
JURISDICTION : FAMILY COURT OF WESTERN AUSTRALIA

ACT : FAMILY LAW ACT 1975

LOCATION : PERTH

CITATION : TRIGG and ROWLAND [2018] FCWA 136

CORAM : THACKRAY CJ

HEARD : 21 & 22 JUNE 2018

DELIVERED : 26 JULY 2018

FILE NO/S : PTW 5026 of 2017

BETWEEN : MR TRIGG
Applicant

AND

MS ROWLAND
Respondent

Catchwords:

CHILDREN – With whom a child lives – Relocation – The mother seeks to relocate with the child to [City A] – Where the father seeks sole parental responsibility – Presumption in favour of equal shared parental responsibility does not apply due to family violence – Mother granted sole parental responsibility for the child’s physical health and in all other matters parties to share parental responsibility equally – Mother not permitted to relocate with the child – Child to spend equal time with both parties.

Legislation:

Family Law Act 1975 (Cth), s 60CC

Category: Not Reportable

Representation:

Counsel:

Applicant : Mr S Jones
Respondent : Self Represented Litigant

Solicitors:

Applicant : Ball & Co
Respondent : Self Represented Litigant

Case(s) referred to in decision(s):

Sawant & Karanth [2014] FamCAFC 235

WORDS IN SQUARE BRACKETS REPLACE WORDS USED IN THE ORIGINAL JUDGMENT - PARTIES' NAMES AND IDENTIFYING DETAILS HAVE BEEN CHANGED

1 [Mr Trigg] (“the father”) and [Ms Rowland] (“the mother”) are unable to agree about future living arrangements for their only child [Rob], aged two years.

2 The family currently lives in [Town A]. The mother grew up in [City A], and now wishes to go home with Rob in order to have the company and support of family and friends, notwithstanding she has not lived in City A for many years.

3 The father is from [Country A] and came to live in Australia only as a result of his relationship with the mother. His only connections in Australia are in Town A and he wants Rob to continue living there in the home and community with which he and Rob are familiar.

Background

4 The father, aged 39 years, works as a [trades person]. He was born in Country A, but now has permanent resident status in Australia. The mother, aged 33 years, is a [social worker]. She was born in [State A].

5 The parties met in 2013 in [Country B] where the mother had been working for some years. She left City A when she was 18 and then worked around the world, occasionally coming home. The parties spent time together in both the Country A and Country B. They were married in the Country A in October 2014. None of the mother’s family came to the wedding, but [Ms P] (“[Aunt K]”) did attend.

6 The mother and father decided to come to Australia to start a family. Having spent a short time in City A, they took up residence in Town A in April 2015. They moved into the father’s current residence in May 2015. The father initially did volunteer work for a charitable organisation. He also started his own [business] and then worked for a [maintenance company]. The mother initially obtained work at a [café] from where she was subsequently dismissed. She obtained a [qualification in social work] in 2015.

7 Rob was born [in] 2016. The mother and father both cared for him for three months following his birth. After returning briefly to the [store] where she had worked previously, the mother obtained employment at her current workplace, a [social work office]. Her hours varied, but she always worked less than 60 hours a fortnight. The father

lost his job at around the same time and stayed home to care for Rob. He resumed working in his business, arranging his hours around the mother's work and his responsibilities for Rob.

8 The parties separated in February 2017 when Rob was aged just 10 months. The mother moved into her own accommodation, leaving the father in the [house] in which he still lives in Town A. The father and mother agreed that Rob would spend equal time with each of them. The father says he did not understand the Australian family law system and thought he had to accept the mother's proposal for equal shared care. His evidence was contradicted by his own mother, who said it was she who had "forced [the parties] to agree to that 4 day plan since they couldn't agree to anything else and I believed that mediation, scheduled to begin in a few months, would find a better way".

9 The care arrangement involved Rob spending blocks of four nights with each parent. The father did not consider the regime was working satisfactorily for Rob. I am satisfied Rob showed signs of distress at leaving his care and that there was not the same level of distress when Rob returned from the mother's care. I consider it likely that in the early months of the separation the mother continued to be anxious and depressed and was drinking to excess, as she had done throughout much of the relationship. I am satisfied that this would have impacted on her ability to care for Rob and that she was probably not providing the same steady routine for Rob as the father was.

10 The father commenced proceedings in August 2017 seeking that Rob live with him and that the mother have rehabilitation for her alcohol and mental health issues. On 18 August 2017, interim orders were made, *inter alia*, as follows:

- the parents to have equal shared parental responsibility;
- [Rob] to live with the parties on an equal shared care arrangement on a four-day rotating roster;
- neither party to consume alcohol when caring for [Rob];
- the parties not to denigrate each other; and
- both parties attend the Mums and Dads Forever program.

11 This arrangement was still in place at the trial in Town B in June 2018. The father had competent solicitors and experienced counsel at

trial, while the mother was self-represented. Notwithstanding she [has a learning difficulty] and lacks any legal training, the mother conducted her case at the hearing with admirable skill and tenacity.

Orders sought by the father

12 The father seeks sole parental responsibility. Provided the Court is satisfied that the mother is able to meet all of Rob’s physical and emotional needs, the father proposes that Rob should live with him from Friday afternoon every week until the following Tuesday afternoon – and with the mother for the rest of the time. In other words, four nights with the father and three nights with the mother each week. After the mother protested that this would make the father a “Disney Dad”, his counsel suggested I might consider allowing the mother occasional weekends with Rob.

13 If I am not satisfied that the mother is able to meet all of Rob’s needs, the father proposed that Rob should live with him and spend time with the mother “at such times and under such conditions as deemed appropriate”. The father also sought an injunction ensuring that Rob lives within 50 km of the Town A Post Office, together with a variety of other orders which will be considered later in these reasons.

14 In the event that the relocation to City A is allowed, the father formally sought the same orders as he proposed if Rob remained in Town A, save that in that event he sought an injunction preventing Rob’s residence being changed to a place more than 50 km from the City A Post Office. However, as will be discussed later, the father gave evidence that he would not, in fact, move to City A, even if the mother was permitted to relocate with Rob.

