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## Whisler & Whisler [2009] FMCAfam 445 (8 May 2009)

Last Updated: 24 February 2010

### FEDERAL MAGISTRATES COURT OF AUSTRALIA

WHISLER & WHISLER

[2009] FMCAfam  
445

FAMILY LAW – Children and property – whether children living week about with each parent should live predominately with husband or wife – whether husband’s initial greater financial contribution outweighs wife’s greater financial contribution during marriage.

[Family Law Act 1975](#), [ss.60B](#), [60CA](#), [60CC](#), [61DAA](#), [65A](#)

[Hickey \[2003\] FamCA 395](#); [\[2003\] FLC 93-143](#)  
*C v C* [\[2005\] FamCA 429](#); [\[2005\] FLC 93-220](#)

Applicant: MS WHISLER

Respondent: MR WHISLER

File Number: MLC 9819 of 2008

Judgment of: Phipps FM

Hearing dates: 23 & 24 March 2009

Date of Last Submission: 24 March 2009

Delivered at: Melbourne

Delivered on: 8 May 2009

### REPRESENTATION

Counsel for the Applicant: Mr R. Allen

Solicitors for the Applicant: Nevett Ford

Counsel for the Respondent: Ms J. Bowden

Solicitors for the Respondent: JDB Law

## ORDERS

(1) That all previous orders are discharged.

### Children

(2) That the Husband and the Wife have equal shared parental responsibility for the children of the marriage namely [X] born [in] 2002 and [Y] born [in] 2004 (“the children”);

(3) That the children live with the Wife commencing at the conclusion of school today 8 May 2009.

(4) That the children spend time with the Husband:

- (a) Each alternate weekend from 3.30 pm Friday until 9.00 am Monday commencing 15 May 2009;
- (b) Each Wednesday from 3.30pm to 6.00pm with [X] commencing 13 May 2009;
- (c) Each Wednesday from 9.00 am to 6.00 pm with [Y] until 18 December 2009 and thereafter each Wednesday during term time from 3.30pm to 6.00 pm commencing 13 May 2009;

(5) That the children spend time with the Husband each Father’s Day from 9.00am until 5.00 pm and with the Wife each Mother’s Day from 9.00am until 5.00pm.

(6) Notwithstanding Order 4, that the children spend time with the Wife from 4.00pm Christmas Day 2009 until 4.00pm Boxing Day 2009 and with the Husband from 4.00pm Christmas Eve until 4.00pm Christmas Day, such time to alternate each alternate year thereafter.

(7) Notwithstanding Order 4, the children spend time with the Husband on the children’s birthdays if they fall on a weekday from 3.30pm to 6.00pm and from 9.00am to 1.00pm if on a weekend if the birthdays fall on the Husband’s non contact time.

(8) Notwithstanding Order 4, that the children spend time with the Wife on the children’s birthdays if they fall on a weekday from 3.30pm to 6.00pm and from 9.00am to 1.00pm if on a weekend if the birthdays fall during the period they are spending time with the Husband.

(9) That the children spend one half of all school holidays including the long summer vacation with each of the Husband and the Wife such time to be divided on a week about basis, up to and including the long summer holiday of 2011 and increasing to two weeks taken consecutively thereafter.

(10) That the changeover occur at the school and kindergarten upon completion of attendance each Friday during school term and at the Wife’s residence during holidays.

(11) That the Husband and Wife each be at liberty to communicate with the children by telephone at all reasonable times, and the other parent shall facilitate that telephone communication

(12) That both parents be noted as enrolling parents and emergency contacts at the children’s school, day-care and extracurricular activities.

(13) That the children's school, day-care and other care providers are authorised to provide all information and documents about the children to both parents, including but not limited to the children's progress, newsletters, reports.

(14) Both parents are at liberty to discuss matters relating to the children with the child's school, teachers, principal, day care and other care providers.

(15) That either parent and the grandparents be at liberty to attend any significant (for example end of year, semester or term) school events, and any significant extracurricular or sporting events.

(16) That the parents notify each other within 24 hours of any change of address, email, or telephone number (including mobile phone).

(17) Each parent must advise the other of any significant illness, accident, or injury suffered by the child, any significant medical or dental treatment provided to a child, any medication a child is to take whilst a child is in the other's care including the dosage and this Order can be regarded as authority for the relevant doctor and hospital to provide relevant information about the children to either parent.

