QUESTION 1

PARENTAL RESPONSIBILITY

The first factor to keep in mind is to ensure that the object and principles of the Family Law Act under s60CA are met by focusing on the best interests of the child as the paramount consideration. In *Goode v Goode* the Court stated "in deciding to make a particular parenting order… the individual child's best interests remain the paramount consideration and the framework in which best interests are to be determined are the factors in ss. 60CC(1-4) and (4A). The objects and principles contained in s 60B provide the context in which the factors in s.60CC are to be examined, weighed and applied in the individual case."

The first issue for determination in the problem is to whom parental responsibility will be allocated in accordance with the presumption ins61DA. It is clear under s61DA(1) that there is a presumption of **equal, shared parental responsibility.** This presumption does not apply where either there is (i) family violence or child abuse or (ii) it is not in the child's best interest. There is nothing on the facts that would suggest abuse or violence or that there is irreconcilable hostility between the parents allowing no viable possibility that they can cooperatively share parental responsibility. Whilst there are some differences of opinion regarding religion there is no solid basis for claiming that the hostility over this issue is too great to prevent shared parental responsibility. As there are no significant facts that would warrant the application of either of these exceptions the parents will be allocated equal shared parental responsibility.

The father's application requests that the grandmother also share parental responsibility, however, whilst the grandmother is a significant figure, to have someone else engage in exercising shared parental responsibility will only arise where one parent cannot viably exercise that role. Thus the circumstances of the case do not justify the Court granting the father's request.

Spending of Time

Since there is equal shared parental responsibility the Act requires that the Court must next consider s.65DAA which deals with how time is to be spent between the parents by the children. S65DAA(1) requires the court to first consider the children spending equal time with the parents. As the Father is relocating to the mining town of Kalgoorlie and the Mother is going to remain resident in Sydney such an equal shared arrangement is clearly not practicable s65DAA(1)(b). Next the court needs to consider substantial and significant time in accordance with 65DAA(2). Again the vast distance which separates the parent's residence would make this type of arrangement impractical. The unsuitability of either of these options leaves the matter of spending time with the parents ' at large' and the Court needs to determine what arrangements are in the circumstances in their best interests.

The court would now turn to a consideration of what actual arrangement of spending time with the father is appropriate in the circumstances. In determining this the primary considerations of s60CC(2) are particularly relevant as the starting point. While (b) is not an issue (a) 'meaningful relationship is. It is obvious that to promote (a) would have the children spending substantial but not exclusive time with the father during the

school holidays as this would be neither disruptive to their schooling and would allow some holiday time to the mother to engage in recreational activities with the children.

The mother's application would allow the children to contact their father by telephone as they wish whereas the father applies for a scheduled phone call once per week and additionally to be able to contact the children at what other times he wants to. S.60CC(3)(l) that requires the Court to make orders least likely to lead to further proceeding would generally best be achieved where the order were more specific rather than vague and general so setting a time each week that the father & the children will be in contact by telephone seems desirable with an addendum that additional calls by either party be permitted in special or emergency situations within reason to avoid unnecessary disruption by frequent unscheduled calls to the children's normal routine.

SCHOOLING/RELIGIOUS DISPUTE

The father's application requests that the children attend the Islamic school and be raised in the Islamic faith. The mother wishes for the children to continue attending their secular public institution. The court will need to consider the effect on the children of attending an Islamic school whilst residing in a secular home with no domestic Islamic practices. However, to exclude Islam from their lives after it has already been a significant component might well be extremely disruptive and traumatic in their social development. The court may take the approach to have the twins continue to attend the public school with the option to attend Islamic religious education classes after school if they desire to do so. This would reflect the principle under s 60B(2)(e) that the children have a right to enjoy their culture while not creating an untenable domestic environment. To the extent that there is an additional cost, that cost legitimately should be shared between the parties.

GRANDMOTHER

The father has also made an application re: the children spending time with the grandmother. The facts elicit that Sophia has developed a meaningful relationship with the grandmother and this relationship should be maintained unless there is reason to think it undesirable in accordance with s60B(2)(b) 'children have a right to communicate on a regular basis with people significant to them (such as grandparents). Aylia has expressed a wish to not spend time the grandmother due to her incessant 'nagging about her lack of interest in Islam'. The father's application for contact between the grandmother and the children for alternate weekends appears excessive for maintaining a relationship with a non-parent and something more limited such as one Sunday a month from 10am-4pm would likely be sufficient to sustain the relationship. The mother's request restraining the grandmother from any discussion of Islam with the children may be extreme as it would effectively deny the children appropriate contact with part of their cultural heritage but an order restraining the grandmother from having the children engage in any religious practice or preaching to them should be allowed with the contact limited to discuss the religion in an educative manner. This would be consistent with the policy of preparing children to be able to make an informed choices about important aspects of their lives in the future.

QUESTION 2

Financial Agreement

The Financial Agreement under s90B will not be binding upon the parties in this scenario because the parties marriage plans did not come to fruition and s90B(2)(a) stipulates that these financial agreements refer to the distribution of property in the event of the breakdown of a marriage. However, in such circumstances, the court may pay regard to the terms of the agreement in providing some guidance regarding matrimonial/defacto property distribution.