Orders sought by the mother

15 The mother seeks an order for equal shared parental responsibility. She proposes that she be permitted to relocate to City A and, in the event the father also relocates, she proposes a continuation of the equal shared care regime. However, instead of the current schedule, the mother proposed what she called a “5-2-2-5” regime, which ensures that Rob has one weekend a fortnight with each parent. The schedule she seeks involves a handover every Wednesday afternoon and handovers each alternate Monday and Friday afternoon.

16 The practical effect of the mother’s proposal is that in a four week cycle there is one handover in Weeks 1 and 3, but three handovers in

each of Weeks 2 and 4 – making a total of eight handovers every four weeks, in contrast with the father’s proposal which involves four handovers. On the mother’s proposal, Rob will always be with the same parent each Monday and Tuesday night and always with the other parent each Wednesday and Thursday night, while Friday, Saturday and Sunday nights are shared equally on an alternating week basis.

17 In the event the father does not relocate, the mother proposes that he be permitted to visit Rob in City A, or that Rob and she would travel to Town A in school holidays.

18 In the event she is not permitted to relocate, the mother proposes that the current equal shared care arrangement be varied to the “5-2-2-5” regime.

Impressions of the father and his witnesses

19 The father presented as a fairly gentle and calm person who has had the benefit of growing up in a stable home. I found him to be a fairly reliable witness although inclined, like most witnesses, to exaggerate his own strengths and the mother’s weaknesses.

20 The [local church minister], who has known the father for three years said the father was “reliable, presentable and personable” and that he was “highly regarded within [the] church community”. He described the father as “the sort of person who people warm to easily; he chats easily to other people and goes out of his way to help others. He is always offering help to others and does not seek any reward”. He was not required for cross-examination and I accept his evidence.

21 [Ms Q], who has also worked for church and charitable institutions in Town A, described the father as “a trustworthy and reliable employee”, who was “well liked by his fellow workers and volunteers and had a great work ethic”. She was cross-examined by telephone. She appeared to be a sensible and caring person. I was strongly inclined to accept her very measured evidence.

22 The father’s mother, a retired [academic], presented as a mature, warm and articulate woman, and I accepted her evidence.

23 The father’s sister-in-law, [Ms R], was cross-examined by telephone. She too sounded a sensible and reliable person and I had no reason to doubt her evidence.

Impressions of the mother and her witnesses

24 The mother presented as bright and quick, but with a sharp and sarcastic tongue. After hearing all the evidence and observing her demeanour, I was left with the impression that the mother is able to control her temper when she chooses but otherwise can have a “short fuse”, especially in a domestic situation or when under the influence of alcohol.

25 The mother has not had the benefit of always living in a happy and stable home, which is not to suggest that she would not have been loved by her mother, who was largely responsible for her care following her parents’ separation. Although I am not satisfied I have the full picture, there have clearly been some very difficult times in the mother’s life and I had the impression that she has had to develop some strong coping mechanisms. Notwithstanding protestations to the contrary, the mother has had more than her fair share of family “ups and downs”, which have led to long periods of estrangement from family members, including her mother, brother and sister. She has no relationship with her father.

26 The mother was not an entirely reliable witness. She had a strong tendency to seek to avoid or deflect when asked a question that would elicit damaging evidence. She greatly underplayed the extent of her problem with alcohol. She was unconvincing in her evidence about, for example, the (minor) injuries she caused to the father during an altercation in 2016.

27 Evidence supporting the mother was given by her work colleague, [Ms C], who is a [social worker]. I found her to be sensible and reliable and I was inclined to accept her evidence. Ms C described the mother as being “a very competent worker in the challenging environment in which we have to work in”. She said the mother:

is supportive to her colleagues, communicates well with her fellow staff and our clients. She is punctual at work and is always prepared to assist others in tasks ... She is able to communicate easily with the ... people that we care for that have been affected by trauma. She is of strong character and is able to articulate boundaries and expectations to them in a caring, understanding and empathetic manner ...

28 Another of the mother’s colleagues, who was not required for cross-examination, also deposed to her ability to “stay positive and supportive” within the difficult working environment at the facility. My impression is that the mother would be very good at this type of work

given her own background, quick wit and clear and direct manner of communication.

29 Rob's maternal grandmother has reconciled with the mother in recent times and assisted her throughout the trial. She is [a manager and academic] and appeared to be an intelligent and rather candid person. It is always difficult to form a reliable impression of witnesses from their brief time in the witness box, but I was left with the impression that it would not be surprising if there was some further breakdown in the relationship between mother and daughter. However, while they remain on good terms, I consider she would be a loving and helpful grandmother for Rob, albeit with responsibilities for her teenage son from a later relationship.

30 Aunt K lectures [at university]. She gave her evidence by telephone. It was difficult to form an impression of her other than that she sounded like a pleasant and honest person. She clearly has a close bond with the mother and has been her most consistent support since at least when the mother was in her teens. She would be a good influence on Rob and, whatever the outcome of the proceedings, will continue to be a great support for the mother.

The father's proposals for caring for Rob

31 The father hopes to continue living in his house in Town A. Although he has "re-partnered", the father does not live with his partner. He works three full days a week and a half day (or more) on the other two days of the working week. He does not work weekends. When he is living with the father, Rob attends a childcare centre, which he enjoys. I am satisfied the father provides a good routine for Rob.

32 The father gave evidence that he earns about \$1,800 gross a fortnight and has expenses which include rent of \$375 per week. His taxable income in 2016/17 was disclosed as being only \$6,633. Although not fully explored, there seemed to be inconsistencies in the information about the father's financial position. I am satisfied though that he has the means to support Rob adequately. If necessary, his family would help him, as they have with his legal fees.

The mother's proposals for caring for Rob

33 Ms C described the mother's home as "clean, homely and well furnished ... and safe". She described Rob as having his own bedroom,

although the mother said that she “co-sleeps” with Rob. The mother has recently refurnished her home.

34 The mother has looked into the availability of rental accommodation in City A and expects to be able to source an appropriate home at a cost less than what she pays in Town A. I am satisfied she will be able to find satisfactory accommodation for Rob wherever she lives, albeit she will always be required to budget very carefully.