(18) Save for preceding Orders when the parents are to communicate with the other by telephone for emergency or urgent situations, the parents must communicate with each other in relation to the children, by use of a communications book, to be exchanged at the time of changeovers.

## **Property**

(19) That the Wife pay to the Husband the sum of \$83,749 ("the payment within 60 days ("the date").

(20) That upon the payment:

- (a) The Husband do all such acts and things and sign all such documents as may be required to transfer to the Wife, at the expense of the Wife, all of his right, title and interest in the real property situate at and known as Property S being the whole of the land more particularly described in Certificate of Title Volume [omitted] ("the real property").
- (b) The Wife indemnify the Husband against all payments and liability mortgage registered number [omitted] to the Australian and New Zealand Banking Group Ltd ("the mortgage") and all rates, taxes and outgoings of or with respect to the real property of whatsoever nature and kind and the Wife provide a discharge of mortgage at her expense on the date.

(21) That in the event of the payment not being made on or before the date the real property be sold altogether out of Court ("the sale") and the parties do all acts and things and sign all necessary documents to effect a sale of the real property.

(22) Upon completion of the sale, the proceeds of the sale be applied as follows:

- (a) Firstly, to pay all costs, commissions and expenses of the sale and to pay any council and water rates and maintenance levies outstanding in respect of the real property;

- (b) Secondly, to discharge the mortgage and any other encumbrances affecting the real property;
- (c) Thirdly, the sum of \$83,749 to the Husband; and
- (d) The balance to the Wife.

(23) That pending the payment or completion of the sale:

- (a) The Wife have the sole right to occupy the real property. During such right of occupation the Wife pay all instalments pursuant to the mortgage and all rates and taxes and like apportionable outgoings of the real property as they fall due;
- (b) The parties hold their respective interest in the real property upon trust pursuant to these Orders;
- (c) Neither party encumber the real property without the consent of the other party.

(24) That while the husband continues to receive the whole of the family tax benefit the Husband pay to the Wife by way of spousal maintenance the sum of \$100 per week.

(25) That unless otherwise specified in these Orders and save for the purpose of enforcing any monies due under these or any subsequent Orders:

- (a) Each party be solely entitled to the exclusion of the other to all property, including choses-in-action, in the possession of such party as of the date of these Orders. All the chattels in the former matrimonial home are to be considered to be in the possession of the Wife.
- (b) Monies standing to the credit of the parties in any bank account is to be deemed the property of the owner named therein;
- (c) Insurance policies remain the sole property of the owner named therein;
- (d) Each party foregoes any claim he or she may have to any superannuation benefits belonging to or earned by the other;
- (e) Each party be solely liable for and indemnify the other against any liability encumbering any item of property to which that party is entitled pursuant to these orders;

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

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
MELBOURNE**

**MLC 9819 of 2008**

**MS WHISLER**

Applicant

And

## **MR WHISLER**

Respondent

### **REASONS FOR JUDGMENT**

#### **Introduction**

1. The husband and wife disagree about who their two children should live with, who should live in the former matrimonial home and the percentage distribution of their matrimonial assets.
2. The parties married [in] 2000. They have two children [X] born [in] 2002, aged six, and [Y] born [in] 2004 aged 4 1/2. They purchased Property S in May 2000. They separated under the one roof on 30 June 2008 and finally when the husband left the matrimonial home to live at his parents on 15 October 2008. Pursuant to orders made on 11 November 2008 the children live week about with each parent. The wife lives in the former matrimonial home with her 15 year old daughter from a previous relationship, [Z]. [Z] spends regular time with her father.

#### **Proposals**

3. Both parties propose there be equal shared parental responsibility. The wife proposes that:
  - a. the children live with her;
  - b. the children spend time with the husband;
    - i. each alternate weekend from 3:30 p.m. Friday until 9 a.m. Monday;
    - ii. each Wednesday from 3:30 p.m. to 6 p.m. with [X];
    - iii. each Wednesday from 9 a.m. to 6 p.m. with [Y] until 18 December 2009 and thereafter each Wednesday during term time from 3:30 p.m. to 6 p.m.;
    - iv. half school holidays during the long summer vacation on a week about basis up to and including the long summer holiday of 2011 and two weeks consecutively thereafter.
4. The wife's proposal deals with birthdays and similar significant days.
5. For property the wife proposes that she retain the former matrimonial home, pay the husband \$60,000 and indemnify him against the existing mortgage. Otherwise she proposes each party retain property in that party's position and superannuation.
6. The husband's proposal mirrors the wife's, that is, that the children live with him and spend alternate weekends and Wednesdays with the wife. He proposes that the former matrimonial home be transferred to him, he pay her \$70,000 and indemnify her against the existing mortgage.
7. The husband's proposal is that the wife receive 36% of the total net property pool including superannuation. The wife's proposal is that the husband receive 30%

