

**FAMILY COURT OF AUSTRALIA**

**STATE CENTRAL AUTHORITY & QUANG [2010] FamCA 231**

FAMILY LAW – CHILD ABDUCTION – Hague Convention – rights of access – reg 24 of the Family Law (Child Abduction Convention) Regulations 1986 – requesting parent in Spain – children in Australia – best interests of the children – where children have limited relationship with father – developmental needs of children

*Family Law (Child Abduction Convention) Regulations 1986 (Cth)*

*Family Law Act 1975 (Cth)*

*Family Law Reform Act 1995 (Cth)*

*Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)*

*De L v Director General, NSW Department of Community Services (1996) FLC 92-706*

*Director General, Department of Families, Youth and Community Care v Reissner*

[1999] FamCA 1238, (1999) FLC 92-862

*DP v Commonwealth Central Authority and JLM v Director General, NSW Department of Community Services (2001) 206 CLR 401*

*State Central Authority and D [2006] FamCA 1083*

<b>APPLICANT:</b>	State Central Authority
<b>RESPONDENT:</b>	Ms Quang
<b>INDEPENDENT CHILDREN’S LAWYER:</b>	Forster & Associates
<b>FILE NUMBER:</b>	MLC 9548 of 2009
<b>DATE DELIVERED:</b>	22 March 2010
<b>PLACE DELIVERED:</b>	Melbourne
<b>PLACE HEARD:</b>	Melbourne
<b>JUDGMENT OF:</b>	Bennett J
<b>HEARING DATES:</b>	2, 3 and 4 February 2010
<b>DATE DELIVERED:</b>	22 March 2010
<b>REPRESENTATION</b>	
<b>COUNSEL FOR THE APPLICANT:</b>	Mr Barbayannis

<b>SOLICITOR FOR THE APPLICANT:</b>	Department of Human Services
<b>THE RESPONDENT:</b>	In Person
<b>COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER:</b>	Ms S Dowler
<b>SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER:</b>	Forster & Associates

## **ORDERS**

1. That the mother and the father, Mr G, have joint parental responsibility for the children L born ... August 2005 and C born ... January 2007.
2. That the children live with the mother.
3. That the mother and the father do all acts and things necessary for the children to communicate with the father on a weekly basis by electronic means with such telephone line, video conferencing or webcam facility being initiated by the father.
4. That in 2011 the father spend time with the children, in Australia, for three weeks, as follows:-
  - a. In the first week:-
    - i. On day one, for a period of 3 hours in the presence of the mother;
    - ii. On day two and three, for 5 hours each day with the mother to be in partial attendance and the periods of her absence from the children and the father to be a matter within her discretion having regard to the apparent comfort of the children;
    - iii. On days four and five, for 6 hours each day, with the mother to be in partial attendance at her discretion having regard to the apparent comfort of the children.
    - iv. As may otherwise be agreed between the father and the mother from time to time.
  - b. In the second week:-
    - i. On day one, for 8 hours;
    - ii. On day two, from 12 noon until 12 noon on day three;

- iii. On day four, from 12 noon until 12 noon on day five;
    - iv. As may otherwise be agreed between the father and the mother from time to time.
  - c. In the third week:-
    - i. On day one, from 10.00 a.m. until 4.00 p.m. on the third day;
    - ii. On day four, from 10.00 a.m. until 4.00 p.m. on the sixth day;
    - iii. As may otherwise be agreed between the father and the mother from time to time.
- 5. That in 2012 the father spend time with the children, in Australia, for three weeks, as follows:-
  - a. In the first week:-
    - i. On day one, for 8 hours;
    - ii. On day two, from 12 noon until 12 noon on day three;
    - iii. On day four, from 12 noon until 12 noon on day five;
    - iv. As may otherwise be agreed between the father and the mother from time to time.
  - b. In the second week:-
    - i. On day one, from 10.00 a.m. until 4.00 p.m. on the third day;
    - ii. On day four, from 10.00 a.m. until 4.00 p.m. on the sixth day;
    - iii. As may otherwise be agreed between the father and the mother from time to time.
  - c. In the third week:-
    - i. On day one, from 10.00 a.m. until 4.00 p.m. on the third day;
    - ii. On day four, from 10.00 a.m. until 4.00 p.m. on the sixth day;
    - iii. As may otherwise be agreed between the father and the mother from time to time.
- 6. That commencing in 2013, the father spend time with the children, in Australia, for three weeks per calendar year, as follows:-
  - a. In the first week:-
    - i. On day one, from 10.00 a.m. until 4.00 p.m. on the third day;
    - ii. On day four, from 10.00 a.m. until 4.00 p.m. on the sixth day;
    - iii. As may otherwise be agreed between the father and the mother from time to time.
  - b. In the second and third week:-

- i. On day one from 10.00 a.m. until 4.00 p.m. on the fifth day;
  - ii. As may otherwise be agreed between the father and the mother from time to time.
7. That the father facilitate the children placing a telephone call to the mother each morning following an overnight period of spending time with the father or in accordance with the reasonable requests of the children (or either of them) to do so.
8. That unless otherwise specified in this order:-
  - a. Time expressed to be in the presence of the mother can be in the presence of the mother or her sister or such person who may be agreed between the mother and father from time to time;
  - b. Time expressed to occur with no mention of the mother being present is intended to be without the mother being present;
  - c. Where time is expressed to be of some hours duration, the commencement time is to be as agreed between the mother and the father and, in the absence of agreement, to commence at 10.00 a.m.;
  - d. Whether the father's wife is to attend for some or all of the time spent by the children with the father is a matter within the discretion of the father;
9. That the father provide to the mother not less than 90 days prior notice in writing of the dates and time on which he will travel to Australia to spend time with the children including:-
  - a. A copy of his itinerary showing the carrier and his date of arrival and departure;
  - b. The date upon which he wishes to commence spending time;
  - c. The address and telephone number of his accommodation;
  - d. The number of the mobile telephone service at which he can be contacted in Australia.
10. That the mother be responsible for and pay to the father, so that such funds are accessible by the father whilst he is in Australia:-
  - a. An amount equivalent to one half of the cost of the father's return economy class airfare from Spain to Australia once each year;
  - b. A contribution to the father's accommodation costs at the rate of \$100 per night for a maximum of 21 days –

such money to be paid either in cash to the father on the first day of the children spending time with him and duly receipted or be paid not less than 4 days prior to his scheduled departure from Spain into a bank account or credit

card facility nominated by the father to the mother for which payment the mother must produce a receipt.

11. That if the father is able to travel to Australia on more than one occasion each calendar year, he spend such time as is agreed with the children and, absent agreement, as ordered by the court.
12. That the father may nominate any dates for his visit to Australia each year save for the week prior to the commencement of any school year for either child and the first two weeks of the school year of either child. Otherwise, if the children are supposed to attend school during the father's visit to Australia, it shall be a matter within the father's discretion as to whether or not the children do so.
13. That the independent children's lawyer make all necessary enquiries to determine whether there is tuition in Spanish culture, customs and language available at an appropriate level for the children, which is not further than a one hours drive from the mother's residence and notify the mother of same. If there is no Spanish school(s), the independent children's lawyer notify the father and mother accordingly.
14. That the mother do all acts and things necessary to ensure that:-
  - a. As soon as practicable the children are enrolled in Spanish school at an age appropriate level for tuition in Spanish culture and customs;
  - b. As soon as practicable the children are enrolled in Spanish school at an age level appropriate for Spanish language tuition;
  - c. The father is informed promptly of any significant injury to the children (or either of them) and, if they are admitted as inpatients to a hospital, the mother provide the father with contact details for the doctor and how the child may be contacted.
  - d. The father receives school photos and reports;
  - e. The proper officer of any school or child care facility attended by the children (or either of them) have a copy of this Order;
  - f. The father is informed as soon as practicable of the dates of school term or long summer school vacation holidays for the children (or either of them).
15. That the mother and the father inform each other and keep each other informed of any change to his/her residential address and contact details.
16. That I reserve liberty to each party and the mother to apply in relation to implementation of this Order and direct that any such application may be returnable before me as soon as practicable.
17. That the independent children's lawyer be discharged one month from this date or, in the event a Notice of Appeal is filed, on determination of the appeal.

