reasonably practicable?

122. Subject to the requirements of the Respondent's employment to undertake overseas trips, a circumstance that will not arise again until the second half of 2021, I find on the basis of my consideration of the primary and additional considerations in section 60CC and taking into account all of the material relied upon by each of the parties, including their submissions, that this is one of the rare cases where it is in the child's best interests to make an order on an interim basis that he spend equal time with each of his parents.

123. I find that it is reasonably practicable for X to spend equal time with each of his parents:

a) The parents live in close proximity to each other – Suburb C and Suburb R;

b) There is nothing in the evidence that would indicate that there is any difficulty or impediment to the parents having capacity to implement an equal time arrangement – they have done so in the past – subject to the Respondent's overseas travel requirements should they recommence after the first of 2021;

c) The parents have shown a capacity to communicate with each other and resolve difficulties. They did so for six months during the 'nesting' arrangement and they have done so since. Their difficulties in communication and resolution of difficulties, where they have arisen, have revolved around their differences as to the amount of time X should spend with each. Once orders are made, that difference is resolved and the difficulties requiring resolution through appropriate communication will be practical day-to-day matters;

d) As I have found above, an equal time arrangement would have no adverse impact upon X.

e) Should the Respondent's requirement to travel overseas for his employment recommence, then orders can easily be framed to accommodate X remaining in his Applicant's care during periods of time when his Respondent is required to be overseas and a week about arrangement resuming thereafter, though I find that the resumption of the week about arrangement is preferable in X's best interest to any arrangement whereby the Respondent has 'make-up time'. That make-up time if occurring would be further disruption to a simple week by week pattern for X and the duration of the Respondent's absences overseas for work, based upon the evidence of each of the parties of past occurrences, are not of such length that they will have harmed the relationship between Respondent and child to the extent where 'make-up time' is needed to re-establish or repair such relationship.

124. Having found that X spending equal time with each of his parents pursuant to interim orders is in his best interests and is reasonable practicable I consider that orders providing for X to spend equal time with each of his parents on a week about basis throughout the year are appropriate, that arrangement to cover all through the school terms and the school holidays at the end of terms 1, 2 and 3, but to be a half school holiday arrangement for the longer Christmas school holiday at the end of term 4 in each year, enabling each parent to have a longer holiday time with X once each year.

125. In that event it will be in X's best interests to make specific orders dealing with the Christmas period being shared between the parties – once again not detailed by either party in their orders sought, but being made in X's best interest so that he can share the Christmas period with each of his parents, subject to the parents agreeing to an alternate arrangement on each occasion.

Interim spousal maintenance – the law

126. The Respondent is liable to maintain the Applicant, to the extent that the Respondent is reasonably able to do so, if, and only if, the Applicant is unable to support herself adequately by reason of having the care and control of the parties' child, by reason of any physical or mental incapacity for appropriate gainful employment or for any other

adequate reason, having regard to, and only to, any relevant matters referred to in subsection 75(2) of the Act.[24]

127. The Court's powers in spousal maintenance proceedings are set out in section 74 of the Act. The Court may make such order as it considers proper for the provision of maintenance in accordance with that Part VIII of the Act.[25] In making that order the court must take into account only the matters referred to in section 75(2) of the Act.[26]

128. In *In the Marriage of Redman*,[27] the Full Court said that:

> *... on an application for interim maintenance the Court conducts "not as final or exhaustive a Hearing as would be the case if one were Hearing the matter finally": In the Marriage of Williamson (1978) 4 Fam LR 355 at 359 per Fogarty J. The evidence need not be so extensive and the findings not so precise. Having regard to those factors, and the general injunction of s 97(3), the Court should in such matters have a greater degree of flexibility than it possesses in applications for maintenance which are intended to last for an indefinite period and can only be varied under s 83.*[28]

129. There is no fettering principle that the pre-separation standard of living must automatically be awarded and reasonableness in the circumstances is the guiding principle.[29]