8. During final addresses counsel for the husband suggested that, although not proposed by either party, an alternative open to the court was the current arrangement, that is week and week about

## Background

9. The husband was born [in] 1963. He is the oldest of six children. He lived with his parents and twin brother and sister, both of whom have disabilities, until the marriage. Another brother and sister, with whom the husband has regular contact, live in Melbourne and another brother lives in South Australia.

10. The wife was born [in] 1971. She is an only child. Her parents live in New South Wales.

11. The husband contributed \$35,000 and the wife \$12,000 to the purchase price of \$105,000 of the Property S property. The mortgage at the time of purchase was \$55,000. The husband soon after sold a truck for \$5,000 and contributed that to the purchase of the house.

12. During the marriage the husband earned income from [working in the automobile industry]. Until 2006 the wife had work as a [occupation omitted]. Between 2006 and 2008 she was employed full time in [omitted].

13. The wife says that until the birth of [Y] they had sufficient money to live. The mortgage was paid and the bills were paid. However, with another child she considered expenses were getting too high. The family had a credit card bill of \$9,000. In addition, there was no money for holidays or other extras and so she undertook an [omitted] course and then worked full-time for two years.

14. She worked normally six days a week and sometimes seven. Normally she left home at 8.00 to 8.30 and returned at 6.00 to 6.30 but sometimes it could be as late as 8.30. She said it was necessary to work these hours because if she did not make sales she did not earn commission. When the wife was at work, the husband undertook the care of the children including [Z].

15. The wife stopped working full time in June 2008. In 2009 she is enrolled as a full-time student undertaking a four-year Bachelor course at [omitted] University. She has 12 contact hours of study, a full day Monday and two hours on Thursday and Friday. She receives Austudy and Centrelink benefits of approximately \$1362 per month. She does 10 hours work each week in a casual job with [omitted].

16. The husband lives with his parents and brother and sister at [G] close to [S]. The property is 30 acres with a variety of animals. This is where the children have been staying when they spend the week with their father.

## Children's issues

17. The specific children's issues in this case are:
- a. The relationship of the children with each parent and [Z];
  - b. The husband's relationship with [Z];
  - c. the wishes of the children;
  - d. the ability of each parent to provide for the children's emotional and intellectual needs.

## The family report

18. Ms. Diane Dockeary prepared a family report dated 6 March 2009.

19. She identified the issues. She said that neither party supports the continuation of the present shared care arrangements. Both parents expressed concerns about the living arrangements in each household.
20. The wife expressed concerns about the composition of the paternal household, his grandparents and a disabled brother and sister. The wife had general concerns about the husband's ability to adequately care for the children and provide a routine for them.
21. The husband is concerned about the composition of the wife's household. In particular he is concerned about what he believes is the malign influence of [Z] and the wife's capacity to adequately care for the children and provide a routine for them.
22. Ms Dockeary described the parental relationship as characterized by a lack of communication and hence some difficulty in discussing the children's issues. She said that basically the husband and wife see most situations differently and seem to have done so for number of years.
23. Ms. Dockeary reports that the wife acknowledges that the husband role has been that of "home dad", a role born out of "necessity" as "someone had to make a decision, and we needed money". The wife acknowledged that the children have a very good relationship with their father because, according to the wife, "he spent more time with them, and I hav'nt been able to do that".
24. Ms Dockeary says that the wife believes she and the children have a very good relationship. She contends their parenting styles differ. Her approach is that "I let them (the children) be more free". She maintains that the children have an excellent relationship with [Z]. [Z] and the husband's less than good relationship was long standing and, according to the wife, was a recognized feature of family life.
25. Ms. Dockeary says that the wife impressed as personable and friendly with a positive outlook on the world. She seemed quite organized in most aspects of her life and has direction and prospects. Ms. Dockeary said that the wife's position is that the children should live with her because she can better provide for their emotional well-being.
26. Ms Dockeary said of the husband that he disputed the wife's contention that he had not been employed during the marriage. He said that "I've basically been self-employed" and been "a home dad".
27. She said that he was quite happy with his role in the family. He felt less and less support and that the wife was critical of most things he did. Ms. Dockeary says that it is apparent that much of the husband's support is derived from his relationship with his family.
28. Ms Dockeary said that the husband came back repeatedly to the topic of the influence of [Z] on his family life and his perceptions of [Z]'s unacceptable behaviour. Ms Dockeary said that the husband's relationship with [Z] seemed to be a real issue for him, bringing out negative responses. He described the relationship between himself and [Z] by saying "we were at war".
29. The husband told Ms. Dockeary he believes the children should be in his care because of the stability and the consistency of routine residing with one parent would provide.
30. Ms. Dockeary said that the husband appears to have some underlying anger. He consistently returned to the discussion about the malign influence of [Z] on him and the family. She says that the husband impresses as somewhat socially isolated, with few supports in his life other than the paternal family and his relationship with his young children.