18. That if either parent initiates further proceedings in this Court in relation to the children, each party is at liberty to seek to have that application listed for mention before myself for directions if I am reasonably available and to do so by contacting my Associate, telephone ... or email ..., with their details. If I am not reasonably available the matter be referred to the Hague Registrar for enquiries to be made of the Chief Justice or otherwise.
19. That all extant applications be otherwise dismissed.

***IT IS DIRECTED:***

20. That these proceedings be removed from the list of matters awaiting finalisation.

***IT IS FURTHER ORDERED:***

21. That pursuant to Rule 19.50 of the Family Law Rules this matter reasonably required the attendance of Counsel.
22. That pursuant to s.62B and s.65DA(2), of the *Family Law Act 1975*, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders, and details of who can assist parties adjust to and comply with an order, are set out in the document entitled “Family Law Courts Fact Sheet” a copy of which is annexed to these orders.

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

FAMILY COURT OF AUSTRALIA AT MELBOURNE

FILE NUMBER: MLC 9548 of 2009

**STATE CENTRAL AUTHORITY**

Applicant

And

**MS QUANG**

Respondent

And

**INDEPENDENT CHILDREN'S LAWYER**

## **REASONS FOR JUDGMENT**

### **Introduction**

1. The applicant State Central Authority, acting on the request of Mr G (the 'requesting parent' or 'the father'), seeks orders to facilitate his rights of access to the children L, who was born in Spain in August 2005 and C, who was born in Melbourne, Australia in January 2007.
2. The respondent to the proceedings is the mother of the children, Ms Quang.
3. The mother and the father resided together in Spain from about May 2004 to late October 2006. On 4 December 2006 the mother and father signed a regulatory agreement in Spain which formalised the parents' settlement about parenting and financial matters. The terms of the agreement were approved on 13 March 2007 by sentencing pursuant to the *Measures Regarding Children of De Facto Unions No 453/06* with the effect that the agreement has full force and effect in Spanish law.
4. In short compass, the agreement provides that the 'father [is] to have the children with him in Spain for a continuous period of 60 days per year,' the costs of which will be paid for equally by the parents. The father can, but is not obliged to, spend time with the children in Australia for 14 continuous days per year and to have telephone communication with the children twice per week.

5. The children have never gone to Spain to spend time with the father nor has the father spent time with the children in Australia (prior to coming to Australia for the purpose of these proceedings).
6. The applicant State Central Authority ('SCA'), seeks orders to ensure that the father's rights to contact and communications with the children can occur as is set out in the agreement. The mother opposes the application and, at least for the time being, opposes the father having any contact with the children in Spain.
7. As part of the court's preparation of this matter for trial, Ms Jean Forster, solicitor, was appointed as the independent children's lawyer. Section 68L of the *Family Law Act 1975* (Cth) ('the Act') provides that, in proceedings under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the 1980 Convention'),<sup>1</sup> such representation should be ordered only in exceptional circumstances. My reasons for securing the independent representation of the children's interests were given on 26 October 2009.<sup>2</sup> I incorporate those reasons into these reasons. Accordingly, I do not repeat my previous discussion as to applicable law, including how Article 21 of the 1980 Convention has been implemented into our domestic law and the considerations which are relevant to the exercise of my discretion to make parenting orders as sought by the applicant SCA.
8. The parties agreed to a private mediation of the dispute following delivery of the family report. The mediation was convened by the deputy manager of child dispute services on 27 January 2010. It was not successful.

## **Terminology**

9. I will deal briefly with terminology used by this court in parenting matters as opposed to the language of the Convention which has been adopted by all party states. I have described the father's entitlement to see the children as the right to "spend time with". There have been certain amendments to our domestic law since Australia implemented the 1980 Convention. Until 1995, the meaning in the 1980 Convention of the term "access" was the same as the meaning of that term in our domestic legislation. On 11 June 1996, the *Family Law Reform Act 1995* (Cth) came into effect and what was previously referred to in our domestic law as "access" became known as "contact". More recently, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) effected further amendments to our domestic law. Now, all non-financial orders in relation to children are called "parenting orders". Section 64B(2) of the Act provides that a parenting order may deal with various matters including :-

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<sup>1</sup> *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (concluded 25 October 1980, entered into force 1 December 1983).

<sup>2</sup> *SCA v Quang* [2009] FamCA 1038

- (a) the person or persons with whom a child is to live;
  - (b) the time a child is to spend with another person or persons;
  - [...]
  - (e) the communication a child is to have with another person or other persons.
10. References to “residence” and “contact” were removed. The term “resides” was replaced by “lives with”. References to a child having “contact” with a person were replaced by the phrases “a child is to spend time with a person” and “the child is to communicate with a person”. Access rights under the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) (‘the Regulations’) equate to an order under the Act that a child either spend time with a person or communicate with a person or both.
11. I will use terms “access”, “spends time or communicate with” and “contact” interchangeably to refer to the various ways in which the father seeks to establish and/or to maintain a relationship with L and C; whether face to face or electronically, in Spain or Australia. However, when it comes to orders which I make for the establishment, organisation or to secure the effective exercise of the requesting parent’s ‘rights of access’, my orders will be expressed in the language of the operative law in Australia, that is “spend time with” and “communicate with”.

### **Legal principles**

12. These proceedings are brought under Part VII of the Act. I will apply such of the procedural advantages in the Regulations as have relevance to this case. These include requiring an assessment and report by a family consultant<sup>3</sup> and the evidentiary provisions in r 29 and s 111CW which require the court to admit into evidence and consider any findings of the courts in Spain on the suitability of the father as a person for L and C to spend time with or communicate with.
13. The paramount consideration in the court’s determination of parenting matters, including orders that L and C spend time or communicate with the father, is the best interests of the children.
14. Section 60B casts light on what is meant by ‘best interests.’ It provides that the objects of Part VII are to ‘ensure that the best interests of the child 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

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<sup>3</sup> Regulation 26

- (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.
15. The objects may be regarded as the core values of the legislation. The value to the children of both parents having a meaningful involvement in their life is of particular importance in this case.
16. The principles which underlie the objects are more specific but are not exhaustive. Except when it is or would be contrary to the child's best interests, the principles are that:-
- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
  - (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
  - (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
  - (d) parents should agree about the future parenting of their children; and
  - (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).
17. In determining the best interests of the children, the court is required to consider two primary considerations and several additional considerations, listed in s 60CC of the Act.
18. The primary considerations echo the first two objects set out in s 60B of the Act. The primary considerations are set out in s 60CC(2) and are described as follows:-
- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
  - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

19. In this case, there are no concerns about abuse or physical harm to the children. The mother accepts that it will be beneficial to the children for the father to have a meaningful involvement in their lives. The dispute is how this can be achieved with regard to the developmental needs of the children, the mother's concerns about the father, the father's adherence to the regulatory agreement and his reluctance to spend time with the children in Australia.
20. The additional considerations listed in s 60CC(3) of the Act are numerous but not exhaustive. I have regard to the relevant additional considerations in the context of evaluating the primary considerations, namely, securing for the children the benefit that may flow from having a meaningful relationship with both parents and protecting the children from harm.
21. Section 60CC(3)(m) of the Act requires the court to take into account 'any other fact or circumstance that the court thinks is relevant'. This ensures that the infinite variety of individual children's circumstances, such as the international character of these proceedings, can be addressed.<sup>4</sup> It is worthwhile to note that there is no conflict between the matters which must inform the exercise of my discretion to make parenting orders in this case and the general principles upon which the access provisions in the 1980 Convention are based.
22. The Hague Conference on Private International Law has produced important Guidelines in relation to the effective application and implementation of the trans-frontier contact provisions of the 1980 Convention, within the context of an international system of cooperation designed to secure rights of access.<sup>5</sup> The general principle recognising the importance of children retaining contact with both of their parents is enunciated in the Guidelines in the following terms:

It is generally recognised that children should for their well-being maintain personal relationships and have contact with both of their parents unless it is unsafe or otherwise contrary to their interests to do so. This remains the case even when the parents are living apart and in different countries, and even though the primary care of the child is vested in one of the parents.<sup>6</sup>
23. Furthermore, the Guidelines clearly recognise the importance of proportionality in setting restrictions on trans-frontier access; in particular, restrictions should be placed only insofar as they protect the best interests of the child:

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<sup>4</sup> *B and B: Family Law Reform Act* (1997) FLC 92-755.