35 The mother’s taxable income last year was \$39,314. She said in her trial affidavit that she works at [the office] between 10 to 30 hours a week, and also works as a casual [social worker] elsewhere three days every two months. The mother said that the weekend work at the office is shared between all the casual staff; that she does not work every weekend; and does not control her roster. She acknowledged her work schedule is “flexible up to a point”.

36 Ms C said the mother:

does not work when she has the care of her son to enable her to maximise their time together. Due to the high regard the [office] has for her work ethic and contribution to our team this arrangement is accommodated and her shifts are scheduled accordingly.

37 The mother says that if she is permitted to move to City A she will work part time. She believes there would be a greater range of work for her in a [city]. The mother is a resourceful woman and I am satisfied will find employment wherever she lives. However, I am not satisfied she will be able to call on family and friends on a long term basis with the regularity that would be required in order to allow her to work easily – unless the father also moves, in which case he would be available to share the care of Rob. I do accept that the mother’s family and friends would be available on an ad hoc basis, but they have their own commitments.

The father’s family

38 The father’s parents live in Country A. The father’s parents have come to Australia three times for lengthy visits since Rob was born just two years ago. In total, the grandparents have come here at least six times. The father is close to his family and often communicates with them by phone and/or Skype. The mother told her psychologist in 2015 (prior to the separation) that the father’s family was “great”.

39 The father has three siblings. His two brothers live in Country A and his sister lives in Country C. His siblings also have children.

The mother's family/friends

40 The mother's parents separated when the mother was young and she thereafter had only a very limited relationship with her father. The maternal grandmother formed a new relationship and spent some years with her partner in [Country D], before spending time in [City B]. She has a child of this relationship, a teenage boy who lives with her in City A, and accompanied her to the trial in Town B.

41 The mother left home when she was about 14. She insists that she was not abandoned by her mother, and that her mother did not move to Country D until a couple of years after she voluntarily left home. After leaving her mother's home, the mother lived for about two years with Aunt K and her son. It is unclear why she then left Aunt K's home, but her situation was clearly somewhat problematic as she was allocated her own Housing Commission residence when she was only 16 years old.

42 The mother said her parents' relationship was one involving significant domestic violence. She has also had a most problematic relationship with her brother, [T], who she says suffers from [a mental impairment] and was violent toward her during her youth. She has been critical of her mother in the past for not preventing this, and for not being prepared to take her "side" in disagreements with T. She says she now understands her mother's position.

43 After living and working overseas for many years, the mother returned to Australia in December 2014 when her [visa] expired. The father was unable to come with her as his Australian visa was not approved until February 2015. While they were apart, the mother stayed with Aunt K in City A. When the father arrived in Australia he too lived with Aunt K for a short time. About two days before the father arrived, there was an altercation involving T, who had been sleeping [at] Aunt K's home, as he was otherwise homeless. It appears that he was told that he would have to leave to make room for the father and this led to an altercation with the mother, and the police had to be called.

44 The mother and Aunt K communicate regularly. Aunt K has a son, [C], who appears to be unemployed. Aunt K has met Rob three times. One of these occasions was when the mother took Rob to City A for a week-long visit. The other two occasions were when Aunt K and C

visited Town A in 2017. The mother also returned to City A on another occasion in 2016 but Rob remained with the father.

45 Apart from her mother, half-brother and T, the mother's other relatives in City A are her sister [Ms N] and her son, and her [Uncle A] and [Aunt R]. It seems the mother gets on well with her Aunt and Uncle, but I am not convinced that the mother has a good relationship with her sister, who did not provide an affidavit to support her case. If I am mistaken about the current status of the mother's relationship with her sister, I cannot be satisfied they will have a good relationship in the future, given the past estrangement.

46 The mother also described having many friends in City A, chief amongst whom is [Ms A], her best friend from high school days, who is also a [social worker]. They have kept in touch over the years and Ms A has come to visit her at least once in Town A. I accept that although she has been away from City A for a very long time, she retains friends there, including the people who came to the baby shower that Ms A organised for her and Rob.

Applicable law

47 These proceedings come under the *Family Law Act 1975* (Cth) ("the Act"), which makes Rob's best interests the paramount consideration.

48 In deciding what orders to make, I must be guided by the objects of the Act and the principles underlying them, which indicate that children's best interests are met by:

- (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
- (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

49

As the Full Court said in *Sawant & Karanth* [2014] FamCAFC 235:

8. Orders that contemplate one parent and the child living in a place geographically remote from the other parent immediately bring the Objects and Principles of Part VII of Family Law Act 1975 ... into sharp focus. The Objects of the Part “are to ensure that the best interests of children are met by” them having, among other things, “the benefit of both of their parents having a meaningful involvement in their lives ...”. (s 60B(1)). The Principles underlying those Objects include the child’s right to “... spend time on a regular basis with ... both their parents ...” (s 60B(2)).
9. Yet, neither that right vested in the child, nor those consequential roles of the child’s parents, is absolute; when parents are unable to agree upon co-parenting arrangements, that right and those roles is each qualified by the Court’s determination as to what orders best meet the particular child’s best interests. That is neither more nor less so when a proposed significant geographical separation renders acute those Objects and Principles and the Considerations which mandatorily dictate the manner in which the child’s best interests are determined. While “relocation case” is a convenient descriptor for cases of this type, no specific statutory principles govern cases which meet that description. (See, for example, *M v S* (2007) FLC 93-313 per Dessau J; *Taylor v Barker* (2007) 37 Fam LR 461).
10. The parties’ proposals are important because they mark each parent’s own assessment of the nature and extent of their role; that is, what each sees as their “meaningful involvement” in the life of their child consistent with the child’s best interests. For that reason alone those proposals must be carefully considered albeit that, because the court is charged independently with arriving at a decision as to the child’s best interests, it is not bound by those proposals (see *U v U* (2002) 211 CLR 238 at [70], [72] per Gummow, Callinan JJ; Gleeson CJ and McHugh J agreeing).

50

These remarks are apposite, as they draw attention to the fact that the focus must always remain on what is in the child’s best interests. In determining the orders most likely to be in a child’s best interests, the legislation mandates an approach to be followed if there is an order for equal shared parental responsibility. In coming to my decision, I am required to apply a presumption that it is in Rob’s best interests for his parents to share parental responsibility equally. The presumption does not apply if there are reasonable grounds to believe that either parent, or a person who lives with them, has engaged in child abuse or family violence (as defined in the Act). Furthermore, this presumption may be

rebutted by evidence that it would not be in the child’s best interests for the parents to have equal shared parental responsibility.