31. Ms Dockeary describes [X] as a sweet natured happy little girl. Her wish was for the family to be back together. The family consisted of both parents, her brother and sister. When asked who she lived with she said both parents.
32. Ms Dockeary says that [X] has a close loving relationship with both parents. She knew that when the family was together the father "stayed home and looked after us, and we went to grandma's". She also knew, she said, that "Mum had to go to work all the time. Dad worked on the cars, but not for money".
33. Ms. Dockeary says that [X] has a close relationship with her older sister [Z]. [X] said she missed [Z] "a lot" when [X] was living with her father.
34. Ms. Dockeary says [X] appeared to understand her weekly routine, one week with her mother and one week with her father. When asked what she felt about this routine [X] said "it's not much fun" when asked why, [X] said: "we don't get to see Mum and dad a lot"
35. When asked which house she would like to live in [X] said "the Property S house". When asked why she said "because it's close to school". She explained that she can walk from there.
36. Ms Dockeary says that reassuringly [X] does not have a preference for one parent over another, but her comments about her routine indicated that she does not like the 7 day interval in which she does not see the other parent.
37. Ms Dockeary said [Y] indicated he was a happy boy. She considered, from his answers to questions, he has a good, reliable relationship with both parents.
38. Ms. Dockeary interviewed [Z]. She described her as polite and courteous in interview. She presented as a sociable and friendly young girl with a positive approach to life.
39. Ms Dockeary said [Z] was notably not as critical of the husband, whom she had lived with since she was a young child, as he was of her. [Z] did say she did not like the husband very much because she felt, "he excluded me".
40. Ms Dockeary observed both children with each other, with their half-sister [Z] and with each parent.
41. Ms Dockeary says that [X], [Y] and [Z] played well together. They appeared to be a happy and familiar sibling group. There was very little difference in the way [X] and [Y] related to each parent.
42. Ms. Dockeary recommends that the children live with the wife. Her recommendations for time with the husband have been adopted by the wife and are in the wife's proposals set out above.
43. In her evaluation Ms. Dockeary indicated that the parties have competing applications for the children to live with them. She said neither parent supported the continuation of the current shared week about routine.
44. Ms. Dockeary said that the spousal relationship seems to have been characterized by quite different expectations in each spouse, expectations which were not met by the other. She said the parental relationship seems to have been marked by poor communication stemming from the long term spousal difficulties. Ms Dockeary says that for these reasons there is now no post-separation cooperative parental relationship either. This, Ms Dockeary says, makes it difficult for the parties to cooperate in a week about routine. Ms. Dockeary said there had been no indication during the course of the interviews that the relationship between the parents will improve in the near future.
45. She considered that the parenting of the children was further complicated by the husband's antipathy towards [Z]. She considered that his views might possibly be

an impediment to [X] and [Y] having a relationship with their sister [Z] unencumbered over time by their father's negative views of [Z].

46. Ms Dockeary noted that the two parents live close to each other and both are likely to remain in the area. She considered this would benefit the children. Ms. Dockeary said that notwithstanding the short geographical distance the parties parent in isolation of each other without any planned, coordinated or integrated approach.

47. Mr. Dockeary considers there are some significant differences in the emotional capacity of each parent to parent the children.