<sup>5</sup> Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice*, Hague Conference on Private International Law (2008) ('the Guidelines').

<sup>6</sup> Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice*, Hague Conference on Private International Law (2008) 4. (footnotes omitted)

Limits on contact may include for example a requirement that the contact be supervised or that it take place only at certain times and in certain places. The principle expressed here is one of proportionality, reminding authorities that limits on parental contact should be justifiable in terms of the child's best interests. The concept of "necessity" when applied to restrictions on contact involves also the idea that there should be no other less restrictive methods available to protect the interests of the child. The European Court of Human Rights has recognised that unreasonable restrictions on visiting rights may lead to the increased alienation of a child from his or her parents.<sup>7</sup>

24. To my mind, our domestic law is entirely consistent with the principles to which all contracting states under the 1980 Convention agreed to adhere in relation to trans-frontier contact.

### **The parties' proposals**

25. The SCA contends that the best interests of the children will be met by implementation as soon as possible of the terms of the agreement entered into between the mother and father in December 2007 and, in any event, that the agreement was the basis upon which the father agreed that the mother could relocate L and their unborn child (C) to Australia.
26. The mother's position is set out in her cross application and is that for the next three years the father spend time with the children in Australia, for up to 60 continuous days per year, but initially supervised. The mother would pay for one half of the costs of the father's airfare and accommodation close to her residence. The arrangement is subject to the father giving a month's prior notice and surrendering his passports and any passports which he has for L. If the father spends time with the children in Australia for at least three weeks per year for the next three years, the mother would consider the children spending time with the father in Spain in three years' time and on an unsupervised basis.
27. In the event that, contrary to her application, the court requires that the children spend time with the father in Spain, the mother seeks that such time be restricted to three weeks per annum to coincide with her leave entitlements, that the children reside with her whilst in Spain, that she will pay one half of the airfares for herself and the children but the father pay for her accommodation whilst in Spain and that she supervise the father's time with the children.
28. The mother's position is based on her concern that if she takes the children to Spain, the father may take steps (through the courts or otherwise) which will prevent her from returning to Australia with the children. Furthermore, the

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<sup>7</sup> Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice*, Hague Conference on Private International Law (2008) 5. (footnotes omitted)

mother contends that prior to the final hearing of this application the father had not demonstrated any commitment to seeing the children by coming to Australia.

29. The position of the ICL was to support of the mother's position. The specific orders sought by the ICL were tendered as a minute of order<sup>8</sup>.

### **Relevant History**

30. The father was born in Spain in 1963. He is 46 years of age. He practices a profession in a family firm in Spain. His financial statement sworn on 4 November 2009 indicates that his income of about \$100,000 per annum is more than his expenses and that he has \$1.6 million of property and about \$380,000 in liabilities. His family reside is Spain.
31. The mother was born in Asia in 1974. Her family subsequently settled in Australia and she is a citizen of Australia. She is 35 years old and is a long term employee of a large company in their sales department. Her financial statement sworn 13 November 2009 indicates that her income of about \$110,000 is more than her expenses. Her principal asset is a home in suburban Melbourne in which she resides, worth \$700,000, and liabilities of about \$130,000. The mother's parents assist her by regularly caring for the children whilst she is at work.
32. The parents met in Spain in August 2004. In late December 2004 the father travelled to Australia to spend time with the mother. In May 2005 the mother, pregnant with their first child, moved to Spain to live with the father.
33. L was born in Spain in August 2005. By late 2005 the parties agreed that they would make their family home in Australia by late 2006. In February 2006 the mother and L visited Australia for 4 weeks. Later in 2006 the mother fell pregnant with the parents' second child. In mid-October 2006 the maternal grandparents visited Spain.
34. On 20 October 2006 the mother was served with court proceedings which prohibited her from leaving Spain with L. Shortly thereafter the father alleged that he was physically assaulted by the mother. The father alleged that the mother gashed his lower abdomen and right shoulder. He presented for treatment at a hospital but was not required to be hospitalised. In late October 2006 the mother secured independent accommodation for herself and L and left the family home.
35. Following court proceedings and a failed attempt by the mother to remove L without the father's consent, the parents negotiated a regulatory or parenting agreement which provides, amongst other things, for the mother to be able to

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<sup>8</sup> Exhibit "ICL2"

relocate to Australia with L, for the father to spend time with L and the (unborn) second child in Spain for 60 consecutive days each year and 14 consecutive days in Australia.

36. The mother and L left Spain immediately upon the mother learning that she could do so. The mother and L arrived in Australia on 23 December 2006 by which time L was one year and four months old. C was born in Melbourne in January 2007.
37. In early 2007 the father communicated, via webcam, with L and saw C. On 14 June 2007 the father formally requested his time with the children in Spain. On 21 June 2007 the mother responded by saying, most significantly, that she signed the agreement under duress and that 60 consecutive days out of her care would compromise the children's emotional health and in particular lead to separation anxiety. She offered to pay some accommodation expenses for the children if he were to travel to Australia for the long summer vacation in December 2007 and January 2008.
38. For 12 month from July 2007 the father pursued recognition of and compliance by the mother with the agreement. The mother, who did not participate in the proceedings, was ordered to comply and fined.
39. On 2 June 2008 the father again formally requested his time with the children in Spain and, again, the mother refused.
40. On 30 July 2008 the father lodged his Article 21 request to the appropriate authorities in Spain which was, in due course processed and accepted by the Australian Central Authority who passed it on to the applicant SCA.
41. The SCA commenced some negotiations directly with the mother with a view to resolving the matter without recourse to court. Those negotiations were not successful and the current application was filed on 23 October 2009. On 26 October various orders were made requiring the mother to file a response, requesting the appointment of an ICL, prohibiting the mother from removing the children from Australia (temporarily) and requiring the mother to deliver the children's passports to the court.
42. Further to the court's preparation of the matter for trial, a family report was ordered to be prepared by a court psychologist. Specifically, the report was to explore:
  - a) The nature of the relationship of each child with each of the child's parents and other persons (including any grandparent or other relative of the children);
  - b) The willingness and ability of each of the children's parents to facilitate and encourage a close and continuing relationship between the child and the other parent;

- c) The likely effect of any changes in the circumstances of each child, including the likely effect on the child of any separation from:-
  - i) either of his or her parents;
  - ii) any other child or other person (including grandparent or other relative of the child) with whom the child has been living.
- d) The capacity of:-
  - i) each of the child's parents; and
  - ii) any other person (including grandparents or other relative of the child);

to provide for the needs of the child including the emotional and intellectual needs;
- e) the effect and the implications in the short and long term for each child of implementation of the parenting agreement which provides, amongst other things, for the children to spend 60 consecutive days in the care of the father; and
- f) any other matter which, in the opinion of the family consultant, the best interest of the children indicate should be covered in the report.

43. The father agreed to travel to Australia for the hearing. The mother alleges that it was only in the course of reading the father's travel itinerary, which was an annexure to his affidavit sworn 14 December 2009,<sup>9</sup> that she deduced that the father had repartnered and that his wife, Ms O, would accompany him to Australia. The father maintains that he told the mother of his marriage shortly after it occurred, in mid 2008. Relevant for an appreciation of the background to this decision is that the father has married, the children have met his wife and she is supportive of the father's relationship with L and C.
44. On Thursday 14 January 2010 the father arrived in Australia just prior to the commencement of interviews for the family report on the following Monday.
45. Whilst in Australia and after the family report was commenced, the father spent time with the children under the supervision of the mother approximately six times.

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<sup>9</sup> Annexure 13

## **Standard of proof and findings of fact**

46. The appropriate standard of proof in family law proceedings such as this is the balance of probabilities. As Lord Nicholls discussed in *Re: H & Ors*<sup>10</sup> :

"Despite their special features, family proceedings remain essentially a form of civil proceedings. Family proceedings often raise various serious issues, but so do other forms of civil proceedings.

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event is more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury ... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation."

47. I agree with that summation of the appropriate standard of proof and have applied it in the determination of the present proceedings.