130. In *Maroney & Maroney*,[30] Coleman J said at paragraph [56]:

> *[56] ... The "capacity" to meet an order for interim spousal maintenance is not confined to income. Once a party, such as the Wife in this case, establishes an entitlement to interim spousal maintenance, and such entitlement is quantified in accordance with that spouse's reasonable needs, an order may be made notwithstanding that the liable spouse could only satisfy the order out of capital or borrowings against capital assets.*[31]

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[24] *Family Law Act 1975* (Cth) s 72.
[25] *Family Law Act 1975* (Cth) s 74(1).*Family Law Act 1975* (Cth) s 72.
[26] *Family Law Act 1975* (Cth) s 75(1). See also See also *Hall & Hall* (2016) 257 CLR 490, [3]-[10], [52]-[58].
[27] *In the Marriage of Redman* (1987) 11 Fam LR 411.
[28] *In the Marriage of Redman* (1987) 11 Fam LR 411, 415.
[29] See *In the Marriage of Bevan* (1993) 120 FLR 283.
[30] *Maroney & Maroney* [2009] FamCAFC 45 (Coleman J).
[31] *Maroney & Maroney* [2009] FamCAFC 45, [56] (Coleman J).

131. In *In the Marriage of Bevan*,[32] the Full Court of the Family Court of Australia summarised the pathway to an order for spousal maintenance as follows:

> *1. A threshold finding under section 72;*
>
> *2. Consideration of sections 74 and 75(2);*
>
> *3. No fettering principle that pre-separation standard of living must automatically be awarded where the Respondent's means permit; and*
>
> *4. Discretion exercised in accordance with the provisions of section 74, with "reasonableness in the circumstances" as the guiding principle.*[33]

Does the Applicant have a need for spousal maintenance?

132. The Applicant's income is $643.80 per week net from her employment with Employer K and JobKeeper top-up.

133. The Applicant's expenses, pursuant to her amended financial statement, are $1230 per fortnight, being $900 in expenses for herself and $330 in expenses for X. Those expenses do not include any accommodation expenses. Once the moratorium on the payment of requirement payments on the ANZ Bank loan account secured on the Suburb C property has expired then those required payments will need to be resumed if the Suburb C property is retained. Whether they should be paid by the Applicant as occupier, by the Respondent as sought by the Applicant, or removed by a sale of the property is yet to be determined. However, if the Court accedes to the order sought by the Respondent, that the Suburb C property be sold, then upon that sale the Applicant will need to find alternate accommodation and that alternate accommodation will come at a cost in the absence of free accommodation being provided to the Applicant by a relative. There is no evidence that such free accommodation will be provide to the Applicant. What that cost would be cannot be determined.

134. The Applicant receives $1300 ($1304 according to the Respondent) by way of assessed child support payments from the Respondent each

[32] *In the Marriage of Bevan* (1993) 120 FLR 283.
[33] *In the Marriage of Bevan* (1993) 120 FLR 283, 290

month. The Applicant states that at the time of hearing the weekly expenses incurred by her for X were $330 per week, being $1430 per month. After application of the child support paid by the Respondent, a shortfall of $130 per month, or $30 per week, remains. The statutory obligation to financially maintain X is upon the Applicant and the Respondent. The Respondent addresses his statutory obligations by payment of his child support as assessed. The Respondent, in addition, meets other expenses for X, as admitted by the Applicant. A great deal of the shortfall in relation to the Applicant's expenses and X's expenses are, on the Applicant's evidence, met by moneys provided by the maternal grandmother. Without the maternal grandmother's financial assistance, the Applicant would not be able to meet her expenses.

135. For the purpose of assessing the Applicant's need in relation to interim spousal maintenance, I take her income as being her income received from her employment of $643.80 per week and I disregard the amount received by her as child support as assessed from the Respondent and any amount received by her as family tax benefit.

136. There is an argument to be made that pursuant to section 75(3) I should disregard the amount of money received by the Applicant as JobKeeper though the question arises as to whether such amounts are "*income tested*". For the present purposes I will leave the JobKeeper amount in and assess the Applicant's relevant income as $643.80 per week net. I note that the Applicant has not included any amount for income tax in her expenses and accordingly I use the net figure as detailed in annexure A – pay advice – to her affidavit of July 2020.