48. She said the wife impresses as personable and outgoing with a positive outlook. She had changed the direction of her life, studying to become a secondary school teacher which the wife felt would complement her parenting role as the children grow up.

49. Ms. Dockeary considered the husband as somewhat socially isolated, not engaged as he is in public life and still holding onto some anger about his life with the wife. Ms Docheary considered it important that he did not speak very well of the wife.

50. Ms Dockeary considered the children's long-term relationship with their half sister needs to be nurtured, supported and encouraged. She said that given the husbands own views about [Z] this might not occur if they live the greater part of the time with the husband.

#### The husband

51. The husband lived at home with his parents until he married. He was then aged 37. During the marriage he did some work – [occupations omitted]. He stopped doing that, he said, because the amount he could earn was not worth the cost of advertising.

52. The husband describes himself as a "home dad". He considers that he should continue in the role he performed for two years between 2006 until the middle of 2008, when he was the children's principal carer. Prior to that time he had much of the care of the children, including [Z].

53. He says his relationship with [Z] was good until her teenage years. His criticism of [Z] was that she would not carry out her allotted tasks in the household. He said [Z] needs to be treated differently. He said she was not always a good influence on her brother and sister but at times she could be quite helpful.

54. The husband was cross-examined about two incidents concerning [Z]. He acknowledged that on one occasion that he told her to get off her fat arse. He says that he drinks Coca-Cola. He acknowledged that he put a line across the bottle so that he could see if [Z] had drunk any.

55. When the parties finally separated the husband removed a number of items from the house. These included compact discs which belonged to [Z]. At the time of the hearing he had only just returned them.

56. The husband says he does not accept that [X] says that she misses [Z] a lot. He says he has spoken to [X] to ask if she wants to telephone [Z] but she does not want to.

57. The husband says on Fridays when the children are to go to their mother that afternoon that [X] is reluctant to go. He acknowledged that [X] may do the same thing on the Fridays when she's coming back to live with him.

58. The husband says that when the wife commenced working full-time in 2006 that was her choice. He considered that the family had enough money to live on. The mortgage and bills were being paid. When he was asked about the \$9,000 credit card

bill he said that was the wife's. His mother, that is the paternal grandmother, described the husband as a "frugal person".

#### The wife

59. The wife was working for her father in his [business] at the time of the marriage. Her parents then retired to live in in New South Wales.

60. She said that in 2006, when she had decided that more money was needed, the husband would not discuss the issue with her. She wanted him to work more. She said working as an [omitted] was not her ideal choice.

61. She acknowledged that the husband had helped with the care of [Z] including taking her to school and picking her up. She said that initially the husband had got on well with [Z]. She said he did not enjoy a good relationship with [Z] as she got older. She said he seemed to exclude [Z]. He did not have an adult child relationship with her. It was more like two children.

62. She said that when the separation under one roof occurred she had wanted the husband to leave but he would not. She acknowledged that there was an incident during this period when she slapped him. She said that the husband had picked [X] up from school without letting her know and she had arrived at the school and [X] was not there. When he returned to the home with [X] at 10:30 p.m. she was angry with him and slapped him. She denied behaviour as the husband alleged, screaming out of control and attacking him with his fists.

63. She acknowledged that she had damaged the husband's [business equipment]. She said it was accidental. This occurred during the period when the parties were separated under the one roof. The side fence was being replaced. She went in under the house to bring out a crow bar. The headroom is limited and she was bent over backing out of from under the house and she accidentally hit and broke a [piece of the equipment] with the crowbar. She denied that she had caused other damage to the [equipment] shown on a photograph. It appears that [equipment] is quite old and at that stage had been [stored in] the carport for some years.

64. The husband alleged that the wife had threatened to move to New South Wales with the children. The wife acknowledged that in the first half of 2008 she had spent two weeks with her parents. She notified the school that [X] would not be there. She made an offer on a house in [H]. However, she was not in a position to bring it about. She said she did not intend moving from [S].

65. The wife receives some assistance from her father in caring for children. He stays overnight sometimes the week she has the children and when the parties were separated under the one roof he spent a couple of days helping to build the side fence.

66. The wife said she had never been afraid of the husband, but his behaviour during the time that they were separated under the one roof made her feel uneasy.

67. The wife acknowledges that the husband had been a house husband during the time she worked as an [omitted]. She acknowledged he did the washing and vacuuming.