## **Evidence**

48. Where in these reasons I have made, or make, statements of fact, they are findings of fact.
49. The SCA relied upon an application to secure effective exercise of rights of access to the children filed 23 October 2009, the father's financial statement sworn 4 November 2009 and the affidavit from Teresa Porrit sworn 21 December 2009 to which materials from the father were attached.
50. The mother relied upon her affidavit sworn on 13 November 2009, the affidavit of her father, the maternal grandfather, sworn 13 November 2009 and her financial statement sworn 13 November 2009.
51. The mother and father were each cross examined. I observed them to be intelligent people who did not waiver from their convictions. The mother was fearful and desperately sad at the prospect of having to return to Spain with the children at this time. The father was adamant that only when L and C stand on Spanish soil will they be able to know him and benefit from his rich family life.
52. The family consultant describes the father as 'a quietly spoken, gentle man who is quite reserved' which accorded with my observation of him. I would add

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<sup>10</sup> (1996) 1 All ER 1, 16.

that, at times, there was a self righteous tone to his evidence, particularly when he described the mother. However, having regard to his abiding belief that anything less than prompt implementation of the regulatory agreement will be disastrous for the children, he was remarkably composed, polite and reasonable.

53. The family consultant describes the mother as vivacious and positive which accorded with my observations of her throughout the preliminary stages of the litigation. However, at the final hearing she appeared quite frightened and frequently cried.
54. The mother and father were conscientious witnesses in that they did their best to answer questions. The cross examination of each of them added interesting dimensions to their respective positions but did not result in any concessions being made nor lead to one party discrediting the position of the other.
55. Ms W interviewed the parents separately and together. The father was interviewed with his wife, with the assistance of a Spanish interpreter. The children were observed with the mother once and with the father on two occasions. Ms W also observed the children with both parents present.
56. The major issue identified by Ms W throughout the assessment process centres on the lack of trust between the parents and its impact on the parents' capacity to develop a parenting arrangement for the children that involves the children travelling to Spain to spend time with the father. A corollary issue identified by Ms W is the amount of time the children require in order to develop a real relationship with their father, given their ages and the limited contact they have had with him up until now.
57. The maternal grandfather was not required for cross examination so I accept his evidence as unchallenged. I note, however, that it does not go beyond that of the mother.
58. The SCA did not call the father's wife, Ms O, as a witness although she was accessible and often sat next to the father in court. I assume that there was no evidence that she could give which would have assisted the SCA's case<sup>11</sup>.
59. The family consultant was cross examined by all parties. She was an impressive witness upon whose evidence I place weight.

## **Discussion**

60. I now turn to consider particular matters relevant to the exercise of my discretion.

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<sup>11</sup> *Jones v Dunkel* (1959) 101 CLR 298

### *The child's views*

61. In determining what is in the children's best interests the Court must consider, amongst other factors, any views expressed by the children and any other factors that the Court thinks are relevant to the weight to be accorded to the children's views<sup>12</sup>. There is a distinction between the concept of children's wishes and children's views. 'Views' will capture a child's perceptions, inclinations and feelings but not necessarily involve an aspiration or conclusion. 'Wishes' are the result of perceptions, inclinations and feelings coalescing into a specific desire or ambition in the child's mind. The requirement in our legislation to focus on the child's views, as opposed to wishes, means that I may have regard to the children's perceptions and inclinations without requiring the family consultant or ICL to make enquiries or elicit the child's ultimate preference or wish.
62. I am satisfied that the children perceive the father in a favourable light, are curious about him and very affectionately inclined toward him. I accept the father's description of the children's attitude to him as follows:-

I am very grateful to the Australian and Spanish Central authorities, thanks to them my children have familiarity with me; even though it is only via telephone and webcam, they talk to me with great affection. A few weeks ago I asked [C] what toys he wanted me to buy him for Christmas, and he answered me that he already has a lot of toys, but he needs batteries, since they have run out of them and some of the cars do not work.

The little one came and went to his wardrobe to show me his toys enthusiastically, but, curiously, he only brought the ones I had posted to him, he was very busy coming and going, and he placed them back in perfect order before bringing another one to show it to me. He told me that he has my photograph on his bedside table, and that it is the last thing he sees before he gets asleep.

I think that, even though the children are so young, they realize many things, and of course, they miss their father, who they undoubtedly need.

The girl told me that she wants "lollies", that is, sweets, and not to send her more Barbies, that she has a lot already.

When I telephone them, the youngest runs from his room and he says "I love you Daddy" in the distance, even though he has not met me personally.

Last week all their cousins, aunts and uncle were present via webcam, my daughter [L] showed confused to see so many unknown faces to her, and suddenly she said "I want to see my Daddy". She told me that she liked the dolls house I had sent her very much, that it is old style furnished, and that

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<sup>12</sup> s 60CC(3)(a) *Family Law Act 1975* (Cth).

she is showing it off very much to her cousin [K] and her friend [S], since they do not have a dolls house. She told me that she had her hair cut and I heard her asking her mother “When is Daddy coming?”

63. I take into account that the children are positively inclined to the father. However, their interpersonal relationship with him is at a very early stage and their very young ages preclude me from according their views any significant weight.

***The nature of the children’s relationships<sup>13</sup>***

64. I consider the nature of the children’s relationship with each of the parents and other persons inclusive of grandparents and other relatives.
65. The mother is the primary carer of the children and Ms W reported approvingly of the children’s relationship with the mother. She adds, however, that the significance and centrality of that relationship to the children requires that it not be disrupted at this stage.
66. I have already found that the children are well disposed toward the father. Although the two observed meetings between the father and the children were awkward for the children as much as the father, Ms W observed that by the end of the second meeting the children ‘were playing with him, seeking his attention, spontaneously calling him daddy and quite excited’.<sup>14</sup> Ms W squarely attributed the children’s positive reaction to the father to the preparation they had received from the mother. The children displayed an awareness that the man they had met was the father and a desire to have a father. As well as being very well prepared by the mother for meeting with the father on those observations, Ms W assessed that ‘their relationship [with the father] had been fostered by her for some considerable time’.<sup>15</sup>
67. Ms W’s assessment is that although the children have an emotional and biological relationship with the father, they have not yet formed a bond with him. The father has been absent from L’s life for a critical period of time and has never been significantly involved in C’s life other than by video and telephone. In cross-examination, Ms W refuted that the six separate occasions on which they have met with the father since the family report interviews was sufficient to develop a bond. She emphasised that a bond ‘is a deep trusting relationship with someone where there’s an attachment formed through shared experiences and through needs being met.’<sup>16</sup>

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<sup>13</sup> s 60CC(3)(b) *Family Law Act 1975* (Cth).

<sup>14</sup> Family report dated 22 January 2010, [52].

<sup>15</sup> Family report dated 22 January 2010, [53].

<sup>16</sup> Transcript of proceedings, 4 February 2010, page 7.

68. Nonetheless, Ms W acknowledged the father's strong desire and capacity to develop his relationship with the children. The family report states that although the father has had a limited role in the children's lives and has little understanding about the needs of children in general (and his own children in particular), he is an intelligent man who was able to engage with the children on their level in a sensitive manner. Overall, the father impressed Ms W as a person with a genuine wish to be involved in his children's lives although he might yet be uncertain as to how this can feasibly be achieved.
69. The maternal grandparents assist the mother with some child care each week. There is nothing to suggest that the children have anything other than a positive relationship with them.
70. The children have not met their paternal grandparents. The father describes his mother as 'a 74 year old sad and desperate grandmother' who yearns for information about her grandchildren and dearly wants to see them in Spain. The father alleges that she cannot travel to Australia to see the children because of her age and her husband's poor health. The fact that the paternal grandfather is terminally ill weighs very heavily on the father.
71. The father is adamant that the children would benefit from spending time with their paternal grandfather in Spain. Whilst there would doubtless be long term benefits to the children of being assimilated into the father's family in Spain, the father does not grasp the reality that the utmost priority is to consolidate his relationship with the children before adding others.
72. The father seems not to have considered that the children can be enriched by information about their paternal grandfather even if they do not ever meet him. Historically, Australia has been populated mainly by immigrants. Prior to international travel becoming so efficient, reasonably priced and generally accessible, many generations of children grew up in Australia without meeting the parents of their parents or their extended family. Nonetheless many had an emotional relationship with their extended family, forged through their own parents' experience of and affection for the family which they left and, in no small part, fuelled the natural curiosity of children to know their origins. I note that C is named after his paternal grandfather. My conclusion in this regard would be different if the best interests of the children was not the paramount consideration. The court can comfortably assume that the children would be showered with affection in Spain by adults who have longed to meet them. However, from a child focussed perspective, with L who is four and a half years old and C who has just turned three years old, the father's family will be most successfully accessed via a soundly based and secure relationship between the children and the father and, in due course, his wife.
73. The court has not had evidence as to how the paternal grandfather's medical condition will progress other than he is terminally ill. However, insistence by

the father and his family for the children to travel to Spain to gain a first hand experience of them is premature having regard to the nature of the children's relationship with the father and his extended family.