De facto relationship?

The recent amendments now bring de facto property distribution within the Act, hence, the first issue for determination is whether or not a de facto relationship exists between Edward and Bella. The Act under s4AA(c) defines a de facto relationship as whether the parties were living together as a couple on a genuine domestic. Section 4AA(2) comprises a list of circumstantial factors that assist in determining whether this test has been met. The duration of the relationship is always an important factor. The parties met in 2005 and commenced a relationship which resulted in them moving in together in April 2007 which lasted until December 2009 and hence they had a relationship lasting almost 5 years and shared a common residence for approximately 2.5 years, this substantial length and sharing a common residence (4AA(2)(b))are good indicators that the parties were engaged in a genuine domestic relationship. The fact that Edward believed that he was the father of the unborn child clearly indicates that a sexual relationship existed (4AA(2)(c)). They have also intermingled their finances by having a joint savings accounts and sharing the household expenses (4AA(2)(d)). Perhaps the most significant element in the test is the degree of mutual commitment to a shared life (4AA(2)(e)). This seems to exist as the facts stipulate that the parties loved each other and they had discussed and even intended to marry one another. Thus there are reasonable grounds to conclude that a de facto relationship exists based on the relevant circumstances. However, the FLA also requires the existence of a gateway requirement under s90SB before the de facto relationship gives rise to property jurisdiction. It is evident that the relationship meets the gateway provision of s90SB(1) as the period of the relationship is at least two years.

Property Distribution

Section 90SM outlines the statutory provisions for the courts to make a de facto property determination in very similar terms to s79 that applies to matrimonial relationships. It provides for a 4-step process of property distribution similar to that which applies to married couples. The first step is to identify and value the parties' property. The assets listed in the facts – property, vehicles, savings, furniture, wine and superannuation(s90MC) all fall within the scope of the de facto property pool. The issue for consideration here whether there should be any add backs of notional property, in the form of the spent savings of $50,000 by Edward to purchase household items and meet his living expenses. This refers to property that has been subject to loss or dissipation that the court feels is inappropriate. *Omacini* identifies that where there is a premature distribution of resources where the expenditure exceeds that necessary for reasonable living expenses. Edwards use of the 50k for furniture and regular household expenses will most likely be viewed as reasonable and hence will not be

credited against him but it could also be seen as moderately excessive in which case some add back will be credited against him. Bella's consumption of the wine may be seen as wastage, however this was only $1000 and it is doubtful the court would give this much weight in the overall scope of a global assessment and her psychologically distraught state due to the miscarriage. The court will likely take a global asset approach here as the relationship duration is about 4.5 years and the parties have significantly intermingled their resources.

The second step is to assess the parties financial and non-financial contributions as per 90SM(4)(a)& (b). The facts indicate that Edward brought minimal assets to the relationship while Bella had substantial assets in the form of the house, vehicle, furniture and superannuation. The house is currently worth $2 million, and her superannuation has increased from $25-130k. The furniture and vehicle have depreciated substantially. Edward currently has $50k in superannuation. The parties both worked throughout the relationship and appear have lived frugally as they have accumulated $100k in savings accounts. Looking at these contributions it is clear that Bella has made the much greater financial contributions. The most significant asset is the house which Bella contributed and their respective superannuation funds again favour Bella's contribution.

With regards to contributions to the welfare of the family (90SM(4)(c)), this appears evenly balanced as Edward attended to the gardening and general maintenance and Bella looked after the cooking and cleaning requirements. As the relationship has existed for 4.5years the relevance of initial contribution will have diminished somewhat but the contribution is still overwhelmingly in Bella's favour at approximately 75% to Edwards 25%. {It is not necessary to specify any specific % in your answer but a general indication as to which of the parties (if either) is favoured by that particular element would be appropriate}.

The third step is to consider the s90SM(4)(d-g) factors and the most relevant consideration is s90SM(4)(e) which requires the court to consider the matters referred to in 90SF(3) (similar to s.75(2)). Looking at these factors it is clear that factors a & b apply to Edward as he is suffering severe depression since the breakdown of the marriage and has been unable to work full time and is going to have difficulty supporting himself in the future, whereas, Bella has been able to continue full time employment and appears to not be incapacitated post-miscarriage. The court will likely make an adjustment here on the 90SF(3) considerations, somewhere in the realm of a 15% shift in Edwards favour to an approximate 40-60% contribution of the parties.

The final step is to apply s90SM(3), this requires that before the court makes any final orders, it be satisfied that the proposed orders are just and equitable. As the asset pool comprises several million dollars, the court is unlikely to conclude that the assessment is not just and equitable as the dependant person Edward will have enough money to support himself in the future. Furthermore, this distribution largely reflects the non-binding 90B financial agreement, which provides a good indication that this is what the parties thought equitable, with an adjustment for the poor mental health of Edward and his limited capacity to support himself in the future.

The court will fashioning its final orders is likely to combine the superannuation entitlements so they are equal between the parties and then distribute the remaining assets in accordance with an overall 40-60 split.