68. She said that her parents did not have a good relationship with her husband. She got on well with the husband's mother, that is the paternal grandmother. The paternal grandmother gave evidence. She said that she liked the wife. The paternal grandmother considered that the wife could not cope well with the children.

#### Parenting and best interest considerations

69. [Section 61DA](#) of the *Family Law Act 1975* (Cth) requires the court to apply a presumption that it is in the best interests of the children for parents to have equal shared parental responsibility. The application of the presumption is agreed in this case. The presumption is rebutted if there are reasonable grounds to believe there has been a family violence. The wife acknowledges slapping the husband on one occasion. The husband says she was screaming and attacking him with her fists. This was after separation under the one roof. I do not consider the evidence shows that there is sufficient to rebut the presumption.

70. [Section 65DAA](#) then requires that the court must consider whether equal time with each parent would be in the children's best interests and reasonably practicable, and if equal time is not appropriate, the court must consider whether substantial and significant time would be in the children's best interests and reasonably practical.

71. [Section 60CA](#) provides that the best interests of the children are the paramount consideration. This must be considered bearing in mind the objects of [Part VII](#) of the *Family Law Act 1975* (Cth) contained in [s.60B](#).

72. [Section 60CC](#) contains the matters the court must consider in determining the best interests of the children.

73. Neither party proposes equal time. However, in closing addresses, counsel for the husband submitted that while the husband's proposal is that the children should live with him and spend alternate weekends and one night during the week with their mother, equal time was an option open to the court.

74. [Section 65DAA](#) sets out the matters the court must have regard to in determining whether it is reasonably practicable for a child to spend equal time or substantial and significant time with each of the child's parents.

75. The first is how far apart parents live. The parents at the moment live four kilometres apart. Travel between the two homes and to [X]'s school is easily done.

76. The next two matters are the parent's current and future capacity to implement the arrangement and capacity to communicate with each other and resolve difficulties that might arise.

77. Ms Dockeary said that the spousal relationship seems to be characterized by quite different expectations in each spouse, expectations not met by the other. She said the parental relationship seems to be marked by poor communication stemming from the long term spousal difficulties. Ms. Dockeary concluded that for these reasons there is now no post separation cooperative parental relationship.

78. Events during the time leading up to the final separation confirm this. The relationship broke down, but the parties could not reach agreement on how they would deal with the breakdown. The wife wanted the husband to leave the house. He did not want to. Eventually, events came to a head and he left. The parties have different parenting styles. The husband said to Ms Dockeary that his approach was that kids have to have boundaries. He considered that with the mother discipline is not there. This encapsulates the different parenting styles. The husband has a disciplined approach while the wife has a freer approach.

79. The requirements that the parents have the capacity to implement the arrangement and to communicate are not met in this case.

80. The fourth of the considerations is the impact the arrangement would have on the children. Ms. Dockeary considered that a secure base is important for the children. The husband said specifically to

Ms. Dockeary that the current routine of week about was not good for the children. The wife concurs. This requirement is not met.

81. Consequently, an equal time arrangement is not practicable.

## Best interest considerations

82. The benefit to the children of a meaningful relationship with each parent will be met by either party's proposal.
83. Of the additional considerations, views expressed by [X] have some relevance, but have to be considered in the context of her age. Ms. Dockeary concluded that she missed [Z] when she was with her father. The husband did not think [X] missed [Z]. One reason he gave was that [X] did not want to telephone [Z].
84. The sort of thing [X] told Ms Dockeary that she liked about [Z] was that [Z] helped her with her reading. That [X] did not want to telephone [Z] does not show that that [X] is not missing [Z]. The husband has negative views about [Z]. This may colour his views about [X]'s relationship with [Z].
85. Ms. Dockeary is the independent expert. I accept that [X] does miss [Z], and that [Z] is important in [X]'s life.
86. The nature of each children's relationship with each parent, [Z] and grandparents is relevant. The nature of her relationship with each parent, in this case, can be considered along with the capacity of each of the parents to provide for the needs of the children including emotional and intellectual needs.
87. Both children have a very good relationship with each parent. Both have the capacity to care for their day to day needs. The husband doubts the wife's ability to do this. The paternal grandmother, who is well disposed towards the wife, considers that the wife has difficulty coping with the children. The husband is critical of the wife's parenting style. He claims it lacks boundaries.
88. The wife has cared for the children a substantial part of the time since the parties separated under one roof, and since October, every second week. She has had some assistance from her father. At the time when Ms Dockeary conducted interviews and made observations on 11 February 2009 the week about arrangement had been in place for about four months. Ms. Dockeary found no evidence of an inability by the mother to cope with the children.
89. Ms. Dockeary considered the husband somewhat socially isolated. The husband relies significantly on his family for support. He appears to have little social contact outside his family and the children. He does little outside the home and family. The wife on the other hand impressed Ms Dockeary as personable and outgoing with a positive outlook.
90. I conclude that the wife is better able to provide for the emotional needs of the children. They will have broader social contact and a principal carer with a more positive outlook on life if they live principally with mother.
91. Until the week about arrangement was put in place in October 2008 the children had lived with their whole lives with [Z] as a sibling group. Their relationship with [Z] is important. This is particularly the case with [X].
92. Ms. Dockeary identifies a particular issue concerning the children's relationship with [Z]. The husband has a negative view of [Z]. If the children are principally with him Ms Dockeary considered this might be an impediment to the children's relationship with their half-sister.
93. Family violence is a best interests consideration. I have referred to the incident where the wife acknowledges slapping the husband. This occurred in the context of the separation. Other than as an illustration of the relationship between the parties it is not now relevant to the current situation of the children.
94. I conclude that the children's best interests are met by the mother's proposal.