74. I do not ignore the potential relationship between the father's wife and the children. However, the court's impression is that the father's wife was careful not to intrude on the father's time with L and C.

***The willingness and ability of each parent to facilitate and encourage the children's relationship with others;*<sup>17</sup>**

***The extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent*<sup>18</sup>**

75. I consider the ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the children and the other parent. It is also necessary for me to assess the extent to which each of the parents has, to date, fulfilled or failed to fulfil their obligations or frustrated the other parent's participation in this regard.
76. The father recognises the importance of the children's relationship with the mother and is supportive of it. The mother is supportive of the father's relationship with the children. The family consultant reported at paragraph 30 of the family report:-

Whilst holding the reservations she has about [the father's] trustworthiness, [the mother] has quite clearly endeavoured, at least since the matter has been before the Courts and [the mother] insists always, to foster the relationship between the children and their father. This was apparent from the very positive attitude that the children clearly held toward [the father] when observed by the Family Consultant when meeting and eventually interacting with him. [The mother] spoke of how she followed the children around the house with the web cam to keep their father aware of the important things in their lives while keeping their attention and how she encouraged and assisted them to speak with [the father] on the phone with him on an almost daily basis despite not really knowing him. [The mother] indicated that she has been happy to facilitate all forms of communication and to continue to do so but that she is concerned that [the father] must maintain his commitment to whatever processes are decided on to assist in that communication. [The mother] expressed concern that [the father] stopped webcam communication without letting the children know he planned to do that stating "I have forced them onto the webcam. If he is not consistent I won't." and that similarly he might simply drop the phone contact without notice. She was baffled by the fact that [the father] did not make phone contact with the children during the first four days he was in

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<sup>17</sup> s 60CC(3)(c) *Family Law Act 1975* (Cth)

<sup>18</sup> s 60CC(4) *Family Law Act 1975* (Cth)

Australia prior to the interviews, particularly given one of those days was [C's] birthday.

77. Ultimately, the family consultant opines that the mother 'is working conscientiously to foster the relationship between her children and their father despite her own issues with him, on the basis of her view that [the] children have the right and the need to be love and be loved by both of their parents.'<sup>19</sup> Ms W's opinion corresponds with my impression of the mother.
78. The father's perception is that the children must be in Spain, as agreed, before they will get to know him and he them. It is unlikely that the father will be able to see past the fact that the mother refuses to take the children to Spain or his identification of her refusal as the single most destructive action she can take in relation to the children's relationship with him. This is not the court's conclusion. I am satisfied that both parents are responsible for this predicament. Each signed the regulatory agreement the terms of which are predicated on the mother and children feeling perfectly safe to return to Spain when, in fact, she was absolutely desperate to leave. In December 2006 the father extracted the maximum concessions that the mother was prepared to give and the mother was prepared to agree to anything in order to leave. Three years later, neither demonstrates empathy for the other's position.

***The likely effect of any changes in the children's circumstances<sup>20</sup>***

79. In determining what is in the best interests of the children, I also consider the likely effect of any change in their circumstances particularly in relation to separation from their parents, other children, wider family including grandparents and other persons with whom the children have a relationship.
80. L was 16 months old when she left Spain. She will only remember, and C has only ever known, the mother as their primary carer. Each child is primarily attached to the mother. Extended time with the father in Spain would be a very significant change for the children. The essence of Ms W's evidence was that, in all the circumstances, the potential benefit to the children of travelling to Spain to spend time with their father (and extended family) would not outweigh the detriment to their emotional and psychological development. In Ms W's opinion, this is true regardless of whether or not the mother accompanies the children to Spain.
81. According to Ms W, the children need to develop their relationship with their father fro a 'secure base'. That base must be:

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<sup>19</sup> Family report dated 22 January 2010, [34].

<sup>20</sup> s 60CC(3)(d) *Family Law Act 1975* (Cth)

On home ground with their mother and all that is familiar nearby and [the father] demonstrating the consistency of his commitment despite the sacrifices he needs to make in doing so.

82. In cross-examination, Ms W explained security as a two-pronged concept. First, the mother must feel secure that she can leave the country and return with the children. Even if the mother is legally secure in the sense that there are safeguards in place to ensure her return, her past experience with the father may nonetheless lead her to experience realistic anxiety about travelling to Spain with the children. Inevitably, that anxiety will impact on the children's experience of their time with the father, as well as on their relationship with their primary caregiver.
83. The second interrelated aspect of security is that the children have the opportunity to develop their relationship with their father in a predictable, familiar space. The environment in which they are familiar, and in which they have thrived, is that of the mother and her extended family. In terms of predictability, the children require a concrete sense that they know when they are going to see and communicate with the father. Ms W stated that the mother's distrust of the father's commitment to consistent and regular contact with the children was an important issue which needs to be addressed.
84. Accordingly, Ms W's recommendations (which she addresses to the parents, rather than to the court) are that time with the father needs to initially occur in Australia and be staged in a gradual fashion. The gradual staging of time in Australia would aim to build both the children's and the mother's sense of security on the two levels explained above.
85. A model for graduated staged time with the father, which Ms W suggests, is that the children spend time with the father initially in the company of their mother, and eventually without her, in Australia for two periods of two to four weeks for at least three to four time periods. If the father saw the children on two separate time periods for two consecutive years, the children could travel to Spain in two years' time. Ideally, they would spend overnight time with the father before travel to Spain is considered. Ms W's opinion is that if these steps were taken, the level of security and trust between the parents would be at an adequate level to support the children.
86. The children are at a critical stage of their development. Ms W identifies serious risks to the children if they were to be rushed or forced to spend time with their father in the unfamiliar territory of the father's homeland; where they do not understand the language, have no pre-existing bond with the father or his extended family and are impacted by their primary caregiver's distrust and anxiety. There is a high probability that the children will feel distress and anxiety, which could negatively impact on their relationships with both parents,

as well as their future capacity to form trusting and intimate relationships. In cross-examination, Ms W provided a salient example:

If you suddenly put a three-year-old with another person for five days, they may have a good time but they don't know that their main anchor, their mainstay, is going to be there when they come back, and that's really the worry for them. So they can become very insecure; not necessarily while they're with the visiting person, but when they return, and that's why we hear about children after contact becoming very clingy.<sup>21</sup>

87. Overall, it was Ms W's clearly enunciated opinion that any period of time proposed to be spent with the father in Spain at this stage would be highly unsuitable. In her opinion, if the children were to spend sixty days in Spain, without seeing their mother, 'the bottom would fall out of their worlds. They're very happy, secure children, that rely so much on the loving relationship they have with their mother'.
88. I accept Ms W's evidence. The father, too, accepts this to some extent. Under cross examination, the father indicated that any time which he spent with the children in Australia would necessarily involve the mother as a supervisor until such time as the children were comfortable with him. Whilst under cross examination, the father proposed that whilst in Spain, the mother and children stay in a house in D, with which she is familiar, and he would see the children regularly but for short periods over sixty or so days. The mother would have use of a car and he would visit the children as often as he could until they were at a stage when they would be prepared to stay overnight with him. These insights reflect favourably on the father's appreciation of the children's needs, however, these were isolated insights.

***Practical difficulties and expense associated with contact<sup>22</sup>***

89. I must consider the practical difficulty and expense of the children spending time with and communicating with the father.
90. The father estimates that this recent trip to Australia cost US\$15,000. This included business class fares for himself and his wife.
91. The access visits which the father proposed after being cross examined extensively were quite different from the 60 consecutive days for which the regulatory agreement provides and which the father demanded in his correspondence to the mother in June 2007 and July 2008. The father's proposal under cross examination is also different to that sought by the SCA in the application filed on 23 October 2009.

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<sup>21</sup> Transcript of proceedings, 4 February 2010, page 15.