51 The allocation of parental responsibility does not govern the time Rob will spend with each parent. However, if I make an order for equal shared parental responsibility, then the Act requires me to consider whether spending either equal time or, failing that, “substantial and significant time” with each parent would be in Rob’s best interests. If either alternative is in his best interests, then I must consider making such an order, provided I have also found the arrangement to be “reasonably practicable”. Whether these outcomes are “reasonably practicable” might depend on whether it will be in Rob’s best interests for his mother to live in City A, given the father intends to remain in Town A.

52 In determining what is in Rob’s best interests, I must consider the matters in s 60CC of the Act, which are divided into “primary considerations” and “additional considerations”. The dichotomy between the “primary” and “additional” considerations has been considered in many judgments of the Full Court, which have also discussed the significance of Parliament having described just two of them as being “primary” considerations. Those judgments adopt the analysis of former Justice Richard Chisholm, who said in one of his many scholarly papers:

It is clear that the relationship between the “primary” and the “additional” factors cannot be that any primary considerations must necessarily outweigh any combination of “additional” considerations. First, the language of considerations involves matters of degree, not absolutes. Second, such an approach would be inconsistent with the fundamental principle that the child’s best interests must be the paramount consideration ... Third, and most obviously, it is expressly stated in [paragraph 51 of the Explanatory Memorandum] that there may be some instances where secondary considerations may outweigh the primary considerations.

53 It is within this legal framework that I must determine this case.

The primary considerations

54 The first of the primary considerations is **the benefit to the child of having a meaningful relationship with both parents**. It is accepted that a “meaningful relationship” is one which is important, significant and valuable to the child, and that “meaningful” is a qualitative adjective, not a quantitative one. I consider there is great benefit to Rob

of having such a relationship with both his parents, who love him greatly and want the best in life for him.

55 The second of the primary considerations is **the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence**. The Act prescribes that this factor is to be given greater weight than the first of the primary considerations.

56 There is no suggestion that Rob would be subjected or exposed to abuse, neglect or family violence in the father's care. Although the mother described the [area surrounding Town A] as being "the [drug] capital of Australia" and argued that she would be living in a safer environment if she was living in City A, the argument is somewhat disingenuous given that her brother who lives in City A appears to be a consumer of [drugs] and she admits her nephew C, who also lives in City A, smokes marijuana.

57 The father suggests there is potential danger for Rob if he lives in City A because of risks posed by the mother's brother, given he is a drug addict with a history of violence. I accept that the mother will not seek out the company of her brother, but there remains the possibility that he will "turn up" either at her residence or at the residence of other relatives where Rob may be visiting or staying. However, the mother and her family have shown that they are not willing to allow the brother to cause trouble and are prepared to involve the police when needed. I consider this is a risk that can be managed.

58 A great deal of time was expended at the hearing on the issue of the parties' drinking habits and the possible impact of excessive drinking on Rob. I am satisfied that the father now drinks alcohol only fairly moderately and does not consume drugs, although I consider it likely he drank quite a lot when the parties were together [overseas].

59 I am satisfied that the mother has had a drinking problem for many years, and that her overconsumption was often a matter of argument between the parties. Although the mother denied the father's allegations about the extent of her drinking, it emerged during the trial that she had admitted to her psychologist that she had drunk between one to two bottles of wine a day for a period of nine years. I accept, however, that the father probably overestimated her drinking when he suggested she drank more than two bottles of wine a day.

60 In September 2017, the mother telephoned the father's sister-in-law in Country A, obviously very drunk, and left a number of revolting messages. As the mother said in her evidence, this was not her "finest hour". As there was no evidence of this happening on other occasions, I assume that this was a once off, although regrettable event. The mother put it down to her being enraged because the father had held over Rob, but the holding over seems to have occurred [in] August 2017, more than a month before the telephone calls. The father justified the holding over on the basis of the mother's mental health problems and difficulty with alcohol. I accept his actions were child focussed and the mother's response indicated a lack of insight into the impact of her drinking.

61 The mother has shown a capacity to abstain from alcohol when she elects to do so. For example, to her credit, she stopped drinking and smoking whilst pregnant with Rob. I am also satisfied that she has complied with the order for her not to consume alcohol while she has Rob in her care. When the mother was breastfeeding Rob she used an "app" on her phone to ensure that it was safe for her to breastfeed. The mother soon gave up breastfeeding and began drinking heavily again. The mother continues to drink at least some alcohol when Rob is not in her care but the evidence was unclear about how much, save that her mother gave evidence that during her recent visit to Town A there was one occasion when the mother was unable to drive due to the amount of alcohol she had consumed to deal with a "meltdown" about the trial.

62 If the mother was to drink as much as she has done in the past there could be adverse consequences for Rob, including possible danger and neglect. While I accept it will be more difficult for the mother to keep abstaining from alcohol when she is not under the microscope of these proceedings, she knows that this microscope will never be removed completely. The mother is desperate to keep Rob and she cares for his welfare. Given the "wake-up" call she has now had, I am satisfied that the mother will not expose Rob to the dangers associated with her being under the influence of alcohol, especially as she knows that if this becomes an issue then arrangements for Rob will need to be revisited.

63 The mother has other compulsive elements to her personality. Since being required to give up drinking while she has Rob, she has taken up online gambling (according to Aunt K because she felt upset and alone). Although it would seem the mother has not wagered very large amounts, even the fairly modest amounts she says she has wagered are concerning for a person of limited means. Fortunately, it seems the

mother has been very lucky as she had a large win, which allowed her to buy a car and furnish her home. I think it likely the mother will be able to ensure that her future “flutters”, as she called them, will not impinge on her ability to provide properly for Rob. Ideally, she will cease gambling altogether in the same way she has been able to manage to significantly moderate her drinking habit.

The additional considerations

64 I turn now to the additional considerations.

- (a) **any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views;**

65 Rob is too young to express any views.

- (b) **the nature of the relationship of the child with:**
 - (i) **each of the child’s parents; and**
 - (ii) **other persons (including any grandparent or other relative of the child);**

66 The father has a close and easy relationship with Rob. The mother told her psychologist in May 2016 that the father had “bonded well” with Rob. She acknowledges that the father is “a good dad, doting, loving and caring”.