## Property

95. The property issues in this case concern contributions, and needs. Both parties wish to retain the matrimonial home.

96. The issues must be placed in the context of the four step property consideration process.[\[1\]](#) The steps are:

What are the assets and liabilities?

What are the parties' contributions?

What are the parties future needs

Is the order just and equitable?

97. The assets and liabilities are agreed.

<b>ASSET</b>	<b>OWNERSHIP</b>	<b>VALUE</b>
Property S	Husband and Wife	\$265,000
1999 Holden Commodore	Wife	\$3,000
Telstra shares	Wife	\$1400
Collection of vintage cars and fire trucks (15 to 20)	Husband	\$10,000
<b>TOTAL ASSETS</b>		<b>\$279,400</b>
<b>LIABILITIES</b>		
Mortgage (family home)	Husband and Wife	\$53,000
<b>TOTAL LIABILITIES</b>		<b>\$53,000</b>
<b>NETT ASSETS EXCLUDING SUPERANNUATION</b>		<b>\$216,400</b>
<b>SUPERANNUATION</b>		
REI Super	Wife	\$13,640
ING	Husband	\$3,777
<b>TOTAL SUPERANNUATION</b>		<b>\$17,417</b>
<b>TOTAL ASSETS INCLUDING SUPERANNUATION</b>		<b>\$243,817</b>

## Contributions

98. Generally, superannuation and other property assets should be considered separately. The superannuation is relatively small and neither party proposes a splitting order. Both parties' proposals involve treating the non superannuation assets

and the superannuation assets as a single pool. The appropriate way is to treat assets together.

99. The length of the marriage was 8 years. The husband's initial contribution is greater. He contributed \$35,000 and the wife \$12,000 to the purchase price of \$105,000 of the Property S property. The mortgage at the time of purchase was \$55,000. The husband sold a truck for \$5,000 and contributed that to the purchase of the house.

100. The wife made a greater financial contribution during the marriage. The following table contains the income of the parties during the years of the marriage. The information is contained in an exhibit to the wife's affidavits of 19 March 2009 except for the husband's 2007–2008 income, which he estimates at \$10,000.

Year	Husband	Wife
2001-2002	\$10,257	\$20,868
2002 2003	\$3360	\$9,231
2003 2004	\$9,262	\$6,790
2004 2005	\$8,773	\$8,199
2005 2006	\$5,027	\$21,469
2006 2007	\$6,969	\$58,701
2007 2008	\$10,000	\$63,000

101. The wife was cross examined about child support paid for [Z] by Mr S, [Z]'s father. He gave evidence.

102. Mr. S pays \$100 per fortnight child support, half the assessed rate. Both the wife and Mr. S say this is by agreement because Mr. S pays other expenses, such as some school expenses for [Z] and clothing. Both say this makes up the additional \$100 per week. There is no reason to doubt their evidence and I find that the wife is receiving appropriate financial support for [Z].