<sup>22</sup> s 60CC(3)(e) *Family Law Act 1975* (Cth)

92. As indicated, the father accepts that the children would need to see the mother very regularly and, at least in the early stages, be based with her in Spain. The father recognises that the mother will need some transport and a generally comfortable existence whilst she visits Spain.
93. Significantly, the father recognises that the mother would need to be free of anxiety about him taking further action to prevent the children leaving Spain or the fines which have been imposed being collected.
94. The mother is acutely aware that she has not honoured the regulatory agreement. She maintains that she has good reasons for doing so but she is not arrogant enough to expect others, particularly the father, will agree with her.
95. The mother's perception is that considerable wrath from the father's family, the authorities and the father await her if, or when, she returns to Spain. She has good reason to be concerned. She gave evidence that she would have signed anything to get out of Spain and that she agreed to the terms of the regulatory agreement with no real intention of abiding those terms once she and L arrived in Australia. I am satisfied that her anxieties in this regard are genuine and reasonable.
96. The mother raised her concerns about being punished and being prevented from returning to Australia with the children as impediments to the children spending time with the father in Spain as early as June 2007. It is a great pity that the applicant SCA could not provide evidence as to how those concerns could be assuaged. It was not until the father was being cross examined that it was apparent that he did not want the mother to be punished for her wrongdoing or that he would agree to not take any steps to retain the children in Spain.<sup>23</sup> These expressions of intent came far too late to be embodied in meaningful or viable safeguards. If that was always the father's state of mind, the SCA should have better prepared the case by anticipating how the mother's concerns for herself and the children could be met and to have advanced a concrete proposal in that regard.
97. The applicant SCA obtained instructions from the father that he would offer a bond of up to \$50,000 for the mother's peace of mind, presumably to be accessed by her in the event she did have difficulties leaving Spain. I am satisfied that this is an inadequate safeguard in circumstance that have not been fully ascertained.
98. I advised counsel and the mother that in the middle of this year Spain and other members of the European Union will accede to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the

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<sup>23</sup> Exhibit "SCA2", fax from Australian Central Authority to Central Authority for Spain dated 22 October 2009

Protection of Children<sup>24</sup> ('the 1996 Convention'). The 1996 Convention aims to supplement the 1980 Convention by minimising conflict between State-party authorities. Although Spain is not a contracting state to the 1996 Convention, it has been implemented in Australian law through the *Family Law Amendment (Child Protection Convention) Act 2002* (Cth) and the *Family Law (Child Protection Convention) Regulations 2003* (Cth).

99. The basic framework, having regard to the 1996 Convention and the 1980 Convention, provides for international legal cooperation in supporting trans-frontier contact rights and is comprised of two basic elements. First, there should be common rules defining the circumstances in which courts may exercise jurisdiction to make or vary decisions relating to contact. The aims of a common jurisdictional basis are to avoid litigation and further conflict between the parties; ensure courts and authorities have a legal basis for their decision-making; set limits on the circumstances in which an existing contact order may be varied; and provide certainty and discourage forum shopping.<sup>25</sup>
100. The second essential element for promoting international legal cooperation is that there be mutual respect for, recognition and enforcement of decisions made on the common jurisdictional basis. Pursuant to article 23(1) of the 1996 Convention, orders relating to contact made by an authority exercising jurisdiction shall be recognised by operation of law in all other contracting states. The grounds for refusing recognition, pursuant to article 23(2) of the 1996 Convention are narrow, but include:
  - a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
  - b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
  - c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;
  - d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;

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<sup>24</sup> *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (concluded 19 October 1996, entered into force 1 January 2002).

<sup>25</sup> Hague Conference on Private International Law, *Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice*, Hague Conference on Private International Law (2008) 12-13.

e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;

f) if the procedure provided in Article 33 has not been complied with.

101. The issues confronting the mother on a return to Spain are very real and worrisome. It is one thing to say that the father has no pending proceedings but quite another for her to be sure that he will not take any further proceedings against her. If this family had at its disposal the security and comfort afforded by the operation between Spain and Australia of both Conventions, the issues would be much less, particularly so if the mechanism for advance recognition of orders as provided in the 1996 Convention were available.
102. Ultimately, no party addressed me on the implications for the children of the 1996 Convention coming into operation between Australia and Spain and there was no application for an adjournment until such time as both countries have the benefits (and obligations) of both Conventions.
103. As will become apparent, I propose to put in place a regime of time to be spent between the father and the children in Australia which will last for three years. If the father avails himself of the regime of time, I anticipate that in the year following 2013 the children will be spending time with the father in Spain. At such time as this court is asked to make orders, by agreement or in a contested hearing, for time to be spent after 2013, it is likely that the 1996 Convention will have been operational between our respective countries for most of the intervening period.

***Capacity of the parents to meet the children's needs***<sup>26</sup>

104. In determining what is in the best interests of the children, I need to consider the capacity of the parent or of any other person to provide for the needs of the children, including their emotional and intellectual needs.
105. The SCA submits that the mother's refusal to abide the terms of the regulatory agreement is not in the best interests of the children and represents a shortcoming in the mother's capacity as a parent. I am unable to accept that submission having regard to the expert evidence of the family consultant in relation to the developmental needs of the children.
106. The family consultant had broad discussions with the father and his wife ranging from what he had planned as activities for the children over the ensuing days to the father's consideration of himself and his wife migrating to Australia to be near to the children. The family report writer recorded:-

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<sup>26</sup> s 60CC(3)(f) *Family Law Act 1975* (Cth)

41. [The father] indicated to the Family Consultant that should he and [his wife] migrate to Australia it would be “good for the children and good for us” but that [the mother] would not assist with this process. He felt it was important to come to live in Australia because “I don’t want the children to say one day their father abandoned them”. He spoke of wanting them to grow up to knowing they are loved by their father “who is not just in a computer.”
42. Whilst on the one hand speaking of his desire to migrate to Australia, to above all be in a country where the children were and where everyone in his view had better opportunities, [the father] noted on the other hand how distressed he was that his terminally ill father and extended family had not been able to spend time with the children because of [the mother’s] breach of the Orders. It was unclear how [the father] would reconcile migration with his closeness with his family, particularly given that his rejection of migration to Australia was a major factor in the collapse of his relationship with [the mother].
43. When observed initially with the children, [the father] was understandably somewhat awkward in dealing with two children who clearly were feeling, anxious, excited and equally awkward. [The father] managed to contain his own equally understandably strong emotions in order to focus on the needs of [the children] as best he could.
44. With time [the father] became increasingly able to engage with the children on their level making every effort to do so in a manner that placed no demands on them. Whilst it was evident that he may not have had extensive close experience with such young children and may indeed not have a particularly strong understanding of their developmental needs, [the father] demonstrated a desire to develop these. Given his success in placing the children entirely at ease to the point where they were boisterously playing, calling him daddy and happy to kiss him goodbye there is little doubt that he has the capacity as well as the desire to do so.
45. [The father] was not able to point to particular plans or ideas for how to occupy the children during his time with them in Australia until the matter proceeded to Court. This, combined with his apparently limited understanding that his requests to adhere to the Consent Orders might not necessarily reflect the children’s best interests was concerning, however [the father] was not only open to discussion regarding these matters but indeed he was most willing for this to occur.
46. The Family Consultant did not have the opportunity to observe [the father’s wife] with the children but had no reason to believe that she would be anything other than focused on relating comfortably with the children for both their sakes and the happiness of her husband. She

impresses as a thoughtful considerate individual who wanted to be supportive of her partner during stressful circumstances.

47. [The father] impresses as someone who genuinely wishes to provide his children with the opportunity to know and understand that they have two loving parents. He impresses however as being as yet uncertain as to how this can occur and in particular what is the most feasible action for him to take in this regard.
107. The father emerges as a man who wants to be involved in the lives of his children but who is very conscious of his inexperience when compared to the competent and easy parenting of the mother. My assessment of the father is that he is unable to think through and arrive at a child focussed resolution for L and C which differs significantly from the terms of the regulatory agreement. He is incapacitated by a fear that, in sanctioning any parenting regime which does not involve the children spending extended periods in Spain with him immediately, he will compromise if not destroy the children's heritage and birthright. I do not regard the father as selfish or self interested. He is caught between the expectations of his family, his love for his terminally ill father and what is right and suitable for the children having regard to their developmental needs. However, the fact that he is so conflicted represents a shortcoming in his ability to provide for the needs of the children, including their emotional needs at this time.