67 The local church minister observed that “[Rob] is well connected with [the father], he seems very comfortable around him and [Rob] seeks [him] for comfort as and when needed”. Although the [minister] observed that previously Rob would be panic stricken when not within reach of the father, he is now much more comfortable and able to separate easily from him.

68 Ms C described the mother as “a loving parent who makes [Rob] her first priority. [Rob] has a strong attachment to [the mother] and her positive parenting skills are evident with [Rob’s] development”. Another of the mother’s work colleagues described the mother as a “loving and supportive parent” and observed that she “has a secure attachment to [Rob] who is thriving under her care”. The mother’s psychologist reported seeing the mother with Rob and observed that mother and child “seemed calm, attached and happy”. The psychologist also reported that the mother’s attachment towards Rob appeared

“warm, friendly and appropriate and [she] appeared consistently available to [Rob] to assist with regulating his emotional needs”.

69 I am satisfied that these observations of the mother are accurate although I have some concerns about whether there are times when the mother’s temper may get the better of her and that Rob may be exposed to disagreements between the mother and others.

(c) **the extent to which each of the child’s parents has taken, or failed to take, the opportunity:**

(i) **to participate in making decisions about major long-term issues in relation to the child; and**

(ii) **to spend time with the child; and**

(iii) **to communicate with the child;**

70 The care arrangements for Rob have been set out earlier. I accept that the father provided more of the hands-on care of Rob while the mother was working prior to separation. For example, the mother conceded that the father did most of the bathing of Rob, explaining that this was “due to [Rob’s] large size for his age. Also, the height of the sink, and my smallish hands”. Nevertheless, I am satisfied that in addition to earning income the mother undertook other work related to Rob, including washing, cleaning and cooking. It did the father no credit to deny initially that such tasks constituted taking care of a child. Overall, however, I am satisfied that he was generally the more consistent and attentive parent while the parties were together, especially when the mother was drinking, which was much of the time.

71 The mother has undertaken all of the arrangements for Rob’s medical and dental care including his immunisations. The father has elected not to participate in this part of Rob’s life despite offers from the mother that he do so. I consider it likely, however, that the father’s decision to leave all medical matters to the mother is because he anticipated that there would be conflict if he tried to participate. Again, however, it did him no credit when he refused to contribute to Rob’s ambulance cover simply because the mother had not asked him first.

(ca) **the extent to which each of the child’s parents has fulfilled, or failed to fulfil, the parent’s obligations to maintain the child;**

72 The parties have been sharing in Rob’s care and largely meet all the costs for him during the time they have him. The mother has been assessed to pay approximately \$21 per month by way of child support.

She unsuccessfully challenged this obligation. The details around this were not fully explored but the father did tell the mother in the communication book in May 2017 that he did not want any child support.

- (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:**
 - (i) either of his or her parents; or**
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;**

73 Rob would be bewildered and devastated in the event that he was to be separated for any long period from either of his parents. There was no expert evidence of the harm this might cause Rob in the longer term but I am satisfied that it could have a seriously negative impact of a long-term nature. This is therefore a very serious matter to consider in light of the father's statement that he would not move to City A if the mother was permitted to relocate.

- (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;**

74 Both parties are adept at maintaining contacts over long distances. However, it would be extremely difficult for Rob to maintain personal relationships with the father if the mother was to relocate and the father remained in Town A. Any visits by the father would involve first the trip to [City C] from Town A and then the expense and time of travelling between City C and City A and the costs of staying in City A. The difficulty and expense would be such that it would be likely that there would be only a few visits, albeit I accept that the father's family would contribute towards the costs.

- (f) the capacity of:**
 - (i) each of the child's parents; and**
 - (ii) any other person (including any grandparent or other relative of the child);****to provide for the needs of the child, including emotional and intellectual needs;**

75 I am satisfied that both parties have the capacity to provide for Rob's needs. Both have cared for him in the absence of the other in the past and they have been sharing his care for some time. The mother spoke well of the father in his capacity as a father.

76 I have some concerns about the mother's capacity to provide for Rob's emotional needs. The mother has had long-term issues with anxiety, stress and depression, even if she is correct in saying that she has not been formally diagnosed with such conditions save for "prenatal depression". As recently as the second half of 2015, she has self-harmed by cutting her leg with a knife. I would be concerned that away from the glare of the court proceedings, the mother might again resort to alcohol in order to "self-medicate", but provided she avoids doing so I am satisfied she will be able to look after Rob appropriately.

77 While seemingly highly intelligent, the mother suffers from a learning difficulty. She gave evidence that she had never read a book in her life and I note she attended [a college] in State A. She was nevertheless able to write fluently (albeit with some spelling errors) in the communication book. She may therefore struggle a little in assisting Rob with some aspects of his education but I do not consider this to be a significant factor.

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

78 Rob is still a very young child who would benefit from having direct relations on a regular basis with both parents and their families, where practicable on their home soil.

79 The father wishes to have the ability to travel with Rob outside Australia for at least three to four weeks each year. The father is not opposed to the mother and Rob travelling to City A to spend time with her family during holidays. He also clearly would have no objection to the mother's family travelling to Town A to visit. In order to travel, the father would need to obtain Rob's Australian and/or Country A passports which are currently held by the Court. The mother argued that the passports should be retained by the Court because she considered the father was a flight risk. While the father was honest in acknowledging that he would like to be able to go back to live in Country A, I do not consider that he is a flight risk and he should therefore be allowed to retain Rob's passports. Until Rob turns six, I

consider that he should not be away from either parent for a period longer than two weeks, and then only on the basis there is regular communication by Skype or similar visual means.

(h) if the child is an Aboriginal child or a Torres Strait Islander child ...

80 This factor is not relevant.

(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

81 Overall the parents have demonstrated a generally good attitude to the responsibilities of parenthood save for permitting Rob to be exposed to the high level of conflict they experienced before separating.