137. In his submissions the Respondent asserts that the Applicant:

> *...has the capacity to earn more moneys per week. She has elected to work part-time rather than full-time. [The Applicant] has access to after school care up to 6 pm and has the assistance of her mother. She can work full-time regardless of the orders made in respect of interim parenting. She has worked on a full-time basis previously. The Applicant has not given evidence saying that she cannot work on a full-time basis.*

138. Further, the Respondent contends that the Applicant cannot show a need for spousal maintenance in circumstance where "*she unilaterally spends $4500 on a pet dog on 17 April 2020*." However, on the

Applicant's evidence the pet dog, at a cost of $4500, was paid for by the maternal grandmother and maternal aunt, not by the Applicant. The Respondent presents no evidence contrary to this assertion.

139. The Respondent further assets that the Applicant misled the Court in her Financial Statement of 4 June 2020 by claiming $10 per week for uniform expense, the Respondent invariably reimbursing the Applicant for payment of the uniform or paying them directly. However, this submission is in error as the Applicant clearly shows that the $10 a week uniform expense incurred for the benefit of X is wholly paid by the Respondent. However, this item would reduce the 'shortfall per week' of $30 after application of the child support moneys paid by the Respondent from $30 down to $20 per week.

140. The Respondent submits that the Applicant cannot substantiate the $25 per week for clothing and footwear for X as stated in her financial statement as:

> *The Respondent purchased the shoes the child wears as well as his school shoes and also buys some clothes when he is with the Respondent.*

141. This assertion in the submissions does not of itself contradict that the Applicant has an expenditure on a per week basis for clothing and footwear for X.

142. Similarly, the Respondent's submissions in relation to the amount claimed by the Applicant as an expense for herself and for X for fares and taxis and in relation to fuel are based on speculation and not factual matters.

143. The Respondent's submission that the amount per week paid by the Applicant for her 10 year driver's licence works out to 67 cents per week rather than the $6 per week claimed by the Applicant is correct.

144. Finally, the Applicant acknowledges in her Financial Statement at annexure 'A' that the Respondent contributes $24 per week toward the cost of health insurance for herself and the child and $30 a week toward the cost of extracurricular activities expenses for X.

145. Accordingly, I find that the Applicant's weekly expenses are $860.67.

146. With the Applicant's income being $643.80 per week and her expenses being $860.67 per week I find that the Applicant has a shortfall of income in relation to expenses of $216.87 per week.

147. The Applicant was 40 years of age at the time of the interim hearing and in good health. The Applicant's evidence in relation to her health revolves around her mental health issues and she does not depose to any physical health issues that would inhibit her from engaging in appropriate gainful employment. However, the question as to whether the Applicant could obtain and engage in either full-time employment or other part-time employment so as to increase her income is a matter on which the Court does not have any specific evidence for this interim determination.

148. There is nothing in the medical evidence relating to the Applicant's mental health issues that would indicate that she is incapable by reason of those issues of engaging in full-time employment or obtaining more extensive part-time employment. The Applicant's evidence going specifically to the spousal maintenance matter, at paragraphs 145 to 159 inclusive of her June affidavit, do not assist.

149. The Applicant has had primary care of X from mid-January 2020 up to the interim hearing and on the basis of the parenting orders I will make she will have care of X on a week about basis.

150. There is no evidence to show that payment of spousal maintenance on an interim basis by the Respondent to the Applicant would increase the Applicant's earning capacity by enabling her to undertake any course of education or training or to establish herself in a business or otherwise obtain an adequate income.

151. The Applicant has contributed to the income, earning capacity, property and financial resources of the Respondent by being the primary carer for X during all occasions when the Respondent was required to be overseas in the course of his employment and by being a primary carer for X through the period of the parties cohabitation thereby enabling the Respondent to engage full-time in appropriate gainful employment.

152. The Applicant is not cohabiting with any other person.

Spousal maintenance – does the Respondent have an ability to pay?

153. The Respondent has an annual income of $215,000 plus use of a funded company car. The Respondent's salary of $215,000 per annum equates to $4134 per week (though the Respondent refers to $4132 per week in his financial statement). The Respondent also declares an additional gross income of $191 per week from his sole trader business. Accordingly, the Respondent has a gross income of $4323 per week.