***The children's maturity, sex, background and other characteristics***<sup>27</sup>

108. I consider the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the children and their parents.
109. Spain is the children's country of origin. I am satisfied that the children will derive considerable benefit from experiencing Spanish life first hand at a point in the future when is consistent with their developmental needs.
110. The mother agrees that the children should start to learn Spanish and indicated that she will learn along with them. If there is an age appropriate Saturday school for culture and customs, she will also enrol them in that school. Australia has a variety of cultural schools for children of many ethnic backgrounds but in many years of family law I have not encountered a Spanish school. If the mother cannot source such a school, I have requested that the ICL investigate the matter.
111. The father's evidence was that he only has three weeks of holidays which he could use to come to Australia. This time curtails the time which he would be able to spend with his wife's family in America.

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<sup>27</sup> *Family Law Act 1975* (Cth) s 60CC(3)(g).

112. L will attend school in 2010. Currently the children attend a child care centre on Mondays and Fridays and are cared for by the mother's parents on Tuesdays and Wednesdays.
113. There is the potential that the father's time in Australia will conflict with the attendance of one or both children at school. Save for the week before the start of the school year and the first two weeks of the school year, the children's association with the father is, in my view, more important than their attendance at school. That said, it would be a very beneficial experience for the father to take them to school and introduce him to their teachers and for the father and his wife to be seen by their friends. The children and the father would benefit enormously from the normality of school drop off, pick up, reading tasks and talking about the events of the day. Handled correctly, the attendance of the children at school for some days that the father is in Australia would add a valuable dimension to the relationship between the father and the children. The father may also bear in mind weather patterns in Melbourne and the fact that special events and activities suitable for these children are much more plentiful and sometimes staged only during school holidays. Ultimately, however, I do not wish to dictate the dates of the father's holidays and I will leave attendance at school by the children during his time with them a matter within his discretion. If the father does decide to take them out of school, I expect that he would liaise with the teachers concerned to see if there is some school work that he can assist the children to learn during that time.
114. The family report and evidence of Ms W plainly supports the mother's position that the interests of the children require that restrictions be placed on the time the children spend with the father. In particular, given the children's young ages and critical stages in development, that fact that they have enjoyed only limited contact and knowledge of their father, and the relationship of immense distrust that exists between the parents, the children's time with the father cannot presently be spent in Spain. To accord any less weight to the importance of the children's need to get to know their father in a familiar setting, in a gradual fashion and with the full support of the mother (under whose care they are thriving), would place their long term emotional and psychological development in jeopardy. I am satisfied that to do so would place the interests of the father in having his wishes enforced would be to elevate his needs above those of the children.
115. Given the age of the children and their limited relationship with the father, I will structure the orders to maximise the time that the children spend with the father over the three week period whilst preserving time for the children to regroup with the mother. The children's time with the father should progress gradually toward overnight time and eventually to multiple nights over the three year period. This will be a staged progression which is predicated on each stage working reasonably well for the children. If that does not occur, it may

need to be adjusted by agreement or, in the absence of agreement, returned to court on very short notice. Given the father's acknowledgement that the children were not ready to be left alone with him during his last visit to Australia, I have some confidence in his ability to read the children's reactions and to act accordingly. I will provide for the children to be able to contact the mother when they spend overnight time with the father and upon the reasonable request of the children or either of them.

116. It is imperative that the father and mother maintain the webcam contact between visits.

***The attitude to the children and to the responsibilities of parenthood demonstrated by each of the children's parents***<sup>28</sup>

117. I must consider the extent to which each of the children's parents has fulfilled, or failed to fulfil his/her responsibilities as a parent. This factor includes the extent to which each parent has taken or failed to take the opportunity to spend time<sup>29</sup> with and communicate with<sup>30</sup> the children and to participate about major long term issues concerning them.<sup>31</sup> It includes the extent to which the parent has fulfilled or failed to fulfil his/her obligations to support the children financially<sup>32</sup> or otherwise maintain the children. It also includes the extent to which each parent has facilitated, failed to facilitate or frustrated the other parent's participation in the long term welfare<sup>33</sup> and the other parent communicating with the children<sup>34</sup> or spending time with the children.<sup>35</sup> The court must have particular regard to events which have happened, and circumstances which have existed, since the parties separated.<sup>36</sup>
118. I have already mentioned the extent to which each parent feels justified in their respective positions and does not empathise with the other parent. The starting point is that both parents accepted that the children should live in Australia with the mother. Thereafter, the mother has frustrated the father's expectation and entitlement to spend time with the children in Spain but has done so, in my assessment, with due regard to what is in the best interests of the children.
119. On the other hand, once it was apparent that the mother had reneged on the terms of the regulatory agreement, the father could have elected to spend time with the children in Australia. He refused to do so, in my assessment, because

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<sup>28</sup> s 60CC(3)(i) *Family Law Act 1975* (Cth)

<sup>29</sup> s 60CC(4)(a)(ii) *Family Law Act 1975* (Cth).

<sup>30</sup> s 60CC(4)(a)(iii) *Family Law Act 1975* (Cth).

<sup>31</sup> s 60CC(4)(a)(i) *Family Law Act 1975* (Cth).

<sup>32</sup> s 60CC(4)(c) *Family Law Act 1975* (Cth).

<sup>33</sup> s 60CC(4)(b)(i) *Family Law Act 1975* (Cth).

<sup>34</sup> s 60CC(4)(b)(ii) *Family Law Act 1975* (Cth).

<sup>35</sup> s 60CC(4)(b)(ii) *Family Law Act 1975* (Cth).

<sup>36</sup> s 60CC(4A) *Family Law Act 1975* (Cth).

he did not want to lose the moral high ground or compromise what he perceived to be the children's entitlement to be in Spain. The father was assiduous in taking legal proceedings in Spain to sure up and enforce the terms of the parenting agreement. It is a pity for the children that some of that energy was not directed at meeting them. The father raised an apprehension of fear of being assaulted by the mother if he visited Australia. I do not accept that was a genuine or reasonable fear.

120. There is plenty of scope for recriminations on both sides. However, in my assessment, the best interests of the children will be served by the parents looking towards the future.

***Any family violence involving the children or any member of the children's family and family violence orders***<sup>37</sup>

121. As noted above, the definition of family violence provided in s 4 of the Act is broad and may include threatened or actual violence toward a person, members of their family or their property.
122. The father alleges that the mother attacked him savagely in October 2006. The mother denies that occurred and alleges that the father made the allegations to obtain leverage in the dispute about the breakdown of their relationship. I make no finding as to whether the assault did occur. However, I am comfortably satisfied that nothing of that nature is likely to arise again between the parties.

***Whether it would be preferable to make an order that will be least likely to lead to the institution of further proceedings in relation to the children***<sup>38</sup>

123. Parenting proceedings are never final in the sense that children and their parents' circumstances change and arrangements may need to alter as a consequence of those changes. Ideally courts should make parenting orders that minimise the prospects of future litigation. Litigation is costly in emotional and financial terms and may have the effect of standing in the way of parties parenting children effectively. Parents and children are readily distracted by litigation. However, in this case, I propose that parenting arrangements be reviewed in approximately three years time with a view to time being enjoyed between the children and the father in Spain with the mother accommodated close by. The orders which I make will be final but are intended to last for about three years, until L is nearly 8 years of age and C will be six years old.
124. It is important that the father has certainty about arrangements before he commits himself, and possibly his wife, to travel to Australia for three weeks.

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<sup>37</sup> ss 60CC(3)(j) and (k) *Family Law Act* (Cth)

<sup>38</sup> s 60CC(3)(l) *Family Law Act* (Cth)

Therefore, in the hope that a streamlined procedure for any future applications may minimise disruption for the children, I will grant liberty to the parties to have the matter re-listed before me, if I am reasonably available. If I am not reasonably available, the Chief Justice who is the other International Hague Network Judge may be available and, if not the Chief Justice then the matter should be referred to a case management judge.