82 The mother has shown a generally responsible attitude in recognising the importance of the father in Rob's life. For example, she helped Rob to make a Father's Day card and a birthday card for the father. The father has not always reciprocated. His decision to put Rob into day-care on Rob's birthday in 2018 was very hurtful to the mother, who was available to care for him. I was not persuaded that his excuse for doing this was valid (i.e. that the mother would not return him at an agreed time). It would have been preferable if the father had agreed to the mother spending more time with Rob on his second birthday, rather than spending much of it in day-care, especially as she also had fairly limited time with Rob on his first birthday.

83 I was also unimpressed by the father's insistence that the mother would have Rob for only two hours on Mother's Day in 2017 and also by his refusal of the mother's request for additional time on Christmas Day 2017 after the father had been told that Rob "has family visiting from interstate". Aunt K and her son had come to visit and would no doubt have very much liked to have spent more time with Rob than they were permitted.

84 I was also unimpressed by the father's refusal to answer the mother's requests about what day-care arrangements had been made for Rob while the father is working.

(j) any family violence involving the child or a member of the child's family;

(k) if a family violence order applies, or has applied ...

85 The evidence suggests there was a high degree of verbal conflict between the parents and there was also some pushing and shoving. The mother once at least caused scratches on the father's torso. On occasion, she broke dishes and tore up photographs. I am prepared to accept the father may have thrown a plate of food during an argument. The mother also gave unchallenged evidence of the father punching a hole through a wall, although she qualified this by saying "it is all hearsay". I think it most likely the mother was the main aggressor during the parties' verbal altercations, induced in part by her excessive consumption of alcohol. Unfortunately, Rob was exposed to this conflict, which would have been very upsetting and damaging for him.

(l) **whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;**

86 It would be preferable to make orders that would avoid further proceedings. However, given Rob's young age and the poor relationship between the parents, there remains the prospect that there will be further proceedings in the years ahead.

(m) **any other fact or circumstance that the court thinks is relevant.**

87 There are two matters to be discussed under this heading.

88 The father has a suspended sentence for stealing as a result of opening the mother's mail to view her bank statements. Whilst inappropriate conduct, I am not satisfied it is a matter of significance. I am also not satisfied that the father's historical offences in Country A are of any relevance given that he has now matured and there is no evidence of any similar offending. The last offence of the father (driving while suspended) appears to have been 16 years ago.

89 The father is involved in what appears to be a serious relationship with another woman but as the father is not living with her, she was not presented as a witness at the trial. The mother did not seek to make anything of this but it would have been preferable had she been called as a witness. I nevertheless accept that the father would be unlikely to continue a relationship with anyone who would be a bad influence on Rob.

Parental responsibility

90 The father said in his trial affidavit that while he had proposed that he would have sole parenting responsibility, he might reconsider his position if the mother was “willing to work on her communication/co-parenting”. He added, “I value the role she plays in [Rob’s] life”. He agreed it would be in Rob’s best interests for the parents to share parental responsibility.

91 The mother said the presumption in favour of equal shared parental responsibility did not apply because of violence “between both of us” but she nevertheless sought equal shared parental responsibility because it “takes two parents to raise a child”. The mother’s rhetoric is not always matched by her actions. For example, she unilaterally arranged for Rob to see a psychologist notwithstanding his very tender years. Although the father asked that she stop taking Rob to a psychologist, she continued to do so.

92 The parties have been unable to agree on a satisfactory form of communication. The mother has preferred to write in a communication book whereas the father claims that he would have preferred for all communication to be by email. The father has intentionally disposed of two communication books and accidentally lost a third. The mother now communicates with the father by email but, despite his constant requests for her to desist, also copies in the father’s solicitors. The pages of the communication books attached to the mother’s affidavit indicate that the mother generally communicated with the father in a very satisfactory fashion whereas the father’s responses varied. On some occasions he responded in an appropriate fashion while at other times he was unduly belligerent. On at least one occasion he showed that he had not been paying attention to what the mother had told him as he complained about her not telling him about booking an appointment with a paediatrician when in fact she had told him in the book (see entries of 18 October 2017 and 7 November 2017).

93 The mother said in her reply affidavit:

There is no working relationship [between us]. There has not been one, in a long time. We have tried counselling, and then mediation. Neither worked. I do not see a path forward without professional support in helping in our co-parenting. I do not see a personal relationship happening ever again, but there might be a possible shared parental relationship, with outside support.

94 I find that the presumption in favour of equal shared parental responsibility does not apply due to the issues of family violence I have identified. The violence is not ongoing and I consider the parties have the capacity to communicate more effectively than they have in the past. Although both have been at fault for the way they have communicated on occasions, there have also been many appropriate communications relating to matters concerning Rob. What is now required is for them to set aside their differences and begin to address each other in civil terms and work together in Rob's best interests. The father in particular needs to stop being so belligerent and the mother needs to curtail her inclination to be sarcastic.

95 I propose to order that the mother have sole parental responsibility for issues concerning Rob's physical health, which are the issues perhaps most likely to arise on a recurrent basis. In all other matters, the parties should share parental responsibility equally. The mother has made the decisions in relation to Rob's physical health to date and the father has largely been content for her to do so. In confining the mother's area of sole parental responsibility to Rob's physical health, I intentionally exclude matters concerning his mental health. If the mother wishes to have Rob seen by a mental health professional, including a psychologist, then she will need to seek the father's agreement. This does not prevent the mother seeking psychological help for herself about issues concerning Rob.

Equal time and substantial and significant time

96 Having not made an order for equal shared parental responsibility, I am not strictly required to follow the legislative pathway I described earlier. Instead, I need to focus directly on what order would be in Rob's best interests.

97 The father does not consider the fortnight rotating roster is working well for Rob. He says "it is too disjointed and I [sic] there is no stability as to what days [Rob] is in our care". The father proposes that Rob should live with him from 4:30 pm on Friday to 4:30 pm on Tuesday each week and with the mother from 4:30 pm on Tuesday to 4:30 pm on Friday. He says his proposal for each week to be divided into four nights with him and three nights with the mother would "allow us to make plans and have a set work routine that will flow on for [Rob] when he starts school in February 2020". The father also said that his proposal would allow the mother "time on the weekends to work and earn the penalty rates" and also allow the mother to "go out with her

friends and not worry about having [Rob] to care for”. He also said that it would allow the mother to take Rob to mothers’ groups and spend quality time with him during the week.