154. The Respondent asserts that he has expenses of $4871 per week, giving a shortfall on income in relation to expenses on the Respondent's evidence of $548 per week. The Respondent has used the same device in his Financial Statement as the Applicant, stating all of his claimed expenditure in annexure 'A' to his Financial Statement of 13 July 2020 rather than setting out those matters separately in part G and part N.

155. The Applicant submits in paragraph 14 of her submissions that the Respondent "*spent excessive amounts on designer clothing, clothing generally, and self-grooming post separation*". The Applicant refers to the Respondent's disclosed Amex and ANZ credit cards, but the detailing of expenditures at various retail outlets on particular days by the Respondent does not, without more, establish by evidence the assertion that he has "*spent excessive amounts*".

156. The Applicant notes that the Respondent asserts in his Financial Statement that he spends $95.48 per week (or almost $5000 per year) on clothing and $29.33 per week (or almost $1525 per year) on toiletries and grooming. She goes on to submit that this spending represents a standard of living that in all the circumstances is unreasonable. However, those submissions are not backed up by evidence grounding the assertions. The Respondent is employed in a highly remunerated position and it is not shown by the Applicant that the Respondent's expenditure on clothing and personal grooming is excessive.

157. In paragraph 17 of the Applicant's written submissions, she sets out a certain expenditure claim by the Respondent and what the Applicant asserts would be a reasonable expense. The sum of those items are on their face wrong:

a) The Respondent asserts that he spends $509.13 per week on school fees and the Applicant asserts that a reasonable expense on school fees would be nil. However, the Applicant does not pay X's school fees, the Respondent does.

b) The Respondent claims that he spends certain amounts per week on upgrades to his laptop, iPad and computer hardware, while the Applicant asserts that such expenditure should be nil. He runs a business from which he makes $191 per week extra income as a sole trader and accordingly any expenditure on equipment required for that sole trader business is his expenditure. If that expenditure is tax deductible it has the consequent effect upon his income tax payable, but it does not render those items free of cost.

c) The Applicant notes the Respondent's accommodation cost at $900 per week, which the Respondent says in his evidence is for an un-serviced apartment, fully furnished and including utilities costs. The Applicant asserts that a reasonable value per week is $500, but provides no evidentiary basis for that assertion.

d) The Applicant asserts that the amount claimed by the Respondent for "*fares, taxis, Ubers*" at $33 per week should be disallowed as an expense as the Respondent "*has a privately owned motor vehicle which he utilises*". It would seem on the evidence that the Respondent has a company car which he utilises. However, it is hard to accede to the Applicant's submission in this regard in relation to the Respondent's claimed expense in view of the Applicant, whilst having exclusive uses between the parties of a motor vehicle, also claiming expenses for "*fares and taxis*" for herself and X.

158. The only item addressed by the Applicant in her written submissions that should be deducted from the weekly expenditure claim by the Respondent is $82.31 per week for "*furnishings*" because on the Respondent's evidence he had to incur certain expenditure to set himself up with certain items in his furnished apartment that were not provided and that he has done so, thereby making it a past capital expenditure and not an ongoing weekly expenditure or an allowance weekly for an expenditure to be incurred on a yearly basis.

159. Even allowing for the deduction of such expenses as I have referred to above from the Respondent's claimed expenses it would not dissolve the gap of expenses over income of $548 per week.

160. The Respondent was 39 years of age at the time of the interim hearing, in good health and physically and mentally capable of engaging in appropriate gainful employment, and was doing so. There is no evidence to suggest that the Respondent is capable of earning or obtaining greater income than he states.

161. The Respondent refers to savings at the time of completing his financial statement in July 2020 in the sum of $18,748, but such sum was being accumulated by him toward his intended payment in November 2020 of school fees for X in advance for the 2021 financial year so as to obtain a discount on fees for early payment.

162. The Respondent is not cohabiting with any other person.

163. The Respondent pays child support as assessed as detailed earlier in these reasons.

164. Accordingly, I find that the Respondent is not reasonably able to maintain the Applicant despite the Applicant being unable to support herself adequately by reason of the income she receives from her part-time employment with Employer K being less than her necessary and unavoidable living expenses. That is of course a finding on an interim basis on untested evidence.