***Any other fact or circumstance the Court thinks relevant***<sup>39</sup>

125. Whilst the best interests of L and C are the paramount consideration, it is not the only consideration. In this case, the purpose of the 1980 Convention must be considered. It is directed toward the legal cooperation and the enhancement of the international movement of children. The Convention acknowledges an international community and the need for reciprocity in our approaches to custody and access. These purposes complement rather than displace the best interests of the subject children.
126. Spain has a system of family law administered by a specialist network of courts similarly to our system. This court has the utmost respect for the operation of Spanish law and the approval of the agreement which was entered into between the parties. As was observed by The Hon. Michael Kirby AC CMG in the Peter Nygh Inaugural Lecture delivered at the International Family Law Congress, Halifax, Canada on 23 August 2009 in relation to the contracting states, like Spain, whose accession or ratification has been accepted by Australia:-

Australia's judges [are] required to deem such countries' judges to have sufficient integrity, lawfulness, and due process in their courts and appropriate procedures to establish the relationship of reciprocity envisaged by the Child Abduction Convention, available for the high purposes that the convention sets out to achieve.<sup>40</sup>
127. There is no defect in the Spanish legal system. The difficulty in this case lies in the terms agreed to between the parties being inappropriate to the particular circumstances of these children.
128. In many ways, this case illustrates the attractiveness for both countries of the coming into operation of the 1996 Convention to augment the operation of the access provisions in the 1980 Convention.
129. Before leaving the significance of the purpose of the 1980 Convention in respect of which this application is brought, I repeat the sentiments of Kirby J (as he then was) in his dissenting judgment in the matter of *DP v Commonwealth Central Authority and JLM v Director General, NSW*

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<sup>39</sup> s 60CC(3)(m) *Family Law Act* (Cth)

<sup>40</sup> *International Journal of Law, Policy and the Family* 24(1), (2010) 95-114, Advance Access Publication 8 December 2009

*Department of Community Services* (2001) 206 CLR 401 at [155] which comments, although dealing with an abduction case and the exceptions to mandatory return, serve always to remind me of Australia's place amongst contracting states:-

Unless Australian courts, including this Court, uphold the spirit and the letter of the Convention as it is rendered part of Australian law by the Regulations, a large international enterprise of great importance for the welfare of children generally will be frustrated in the case of this country. Because Australia, more than most other countries, is a land with many immigrants, derived from virtually every country on earth, well served by international air transport, it is a major user of the Convention scheme. Many mothers, fathers and children are dependent upon the effective implementation of the Convention for protection when children are the victims of international child abduction and retention. To the extent that Australian courts, including this Court, do not fulfil the expectations expressed in the rigorous language of the Convention and the Regulations, [...], we should not be surprised if other countries, noting what we do, decline to extend to our courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in aggregate, be in the best interests of children generally and of Australian children in particular.

### **Parental responsibility**

130. Neither parent sought an order affecting parental responsibility. The ICL recommended that the mother have sole parental responsibility. Likewise, neither parent sought an order that the children live with the mother but the case is predicated on them doing so and that they are habitually resident in Australia.

131. I will make an order that the children live with the mother.

132. Parental responsibility in relation to children means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.<sup>41</sup> In making parenting orders in relation to children, I am (subject to a few exceptions) required to adopt as a starting point that it is in the best interests of the children that the parents have equal shared parental responsibility.<sup>42</sup> Equal shared parental responsibility relates to decision making about 'major long term issues', which is defined in s 4 of the Act as follows:-

..... issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

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<sup>41</sup> s 61B *Family Law Act 1975* (Cth).

<sup>42</sup> s 61DA(1) *Family Law Act 1975* (Cth).

- a) the child's education (both current and future); and
- b) the child's religious and cultural upbringing; and
- c) the child's health; and
- d) the child's name; and
- e) changes to the child's living arrangements that make it significantly more difficult for the children to spend time with a parent.

This presumption does not provide a starting point about the amount of time or communication that a child is to have with parents.

133. Where two or more persons share parental responsibility, equally or in relation to any major long-term issue under a parenting order, they are required to make the decision jointly.<sup>43</sup> The concept of joint responsibility carries with it the requirements to 'consult the other parent in relation to the decision to be made about that issue'<sup>44</sup> and to 'make a genuine effort to come to a joint decision about that issue'.<sup>45</sup> These provisions mean that consultation and some discussion between the parties is required regarding major long-term decisions, for which parental responsibility shared.
134. The presumption that it is in the best interests of the children that the parents have equal shared parental responsibility does not apply or is rebutted, inter alia, in the following circumstances:-
- a) If the court reasonably believes that a parent of a child, or a person who lives with a parent of a child, has engaged in family violence<sup>46</sup> or abuse of the child or another child who is a member of the parent's family;<sup>47</sup>
  - b) Where evidence is adduced, upon which the court is satisfied 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.<sup>48</sup>
135. I am not satisfied that this case falls within either category of exception. Whilst there is superficial attraction to the mother having sole parental responsibility because she is on hand to make most decisions, in my view it is quite unjustified and contrary to the children's best interests to remove the father from that role.
136. I am satisfied that it is in the best interests of the children for the father to be consulted about the children's education, religious and cultural upbringing and

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<sup>43</sup> s 65DAC(2) *Family Law Act 1975* (Cth).

<sup>44</sup> s 65DAC(3)(a) *Family Law Act 1975* (Cth).

<sup>45</sup> s 65DAC(3)(b) *Family Law Act 1975* (Cth).

<sup>46</sup> s 61DA(2)(b) *Family Law Act 1975* (Cth).

<sup>47</sup> s 61DA(2)(a) *Family Law Act 1975* (Cth).

<sup>48</sup> s 61DA(4) *Family Law Act 1975* (Cth).

any changes to living arrangements which would make it more difficult for the children to have access to the father.

137. I have considered that the parents do not have a relationship in which they talk freely about the children. Nonetheless they are intelligent and capable people. I have regard to the fact that the father lives in another country so it is not going to be appropriate or reasonable for the mother to continually refer issues to him to see if they can reach agreement. However these major decisions do not arise often. In this case, the parties' obligation to consult is likely to be met by the mother notifying the father, in comprehensive terms, of what she identifies the issue to be and what she proposes to do about it and the father being given an adequate time to consider the alternatives he wishes to put forward or whether proceedings in this court may be necessary.

### **Consideration of equal time or substantial and significant time with both parents**

138. Sub-section 65DAA(1) of the Act provides that, in making a parenting order for a child's parents to have equal shared parental responsibility for the child, I must consider the following:
- a) whether the child spending equal time with each of the parents would be in the best interests of the child;<sup>49</sup>
  - b) whether the child spending equal time with each of the parents is reasonably practicable;<sup>50</sup> and,
  - c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.<sup>51</sup>
139. The fact that the father resides in Spain makes substantial or significant time impracticable in common sense terms and in the terms of what is 'reasonably practicable' by taking into account the factors listed in s 65DAA(5).
140. Section 65DAA(3) of the Act states that a child will be taken to spend substantial and significant time with a parent only if that time includes weekdays, weekends, holidays and non-holidays<sup>52</sup> and involvement of the parent in aspects of the child's daily routine<sup>53</sup> and occasions of significance to both parent and child.<sup>54</sup> The legislation notes that these factors are not intended

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<sup>49</sup> s 65DAA(1)(a) *Family Law Act 1975* (Cth).

<sup>50</sup> s 65DAA(1)(b) *Family Law Act 1975* (Cth).

<sup>51</sup> s 65DAA(1)(c) *Family Law Act 1975* (Cth).

<sup>52</sup> s 65DAA(3)(a) *Family Law Act 1975* (Cth).

<sup>53</sup> s 65DAA(3)(b)(i) *Family Law Act 1975* (Cth).

<sup>54</sup> ss 65DAA(3)(b)(ii) and 65DAA(3)(c) *Family Law Act 1975* (Cth).

to limit the matters to which the Court may consider in determining whether the time spent with a child is substantial and significant.<sup>55</sup>

141. Although substantial or significant time is not feasible in this case on a regular and frequent basis, I have regard to the nature of the relationship contemplated by the legislature as being beneficial to children to whom exceptions do not apply. Hopefully, all going well, three years hence, the time which L and C spend with the father will embrace all aspects of his life including his life in Spain. I am satisfied that the orders which I make in this proceeding represent the best way in which that can be achieved.

### **Conclusion**

142. For the above reasons, I make the orders set out at the commencement of this judgment.

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**I certify that the preceding one hundred and forty two (142) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Bennett**

Associate:

Date: 22 March 2010

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<sup>55</sup> s 65DAA(4) *Family Law Act 1975* (Cth).