98 While the father’s views have some merit, I am more attracted to the mother’s proposal. Provided she does not drink when she has Rob, I consider his interests, **for at least the next few years**, will be advanced by spending equal time with both parents. The mother’s “5-2-2-5” proposal has the benefit of the parties (and in due course Rob) always knowing where Rob will be on Monday, Tuesday, Wednesday and Thursday night of each week. While there will be two weeks in every four when there are more changeovers than I would prefer, matched against this is an equal sharing of weekend and weekday times between the parents. The roster is not as complex as it first looks; the only thing the parents need to remember is whether last week was the week they did not have Rob on the weekend, in which case they will have him this weekend. Mondays to Thursdays will remain stable.

99 I would not wish to see such a roster extending much past the first couple of years of Rob attending school, since the number of handovers will then become more problematic. I envisage, at an appropriate time, the arrangement turning into a week-about arrangement, unless there are changes in the lives of the parties and Rob such that it is appropriate Rob should spend more than half of the time with the other parent. At present I have some difficulty envisaging that it would be the mother who would at any point have more than half the time with Rob, since the father presents as overall the more stable, calm and consistent parent. However, while Rob is so young, I consider it best for him to see each of his parents for the same amount of time. I consider also that he will be able to cope with five days away from the other parent. To have anything less than two blocks of five nights every fortnight would be more destabilising and would simply increase the number of handovers.

Relocation

100 The decision of whether the mother should be permitted to relocate to City A with Rob is a very difficult one. Clearly there is some attraction in the mother being permitted to live near her extended family and friends in circumstances where the father comes from overseas and has no relatives living near his home in Town A. Just as the father has slowly managed to put down roots in Town A, he might be expected to do so if he moved to City A.

101 However, I do not consider that the mother's argument is quite as convincing as it first seems. While it is likely that if she was living in City A she would continue to be on good terms with Aunt K, her Aunt and Uncle and with Ms A, I am not persuaded that she will necessarily continue to remain on good terms with her mother or her sister, and she is completely estranged from her brother. There has been dysfunction for a very long time within the mother's family, not all of which has been mentioned in these reasons. The mother told Ms Q that she had "no respect for her mother and the only person she was close to was her [Aunt K]". While the mother has papered over her differences with her mother, the evidence indicates she carries a deep-seated feeling of betrayal by her mother.

102 The mother's expressed wish now to be on good terms with everybody (other than her brother) depends upon something happening in the future which has not happened consistently in the past. The fact that Aunt K and Rob's maternal grandmother do not get on would potentially make it more difficult for the mother to remain on good terms with both of them. It would not be in Rob's best interests for him to be caught up in any disputation that might occur between the mother and various members of her family, but I fear this is likely to occur.

103 I accept that the father's position of stating that he will remain in Town A leaves him open to strong criticism that he does not have Rob's best interests at heart. I accept also that there is more than a faint possibility that he would change his mind and go to live in City A if the mother was permitted to relocate, albeit the father was not challenged when he announced that he would not move to City A. Nevertheless, I consider it at least as likely that he would elect to remain in Town A as he has no connections at all in City A, whereas he has strong connections in Town A and is involved in a relationship with a woman who herself is tied to Town A by her teenage children and parents who live in Town A.

104 I cannot think of anything much worse for Rob than for him to move to City A and thereafter lose contact with his father in the same way the mother did when she was a child, when her parents lived in different cities. While I am satisfied that it would be in Rob's best interests to live half of the time with his mother, I am not satisfied that it would be in his interests to live with her all the time. I have in mind here many elements of the evidence including that of Ms Q who described how easily the mother became angry and frustrated with Rob as a young

baby, whereas the father was much calmer and took matters “in his stride”.

105 While Rob is still young and probably quite adaptable, one point of continuity in his life is the fact that he has had one stable residence from the time of his birth. He is also becoming integrated in the Town A community, whereas he would be starting from scratch in City A save for connections with people he has seen only on a few occasions in his life. Although he is very young, the evidence establishes that there are people Rob would recognise and with whom he is very comfortable in Town A.

106 There is no doubt that the mother will remain in Town A if she is not permitted to relocate with Rob, and in that event Rob would continue to have the benefit of close and frequent association with both parents. While I accept the lives of young people change greatly once they have a child, it is nevertheless relevant to record that the mother in the past has spoken in strong negative terms about City A and about her desire to get away from her family. She was more than content to live interstate and overseas for many years with only very intermittent physical contact with her friends and family at home.

107 If the relocation is not permitted, the mother will still be able to visit family and friends in City A and they can continue to visit her in Town A, albeit I accept that these will not be frequent events. In between visits, Rob will be able to remain in contact with the mother’s family and friends in City A, noting here the mother’s evidence that her family “have been maintaining regular contact with [Rob] and me, by phone, Skype, FB messenger, and other social media platforms”.

108 The mother asks me to take into account her claim that the cost of living is cheaper in City A than in regional Western Australia. Whilst I accept her evidence that City A is the cheapest of the Australian cities in which to live I am not persuaded that the margins, if any, between Town A and City A are of significance to the outcome of these proceedings. Although the mother presently has only two part-time positions, she is able to meet her rent and bills and provide a good standard of living for Rob.

109 While there is some strength in propositions the mother advanced about the availability of employment in a capital city, she has been able to obtain work in Town A and elsewhere. I am satisfied she will be able to continue to obtain work in the future, particularly with a regime for

Rob which allows her to confidently predict whether she will have Rob in her care on any given day. The availability of the father in Town A will assist her to retain employment whereas if she moved to City A, and he did not follow, I consider she would be likely to face more difficulties with childcare than she currently acknowledges. As the mother explained in a different context, at least some of her family members on which she would be relying for assistance are “locked down by their careers”.

110 The father continues to live in a home in which I am satisfied Rob feels safe and comfortable, having lived there since his birth (aside from the times he is with the mother). I am satisfied that it is the father’s intention to live in this property indefinitely and that he has no plans to remove Rob from Australia save for the purposes of visiting his family. Rob attends swimming lessons, childcare and the local church, where the father has been known for three years and where he has been attending regularly for a year. Apart from occasional visitors from State A and Country A, the people that Rob knows are the people who live in the Town A community. Apart from the church and social activities which he attends with the father, the mother has Rob involved in [two playgroups] and also takes him along when she volunteers at the local [community site]. As well as visits to the beach and park, the mother takes Rob on play dates and gave evidence that he has “good connections with other children and adults” including those at the mothers’ group she attends.