Exclusive occupation and payment of the outgoings in relation to the Suburb C property

165. The Respondent does not directly oppose the Applicant having exclusive occupation of the Suburb C property as between the Applicant and himself, but rather he either seeks an interim order for sale of that property as stated in his filed documents or simply opposes the order that the Applicant have sole occupation without proposing that he himself have any benefit or occupation, as outlined by his counsel when stating the orders sought by him on the interim hearing.

166. In the Respondent's written submissions he notes that the order for exclusive occupation sought by the Applicant is opposed, but he does not make any submissions on the point.

167. Since 17 January 2020 the Applicant has had effective sole occupation of the matrimonial home, X living with her at the matrimonial home when he is not spending time with his Respondent. The Respondent does not press on interim hearing his order for a sale of the Suburb C property, but he does oppose the Applicant's application that he pay the outgoings relating to the ANZ loan account secured by a mortgage on the property, rates, strata fees and property insurance.

168. The Applicant in her Amended Initiating Application filed 17 April 2020 seeks by way of final property settlement order that the Respondent transfer his interests in the Suburb C property to her, that she do all things necessary to obtain a discharge of the mortgage secured over the property by ANZ Banking Group Limited, which would necessitate a payment out by the Applicant of the loan account secured on that property, and that there be "*a cash payment from the Respondent to the Applicant*" so as to result in a just and equitable division of the net pool of assets available for distribution between the parties including superannuation entitlements,

169. On the Applicant's valuations as set out in her evidence, that the Suburb C property is valued at $1 million and subject to a secured debt of $650,274, the parties have $394,726 equity in Suburb C. If the Applicant were to retain the equity in the property after refinancing the loan account secured on the property and retain her superannuation of $91,243 she would have $440,969 worth of the net matrimonial asset pool, whilst the Respondent would have $218,494 worth, being the value of his superannuation entitlements (leaving aside any other property, in relation to which the Respondent deposes only his current savings toward a payment of school fees and the Applicant deposes on savings of $300 and an $8000 motor vehicle).

170. This would give the Applicant 66.8 per cent of that matrimonial asset pool and the Respondent 33.2 per cent thereof. If that were the result, and without any payment from Respondent to Applicant or Applicant to Respondent, then the Applicant would need to find a bit over

$650,000 in financing so as to refinance the current loan account secured on the Suburb C property.

171. The Applicant's current financial circumstances as set out in her Amended Financial Statement of June 2020 would tend to cast some doubt on her ability to do so unless she has available to her the assistance of other persons in some manner. Nevertheless, that is her aim and as there is no evidence before the Court at the present time of the equity in the property being depleted through non-payment of the loan account secured on the property there is no basis on which the Court should contemplate an interim property order by way of a sale of the Suburb C property, preserving that property at the present time to meet the Applicant's aims in the final result. However, that position may need to be re-determined if in time the circumstance should arise where the equity in the property is being eroded through non-payment.

172. With the Applicant asserting to the Court that as a final result she seeks to retain the property herself, by whatever means and with whatever assistance, refinance the $650,000 loan account secured on the property, and, additionally, with my analysis of the financial positions of the parties whereby I find that the Respondent's necessary and unavoidable living expenses exceed his income, I will not make the order as sought by the Applicant requiring the Respondent pay the outgoings on the Suburb C property, either by way of a spousal maintenance order, for the reasons given above under that heading, or by way of preservation of property order (the alternative as proposed by the Applicant to ground such order in power), but leave that matter between the parties pending final hearing.

173. If payments are required and not made it may ground a further application on the basis of preservation of property. If payments are met by the Applicant it may go to assessment of contributions on final hearing and a grounding of the Court's finding as to whether or not the Applicant is in a position to retain the property, or if the payments are made by the Respondent, or contributed to by the Respondent, it may go to assessment of contributions on final hearing.

174. Accordingly, I make the orders as set out at the start of these reasons.

I certify that the preceding one hundred and seventy-four (174) paragraphs are a true copy of the reasons for judgment of Judge Morley

Associate:

Date: 10 February 2021