103. On 7 October 2008, that is just prior to final separation, the wife made a Loan Repayment Holiday Request to the ANZ bank for a repayment holiday for a maximum of six fortnightly payments on the home loan. She did not tell the husband, and forged his signature on the document. She said she did it because of the financial situation. At that stage, the husband was receiving the whole of the family tax payment of \$215 a week.

104. The wife said that she did not make some two or three payments. One of the orders made on 11 November 2008 was that the husband pay the \$100 per week commencing 13 November 2000 by way of spousal maintenance, and that the wife pay mortgage payments as and when they fall due. This has happened.

105. The wife's unilateral application for a repayment holiday, and the subsequent non payment of two or three instalments may have increased the mortgage slightly, but not such that it affects either the assessment of contributions or needs.

106. The husband contributed about 38 % and the wife about 11 1/2 percent of the initial purchase price of \$105,000. Over the 8 years of the marriage the value increased by about 250%. A strict mathematical approach is not the determinant of financial contributions, but it is an illustration, in this case, of the erosion of the effect of the husband's greater initial contribution over the period of the marriage.

107. From 1 July 2001 to 30 June 2008 the husband earned \$44,648. The wife earned \$188,168. These are both before tax figures.

108. The wife earned more than the husband in every year except in 2003/2004 when the husband earned about \$2500 more than the wife. This was the year [Y] was born, [in] 2004. In the year [X] was born the wife earned nearly \$6,000 more than the husband.

109. The wife's substantial financial contribution continued during the period when she was pregnant and when she had a young child. The parties dispute the extent to which each carried out a homemaker role. Clearly, when the wife was working six days a week in the two-year period prior to separation the husband carried out the major part of the task. He was assisted to some extent by his parents, but this constitutes part of his contribution.

110. Relevant is the fact that the wife's full time work was not by agreement. She says she spoke to the husband about his earning more money but he was unwilling to do so. She said the family was in debt with a \$9000 credit card bill, and with three children needed more income. In addition, there was no money for holidays or other extras. The credit card bill was paid by refinancing the mortgage.

111. The husband's attitude to the credit card bill is that it was the wife who incurred it. The \$9,000 was money spent on the family. The husband lived a frugal life and may well have considered that the family could continue to exist on their existing level of income. The wife's desire to have more money for the family was a reasonable one. I consider that the circumstances in which she commenced working full time are to be taken into account.

112. The husband's greater initial financial contribution has been substantially eroded over the period of the marriage and has to be considered against the other matters I have referred to. The contributions are 55% by the husband and 45% by the wife.

## Needs

113. The relevant [s.75\(2\)](#) matters are:

- a. the age and state of health of each of the parties,
- b. The income property and financial resources of each and their physical and mental capacity for appropriate employment;
- c. the care and control of children of the marriage under the age of 18 years, in this case [X] and [Y];
- d. the commitments of each party necessary to support themselves and any other person, in this case, the wife's commitment to support [Z];
- e. any child support provided or likely to be provided.

114. The husband is aged 44. The wife is aged 37. Both are in good health. But have the capacity to work full-time. The wife currently is studying and working part time. Her work history shows that once the studies are completed she will work full time taking into account the need to care the children

115. The husband has the capacity to work full time but chooses not to do so. He has worked as a [omitted], and has obtained a qualification so that he could work in the security industry. He may not be able to earn as much as the wife once the wife is qualified as a [omitted] but he does have the capacity to earn an amount which would enable him to support himself and pay substantial child support.

116. However, his history of employment shows that he is unlikely to work full time, and so will pay little child support. Most of the financial burden of caring for the children will fall to the wife

117. The wife must support herself as well as pay her share of the support for [Z]. The husband commitments are to support himself.

118. The adjustment for needs is 15% in favour of the wife. This means that assets are to be divided 60% to the wife and 40% to the husband.

#### Just and equitable

119. Each party wishes to retain the house. The children will be living principally with the wife. This leads to the conclusion that it is just and equitable to give her the opportunity to purchase the house.

120. The husband is to receive:

40% of \$243,817, \$97,526.80

Less

Cars and trucks \$10,000

Superannuation \$3777

\$13,777

Nett payment \$83,749

**I certify that the preceding 120 paragraphs are a true copy of the reasons for judgment of Phipps FM**

Associate: Paul Moss

Date: 7 May 2009

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[1] *Hickey* [2003] FamCA 395; [2003] FLC 93-143. For superannuation *C vC* [2005] FamCA 429; [2005] FLC 93-220