111 I accept that the mother nevertheless sometimes feels lonely and isolated living in Town A and she yearns for the support of a loving family. I accept she will continue to experience feelings of loneliness and isolation if required to remain in Town A but that similarly she would experience negative emotions if she returned to City A and found that life there is not as idyllic as she currently envisages it will be. The mother is a resourceful person who has developed strong coping mechanisms. She has shown a capacity to reach out for professional help as required. She has a demonstrated capacity to make friendships in a new community, including that of friends who supported her throughout the trial.

112 All of these things will help the mother to overcome to some extent what I accept will be feelings of frustration and upset about being required to live where she does not wish to live. My focus must, however, be on Rob’s best interests and the mother’s upset and frustration is relevant primarily only to the extent to which they impact

on her parenting of Rob. The evidence did not satisfy me that the mother's feelings about being required to remain in Town A would have a significant adverse effect on her parenting capacity.

113 I consider it is in Rob's best interests for him to remain living in Town A where he is guaranteed to spend significant time with both his parents.

Orders

114 I intend to make the following orders. To the extent I have not given reasons for the detailed orders, I need say only that I consider they will promote Rob's best interests.

1. **[MS ROWLAND]**, the mother, have sole parental responsibility only in relation to the physical health of **[ROB]**, born [in] 2016 provided that the mother keeps the father, **[MR TRIGG]**, informed of decisions made in relation to [Rob's] physical health.
2. In all other matters not referred to in Order 1, the mother and the father (collectively "the parties"), have equal shared parental responsibility for [Rob].
3. The parties be restrained and an injunction is hereby granted restraining each of them from changing [Rob's] residence more than 50 kms from the [Town A] Post office.
4. [Rob] live with the parties in a fortnightly cycle as follows:
 - (a) In the first half of the fortnight:
 - (i) With the father from 4.30pm Wednesday to 4.30pm the following Monday; and
 - (ii) With the mother from 4.30pm Monday to 4.30pm Wednesday.
 - (b) In the second half of the fortnight;
 - (i) With the father from 4.30pm Wednesday to 4.30pm Friday; and

- (ii) With the mother from 4.30pm Friday to 4.30pm the following Wednesday.
5. Each parent shall permit the other parent Skype or FaceTime or equivalent communication with [Rob] on two occasions during each of the five day periods prescribed in Order 4 at times agreed and if not agreed between 5pm and 5.30pm.
6. For the purposes of Order 4, the parties conduct handover of [Rob] at [Town A] McDonalds.
7. The mother and father each be restrained and an injunction is hereby granted restraining them from:
 - (a) denigrating or speaking poorly of the other in the presence or hearing of [Rob].
 - (b) audio or video recording the handovers of [Rob] in accordance with these orders.
8. Until further order of the Court, the mother is restrained by injunction from consuming alcohol whilst [Rob] is in her care.
9. Each party's time with [Rob] pursuant to these orders be suspended to allow [Rob] to spend special events and holidays with the parties as follows:
 - (a) In 2018 and every alternating year thereafter, [Rob] spend time with the mother from 5pm on Christmas Eve until 2pm on Christmas Day and with the father from 2pm on Christmas Day until 5pm on Boxing Day;
 - (b) In 2019 and every alternating year thereafter, [Rob] spend time with the father from 5pm on Christmas Eve until 2pm on Christmas Day and with the mother from 2pm on Christmas Day until 5pm on Boxing day;
 - (c) On Mother's Day [Rob] spend the day with the mother from 9am on Mother's Day until 9am the following day;

- (d) On Father's Day [Rob] spend the day with the father from 9am on Father's Day until 9am the following day;
 - (e) For [Rob's] birthday, if the birthday is on a week day [Rob] spend time with the non-resident parent from 3pm until 6pm;
 - (f) For [Rob's] birthday, if the birthday is on a non-week day [Rob] spend time with the non-resident parent in 2019 and each alternating year thereafter from 2pm until 6pm and in each intervening year from 9am until 1pm.
10. [Rob's] passports currently held by the Family Court of Western Australia be released to the father.
11. The father be at liberty to remove [Rob] from the Commonwealth of Australia to visit family on one occasion each year and for this purpose the mother's time with [Rob] be suspended provided that:
- (a) [Rob] is not away from the mother for longer than two weeks until [Rob] turns six years of age and thereafter for not longer than three weeks;
 - (b) The father permits the mother Skype or FaceTime or equivalent communication with [Rob] at least twice each week during his absence; and
 - (c) [Rob] does not miss any period of pre-primary or primary school without the consent of the mother.
12. The mother be at liberty to take [Rob] interstate to visit her family on up to three occasions each year and for this purpose the father's time with [Rob] be suspended provided that:
- (a) [Rob] is not away from the father for longer than two weeks at a time until [Rob] turns six years of age and thereafter for not longer than three weeks;

- (b) The mother permits the father Skype or FaceTime or equivalent communication with [Rob] at least twice each week during her absence; and
 - (c) [Rob] does not miss any period of pre-primary or primary school without the consent of the father.
- 13. Each party give the other at least 28 days' notice of their intention to travel with [Rob] outside Western Australia but within the Commonwealth of Australia and at least 56 days' notice of their intention to travel with [Rob] internationally with such requests to be approved in writing by the other party and such approval not to be unreasonably denied.
- 14. There be liberty to apply in relation to:
 - (a) variation or further definition of the orders relating to the times [Rob] spends with each parent pursuant to these orders;
 - (b) any proposals by the father for [Rob] to spend specific Christmas or [other special] periods in [Country A];
 - (c) any proposals by the mother for [Rob] to spend specific Christmas periods in [City A]; and
 - (d) the discharge of the injunction in Order 8, provided that such liberty is not exercised within 12 months of the date of this order.
- 15. All outstanding applications and responses be otherwise dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Family Court of Western Australia.

KM
ASSOCIATE

26 JULY 2018